CLERK'S COPY.

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING ~~INTERNATIONAL~~ BONDHOLDERS COMMITTEE, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 26, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED DECEMBER 30, 1941.
JANUARY 17, 1942.
FEBRUARY 28, 1942.
MARCH 30, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME I

Page 1 to 470

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Affidavit of service of notice of entry of order approving plan of reorganization 1607

Answer of the Institutional Committee to the petition of the Debtor for rehearing and modification of the report and order dated June 21, 1939 of the Interstate Commerce Commission 1750

Appeal:

Designation of contents of record on (appellants') (District Court) 1618

Designation of contents of record on (Institutional Bondholders' Committee) (District Court) 1772

Designation of contents of record on (Reconstruction Finance Corp.) (District Court) 1841

Notices of:

A. C. James Co. 1611

Western Pacific Railroad Corporation 1612

Railroad Credit Corporation 1613

Western Pacific Railroad Company 1616

Irving Trust Company 1616

Index

Page

Order dispensing with printing of certain portions of record on 2625

Order extending time within which to file transcript of record on (Circuit Court of Appeals) 2603

Order extending time to file stipulation re portions of record to be printed 2607

Statements of points of several appellants on (Circuit Court of Appeals) 2600

Statements of points relied upon:

A. C. James Co. (District Court) 1627

Western Pacific Railroad Corporation (District Court) 1635

Railroad Credit Corporation (District Court) 1642

Western Pacific Railroad Company (District Court) 1645

Irving Trust Co. (District Court) 1651

Stipulation for order dispensing with printing of certain portions of record on 2612

Attorneys of record, names and addresses of 1

Clerk's Certificate 2596

Commission's order of Sept. 19, 1939 denying debtor's petition for rehearing and modification 884

Designation of contents of record (Appellants) (District Court) 1618

Index

	Page
Designation of contents of record—Institutional Bondholders Committee (District Court)	1772
Designation of Contents of Record—Reconstruction Finance Corp. (District Court)	1841
Exceptions to proposed Report of Bureau of Finance of:	
Railroad Credit Corp.	401
Reconstruction Finance Corp.	416
Debtor	439
Irving Trust Co.	486
A. C. James Co.	518
Crocker First National Bank	573
Institutional Bondholders	589
Final modifying report and order of the Commission	300
Order	362
Memorandum statement, submitted by Reconstruction Finance Corp. in regard to plan of reorganization	1764
Monthly Income Statements of debtor (I. C. C. Exhibits 127-148)	2239
Names and addresses of attorneys	1
Notices of Appeal:	
A. C. James Co.	1671
Western Pacific Railroad Corporation	1612
Railroad Credit Corp.	1613
Western Pacific Railroad Company	1616
Irving Trust Co.	1616

Index

	Page
Notice of entry of order approving plan of reorganization	1609
Objections to Interstate Commerce Commission Plan of Reorganization by:	
A. C. James Co.	892
Western Pacific Railroad Corporation	943
Railroad Credit Corp.	955
Western Pacific Railroad Company	963
Irving Trust Co.	974
Western Realty Co.	983
Institutional Bondholders Committee	1755
Order approving petition for bankruptcy and restraining disposition of collateral	811
Order approving plan of reorganization	1600
Order authorizing trustees to extend certificates of indebtedness	1834
Order dispensing with printing of certain portions of record on appeal	2625
Order extending time to docket	1845
Order extending time to docket	1846
Order extending time to docket	1848
Order extending time to docket	1849
Order extending time within which to file transcript of record on appeals	2603
Order extending time to file stipulation re portions of transcript of record to be printed	2607

Index

	Page
Order fixing date of hearing parties in interest	1273
Order fixing time for hearing of petition to extend Certificates of indebtedness	1829
Order for omission and transmission of exhibits	1850
Order making stipulation of facts not in dispute part of record	1273
Opinion of the District Court upon approval of plan of reorganization	1569
Order providing for hearing on petition to borrow $10,000,000.00	1809
Order relative to issues raised by objections to the Commission plan	1277
Order, supplemental, authorizing the borrowing of $10,000,000.00 from Reconstruction Finance Corp.	1813
Petition for rehearing and modification of Commission's report and order dated Oct. 10, 1938 by:	
Railroad Credit Corporation	675
Reconstruction Finance Corporation	695
Debtor	702
Irving Trust Co.	708
A. C. James Co.	726
Institutional Bondholders Committee	753
Petition for supplemental order to borrow $10,000,000.00 from Reconstruction Finance Corporation	1801

Index

	Page
Petition of Debtor for rehearing and modification of Commission Report and Order of June 21, 1939	1819
Petition of Debtor under Section 77(a) of Bankruptcy Act	4
Petition of Trustees to extend certificates of indebtedness in the amount of $10,000,000.00	1820
Petition of Western Pacific Railroad Company respecting sale or disposition of collateral by R. F. C., et al.	1778
Plan of Reorganization proposed by:	
Debtor	19
A. C. James Co.	101
A. Basic principles upon which proposed Plan of Reorganization is constructed	101
B. General comments as to proposed Plan of Reorganization	103
C. Proposed provision for new money and necessary modifications in existing capital structure	103
D. Description of new securities	108
E. Formation of Reorganization Committee	111
F. Method of participation in, and consummation of, the Plan	113
G. Expenses of the Plan	114

Index

Page

Schedule A.
Present Capital Liabilities 114

Schedule B.
Proposed New Capitalization 115

Institutional Bondholders Committee 48

Proposed Report of Bureau of Finance of I. C. C. 116

Replies of the several parties to the exceptions of the parties to the proposed report of the Bureau of Finance of the Interstate Commerce Commission:
Crocker First National Bank 1693
Institutional Bondholders 1662
Railroad Credit Corp. 1735
Reconstruction Finance Corp. 1654

Reply of First Mortgage Trustees to the petitions for modification of the Interstate Commerce Commission Report and order dated October 10, 1938 1745

Report and Order of the Commission dated Oct. 10, 1938 194
Order 281

Report, Final modifying, and order of the Commission 300
Order 362

Index

Page

Report of the Commission on consideration of petition for further modification of approved plan of reorganization 884

Order 891

Report, Proposed, of Bureau of Finance of I. C. C. 115

Statement of points to be relied upon on appeal (Circuit Court of Appeals) 2600

Statements of points relied upon appeal of:

A. C. James Co. (District Court) 1627

Irving Trust Co. (District Court) 1651

Railroad Credit Corp. (District Court) 1642

Western Pacific Railroad Company (District Court) 1645

Western Pacific Railroad Corporation (District Court) 1635

Stipulation as to facts not in dispute 1017

Exhibits to stipulation of facts not in dispute:

A. Plan and agreement for reorganization dated December 15, 1915 1112

B. Loan account with the Railroad Credit Corporation 1211

C. 1214

D. Granting clauses of first mortgage 1215

Index

		Page
E.	Granting clauses of general and refunding mortgage	1231
I.	Letter dated March 26, 1937 to Irving Trust Company from the Western Pacific Railroad Company	1247
J.	Standard Realty and Development Company General Balance Sheet as of October 31, 1939	1264
K.	High, Low and Total Sales Debtor's First Mortgage 5% Bonds, Six Months' Periods, 1923-1929	1265
L.	Total Operating Revenues of the Western Pacific Railroad System and Class I Railroads of the U. S.	1267
M.	Net Railway Operating Income, Western Pacific Railroad System and Class I Railroads of the U. S.	1269
Stipulation for order dispensing with printing of certain portions of record on appeal		2612
Supplemental order authorizing the borrowing of $10,000,000.00 from Reconstruction Finance Corp.		1813

Index

Page

Testimony, Transcript of, before District Court 1280

Exhibits for Irving Trust Company:

1-A—Statement headed "Combined Railway Operating Revenues" .. 1302

1-B—Statement headed "Combined income available for interest charges" 1304

1-C—Statement headed "Combined income available for interest charges, etc." 1305

1-D—Statement entitled, "Gross Revenues accruing to Western Pacific R. R. Co. from freight originating and terminating on and passing over Northern California Extension" 1306

1-E—Statement headed "Income available for interest charges Tidewater Southern R. R. Co. 1307

1-F—Western Pacific R. R. Co. proportion of revenues over traffic interchange with Tidewater Southern R. R. Co. 1308

1-G—"Railway Operating Income, Central California Traction Co." 1309

Index

Page

1-H—Income and Profit and Loss, Deficit of Central California Traction Co. 1309

1-I—Western Pacific R. R. Co. proportion of revenues from traffic interchange with Central California Traction Co. 1310

2—Interstate Commerce Valuation of Alameda Belt Line as of December 31, 1935 and December 31, 1938 and also balance sheets of Alameda Belt Line as of said dates 1314

4—Statement showing amount of cash and receivables in hands of Trustees on March 4, 1936 1316

5—Statement showing equipment or equity in equipment acquired during course of reorganization proceedings by Debtor's Trustees, etc. 1319

6—Listing statement of July 16, 1925 1324

7—Listing statement of September 30, 1926 1350

8—Listing statement of October 31, 1927 1376

Index

Page

9—Listing statement of May 16, 1929 1404

10—Listing statement of July 1, 1930 1433

11—Listing statement of September 30, 1930 1465.

12—Listing statement of February 29, 1935 1496

Exhibits for Petitioners:

1—Stipulation of Facts and Memoranda of Corrections 1017

Exhibits for Reconstruction Finance Corporation:

1—Chart headed "Offerings of Railroad bond issues 1938-1940" 1540

2—Table headed "Western Pacific R. R. Co. indicated income remaining after proposed interest charges and per cent of gross revenues of such income remaining, 1922-1938 inc. 1548

Exhibits for Western Pacific Railroad Corporation:

1—Statement showing percentage of preferred stock of the corporation held by A. C. James Co. and the two corporations which he owns 1529

Index

Page

Witness for Debtor:

Elsey, Charles
—direct 1283
—cross 1289

Witness for Irving Trust Co.:

Curry, M. J.
—direct 1323

Witness for Reconstruction Finance Corporation:

Blyth, Charles R.
—direct 1530

Futterer, Charles
—direct 1536
—cross 1557

Testimony, Transcript of, before Interstate Commerce Commission 1853

Exhibits introduced before Interstate Commerce Commission:

1—Plan of Reorganization effective January 1, 1936 [Set out at page 19] 1859

22—Western Pacific Railroad Company Reorganization Plan forecast of revenue, expenses and income 1922

Index

Page

27—Statements indicating operating revenues of the Western Pacific Railroad Company, preceding the year 1936 and a forecast of those revenues for the years 1936 to 1940, inclusive 1950

29—Additional exhibits as requested by counsel for creditors or examiners for Interstate Commerce Commission at hearing held March 23, 1936, together with supplementary explanatory memoranda 2020

32—Statements indicating revenues of Sacramento Northern Railway, Tidewater Southern Railway Company and Deep Creek Railroad Company for years 1929 to 1935 inclusive and a forecast of revenues for the years 1936 to 1940 inclusive 2121

33—Additional information requested by Examiner Boyden relating to estimates of operating expenses of the Western Pacific Railroad Company as shown by Exhibit 22 2145

38—Report to Frederick H. Ecker, Esq., Chairman of the Board, Metropolitan Life Insurance Co., New York, N. Y. 2221

Index

Page

42—Suggested Plan of Reorganization of the Western Pacific Railroad Company. Effective date January 1, 1937. [Set out at page 48] 2272

76—Plan of Reorganization for the Western Pacific Railroad Co. proposed by A. C. James Co. [Set out at page 101] 2407

125—Statement showing stockholdings of Arthur Curtiss James in the Western Pacific Railroad Corporation together with the holdings of the Curtiss Southwestern Corporation and the Curtiss Southwestern Company 2565

127-148—Monthly income statements of debtor introduced before Commission 2239-2260

Witnesses before Interstate Commerce Commission:

Bon, J. F.

—direct 1927

Buckley, Carl E.

—direct 2349

—recalled, direct 2463

—recalled, direct 2578

—cross 2580

Index

Page

Curry, Michael J.
—direct 1857
—recalled, direct 2300
—recalled, direct 2433
—recalled, direct 2510

De Graff, D. C
—direct 1999
—cross 1999

Elsey, Charles
—direct 1859
—cross 1883
—recalled, direct 2017
—cross 2100
—recalled, direct 2195

Engelbright, Edward W.
—direct 1983
—cross 1990
—recalled, direct 2144
—cross 2163

Hamilton, J. A.
—direct 2213
—cross 2214

Poulterer, H. E.
—direct 2118
—recalled, cross 2191

Proceedings in U. S. C. C. A., Ninth Circuit 2659
Order directing argument; etc. 2661
Order of submission 2662
Order directing filing of opinion and filing and recording of decree 2663
Opinion, Matthews, J. 2663
Decree of November 28, 1941 2675
Certificate of Clerk of United States Circuit Court of Appeals 2677
Order amending decree of November 28, 1941, etc. 2681
Amended decree 2683
Clerk's certificate 2684
Orders allowing certiorari 2685

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In the District Court of the United States,
for the Northern District of California,
Southern Division.

26591 S.

In proceedings for the reorganization of a railroad.

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

PETITION [1*]

To the Honorable, the Judges of the District Court of the United States, for the Northern District of California, Southern Division:

The petition of The Western Pacific Railroad Company, a railroad corporation, hereinafter referred to as the debtor, respectfully represents:

First: That the debtor is a railroad corporation organized and existing under the laws of the State of California and is a citizen and resident of the State of California; and is a common carrier by railroad engaged in the transportation of persons and property in interstate and intrastate commerce in the States of California, Nevada and Utah, and is not a street, suburban or interurban electric railway; that during the six months' period immediately preceding the filing of this petition the debtor has had, and now has, its principal operating office in the City of San Francisco, in the State of California, and in the Northern District of California, Southern Division.

*Page numbering appearing at foot of page of original certified Transcript of Record.

Second: That there became due on March 1, 1934, interest in the amount of $1,231,252.50 on $49,290,100. First Mortgage Bonds of the debtor and a like amount of interest thereon on September 1, 1934, payment of which was conditionally deferred until January 1, 1937, pursuant to a deferment plan agreement signed by holders of more than 86% of the outstanding First Mortgage Bonds, but more than 13% of the holders of said outstanding bonds executed no deferment agreement. That it is provided in [2] the said deferment plan agreement between the debtor and holders of said First Mortgage Bonds, parties to such Deferment Plan, that the installments of interest due March 1, 1934, and September 1, 1934, and conditionally deferred until January 1, 1937, shall forthwith become due and payable if any receiver for The Western Pacific Railroad Company shall be appointed by any Court of competent jurisdiction or any proceeding commenced under Section 77 of the Federal Bankruptcy Act, as amended, prior to January 1, 1937.

That there became due on March 1, 1935, interest in the amount of $1,231,252.50 on said First Mortgage Bonds of the debtor and the whole amount thereof remains unpaid and the debtor is without funds to pay and discharge the same.

That there is also due and payable the following amounts of interest on the unfunded debt of the debtor and the debtor is without funds to pay and discharge the same:

Name of Creditor	Principal amount of debt as of June 30, 1935	Interest accrued and unpaid as of June 30, 1935
Reconstruction Finance Corporation	$2,963,000.	$ 204,324.13
The Railroad Credit Corporation	2,538,956.	53,922.73
A. C. James Co.	4,999,800.	374,985.00
The Western Pacific Railroad Corporation	5,739,722.	1,018,852.76

That the debtor is without funds to pay and discharge the aforesaid obligations as they mature and upon information and belief alleges that it has no means of borrowing or otherwise procuring such funds; that it is unable to meet its debts as they mature and desires to effect a Plan of Reorganization, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

Third: That a Plan of Reorganization of debtor, an outline of which is annexed hereto, marked Exhibit A, has been prepared by the debtor after protracted negotiation and conference [3] with representatives of large institutional holders of First Mortgage Bonds and junior creditors, including Reconstruction Finance Corporation.

Fourth: That a copy of this petition is this day being filed with the Interstate Commerce Commission with a request that said Commission fix an early date for a public hearing at which the debtor may present said Plan, as provided in said Section 77.

Fifth: That the filing of this petition by and on behalf of the debtor was duly authorized by resolution of the Board of Directors of the debtor adopted

at a meeting thereof duly held on the 2nd day of August, 1935.

Wherefore, your petitioner prays that an order may be entered approving this petition as properly filed under said Section 77 of said Chapter VIII and that it be granted all other and further relief to which it may be entitled.

THE WESTERN PACIFIC RAILROAD COMPANY

By (original signed) CHARLES ELSEY,
President.

WARREN OLNEY, Jr.,
Balfour Building,
San Francisco, California,
PIERCE & GREER,
15 Broad Street,
New York City, New York,
Attorneys for Debtor. [4]

State of California,
City and County of San Francisco—ss.

Charles Elsey, being duly sworn, deposes and says, that he is an officer, to wit, the President, of The Western Pacific Railroad Company, a corporation, the petitioner debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on informa-

tion and belief and as to those matters he believes them to be true.

CHARLES ELSEY.

Subscribed and sworn to before me this 2nd day of August, 1935.

(Seal) FLORA HALL

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires May 5, 1937.

THE WESTERN PACIFIC RAILROAD COMPANY
A PLAN OF REORGANIZATION

EXISTING CAPITALIZATION AND OTHER CAPITAL LIABILITIES (As of December 31, 1934, except as noted.)		PROPOSED NEW CAPITALIZATION				
		Equipments to be Undisturbed	Fixed 4% Interest 30-Year First Mortgage Bonds	Fixed 4-4½% Interest 30-Year First Mortgage Bonds (Note 1)	Series "A" 5½% 30-Year Mortgage Income Bonds (Note 2)	Series "B" 5½% 30-Year Mortgage Convertible Income Bonds (Note 2)
Existing Capitalization						
$ 2,994,065	Equipment Trusts and Baldwin Lease (June 30, 1935)	$2,994,065	$ —	$ —	$ —	$ —
49,290,100	First Mortgage 5% Bonds due 1946	—	14,787,000 (30%)	—	17,251,550 (35%)	17,251,550 (35%)
—	New Money from Reconstruction Finance Corporation	—	—	10,000,000	—	—
2,963,000	Notes held by Reconstruction Finance Corporation (June 30, 1935)	—	888,900 (30%)	—	1,037,050 (35%)	1,037,050 (35%)
4,999,800	Notes held by A. C. James Co.	—	—	—	—	—
2,538,956	Notes held by The Railroad Credit Corporation (June 30, 1935)	—	—	—	—	—
62,785,921	Total of Above Debt	—	—	—	—	—
28,300,000	Preferred 6% Stock	—	—	—	—	—
47,500,000	Common Stock	—	—	—	—	—
75,800,000	Total Stock	—	—	—	—	—
Other Capital Liabilities						
2,464,506	Interest due in 1934 on present Bonds	—	—	—	1,232,253 (50%)	1,232,253 (50%)
119,152	Interest due in 1934 on Notes to Reconstruction Finance Corporation	—	—	—	59,576 (50%)	59,576 (50%)
249,990	Interest due in 1934 on Notes to A. C. James Co.	—	—	—	—	—
29,385	Interest due in 1934 on Notes to The Railroad Credit Corporation	—	—	—	—	—
5,739,722	Principal due The Western Pacific Railroad Corp. (March 22, 1935)	—	—	—	—	—
51,667	Principal due The Western Realty Company	—	—	—	—	—
8,654,422	Total Other Capital Liabilities	—	—	—	—	—
$147,240,343	Grand Total Capitalization	$2,994,065	$15,675,900	$10,300,000	$19,580,429	$19,580,429

THE WESTERN PACIFIC RAILROAD COMPANY
A PLAN OF REORGANIZATION

TIES — PROPOSED NEW CAPITALIZATION

	Equipments to be Undisturbed	Fixed 4% Interest 30-Year First Mortgage Bonds	Fixed 4-4½% Interest 30-Year First Mortgage Bonds (Note 1)	Series "A" 5½% 50-Year Mortgage Income Bonds (Note 2)	Series "B" 5½% 50-Year Mortgage Convertible Income Bonds (Note 2)	Junior Lien 6% 75-Year Income Bonds (Note 3)	New Common Stock (Note 4)	Proposed Total
	$2,994,065	$ —	$ —	$ —	$ —	$ —	—	$ 2,994,065
	—	14,787,000(30%)	—	17,251,550(35%)	17,251,550(35%)	—	—	49,290,100
	—	—	10,000,000	—	—	—	—	10,000,000
une 30,								
	—	888,900(30%)	—	1,037,050(35%)	1,037,050(35%)	—	—	2,963,000
	—	—	—	—	—	4,999,800	—	4,999,800
), 1935)	—	—	—	—	—	2,538,956	—	2,538,956
	—	—	—	—	—	—	—	—
	—	—	—	—	—	—	—	—
							300,000 sh.	300,000 sh.
	—	—	—	—	—	—	—	—
	—	—	—	1,232,253(50%)	1,232,253(50%)	—	—	2,464,506
ce Cor-								
	—	—	—	59,576(50%)	59,576(50%)	—	—	119,152
	—	—	—	—	—	249,990	—	249,990
Corpo-								
	—	—	—	—	—	29,385	—	29,385
rch 22,								
	—	—	—	—	—	—	—	—
	—	—	—	—	—	—	—	—
	—	—	—	—	—	—	—	—
	$2,994,065	$15,675,900	$10,300,000	$19,580,429	$19,580,429	$7,818,131	300,000 sh.	$75,648,954 plus 300,000 sh.

CAPITALIZATION

Description	Present Capitalization	Proposed Assuming No Conversion Series "B" Bonds	Proposed Assuming Conversion All Series "B" Bonds
Equipment Trusts and Baldwin Lease	$ 2,994,065	$ 2,994,065	$ 2,994,065
First Mortgage Debt	49,290,100	25,675,900	25,675,900
Total	52,284,165	28,669,965	28,669,965
R. F. C.-A. C. James Co.-R. C. C. Secured Debt	10,501,756	—	—
Total Fixed Interest Debt	62,785,921	28,669,965	28,669,965
Advances and Deferred Interest	8,654,422	—	—
Income Mortgage Bonds (Note 2)	—	39,160,858	19,580,429
Junior Lien Income Bonds	—	7,818,131	7,818,131
Total Debt	71,440,343	75,648,954	56,068,525
Preferred Stock—(Note 4)	28,300,000	—	—
Common Stock—(Note 4)	47,500,000 (Par $100)	300,000 sh. (No Par)	887,412 sh. (No Par)
Total Stock	75,800,000	300,000 sh.	887,412 sh.
Total Capitalization	$147,240,343	$ 75,648,954 plus 300,000 sh.	$ 56,068,525 plus 887,412 sh.
Approximate Interstate Commerce Commission valuation of The Western Pacific RR. Co. and owned subsidiaries	$143,500,000	$146,000,000	$146,000,000

ANNUAL BOND INTEREST REQUIREMENTS

Debt	On Present Bonds, Notes and Advances	Proposed Assuming No Conversion Series "B" Bonds	Proposed Assuming Conversion All Series "B" Bonds
Present Fixed Interest Debt	$3,177,302	$ —	$ —
New First Mortgage Bonds (Note 5)	—	1,027,036	1,027,036
Contingent Mortgage Bonds—Series "A"	—	1,076,924	1,076,924
Contingent Mortgage Bonds—Series "B"	—	1,076,924	—
Junior Lien Bonds	—	469,087	469,087
Total (Note 5)	$3,177,302	$3,649,971	$2,573,047

NOTES

Note 1—Bonds to Be Purchased by Reconstruction Finance Corporation:

(a) Reconstruction Finance Corporation is undertaking, subject to approval of the Interstate Commerce Commission, to (1) provide money for rehabilitation up to $10,000,000 by the purchase of 30-year bonds to bear interest at 4% for the first ten years and at such higher rate thereafter as will make an average yield of 4½% from the date money is advanced to the maturity of bonds, or (2) in the alternative, to advance $10,000,000 for twenty or twenty-five years at 4% collaterally secured by 120% of First Mortgage 4% Bonds.

(b) Money will be drawn down over period of about 3 years as required to finance program of work.

Note 2—Income Mortgage Bonds:

(a) Income Mortgage Bonds to be issued in two series, viz:

Approximately	
$19,580,429	Series "A" 5½% Non-Convertible 50-Year Bonds.
19,580,429	Series "B" 5½% 50-Year Bonds convertible into 30 shares of no par value common stock for each $1,000 bond.

(b) Interest to be cumulative against two years' income.

Note 3—Junior Lien Bonds:

ion No. 1 Junior Lien Income Bonds to be non-cumulative as to interest.

Note 4—Common Stock:

(a) Present Preferred and Common Stocks are $100 par value.

(b) Common Stock to have no par value and to be carried at stated value acceptable to Interstate Commerce Commission.

(c) 300,000 shares to be issued on consummation of plan.

(d) 587,412 shares to be reserved for conversion of Series "B" Income Bonds at rate of 30 shares for each $1,000 bond.

(e) As to the 300,000 shares of common stock allocated to the present equity, 150,000 shares to be placed in escrow and in any one year, after a five-year period that full interest is not paid on all of the income mortgage bonds, shares from this 150,000 to be given to the bondholders in the ratio of two shares of common stock for each full interest coupon. Unless there is a reduction for the foregoing reasons in the amount of common stock allocated to the equity (300,000 shares), the present equity would be entitled to any dividends declared on the 300,000 shares.

Note 5—Annual Interest Under Plan:

Annual requirements shown include interest at 4% on full $10,000,000 of bonds which may ultimately be sold to the Reconstruction Finance Corporation. Under circumstances indicated in Note 1(a), this interest rate would be increased after first ten years.

Note 6—Interest Fund:

An interest fund is to be created into which shall be paid a minimum of 10% of net earnings available for the common stock until the fund equals one year's interest on fixed and contingent interest debt. Fund to be invested in Government Bonds.

Note 7—Financial Control:

Provision to be made satisfactory to First Mortgage Bondholders, assuring them financial control of the reorganized company through representation on the Board of Directors and Executive Committee.

[Endorsed]: Filed Aug. 2, 1935.

[Title of District Court and Cause.]

ORDER

Upon due consideration of the petition of The Western Pacific Railroad Company, the above named debtor, verified August 2, 1935, and filed herein this day, stating that such debtor is unable to meet its debts as they mature and that it desires to effect a Plan of Reorganization in accordance with Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, and the Court being satisfied that such petition complies with said section and has been filed in good faith, it is Ordered:

(1) That said petition be, and hereby is, approved as properly filed under Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy.

(2) That the debtor be, and it hereby is, authorized and directed, pending further order of the court in the premises, to run, manage, maintain, operate and keep in proper condition and repair the railroads and property of the debtor, wherever situated, whether in this state, judicial circuit, or elsewhere and to manage and conduct its business as a railroad company, and to this end to exercise its authority and franchises and discharge all public duties obligatory upon it, and to employ and discharge and fix the compensation of all officers, attorneys, managers, superintendents, agents and employees; to collect and [6] receive the incomes, rents, revenues, tolls, issues and profits of said

property; to collect all outstanding accounts and all dividends and interest on securities belonging to it; to exercise such sale, conveyance, exchange and release rights as are reserved to, or available to, the debtor, under outstanding deeds of trust, mortgages, trust indentures and similar instruments, and to use the proceeds of sale of all released property as provided in such instruments; all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor; and to make such advances to its subsidiary corporations as are necessary to protect the debtor's interest therein, all in the same manner that it would be entitled and bound to do in its own right; and, to the extent necessary to protect and preserve the property of the debtor, to make and pay for additions and betterments to the railroads and property of the debtor, all of the foregoing powers to be exercised according to law, and subject to such supervision and control by the Court as the Court may exercise by further orders entered herein. The authority given by the foregoing shall not include authority to incur expense, other than such as is necessary in the course of the usual and ordinary maintenance and operation of the debtor's property. Any extraordinary expense and expense incident to the reorganization of the debtor shall be subject to the prior approval of the Court.

(3) That the debtor is authorized, in its discretion from time to time until further order of this Court, out of funds now or hereafter coming into its hands, to pay:

(a) All taxes and assessments due or to become due upon the property of the debtor.

(b) All necessary expenses of operating the railroads and conducting the business of the debtor, including among other expenses the wages, salaries and compensation of all officers, attorneys, counsel, managers, superintendents, agents and employees retained by the [7] debtor; ticket, traffic, car mileage and car per diem balances; interline accounts; freight and overcharge claims; interest on and installments of principal of equipment trust obligations; and amounts for car and equipment repairs now due or that may become due to connecting or other railroad companies or other common carriers, including all sums now due or which may hereafter become due to other persons or corporations for the occupation or use, jointly or otherwise, of buildings, depots, terminals, tracks, side tracks, yards, warehouses, shops, bridges and other railroad facilities, and such sums as may be necessary to comply with the obligations of the debtor under contracts by virtue of which said occupation or use may now or hereafter be enjoyed (but such payments shall not constitute affirmations of said contracts, or of any of them);

(c) The following claims incurred by the debtor within six months preceding the date of this order, in the usual and customary operation of its properties, and the conduct of its current business, to-wit: Wages, salaries, fees, and other charges due and payable for services rendered to the debtor, unpaid material and supply accounts incurred in the operation of said properties; unpaid and outstanding pay checks and wage checks representing labor actually performed for the debtor. The debtor is also authorized in its discretion to adjust compromise and pay claims of shippers, consignees, or others in interest, for overcharges or reparation awards; and for loss, damage or delay to freight and baggage; also to settle and pay on behalf of itself and other carriers and private car owners, claims arising out of rate [8] divisions, interline settlements, per diem accounts, switching reclaims, proportion of reparation awards, and freight charges or adjustments respecting shipments with transit or storage privileges and other charges or adjustments of like character, between carriers in the conduct of their joint business, regardless of when accrued.

(d) Pending further order of this Court in the premises, the debtor hereby is authorized to pay pay checks, and like instruments issued to employees for services rendered to the debtor, whether before or during said six months

period, whenever the same are presented for payment.

(e) The cost of maintaining the corporate existence of the debtor, including the necessary expenses of the preservation of records, and the registration and transfer of its stocks and bonds, and trustees' charges under indenture under which securities of the debtor have been issued.

(f) All monthly payments due from time to time under any existing pension or insurance system of the debtor.

(g) The expense of printing pleadings, motions, petitions and orders now on file or hereafter filed in this case reasonably necessary to be printed, in such quantity as shall provide copies for the use of the Court, the debtor, parties to the cause, and such others as may have a substantial interest therein: such expense to be taxed as costs in this case.

(4) That the debtor shall be allowed until January 1, 1936 (unless the time be extended further by order of this Court), within which to disaffirm any contracts. Such disaffirmance shall be indicated by notice to that effect, in writing, served on the [9] other party or parties to such contract, and filed of record in this proceeding, and continued operation by the debtor under any of said contracts, within said period allowed for disaffirmances, shall not be deemed to conclude the debtor in respect of such election, or to constitute an election.

(5) That, pending further order of the Court in the premises, the debtor is authorized and empowered to institute or prosecute in any Court, or before any tribunal of competent jurisdiction, all such suits and proceedings as may be necessary, in its judgment, for the recovery or proper protection of its property or rights, and to make settlement of any thereof; and likewise to defend or liquidate, by written agreement or consent judgments, any actions, claims, proceedings, or suits, now pending against the debtor, or which may hereafter be asserted, or be brought in any Court, or before any officer, department, commission or tribunal, to which the debtor is, or shall be, a party, but no payments shall be made by the debtor in respect of any such claims accruing prior to the date of this order, in respect of any actions, proceedings, or suits, on such claims, without further order or direction of this Court except as may be provided in other paragraphs of this order and except such as may be permitted by other general orders hereafter entered herein, and such as constitute preferred claims under the Acts of Congress relating to bankruptcy; and no action taken by the debtor in defense or settlement of such claims, actions, proceedings, or suits, shall have the effect of establishing any claim upon, or right in, the property or funds in the possession of the debtor, that otherwise would not exist.

(6) That the debtor shall close its present books of account as of the close of business on July 31, 1935. The debtor shall open new books of account as of the opening of business on August 1, 1935.

and cause to be kept therein due and proper [10] accounts of the earnings, expenses, receipts and disbursements of the debtor, and shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the debtor are presently deposited as shall be selected by the debtor, or in such other bank or banks as shall be selected by and approved by this Court.

(7) That within sixty days after the entry of this order, the debtor shall file with the Clerk of this Court a statement of the assets and liabilities of the debtor as of the close of business on July 31, 1935, and within fifty days after the close of each calendar month thereafter shall file with said Clerk a statement of the assets and liabilities of the debtor as of the close of business on the last day of the second preceding calendar month, together with a summary statement of the revenues and expenses of the debtor of the second preceding calendar month. All such statements shall be certified as correct by the chief accounting officer of the debtor.

(8) That all persons, firms and corporations, whatsoever and wheresoever situated, located, or domiciled, hereby are restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, and enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, railroads, properties and premises belonging to, or in the possession of the debtor, or from taking possession of the same, or any part

thereof, or in any way interfering in any manner to prevent the discharge by the debtor of its duties in the operation of said property and business, under the orders of this Court, or from bringing any new suits or actions, accruing prior to this date, in or before any Court from which an appeal or proceedings to review, can be taken only upon the filing of an appeal bond, as a jurisdiction or mandatory requirement. [11]

(9) That all persons and corporations holding collateral heretofore pledged by the debtor as security for its notes or obligations be, and each of them is, hereby restrained and enjoined from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of this Court.

(10) This Court reserves full power and jurisdiction to make from time to time such orders amplifying, extending, limiting or otherwise modifying this order as to the Court may at any time seem proper.

(Sgd) A. F. ST. SURE
District Judge

Dated: August 2, 1935.

[Endorsed]: Filed Aug. 2, 1935. [12]

The Western Pacific Railroad Company

PLAN OF REORGANIZATION

Effective date January 1, 1936

Presented by
The Western Pacific Railroad Company pursuant to
Section 77 of the Bankruptcy Act.

[119]

The Western Pacific Railroad Company
Office of Chairman of the Executive Committee
37 Wall Street,
New York

T. M. Schumacher,
Chairman.

In the Matter of the Reorganization
of
The Western Pacific Railroad Company

FEBRUARY 7, 1936.

To:

The Honorable, the District Court of the United States for the Northern District of California, Southern Division, and

The Honorable, the Interstate Commerce Commission, Washington, D. C.

There is annexed hereto for filing pursuant to sub-section (d) of § 77 of the Bankruptcy Act,

the Plan of Reorganization of The Western Pacific Railroad Company, an outline of which was submitted as part of this Company's petition filed under said Act on August 2, 1935.

This plan of Reorganization prepared as the result of conferences with the Committee of Bondholders referred to therein and with Reconstruction Finance Corporation and other creditors will be presented by this Company at the public hearing heretofore requested by it under said Section 77.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By T. M. SCHUMACHER,
Chairman of the Executive Committee

[120]

The Western Pacific Railroad Company
(hereinafter called the Railroad Company)

PLAN OF REORGANIZATION
Effective Date January 1, 1936

I.
Procedure

As the means for the execution of the plan with a minimum of delay and expense it is proposed to continue the Railroad Company, with any necessary or appropriate amendments to its Articles of Incorporation and By-Laws, but the right is reserved to create a new Company or to resort to any

procedural methods sanctioned by Section 77 of the Bankruptcy Act, or any amendment thereof, for the issuance of the new securities in substitution for those to be retired under the Plan, and for the protection of any class of creditors or stockholders who may not accept the Plan.

II.

Summary of the Plan

For convenient reference a tabulated summary of the Plan showing the bases of conversion of present securities of the Railroad Company into securities of the reorganized Company appears on the following page. A detailed statement respecting each of the proposed new securities and the terms of issue appears at a subsequent point.

The underlying purpose of the Plan is the creation of a revised capital structure providing for fixed charges believed to be within the probable prospective earnings of the reorganized Company under any conditions reasonably to be expected in the future; also to provide funds for necessary rehabilitation work including deferred maintenance which necessarily accrued during the depression period. *Fixed annual interest is to be reduced from $3,180,053 to $1,027,036,** including in the latter figure interest at 4% on $10,000,000, the maximum of new money to be provided by Reconstruction Finance Corporation. [121]

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* Italics used throughout this paper were used in the original document.

THE WESTERN PACIFIC RAILROAD COMPANY
SUMMARY OF PLAN OF REORGANIZATION
(Effective Date January 1, 1936)

Existing Capitalization and Other Capital Liabilities			Proposed Capitalization							
Amount and Nature of Obligation (December 31, 1935)		Equipments to be Undisturbed	Fixed 4% First Mortgage 30-Year Bonds	Fixed 4-½% First Mortgage 30-Year Bonds	Series "A" 5½% Income Mortgage 50-Year Sinking Fund Bonds	Series "B" 5½% Income Mortgage 50-Year Convertible Bonds	Junior Lien 6% Income 75-Year Bonds	New No-Par Common Stock	Proposed Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Existing Capitalization									
$ 2,682,598	Equipment Trusts and Baldwin Lease	$2,682,598	$ —	$ —	$ —	$ —	$ —	—	$ 2,682,598
(A) 49,293,100	First Mortgage 5% Bonds, due 1946	—	14,787,000 (30%)	—	17,251,550 (35%)	17,251,550 (35%)	—	—	49,290,100
—	New Money to be provided by Reconstruction Finance Corporation	—	—	10,000,000	—	—	—	—	10,000,000
(B) 2,963,000	Notes—Reconstruction Finance Corp.	—	888,900 (30%)	—	1,037,050 (35%)	1,037,050 (35%)	—	—	2,963,000
(B) 4,999,800	Notes—A. C. James Co.	—	—	—	—	—	4,999,800	—	4,999,800
(B) 2,524,907	Notes—The Railroad Credit Corp.	—	—	—	—	—	2,524,907	—	2,524,907
$ 62,460,405	Total of above debt	—	—	—	—	—	—	—	—
28,300,000	Preferred 6% Stock—Par $100†	—	—	—	—	—	—	—	—
47,500,000	Common Stock—Par $100	—	—	—	—	—	—	300,000 Sh.	300,000 Sh.
$ 75,800,000	Total Stock	—	—	—	—	—	—	—	—
Other Capital Liabilities									
$ 4,928,760	Matured First Mortgage Bond Interest Unpaid	—	—	—	2,464,380	2,464,380	—	—	4,928,760
268,836	Matured Interest Unpaid—Reconstruction Finance Corporation	—	—	—	134,418	134,418	—	—	268,836
499,980	Matured Interest Unpaid—A. C. James Co.	—	—	—	—	—	499,980	—	499,980
68,022	Matured Interest Unpaid—The Railroad Credit Corporation	—	—	—	—	—	68,022	—	68,022
6,897,274	Principal and accrued interest due The Western Pacific Railroad Corp.†	—	—	—	—	—	—	—	—
54,167	Principal and accrued interest due The Western Realty Company†	—	—	—	—	—	—	—	—
$ 12,717,039	Total Other Capital Liabilities	—	—	—	—	—	—	—	—
$150,977,444	Grand Total	$2,682,598	$15,675,900	$10,000,000	$20,887,398	$20,887,398	$8,092,709	300,000 Sh.	$78,226,063 plus 300,000 Sh.

(A)—The First Mortgage Bonds are outstanding under an indenture dated June 26, 1916 executed by the Railroad Company to First Federal Trust Company (now

Existing Capitalization and Other Capital Liabilities		Proposed Capitalization							
Amount and Nature of Obligation (December 31, 1935)		Equipments to be Undisturbed	Fixed 4% First Mortgage 50-Year Bonds	Fixed 4-4½% First Mortgage 50-Year Bonds	Series "A" 5½% Income Mortgage 50-Year Sinking Fund Bonds	Series "B" 5½% Income Mortgage 50-Year Convertible Bonds	Junior Lien 6% Income 75-Year Bonds	New No Par Common Stock	Proposed Total
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Existing Capitalization									
$ 2,682,598	Equipment Trusts and Baldwin Lease	$2,682,598	$ —	$ —	$ —	$ —	$ —	—	$ 2,682,598
(A) 49,290,100	First Mortgage 5% Bonds, due 1946	—	14,787,000 (30%)	—	17,251,550 (35%)	17,251,550 (35%)	—	—	49,290,100
—	New Money to be provided by Reconstruction Finance Corporation	—	—	10,000,000	—	—	—	—	10,000,000
(B) 2,963,000	Notes—Reconstruction Finance Corp.	—	888,900 (30%)	—	1,037,050 (35%)	1,037,050 (35%)	—	—	2,963,000
(B) 4,999,800	Notes—A. C. James Co.	—	—	—	—	—	4,999,800	—	4,999,800
(B) 2,524,907	Notes—The Railroad Credit Corp.	—	—	—	—	—	2,524,907	—	2,524,907
$ 62,460,405	Total of above debt.	—	—	—	—	—	—	—	—
28,300,000	Preferred 6% Stock—Par $100	—	—	—	—	—	—	—	—
47,500,000	Common Stock—Par $100	—	—	—	—	—	—	300,000 Sh.	300,000 Sh.
$ 75,800,000	Total Stock	—	—	—	—	—	—	—	—
Other Capital Liabilities									
$ 4,928,760	Matured First Mortgage Bond Interest Unpaid	—	—	—	2,464,380	2,464,380	—	—	4,928,760
268,836	Matured Interest Unpaid—Reconstruction Finance Corporation	—	—	—	134,418	134,418	—	—	268,836
499,980	Matured Interest Unpaid—A. C. James Co.	—	—	—	—	—	499,980	—	499,980
68,022	Matured Interest Unpaid—The Railroad Credit Corporation	—	—	—	—	—	68,022	—	68,022
6,897,274	Principal and accrued interest due The Western Pacific Railroad Corp.†	—	—	—	—	—	—	—	—
54,167	Principal and accrued interest due The Western Realty Company†	—	—	—	—	—	—	—	—
$ 12,717,039	Total Other Capital Liabilities	—	—	—	—	—	—	—	—
$150,977,444	Grand Total	$2,682,598	$15,675,900	$10,000,000	$20,887,398	$20,887,398	$8,092,709	300,000 Sh.	$78,226,003 plus 300,000 Sh.

(A) The First Mortgage Bonds are outstanding under an indenture dated June 26, 1916 executed by the Railroad Company to First Federal Trust Company (now Crocker First National Bank of San Francisco) and Henry E. Cooper, Trustees. Samuel Armstrong was substituted as Co-trustee in place of Henry E. Cooper, effective January 28, 1935.

(B) The Railroad Company has issued as collateral for notes held by Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., $17,999,500 of General and Refunding Mortgage Bonds which are to be cancelled under the Plan. These Bonds are issued under an indenture dated January 1, 1932 executed by the Railroad Company to The Chase National Bank of the City of New York, Trustee.

†Cancelled under the Plan.

The tabulation on the opposite page shows in Column 1 the present outstanding securities and other Capital Liabilities, and, in Columns 3 to 9, inclusive, what the holders of present securities would receive under the Plan.

As appears in Columns 4, 6 and 7, holders of present First Mortgage 5% Bonds are to receive new fixed interest. First Mortgage 4% Bonds to the extent of 30% of the face value of their present holdings and 35% in Series "A" and 35% in Series "B" Income Bonds on which interest at 5½% will be payable to the extent earned as more fully set forth in Article V of this Plan, and, in addition, Series "A" and Series "B" bonds in equal proportions of face value equal to the full amount of unpaid 1934 and 1935 interest. Series "A" and Series "B" bonds are to be the same in all respects except that Series "A" are to be subject to a Sinking Fund, and Series "B" are to be convertible, under certain conditions in said Article V stated, into Common Stock.

The proposed treatment of other secured and unsecured debt is similarly indicated.

All of the Common and Preferred Stock of The Western Pacific Railroad *Company* is owned by The Western Pacific Railroad *Corporation*, a holding company, and treatment of the Corporation's stock ownership is also shown by the tabulation.

In Article III, which immediately follows, will be found tabulations showing comparisons in convenient form of present and proposed debt structure and present and proposed interest requirements. [123]

III.

Comparisons

As showing that the Plan will be financially advisable and compatible with the public interest, the following comparisons are submitted:

(1)

COMPARISON OF PRESENT AND PROPOSED CAPITALIZATIONS

Description	Present Capitalization Dec. 31, 1935	Proposed Capitalization Assuming No Conversion Series "B" Bonds	Proposed Capitalization Assuming Conversion All Series "B" Bonds
(1)	(2)	(3)	(4)
Equipment Trusts and Baldwin Lease	$ 2,682,598	$ 2,682,598	$ 2,682,598
First Mortgage Bonds	49,290,100	25,675,900	25,675,900
Total	51,972,698	28,358,498	28,358,498
R. F. C.—A. C. James Co.—R. C. C. Secured Debt	10,487,707	—	—
Total Fixed Interest Debt	62,460,405	28,358,498	28,358,498
Other Capital Liabilities—Principal and Unpaid Interest	12,717,039	—	—
Income Mortgage Bonds—Series "A"	—	20,887,398	20,887,398
Income Mortgage Bonds—Series "B"	—	20,887,398	—
Junior Lien Income Bonds	—	8,092,709	8,092,709
Total Debt	75,177,444	78,226,003	57,338,605
Preferred Stock	28,300,000	—	—
Common Stock	47,500,000 (Par $100)	300,000 Sh. (No Par)	926,622 Sh. (No Par)
Grand Total	$159,977,444	$ 78,226,003 plus 300,000 Sh.	$ 57,338,605 plus 926,622 Sh.

Note: Present value, on an Interstate Commerce Commission basis, of The Western Pacific Railroad Company and final or tentative values of owned subsidiaries totals approximately $143,600,000. Estimated capital expenditures incident to the rehabilitation program, for which new money is to be obtained, will increase this value to approximately $146,500,000.

(2)

COMPARISON OF PRESENT FIXED ANNUAL INTEREST REQUIREMENTS WITH PROPOSED FIXED INTEREST REQUIREMENTS AND INTEREST PAYABLE ONLY IF EARNED.

Item of Debt	On Present Debt Structure	Proposed: Assuming No Conversion Series "B" Bonds	Proposed: Assuming Conversion All Series "B" Bonds
(1)	(2)	(3)	(4)
Fixed Annual Interest:			
First Mortgage Bonds	$2,464,505	$ —	$ —
Other Funded and Unfunded Debt (1935)	715,548	—	—
New First Mortgage Bonds at 4% (See Note A)	—	1,027,036	1,027,036
Total	$3,180,053	$1,027,036	$1,027,036
Equipment Trusts and Baldwin Lease (1936) (See Note B)	121,681	121,681	121,681
Interest Payable Only if Earned:			
Income Mortgage Bonds, Series "A" at 5½%	—	1,148,806	1,148,806
Income Mortgage Bonds, Series "B" at 5½%	—	1,148,806	—
Junior Lien Income Bonds at 6%	—	485,563	485,563
Total Payable if Earned	$ —	$2,783,175	$1,634,369
Grand Total	$3,301,734	$3,931,892	$2,783,086

Note A: Proceeds from sale of bonds to Reconstruction Finance Corporation within the maximum of $10,000,000 will be drawn down over a period of about three years as required to finance the program of rehabilitation and for a Contingency Reserve Fund. Interest is shown above on maximum amount of such bonds at the rate of 4% which will prevail for first ten years.

Note B: Equipment Trust principal in the amount of $2,682,598 is reduced annually with corresponding decrease in annual interest.

IV.

New Money From Reconstruction Finance Corporation

An outstanding feature of the Plan is the undertaking of Reconstruction Finance Corporation, subject to approval and authorization of the Interstate Commerce Commission, to provide money for rehabilitation and working capital up to $10,000,000 by the purchase at par of new Thirty-year First Mortgage Bonds which may bear interest at 4% for the first ten years and at such higher rate or rates thereafter as will make an average yield of 4½% from the date the money is advanced to the maturity of the Bonds.

The right, however, is reserved (a) to issue these bonds bearing a 4% interest rate to maturity and to adjust the additional ½% in the purchase price of the Bonds, or (b) to accept an alternative proposal to advance $10,000,000 for 20 or 25 years at 4% collaterally secured by 120% of First Mortgage Bonds of the reorganized Company.

All Bonds issuable on this account may be authenticated forthwith and placed in the treasury of the reorganized Company. They shall be issued against the surplus created as a result of the reorganization, and their proceeds shall be available for such capital and rehabilitation expenditures as the Board of Directors, after providing for a Contingency Reserve Fund, may deem proper. All re-

habilitation expenditures other than those chargeable to Capital Account shall be charged to surplus, and the necessary authorization of such charges by the Interstate Commerce Commission is a part of this Plan. Out of the proceeds of such Bonds there shall be set apart $500,000. as a Contingency Reserve Fund, which shall be available only for the purpose of paying fixed interest charges, principal of and dividends on Equipment Trust obligations and operating expenses which cannot otherwise be provided for without, in the opinion of the Board of Directors, unduly impairing free working capital. As such new Bonds are disposed of from time to time, the proceeds, except such part as may be so set apart, shall be placed in a special fund to be disbursed only to meet expenses of the rehabilitation and improvement or equipment [125] program except that such proceeds (a) may be used for such additions and betterments as the Board of Directors may substitute for any part of such program or authorize after its completion and (b) may be resorted to if necessary to avert a default under the Fixed 4% Mortgage or any Equipment Trust Agreement of the reorganized Company.

It is estimated that the work program will cover a period of not less than three years from January 1, 1936.

This undertaking to advance new money is made by Reconstruction Finance Corporation on condition that its existing claim against the Railroad Company amounting to $2,963,000 represented by

collateral notes junior to the existing First Mortgage Bonds be refunded under the Plan in like securities and in like proportions as those given holders of existing First Mortgage Bonds.

V.

Description of New Securities

A First Mortgage Bonds:

The new First Mortgage shall constitute a first lien upon all the railroads and fixed property, real and personal, and equipment of the reorganized Company now pledged under the First Mortgage of the Railroad Company. The total authorized issue of Bonds thereunder is to be limited to $50,000,000, of which

$15,675,900 are to be distributed under the Plan;

10,000,000 are to be purchased by or used in part to collateralize loans from Reconstruction Finance Corporation,

1,000,000 are to be issued forthwith and placed in the Treasury of the reorganized Company free from restriction; and

23,324,100 are to be reserved to be issued to provide for, or to reimburse the reorganized Company for expenditures made for additions, betterments, [126] improvements or extensions, in a principal amount not exceeding 75% of the actual cost of such additions, betterments, improvements or extensions. If the Board of Directors of

the reorganized Company shall elect to accept the alternative proposal of Reconstruction Finance Corporation described in clause (b) of the second paragraph of Article IV hereof, $2,000,000 of the reserved Bonds may, however, be used as collateral to loans from Reconstruction Finance Corporation, but upon payment of such loans the further issue of said $2,000,000 of reserved Bonds shall be subject to the limitations hereinbefore provided.

The First Mortgage Bonds may be issued in series which may differ as to date of maturity and interest rate but the Bonds immediately issuable under the Plan are to be dated January 1, 1936, are to mature January 1, 1966, and are to bear interest at 4% per annum, except that such of said Bonds as may be sold to Reconstruction Finance Corporation under the alternative proposal described in clause (a) of the second paragraph of Article IV hereof, may bear interest at varying rates not exceeding an average of 4½% from the date of issue to the date of maturity of the Bonds.

The First Mortgage Bonds to be distributed under the Plan and all First Mortgage Bonds sold or pledged to Reconstruction Finance Corporation shall be redeemable in whole or in part on any interest payment date, upon 30 days' notice, at their principal amount and accrued interest.

B. Income Mortgage 5½% Bonds:

1. The Income Mortgage will be a lien upon all of the railroads and property covered by the First Mortgage, subject only to the lien of the First Mortgage. The Bonds issued under the Income Mortgage are to be limited to [127]

$20,887,398 Series "A" 5½% Income Mortgage 50-Year Sinking Fund Bonds (hereinafter called the Series "A" Bonds), and

20,887,398 Series "B" 5½% Income Mortgage 50-Year Convertible Bonds (hereinafter called the Series "B" Bonds).

All of the Series "A" Bonds and the Series "B" Bonds are immediately issuable under the Plan and are to be equally and ratably secured by the Income Mortgage.

The Series "A" Bonds are to be dated January 1, 1936, are to mature January 1, 1986, are to bear interest at the rate of 5½% annually, payable as provided in the Income Mortgage only out of Available Net Income, and are entitled to the benefit of a cumulative Sinking Fund not to exceed in any year one-half of 1% of the largest principal amount of such Bonds theretofore issued.

The Series "B" Bonds are to be dated January 1, 1936, are to mature January 1, 1986, are to bear interest at the rate of 5½% annually payable as provided in the Income Mortgage only out of Available Net Income, are to be convertible into common stock of the reorganized Company at the rate of

thirty shares of such stock for each $1,000 principal amount of such Bonds.

Income Bonds of both Series "A" and Series "B" are to be redeemable, in whole or in part, upon 30 days' notice, on any interest payment date, at their principal amount, together with any interest thereon payable on said date, payable out of Available Net Income for fixed charges as hereinafter provided.

As more fully provided in Section 3 of this subdivision B, interest on the Income Mortgage 5½% Bonds of both Series "A" and "B" shall be cumulative, as against the Available Net Income of the reorganized Company, for the Income Period in respect of which such interest is payable and for the four Income Periods next succeeding the Income Period in respect of which such interest is payable. If on any April 1 or [128] October 1, commencing April 1, 1941, full interest at the rate of 5½% per annum shall not be paid on the Series "A" and the Series "B" Income Mortgage Bonds in respect of the next preceding Income Period, there shall be delivered out of the escrow provided for in Article VI hereof to the holders of such Bonds, Common Stock of the reorganized Company (or Voting Trust Certificates therefor, so long as the Voting Trust hereinafter provided for shall continue) in respect of any deficiency in the payment of such full interest, at the price of $27.50 per share. In respect of fractional shares becoming so deliverable, scrip will be issued, convertible into

Common Stock (or Voting Trust Certificates) in amounts aggregating full shares.

Any such stock remaining in escrow when all Series "A" and Series "B" Bonds shall have been retired, shall be delivered to holders of Escrow Receipts covering such stock.

2. Available Net Income shall be determined for each period of six months ending June 30 or December 31 (hereinafter called Income Periods) beginning with the Income Period of the reorganized Company ending June 30, 1936. Available Net Income for any Income Period shall be determined by deducting from "income of the reorganized Company available for fixed charges" for such Income Period (determined in accordance with accounting rules of the Interstate Commerce Commission or other analogous Federal authority having jurisdiction in the premises, at the time in force):

(a) All fixed charges of the reorganized Company accrued during such Income Period; and

(b) All other charges properly deductible from such income in determining income after fixed charges (under such accounting rules then in force), but excluding contingent interest, or Sinking Fund requirements hereinafter provided for.

3. Available Net Income for each Income Period shall be applied to the following purposes and in the following order: [129]

(a) To the maintenance of the Contingency Reserve Fund at $500,000. provided, however, that the amount applied to this purpose shall not exceed 10% of the Available Net Income for such Income Period.

(b) To the creation of a Capital Fund to be applied to or to provide for or reimburse the treasury of the reorganized Company for Capital *Investments* (as defined by the Interstate Commerce Commission Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701, 702, 705 and 706 then in effect and including therein initial and principal payments on equipment leased under equipment trusts or purchased under conditional sale agreements) to the extent that such Capital Investments have been made during such Income Period, provided, however, that (1) to the extent that expenditures are so provided for or reimbursed out of the Capital Fund, the reorganized Company shall not thereafter have the right to issue any Bonds or other evidence of indebtedness to capitalize or reimburse such expenditures; that (2) the amount set aside in the Capital Fund out of the Available Net Income of any calendar year shall not exceed $500,000. during the years 1936 to 1940, both inclusive, $1,000,000. during the years 1941 to 1945, both inclusive, and in all subsequent years not more than 3% of the gross revenues of the

reorganized Company for the next preceding calendar year and (3) that any unappropriated amount not charged out as of December 31 in any year shall not be carried forward.

(c) To the payment on April 1 and October 1 in each year of interest on the Series "A" Bonds and the Series "B" Bonds, above described accruing during the Income Period ending on the next preceding December 31 and June 30, respectively, and, to the extent unpaid, any interest which shall have accrued on [130] said Bonds in respect of four Income Periods next preceding such Income Period, all without preference in favor of either series as against the other.

(d) To the creation of a cumulative Sinking Fund in an amount not exceeding in any calendar year one-half of 1% of the largest principal amount of Series "A" Bonds theretofore issued. Said Sinking Fund shall be applied to the purchase of Income Bonds, Series "A", at not exceeding their redemption price; and whenever the amount in the Sinking Fund exceeds $100,000 and Income Bonds, Series "A", are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking Fund shall be applied to the redemption of Income Mortgage Bonds, Series "A", on the next succeeding interest payment date. Bonds purchased or redeemed out of the Sinking Fund shall not there-

after be issuable, but the amount of interest which would otherwise have become payable thereon out of Available Net Income shall be added to the Sinking Fund on each April 1 and October 1 so long as any Income Bonds, Series "A" shall be outstanding.

(e) To the payment on April 1 and October 1 in each year of interest on the Junior Lien 6% Income Bonds.

(f) To the creation of an Interest Fund into which shall be paid from time to time 10% of the Available Net Income remaining after the payments provided for in the preceding clauses (a), (b), (c), (d) and (e), provided, however, that such payments shall not be required to be made into said Interest Fund from the Available Net Income of any Income Period at the end of which the amount of said Interest Fund shall aggregate at least one year's interest on all outstanding First Mortgage Bonds, including First Mortgage Bonds pledged as collateral for other obligations of the reorganized Company and 120% of such part of [131] the $10,000,000 provided to be supplied by Reconstruction Finance Corporation which shall not have been supplied at the end of such Income Period. Said Interest Fund shall be available only for the payment of interest upon the First Mortgage Bonds, and, pending such application, shall be invested in such manner as the Board of Directors of

the reorganized Company may in its discretion determine. The obligation to make payments into and to maintain said Interest Fund shall cease whenever for five consecutive years the Net Income of the reorganized Company available for fixed charges shall have equalled three times the amount of such fixed charges, and full interest and Sinking Fund shall have been paid on, and for, the Income Mortgage Bonds.

(g) To general corporate purposes, including dividends on Common Stock.

4. Interest on Income Mortgage Bonds shall be paid only in amounts equal to one-fourth of 1%, or multiples thereof, smaller fractional amounts being carried forward and added to that portion of the Available Net Income for the next succeeding Income Period required to be applied to the payment of interest of such Bonds.

C. Junior Lien 6% Income Bonds.

The Junior Lien Mortgage will be a lien upon all of the railroads and property covered by the First Mortgage, subject to the prior liens of the First Mortgage and the Income Mortgage.

The Bonds issued under and secured by the Junior Lien Mortgage are to be limited to $8,092,709, all of which are issuable forthwith under the Plan.

The Junior Lien 6% Income Bonds are to be dated January 1, 1936, are to mature January 1, 2011, are to bear interest at the rate of 6% per annum payable as provided in the Junior Lien Mort-

gage only out of Available Net Income, and are to be non-cumulative. [132]

D. Common Stock:

The Common Stock is to be without par value and is to be carried in the accounts of the reorganized Company at a value acceptable to the Interstate Commerce Commission. The authorized issue will be 926,622 shares, of which 300,000 will be issuable forthwith under the Plan and 626,622 will be reserved for issue upon conversion of $20,887,398 Series "B" Bonds.

VI.

Participation of Bondholders in the Management of the Reorganized Company

The Board of Directors of the reorganized Company shall consist of seventeen members, a majority of which shall be citizens of the State of California.

For the protection primarily of the holders of the Income Bonds, all of the stock of the reorganized Company shall be placed in a Voting Trust under which three Voting Trustees nominated by the Railroad Company and approved by the Bondholders' Committee hereinafter mentioned at or before the hearing before the Interstate Commerce Commission upon this Plan shall act as Voting Trustees pursuant to a Voting Trust Agreement which shall be acceptable to the Railroad Company

and the said Bondholders' Committee. Voting Trust Certificates shall be delivered in respect of Common Stock deposited under the Voting Trust Agreement. Such Voting Trust shall continue until ten years from the date upon which the Plan shall be finally confirmed by the Court. It is the intention of this provision and the Voting Trust Agreement shall provide that the reorganized Company shall during such period be managed by a board of directors, at least a majority of which shall in the opinion of the Voting Trustees be representatives of holders of Income Bonds. The Voting Trust Agreement shall also provide that, so long as Reconstruction Finance Corporation shall be the holder of more than $500,000, principal amount, of First Mortgage Bonds or of notes of the reorganized Company secured by First Mortgage Bonds, the Voting [133] Trustees shall elect to the board of directors of the reorganized Company a person designated or nominated for that purpose by Reconstruction Finance Corporation. The Voting Trust Agreement shall provide that if any vacancy shall occur among the Voting Trustees, such vacancy shall be filled by a majority of the remaining Voting Trustees. Action of a majority of the persons at the time acting as Voting Trustees, at a meeting or in writing without a meeting, shall constitute the action of the Voting Trustees under the Voting Trust Agreement and under the Plan.

The reorganized Company shall, by By-law or otherwise, create a Finance Committee of not less

than three nor more than five members of its Board of Directors, of whom a majority shall be named from persons representing the Income Mortgage Bondholders, which Committee shall have supervision over all financial matters, including the annual budget of capital expenditures and all other expenditures of the reorganized Company's funds; and the reorganized Company shall covenant for the benefit of the Income Mortgage Bonds, to make only such expenditures as shall be authorized by said Finance Committee, exclusive of emergency expenditures and of capital items not exceeding $25,000 for any item and not exceeding $200,000 in the aggregate in any year.

The By-laws of the reorganized Company shall also provide for an Executive Committee having all the powers of the present Executive Committee of the Railroad Company, except as they may be vested in a Finance Committee as hereinbefore provided.

In respect of the 300,000 shares of Common Stock to be presently issued under the Plan and of any shares of Common Stock which may be issued on conversion of the Income Mortgage Bonds, Series "B", so long as the Voting Trust Agreement shall be in effect, Voting Trust Certificates shall be issued in such form as shall be provided in the Voting Trust Agreement.

Voting Trust Certificates for 150,000 shares of Common Stock shall be placed in escrow with the Trustee of the Income Mortgage for delivery to the

holders of the Income Mortgage Bonds in respect of interest deficiencies, as provided in paragraph 1 of subdivision B of Article V hereof, and to the extent that such delivery is not required prior to payment or retirement of all Income Mortgage Bonds of both Series "A" and Series "B", for delivery, upon [134] such payment or retirement, to holders of Escrow Receipts therefor, which shall be delivered to present holders of the Common Stock of the Railroad Company in lieu of said 150,000 shares of Common Stock (or Voting Trust Certificates therefor).

VII.

Method of Participation in and Consummation of the Plan

No holder of any security of the Railroad Company affected by the Plan shall be requested to accept the Plan until after a public hearing upon the Plan, held as provided in Section 77 of the Bankruptcy Act as it now exists or hereafter may be amended, and a report and order of the Interstate Commerce Commission approving the Plan (in its present form or as it may be modified as hereinafter provided) and after the filing of an opinion and order of the Court approving the Plan and finding that the Plan complies with such Section 77. If and when the Interstate Commerce Commission and the Court shall so approve the Plan (including any modification thereof), such Plan shall be submitted in such manner as the Interstate Commerce

Commission shall direct to the security holders affected thereby for acceptance or rejection.

The Plan shall not be declared operative or carried out until finally approved by the Interstate Commerce Commission and confirmed by the Court after acceptance by the holders of such amount of each class or classes of securities or claims affected by the Plan as shall be sufficient under the provisions of the Bankruptcy Act as now existing or as it may hereafter be amended, to make the Plan binding upon the holders of all classes of securities or claims affected thereby.

The Board of Directors of the Railroad Company may, whether before or after its acceptance by holders of securities, modify the Plan or adopt a Substitute Plan in accordance with and subject to the provisions of Section 77 of the Bankruptcy Act as now existing or as it may hereafter be amended; and the term Plan as used herein shall be deemed to include any such modification or substitute Plan. [135]

Messrs. Frederick H. Ecker, John W. Stedman and Reeve Schley have heretofore acted as a Committee to represent certain large institutional holders of First Mortgage Bonds, being not more than twenty-five *bona-fide* holders thereof, in respect of the extension of the interest maturing during 1934 upon such First Mortgage Bonds, in respect of the performance of the Railroad Company's agreements made in connection with said extension and in the

negotiation of this Plan with the Railroad Company. Said Committee shall continue as a Committee to represent the interest of such holders of the present First Mortgage Bonds in connection with the reorganization, but assumes no representation of any other holders of said Bonds, and shall not represent holders of Income Bonds in the selection of directors for the reorganized Company. The members of such Committee have agreed to serve without commission, but the expenses of said Committee shall be reimbursed as hereinafter provided.

All acceptances or assents to the Plan shall be subject to the condition that the Plan shall have been finally confirmed by the Court, pursuant to Section 77 of the Bankruptcy Act, The Plan may be made effective retroactively to midnight on December 31, 1935, by the terms of the decree of confirmation, or on such later date as may, with the approval of the Interstate Commerce Commission, be fixed by agreement between (1) the Railroad Company, (2) Reconstruction Finance Corporation, and (3) Messrs. Frederick H. Ecker, John W. Stedman and Reeve Schley of their successors as such Committee.

The Board of Directors of the Railroad Company shall have power, subject to the provisions of the Plan and to the approval of said Committee or of their counsel, to determine the form and provisions of the several indentures, bonds, stock certificates, acceptances, assents, and other instruments in connection with carrying out the Plan.

All securities may be issued as of January 1, 1936, notwithstanding that confirmation of the Plan may be delayed beyond that date, and the base figures as set forth in the Plan may be adjusted to any effective date which may be substituted for January 1, 1936. Expenditures made for the rehabilitation program subsequent to January 1, 1936, but prior to confirmation of the [136] Plan, whether made out of current funds or from the proceeds of Trustees' Certificates, shall be reimbursed out of the proceeds of sale of the Fixed 4% First Mortgage Bonds purchased by Reconstruction Finance Corporation.

Unless otherwise provided in Section 77 of the Bankruptcy Act or in any order or orders of the Court or the Interstate Commerce Commission, whenever notice shall be required or permitted to be given under or pursuant to the Plan, such notice shall be given by publishing a copy of such notice once in each week in one newspaper published and of general circulation in the Borough of Manhattan, the City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders or creditors who have accepted the Plan, by mailing such notice, postage prepaid, to the addresses of such security holders or creditors set forth in the acceptances signed by them; and (2) in case of notices to security holders or creditors who shall not have accepted the Plan, by mailing such notice, postage prepaid,

to such security holders, or creditors whose names and addresses appear on the books of the Railroad Company.

All powers conferred by the Plan upon the Board of Directors of the Railroad Company may also be exercised by its Executive Committee.

VIII.

Provision for Other Claims

The following claims are not affected by the Plan: (a) current liabilities of the Railroad Company incurred in the ordinary conduct of its business prior to the institution of the reorganization proceedings, including claims for personal injury and property damage, (b) current liabilities and obligations of the Railroad Company and of any trustee or trustees of the estate incurred during the reorganization proceedings, and (c) all other claims, liabilities or obligations for which specific provision is not made in the Plan. To the extent that such claims, liabilities or obligations are not paid by the Railroad Company or any trustee or [137] trustees of the estate pursuant to order of the Court in the reorganization proceedings, they are to be paid in cash by the reorganized Company upon the consummation of the Plan, or assumed by the reorganized Company. All such claims, liabilities and obligations, including any claims arising from the disaffirmance of executory leases or other contracts by the Railroad Company or any trustee or trustees

of the estate in the reorganization proceedings pursuant to order of the court, in respect of which claims are filed or evidenced in accordance with orders of the Court, may be adjusted or compromised and dealt with or paid or discharged by the reorganized Company, all as may be determined by the Board of Directors of the reorganized Company and approved by the Court.

The reorganized Company shall be deemed to have assumed such of the contracts of the Railroad Company which are executory in whole or in part, including any executory leases and liabilities under guaranties, as shall have been affirmed by the Railroad Company or any trustee or trustees of the estate in the reorganization proceedings with the approval of the Court in the Reorganization Proceeding and prior to the date of confirmation of the Plan, and also any executory contracts made by the Railroad Company or any trustee or trustees of the estate with the approval of the Court in the reorganization proceedings which, by their terms, do not terminate at the conclusion of the reorganization proceedings.

IX.

Expenses of the Plan

All expenses of carrying out the Plan, and all costs of administration and other allowances made by the Court, shall be paid by the Railroad Company or by the reorganized Company subject to the provisions of Section 77 of the Bankruptcy Act and

shall constitute a charge upon the properties of the Railroad Company and the reorganized Company as a cost of administration prior in lien to all securities affected by the Plan. There shall be included in such expenses such reasonable compensation for necessary services rendered and reimbursement for actual expenses incurred [138] in connection with the proceeding and the Plan by the Trustees under the present First Mortgage, said Committee representing certain First Mortgage Bondholders (including reimbursement for actual expenses incurred in connection with said extension of the interest accruing during 1934 upon the existing First Mortgage Bonds) and by other parties in interest, committees or other representatives of creditors or stockholders, and the attorneys or agents of any thereof (including the Railroad Company), as may be approved by the Interstate Commerce Commission and the Court pursuant to the Bankruptcy Act; but the Plan shall not be construed as an offer or contract for such services independent of the Bankruptcy Act.

X.

Statements Contained in the Plan

All statements and figures herein contained with respect to the capitalization of the Railroad Company have been taken from its books or records, but no estimate, statement, explanation or suggestion contained in the Plan or in any circular issued, or which may hereafter be issued, by the Railroad

Company, or by any of its officers, is intended or is to be accepted as a warranty by the Railroad Company, or any of its directors or officers.

Dated as of January 1, 1936.

[Endorsed]: Filed Feb. 8, 1936. [139]

SUGGESTED PLAN OF REORGANIZATION OF THE WESTERN PACIFIC RAILROAD COMPANY

Effective Date, January 1, 1937.

The Committee which represents certain institutional holders of existing First Mortgage Bonds heretofore accepted the Plan proposed by the Railroad Company in the Reorganization Proceeding, conditioned on the acceptance of the Plan by the principal creditors of other classes. Such other classes of creditors having stated before the Interstate Commerce Commission that the Railroad Company's Plan was unacceptable to them without modifications which the Committee would regard as substantially adversely affecting the interests of the existing First Mortgage Bonds, and in the light of the past and probable future earnings of the Railroad Company's system, the Committee believes that the reorganization of the Railroad Company should follow substantially the lines of this Suggested Plan.

[140]

COMPARISON OF DISTRIBUTION OF ANNUAL INCOME UNDER SUGGESTED PLAN WITH THAT UNDER RAILROAD COMPANY'S PLAN OF JANUARY 1, 1936

Distributees	Suggested Plan (Effective as of January 1, 1937)			Railroad Company Plan (Effective as of January 1, 1936)	
	Assuming W. P. Corp. Furnishes New Money	Assuming RFC, RCC or ACJ Furnishes New Money	Assuming 1st Mtg. Bdhdrs. Furnish New Money	Income Bonds Not Converted	Income Bonds* Converted
Undisturbed	86,473	86,473	86,473	86,473	86,473
To First Mortgage Bondholders	394,320	394,320	394,320	591,480	591,480
For New Money, pari passu	400,000	400,000	400,000	400,000	400,000
To Others, pari passu	None	None	None	35,556	35,556
Total Fixed Charges	880,793**	880,793**	880,793**	1,113,509**	1,113,509**
Capital Fund	500,000	500,000	500,000	500,000	500,000
To First Mortgage Bondholders for Contingent Interest	985,802	985,802	985,802	2,168,752	1,084,376
To Others pari passu	none	none	none	128,861	64,430
To Junior Debt for Contingent Interest	none	none	none	485,563	485,563
Total Interest Charges, plus Capital Fund	2,366,595	2,366,595	2,366,595	4,396,685	3,247,878
To First Mortgage Bondholders for Preferred Dividend	1,675,848	1,675,848	1,675,848	none	none
Sinking Fund for Income Bonds	197,160	197,160	197,160	104,437	104,437
Total before Common Stock	4,239,603	4,239,603	4,239,603	4,501,122	3,352,315
$3 per share on Common Stock (before Preferred participates)	1,019,985	1,169,985	1,469,985***		
	5,259,588	5,409,588	5,709,588		
Excess over this total goes approximately					
To Existing First Mortgage Bondholders	45%	40%	75%	none	64%
To Others	55%	60%	25%	100%	36%

*But earnings must exceed $5,500,000 to warrant conversion.

**Exclusive of interest upon any equipment obligations hereafter issued.

***Of this amount approximately 61% would be paid on new Common Stock purchased by existing First Mortgage Bondholders to furnish new money.

[141]

The Western Pacific Railroad Company

PLAN OF REORGANIZATION

Effective Date, January 1, 1937

I.

Introductory Statement

The Western Pacific Railroad Company, a California corporation (hereinafter called the Railroad Company), prior to the Reorganization Proceeding hereinafter mentioned, owned and operated approximately 926 miles of main line track extending from San Francisco to Salt Lake City and approximately 106 miles of main line track extending from a connection at Keddie, California, with the line first mentioned, northerly to a connection with the lines of the Great Northern Railway Company near Bieber, California. This latter so-called Northern California Extension was constructed at a cost of slightly less than $10,000,000 and put into operation on November 10, 1931. Its operation has materially added to the revenues of the System.

In addition to the foregoing main lines and various branch lines (together aggregating approximately 1,211 miles of road), the Railroad Company owned the entire capital stock and substantially all the outstanding indebtedness of the following subsidiaries:

(1) Sacramento Northern Railway Company, an electrically operated, standard gauge, freight and passenger railroad, serving and con-

necting San Francisco and Oakland with Pittsburgh, Vocaville, Sacramento, Woodland, Marysville, Colusa, Oroville, Chico and other Sacramento Valley points. It also operates a street railway service in Sacramento, Marysville, Yuba City and Chico. Its lines aggregate approximately 276 miles of road. Its stock was acquired by the Railroad Company on November 9, 1925, and that portion of its line between Oakland and Sacramento was acquired as of January 1, 1929. Certain of its branches have been constructed since the latter date. Though its operations have resulted in a deficit before interest during each of the last five years, the Management of the Railroad Company advises that it contributes to the System a volume of traffic sufficient to justify its continued operation as part of the System.

(2) Tidewater Southern Railway Company owns and operates a standard gauge, steam railroad connecting Stockton, California, with Mantesa, Escalon, Modesto and Turlock in the San Joaquin Valley. Passenger service was abandoned in 1932. Its operations have resulted in income available for payment of interest on its indebtedness to the Railroad Company in every one of the last five years and have produced a surplus over all interest in each of those years, except 1931.

(3) Deep Creek Railroad Company owns and operates a standard gauge, steam railroad

from Wendover, Utah, to Cold Hill, Utah, a distance of 46 miles. While its operations during the last five years have shown a small deficit before interest, the Management of the Railroad Company advises that traffic furnished by it to the System justifies its continued operation.

(4). Standard Realty & Development Company handles land purchases and sales in connection with non-operating property, and its operations have resulted in a deficit in each of the last five years, in no case, however, exceeding $10,000.

In addition, the Railroad Company owned jointly and equally with the Atchison, Topeka & Santa Fe Railroad and the Southern Pacific Railroad, the Central California Traction Company (acquired in 1928), an electrically operated railroad of about 53 miles between Stockton and Sacramento, California, with a branch line to Lodi, and jointly and equally with the Atchison, Topeka & Santa Fe, the Alameda Belt Line, (acquired in 1932), a standard gauge steam belt line of about 14 miles in the City of Alameda. As to each of [142] these companies the parent companies share equally operating deficits or profits, as well as advances for bond interest, sinking fund or additions and betterments. The Railroad Company, up to January 1, 1936, had been required to supply an aggregate of $676,431 for those purposes since acquisition of its interests therein.

The Management of the Railroad Company reports that the consolidated net income of the System of the Railroad Company and its above-mentioned railroad subsidiaries, available for interest on funded debt, for the last ten years has been:

1926	$4,759,282.22*
1927	2,647,493.79
1928	2,964,371.04
1929	2,529,946.36
1930	1,552,487.24
1931	186,707.68 Deficit
1932	252,706.16
1933	674,007.18
1934	1,084,243.85
1935	805,589.39

The Management points out, however, that in arriving at the foregoing figures an average of approximately $140,000 per annum has been deducted for amortization of bond discount, and that during 1935 substantial extraordinary amounts were charged to maintenance in connection with laying of new rail, $111,789 deducted from 1934 income under the Railroad Retirement Act was credited back to 1935 income.

The Management, in statements filed with the Interstate Commerce Commission, has estimated that the consolidated net income of the System of the Railroad Company and its subsidiaries, available for interest on funded debt (without however deducting that part of the estimated expense of the re-

*The adequacy of maintenance expenditures in 1926 is questioned by the present management.

habilitation program hereinafter mentioned which, under the accounting rules of the Interstate Commerce Commission, would normally be chargeable to operating expense but which, it is expected, will be charged against surplus created as a result of the reorganization), will be:

Year	Available Income	Rehabilitation Operating Expense Not Deducted
1936	1,521,386**	1,747,284
1937	2,180,586	2,021,312
1938	2,738,886	1,280,074
1939	3,365,836	None
1940	3,769,836	None

The foregoing estimates of income available for interest on funded debt are also before deduction of any amount for the making of those routine additions and betterments (not included in the rehabilitation program) for which the issue of additional debt is of doubtful wisdom. The Management ad-

**During the eight months ended August 31, 1936, the Consolidated Net Income of the System and its subsidiaries, available for interest on funded debt, similarly computed, was $258,844.25. The amount of operating expense attributable to the rehabilitation program not deducted in arriving at this amount was $1,169,880.09, so that the total amount available for interest under the accounting rules of the Interstate Commerce Commission for the first eight months of 1936 was a deficit of $911,035.74. For the first eight months of 1935 the amount available for interest was a deficit of $223,241.54, there being, however, no comparable operating expense attributable to the rehabilitation program during that period.

vises that provision should be made for such capital funds up to a maximum of $500,000 per annum during the years 1936 to 1940, when the rehabilitation program will be in operation, and $1,000,000 per annum during the years 1941 to 1945 inclusive. The necessity for such appropriation must be considered in determining the soundness of any capital structure proposed in the reorganization.

In 1927 the Railroad Company initiated an improvement or rehabilitation program contemplating the expenditure of $18,000,000 over a five-year period. This program was partly carried out, with the following resultant expenditures:

	Maintenance				
	Way and Structures	Equipment	Total	Investment Accounts	Total
1927	$ 324,218	$ 363,386	$ 687,604	$ 707,110	$1,394,714
1928	931,336	374,345	1,305,681	988,123	2,293,804
1929	488,024	587,306	1,075,330	836,575	1,911,905
1930	537,421	174,040	711,462	808,331	1,519,793
1931	110,339	12,396	122,735	534,339	657,074
1932	Cr. 56,246	144	Cr. 56,102	70,073	13,971
	$2,335,092	$1,511,617	$3,846,710	$3,944,551	$7,791,261

Of the originally contemplated $18,000,000 program, $8,000,000 was estimated as Operating Expense.

Because of declining revenues, the rehabilitation program was substantially discontinued in 1931.

[143]

Having failed to pay any interest on its First Mortgage Bonds since September 1, 1933, the Railroad Company on August 2, 1935 filed in the United States District Court for the Northern District of California, Southern Division, its petition for reorganization under Section 77 of the Bankruptcy Act. The proceedings upon said petition are herein called the Reorganization Proceeding.

The Trustees appointed by the Court in the Reorganization Proceeding have obtained authority from the Court to proceed with the rehabilitation program, with a contemplated expenditure of approximately $9,650,000, and have been authorized by the Court and the Interstate Commerce Commission to issue, and have issued, Trustees' Certificates having a lien prior to that of the existing First Mortgage, to provide the first $3,000,000 toward this program. The rehabilitation program has been substantially approved by experts employed by Reconstruction Finance Corporation and by the Committee hereinafter mentioned, for the purpose of making a physical examination of the property and a study of the program. These experts, however, have recommended that in addition to the expenditures contemplated by the Trustees, additional equipment should be purchased at an estimated cost of ap-

proximately $3,750,000. A substantial part of this amount can be financed by equipment obligations and the remainder out of income contemplated to be applied to capital expenditures. Both the management and the representatives of the larger creditors and stockholders are, therefore, in agreement that there should be provided in any reorganization of the Railroad Company $10,000,000 of new money with which to pay the outstanding Trustees' Certificates, to provide for the remainder of the rehabilitation program, and also to provide additional working capital.

Although the system of the Railroad Company has been valued by the Interstate Commerce Commission at approximately $145,000,000, and although, as indicated above, the consolidated net income of the System available for fixed charges reached $4,759,000* in 1926, the more recent record of earnings, and the Management's forecast for the next five years, would seem to indicate the wisdom of keeping fixed interest charges after reorganization within $1,000,000, and total interest charges, both fixed and contingent, within $2,000,000.

As the foregoing amounts are insufficient to provide interest upon the $49,290,100 of First Mortgage Bonds now outstanding, and the $8,214,766 of unpaid interest which will have accrued thereon by January 1, 1937, and in addition interest on the required $10,000,000 of new capital, it would seem

*See footnote p. 2. [See page 54 of this printed record.]

that a sound capital structure can be insured only by allotting stock to the existing First Mortgage Bondholders for a portion of their present claims. Since all other classes of securities of the Railroad Company, other than the equipment obligations, are entirely junior in lien to the First Mortgage, obviously any stock so allotted to the present First Mortgage Bondholders (whether for principal or for accrued interest) should have rights as to both assets and income prior to those of the stock allotted such other creditors and stockholders of the Railroad Company.

This Plan has been prepared by Messrs. Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing certain institutional holders of First Mortgage Bonds, as an application of the foregoing principles. It is believed that the Plan, if consummated, will result in a sound capital structure and that, in the distribution of the resultant securities, it fairly recognizes the relative rights and priorities of all the existing classes of the Railroad Company's security holders. The Plan contemplates that the opportunity to subscribe to new securities to supply the necessary $10,000,000 of new money, offered, first, to The Western Pacific Railroad Corporation, as the Railroad Company's sole stockholder, second, to its junior creditors, and, third, to the present First Mortgage Bondholders, shall be upon terms sufficiently attractive to insure the raising of the new money.

The statements and figures herein contained with respect to the capitalization of the Railroad Com-

pany have been taken from the books and records furnished by the Management of the Railroad Company, but no estimate, statement, explanation or suggestion contained in the Plan or in any circular issued, or which may hereafter be issued, by the Committee, or by the Railroad Company, or by any of its officers, is intended or is to be accepted as a warranty. **[144]**

II.

Present Capital Liabilities as of January 1, 1937
(including unpaid interest)

			Fixed Annual** Interest
Equipment Trusts, Baldwin Lease and Pullman Contract*		$ 2,048,190	$ 86,473
First Mortgage 5% Bonds due 1946:			
Principal	$49,290,100		2,464,505
Unpaid Interest	8,214,766		
Total		57,504,866	
General and Refunding Mortgage 5% Bonds		18,999,500	
Pledged as follows:			
$10,750,000 for Note to Reconstruction Finance Corporation,			
Principal	$2,963,000		148,150
Unpaid Interest	427,564		
Total	$3,390,564		
The Note to RFC is also secured by a second lien upon $2,000,000 General and Refunding Mortgage Bonds pledged to secure the Note to RCC.			
$4,000,000 for Note to The Railroad Credit Corporation,			
Principal	$2,462,148		36,932**
Unpaid Interest	111,363		
Total	$2,573,511		
The Note to RCC is also secured by a second lien upon the $10,750,000 General & Refunding Bonds pledged to secure the Note to RFC and by a first lien upon the rights of the Railroad Company under the Marshalling and Distributing Plan of 1931.			
$4,249,500 for Note to A. C. James Company,			
Principal	$4,999,800		249,990
Unpaid Interest	749,970		
Total	$5,749,770		
$2,000,000 of the General and Refunding Bonds pledged to secure the Note to RCC were initially pledged to secure the Note to ACJ and by it re-			

First Mortgage 5% Bonds due 1946:			
Principal	$49,290,100		2,464,505
Unpaid Interest	8,214,766		
Total		57,504,866	
General and Refunding Mortgage 5% Bonds		18,999,500	
Pledged as follows:			
$10,750,000 for Note to Reconstruction Finance Corporation,			
Principal	$2,963,000		148,150
Unpaid Interest	427,564		
Total	$3,390,564		
The Note to RFC is also secured by a second lien upon $2,000,000 General and Refunding Mortgage Bonds pledged to secure the Note to RCC.			
$4,000,000 for Note to The Railroad Credit Corporation,			
Principal	$2,462,148		36,932**
Unpaid Interest	111,363		
Total	$2,573,511		
The Note to RCC is also secured by a second lien upon the $10,750,000 General & Refunding Bonds pledged to secure the Note to RFC and by a first lien upon the rights of the Railroad Company under the Marshalling and Distributing Plan of 1931.			
$4,249,500 for Note to A. C. James Company,			
Principal	$4,999,800		249,990
Unpaid Interest	749,970		
Total	$5,749,770		
$2,000,000 of the General and Refunding Bonds pledged to secure the Note to RCC were initially pledged to secure the Note to ACJ and by it re-pledged as additional collateral with the RCC.			
Total Collateral Notes with Unpaid Interest	$11,713,845		
Unsecured Obligations to The Western Pacific Railroad Corporation, including The Western Realty Company (with interest to January 1, 1937)		7,245,274	362,264
Preferred Stock		28,300,000	
Common Stock		47,500,000	
		$161,597,830	$3,348,314**

*Does not include Equipment Trust which Trustees propose to issue in the near future in respect of additional equipment agreed upon as necessary.

**Without interest on interest accrued and unpaid on First Mortgage Bonds or on RFC, RCC or ACJ Notes; and computing interest on said Notes rather than on their collateral, interest on the RCC Note being computed at 1½%, the New York Federal Reserve Bank rediscount rate as of April 20, 1936.

III.
Proposed New Capitalization

Summary

	Authorized	Presently Issued	Initial Charges
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract*	$ 2,048,190	$ 2,048,190	$ 86,473
First Mortgage Bonds	50,000,000	19,858,020	794,320**
Total annual fixed charges			$ 880,793
Income Mortgage 5% Bonds	19,716,040	19,716,040	985,802
Total annual interest charges, fixed and contingent			$1,866,595
Participating 6% Preferred Stock	50,000,000	27,930,800	1,675,848
Total annual interest and dividend charges			$3,542,443
Common Stock, without par value	500,000 shs.	Not less than 339,995 shs. nor more than 489,995 shs.	

*See footnote page 4. [See page 62 of this printed record.]

**Assuming that all such bonds bear interest at the rate of 4% per annum. As hereinafter provided the $10,000,000 thereof to be issued to provide new money may bear interest at a rate not exceeding 5% per annum.

New First Mortgage Bonds

The new First Mortgage shall constitute a first lien upon the railroads and other property, real and personal, acquired by the New Company in the reorganization, including all interests of the Railroad Company, whether by way of stock, bonds or advances, in the other companies mentioned in the introductory statement.

Of the total authorized issue of $50,000,000 new First Mortgage Bonds

$9,858,020 are to be issued to the holders of existing First Mortgage Bonds in the reorganization;

$10,000,000 are to be offered for subscription, with shares of new Common Stock as hereinafter in Article V provided, to provide the new money required in the reorganization;

$1,000,000 are to be authenticated forthwith and placed in the treasury of the New Company for issue for any proper corporate purpose;

$29,141,980 are to be reserved to provide for, or to reimburse the New Company for, expenditures for additions, betterments, improvements or extensions made after January 1, 1937, in a principal amount not exceeding 75% of the actual cost of such additions, betterments, improvements or extensions.

The new First Mortgage Bonds may be issued in series which may differ as to date of maturity and interest rate. The Bonds to be issued under the Plan

shall be dated January 1, 1937, shall mature January 1, 1967, shall bear interest at the rate of 4% per annum, payable semi-annually, and shall be redeemable, in whole or in part, on any interest payment date upon 30 days' notice, at their principal amount and accrued interest except, however, that as hereinafter in Article V provided, the $10,000,000 principal amount of new First Mortgage Bonds to be offered for subscription to provide the new money required in the reorganization may bear interest at a rate not exceeding 5% per annum, payable semi-annually, may mature not earlier than January 1, 1952, and may be redeemable at not exceeding 105% of their principal amount and accrued interest.

New Income Mortgage 5% Bonds

The new Income Mortgage shall constitute a lien, subject only to the lien of the First Mortgage, upon all property from time to time subject to the lien of the First Mortgage.

The entire authorized issue of $19,716,040 new Income Mortgage 5% Bonds is to be issued to holders of existing First Mortgage Bonds in the reorganization.

The new Income Mortgage Bonds shall be dated January 1, 1937, shall mature January 1, 1987, and shall bear interest at the rate of 5% per annum, payable semi-annually, but, as hereinafter in this Article more fully provided, said interest shall be payable on October 1 and April 1 in each year, in respect of Income Periods ending the next pre-

ceding June 30 and December 31, respectively, and only out of Available Net Income of the New Company, and such interest shall be cumulative as against such Available Net In- [146] come for the Income Period in respect of which such interest is payable, and for the six Income Periods next succeeding such Income Period. Said Bonds shall be redeemable on any interest payment date at their principal amount, plus any interest payable thereon on such interest payment date.

As also hereinafter more fully provided there may be paid out of said Available Net Income, before payment of interest on the new Income Mortgage Bonds, certain amounts to provide a Contingency Reserve Fund and a Capital Fund.

As also hereinafter more fully provided the new Income Mortgage Bonds shall be entitled to the benefits of a 1% Cumulative Sinking Fund, payable out of Available Net Income remaining after any dividends paid therefrom on the new Participating 6% Preferred Stock.

New Participating 6% Preferred Stock

There will be authorized 500,000 shares of new Preferred Stock, each of the par value of $100, of which 279,308 shares are to be issued to holders of the existing First Mortgage Bonds in the reorganization.

The new Preferred Stock shall be entitled to receive dividends at the rate of 6% per annum in respect of each calendar year, from January 1, 1937,

before any dividends shall be paid, or declared or set apart for payment, on the Common Stock. Such dividends shall be cumulative to the extent earned in respect of any calendar year but not paid; but such dividends shall otherwise be non-cumulative. After dividends shall have been paid or declared or set apart for payment, on the new Common Stock at the rate of $3 per share in respect of any year, each share of new Preferred Stock shall be entitled to share equally with each share of new Common Stock in any dividends paid, or declared or set apart for payment, in respect of such year.

In any liquidation or winding up of the New Company, whether voluntary or involuntary, the new Preferred Stock shall be entitled to receive, out of the assets of the New Company, its par value, plus any accrued and unpaid cumulative dividends thereon, before any distribution shall be made to the new Common Stock but shall not be entitled to any further participation in such assets.

The new Preferred Stock shall be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends.

Holders of new Preferred Stock shall be entitled to voting power on all matters in respect of which stockholders of any class shall be entitled to vote, and shall further be entitled, voting separately as a class, to elect a majority of the Board of Directors of the New Company until full 6% dividends shall have been paid upon the new Preferred Stock for 5 successive calendar years, or until the number

of shares thereof outstanding shall have been reduced to less than 100,000 shares. Thereafter each share of new Preferred Stock shall be entitled to vote equally with each share of new Common Stock upon the election of Directors, and such election shall be by cumulative voting.

The New Company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new Preferred Stock, (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new First Mortgage, the new Income Mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75% of the purchase price of such property; (2) create or issue any bonds, notes or other evidences of indebtedness maturing more than two years from their date, except purchase money obligations given for not more than 75% of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new Preferred Stock, or (4) permit any subsidiary, all of whose stock except directors' shares, shall be owned by the New Company, to create any mortgage or other lien upon any of its properties or issue any such bonds, notes or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall be acquired by the New Company.

New Common Stock

There will be authorized 500,000 shares of new Common Stock, without par value, of which 189,995 shares are to be issued forthwith and deposited in escrow for the benefit of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company, as hereinafter in Article IV provided. In addition, as hereinafter in Article V provided, a minimum of 150,000 shares and a maximum of 300,000 shares are to be issued forthwith and offered for subscription in connection with the $10,000,000 of new First Mortgage Bonds to provide the new money required in the reorganization.

Application of Available Net Income

Available Net Income shall be determined for each period of six months ending June 30 or December 31 (hereinafter called Income Periods) beginning with the Income Period ending June 30, 1937.

Available Net Income for each Income Period shall be determined by deducting from the consolidated income of the New Company and its subsidiaries available for fixed charges for such Income Period (determined in accordance with accounting rules of the Interstate Commerce Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice):

(1) All fixed charges of the New Company and its subsidiaries accrued during such Income Period; and

(2) All other charges properly deductible from such income in determining income after fixed charges under such accounting rules then in force, but excluding contingent interest and Sinking Fund requirements, hereinafter provided for;

provided, however,

(a) that in determining Available Net Income there shall not be deducted any amounts expended in connection with the rehabilitation program out of the $10,000,000 of new money to be provided in the reorganization (or out of the proceeds of any Trustees' Certificates or other obligations retired out of said new money), notwithstanding that under the accounting rules hereinbefore mentioned such expenditures may be chargeable as operating expenses*; and

(b) if the New Company shall not come into ownership and possession of the properties now operated by the Trustees of the Railroad Company in the Reorganization Proceeding on or before January 1, 1937, Available Net Income

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*It is intended that the entire $10,000,000 of new First Mortgage Bonds to be issued to provide new money, and the $1,000,000 of new First Mortgage Bonds to be authenticated and placed in the treasury of the New Company, shall be issued against surplus created as a result of the reorganization, and approval by the Interstate Commerce Commission to charging the expenditures above referred to, commencing as of January 1, 1937, to surplus, rather than to operating expense, is to be requested.

for any period after January 1, 1937 until the New Company comes into possession and operation of such properties shall be computed as if the New Company had come into such ownership or possession on January 1, 1937 and had issued, as of that date, the new securities issuable under the Plan, other than the $10,000,000, principal amount, of new First Mortgage Bonds to be issued to provide new money; and in lieu of interest on said Bonds there shall be charged the amount of interest actually accruing during such period upon any Trustees' Certificates or other obligations issued to provide funds for the rehabilitation program.

Available Net Income for each Income Period shall be applied to the following purposes and in the following order:

(1) If and to the extent that the Board of Directors of the New Company shall in its discretion so determine, to the maintenance at $500,000 of the Contingency Reserve Fund (to be initially created out of new money as hereinafter provided), provided, however, that the amount applied to such purpose shall not exceed 10% of the Available Net Income for such Income Period.

(2) Any then remaining Available Net Income may, if the Board of Directors of the New Company in its discretion shall so determine, be applied to the creation of a Capital Fund to be

applied to, or to provide for, or to reimburse the treasury of the New Company for, Capital Investments (as defined by the Interstate Commerce Commission Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701, 702, 705 and 706 or such substituted accounts as may at the time be in effect, and including therein initial and principal payments upon equipment leased under equipment trusts or purchased under conditional sale agreements) to the extent that such Capital Investments have been made during the calendar year in which such Income Period is included, provided, however, that

(a) to the extent that expenditures are so provided for or reimbursed out of the Capital Fund, the New Company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the new Preferred Stock, to capitalize or reimburse such expenditures;

(b) the amount set aside in the Capital Fund out of Available Net Income of any calendar year shall not exceed $500,000 in respect of the calendar years 1937 to 1940, both inclusive; [148] $1,000,000 in respect of the years 1941 to 1945, both inclusive; or, in respect of any subsequent year, more than 3% of the consolidated gross revenues of the

New Company and its subsidiaries for such calendar year; and

(c) Any unappropriated amount not charged out as of December 31 of the year in respect of which it shall have been set aside shall not be carried forward.

(3) Any then remaining Available Net Income shall be applied to the payment on October 1 and April 1 each year, commencing October 1, 1937, of interest on the then outstanding new Income Mortgage 5% Bonds (not including any thereof theretofore purchased or redeemed out of the Sinking Fund hereinafter in clause (5) provided for) accruing during the Income Period ending on the next preceding June 30 or December 31, respectively, and, to the extent unpaid, any interest which shall have accrued on said Bonds in respect of six Income Periods next preceding such Income Period.

(4) Any then remaining Available Net Income shall be applied, if, and to the extent that, such dividends shall be declared by the Board of Directors of the New Company, to the payment on April 1 of each year, commencing April 1, 1938, of dividends at the rate of 6% per annum upon the new Preferred Stock in respect of the two Income Periods ending on the next preceding December 31, to the extent not theretofore paid, and of any accrued and unpaid cumulative dividends on the new Preferred Stock; and, if and to the extent so declared, to the

payment on October 1 in each year, commencing October 1, 1937, of interim dividends on the new Preferred Stock at the rate of 6% per annum in respect of the Income Period ending on the next preceding June 30, and of any such accrued and unpaid cumulative dividends.

(5) Any then remaining Available Net Income shall then be applied to the creation on October 1 and April 1 in each year, commencing October 1, 1937, of a Cumulative Sinking Fund, in an amount up to, but not exceeding, in respect of any calendar year, 1% of the total principal amount of new Income Mortgage Bonds issued in the reorganization plus an amount equal to interest on any Income Mortgage Bonds theretofore purchased or redeemed out of the Sinking Fund calculated at the rate paid (pursuant to the foregoing clause (3)) in respect of such calendar year, including accumulations, upon outstanding Income Mortgage Bonds. Said Sinking Fund shall be applied to the purchase of new Income Mortgage Bonds at not exceeding their redemption price, and whenever the amount in the Sinking Fund exceeds $50,000 and new Income Mortgage Bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking Fund shall be applied to the redemption of the new Income Mortgage Bonds on the next succeeding interest payment date. Bonds purchased or re-

deemed out of the Sinking Fund shall not thereafter be re-issued.

(6) Any then remaining Available Net Income may be applied to any proper corporate purpose of the New Company, including (but only after all accrued and unpaid cumulative dividends on the new Preferred Stock to the next preceding June 30 or December 31, as the case may be, shall have been paid, or declared and set apart for payment) dividends on the New Common Stock and participating dividends on the new Preferred Stock, in accordance with their respective rights as hereinbefore provided.

IV.

Treatment of Existing Securities

1. Existing Equipment Trusts, Baldwin Lease and Pullman Contract, aggregating $2,048,190, shall remain undisturbed and shall be assumed by the New Company.

2. Holders of existing First Mortgage 5% Bonds (with March 1, 1934, and subsequent coupons) shall receive for each $1,000, principal amount, of such Bonds:

(a) $200 of new First Mortgage 4% Bonds;

(b) $400 of new Income Mortgage 5% Bonds;

(c) $400 of new Participating 6% Preferred Stock;

(d) $166.66⅔ of new Participating 6% Preferred Stock (being of par value equal to the

amount of interest on the existing Bonds accrued to January 1, 1937); and

(e) subject to the terms and conditions hereinafter in Article V provided, the contingent right to subscribe for new First Mortgage Bonds and new Common Stock to be issued to provide new money. [149].

3. Notes to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company, together with interest accrued thereon to January 1, 1937, shall be dealt with as follows:

189,995 shares of new Common Stock shall be deposited with a Depositary under an Escrow Agreement for the benefit of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company, as hereinafter provided, and there shall be issued to said corporations, respectively, registered Escrow Certificates evidencing their respective rights under the Escrow Agreement. Said Certificates shall be in such form as may be determined by the Committee (hereinafter in Article VIII provided for), and shall be transferable upon presentation thereof for transfer at the office of the Escrow Depositary accompanied by appropriate instruments of assignment and transfer duly executed by the registered holder of such surrendered Certificate or Certificates. As hereinafter used, "RFC", "RCC", and "ACJ"

mean the registered holder of the Escrow Certificates issued to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company, respectively. If the New Company shall purchase or acquire any of said Escrow Certificates, it may become the registered holder thereof and succeed to all the rights of a registered holder of such Escrow Certificates, and shall thereupon be embraced in said terms as herein used.

RFC shall be entitled to receive, upon surrender of its Escrow Certificate at the office of the Escrow Depositary, on January 1, 1942, either

(1) an amount in cash equal to $3,390,564, plus interest thereon at the rate of 4% per annum from January 1, 1937, less the amount of any cash paid to it as hereinafter in this Article IV provided, or

(2) if such amount be not paid to it on January 1, 1942, as hereinafter provided, 107,500 shares of new Common Stock.

If the amount to be paid to RFC on January 1, 1942, as aforesaid, is not deposited with the Escrow Depositary by the New Company on or before December 1, 1941, it may be so deposited by RCC, and if it is not so deposited by RCC on or before December 15, 1941, it may be so deposited by ACJ on or before January 1, 1942. If such deposit is made by the New Company,

or by RCC, or by ACJ, the amount thereof shall be paid by the Escrow Depositary to RFC on January 1, 1942, and said 107,500 shares of new Common Stock shall continue to be held by the Escrow Depositary for delivery as hereinafter provided. If such deposit is not made on or before January 1, 1942, the Escrow Depositary shall deliver to RFC said 107,500 shares of new Common Stock.

RCC shall be entitled to receive, upon surrender of its Escrow Certificate at the office of the Escrow Depositary on January 1, 1943, either

(1) an amount in cash equal to $2,573,511, plus interest thereon at the rate of 4% per annum from January 1, 1937, less the amount of any cash paid to it, as hereinafter provided, less also any amount paid to RCC on account of the Railroad Company's rights under the Marshalling and Distributing Plan, 1931 (plus any amount deposited by RCC for payment on January 1, 1942, to RFC as aforesaid, with interest thereon at the rate of 4% per annum from the date of such deposit), or

(2) if such amount be not paid to it on January 1, 1943, as hereinafter provided, 40,000 shares of new Common Stock, and if said 107,500 shares of new Common Stock have not been delivered to RFC as hereinbefore provided, said 107,500 shares of new Common Stock.

If the amount to be paid to RCC on January 1, 1943, as aforesaid, is not deposited with the Escrow Depositary by the New Company on or before December 15, 1942, it may be so deposited by ACJ on or before January 1, 1943. If such deposit is made by the New Company or by ACJ, the amount thereof shall be paid by the Escrow Depositary to RCC on January 1, 1943, and said 40,000 shares of new Common Stock (and also said 107,500 shares of new Common Stock if not already delivered to RFC) shall continue to be held by the Escrow Depositary for delivery as hereinafter provided. If such deposit is not made on or before January 1, 1943, the Escrow Depositary shall deliver to RCC said 40,000 shares of new Common Stock, and, if said 107,500 shares of New Common Stock have not been delivered to RFC as hereinbefore provided, also said 107,500 shares of new Common Stock.

ACJ shall be entitled to receive, upon surrender of its Escrow Certificate at the office of the Escrow Depositary on January 1, 1944, either [150]

(1) an amount in cash equal to $5,749,770, plus interest thereon at the rate of 4% per annum from January 1, 1937, less the amount of any cash paid to it, as hereinafter provided (plus any amount deposited by ACJ for payment on January 1, 1942, to RFC as aforesaid, plus any amount deposited by ACJ

for payment on January 1, 1943, to RCC as aforesaid, in each case with interest thereon at the rate of 4% per annum from the date of such deposit), or

(2) if such amount be not paid to it on January 1, 1944, as hereinafter provided, 42,495 shares of new Common Stock, and, if said 107,500 shares of new Common Stock have not been delivered to RFC or RCC, as hereinbefore provided, said 107,500 shares of new Common Stock, and if said 40,000 shares of new Common Stock have not been delivered to RCC, as hereinbefore provided, said 40,000 shares of new Common Stock.

The amount to be paid to ACJ on January 1, 1944, as aforesaid, may be deposited with the Escrow Depositary by the New Company on or before January 1, 1944, and, if so deposited by the New Company, the amount thereof shall be paid by the Escrow Depositary to ACJ on January 1, 1944, and all of the shares of new Common Stock then on deposit with the Escrow Depositary shall be delivered by the Escrow Depositary to or on the order of the New Company. If such deposit is not made on or before January 1, 1944, the Escrow Depositary shall deliver to ACJ said 42,495 shares of new Common Stock, and, if said 107,500 shares of new Common Stock shall not have been delivered to RFC or RCC as hereinbefore provided, also said 107,500 shares of new Common Stock, and,

if said 40,000 shares of new Common Stock shall not have been delivered to RCC as hereinbefore provided, also said 40,000 shares of new Common Stock.

Until payment of cash or delivery of shares of new Common Stock to RFC, RCC and ACJ, the Escrow Depositary shall, from time to time, pay any cash dividends received upon the shares of new Common Stock deposited with it to RFC, RCC and ACJ in the same proportions in which the proceeds of the sale of such shares are required to be distributed, as hereinafter provided.

The New Company may at any time at its option, upon 30 days' notice to the registered holders of Escrow Certificates at the time outstanding, redeem such outstanding Escrow Certificates by depositing with the Escrow Depositary for the account of the registered holders of such outstanding Escrow Certificates an amount in cash equal to the total cash amount at the time represented by such outstanding Escrow Certificates, (including interest at the rate of 4% per annum, and any amount which, at that time may have been deposited by RCC or ACJ, as hereinbefore provided, for payment to RFC or RCC, with interest thereon at the rate of 4% per annum to the date of such deposit, and deducting any cash previously paid thereon as herein provided), and upon such redemption and deposit the Escrow Depositary

shall pay said amounts in cash to the respective holders of outstanding Escrow Certificates and shall deliver all the new Common Stock then on deposit, to or on the order of the New Company.

Purchase Warrants shall be issued (to or on the order of The Western Pacific Railroad Corporation, as hereinafter provided) entitling the holders thereof to purchase on or before December 1, 1941, all or any part of said 189,995 shares of new Common Stock at the price of $62 per share, plus interest thereon at the rate of 4% per annum from January 1, 1937, to a date 10 days after the exercise of such Purchase Warrants. Unless the New Company shall theretofore have deposited with the Escrow Depositary the amount necessary to redeem all the outstanding Escrow Certificates, as hereinbefore provided, the proceeds of the exercise of such Purchase Warrants shall be paid to the Escrow Depositary and the Escrow Depositary shall deliver, out of the new Common Stock deposited with it, as hereinbefore provided, new Common Stock so paid for upon the exercise of such Purchase Warrants and shall, within 10 days thereafter, pay to RFC, RCC and ACJ such cash in the proportions of 56.581% to RFC, 21.053% to RCC and 22.366% to ACJ, until the cash amount payable in respect of RFC Escrow Certificate shall have been paid in full, and there-

after in the proportions of 77.634% to RCC and 22.366% to ACJ, until the cash amount payable in respect of RCC Escrow Certificate shall have been paid in full, and thereafter all such proceeds shall be paid to ACJ until the cash amount payable in respect of ACJ Escrow Certificate shall have been paid in full. Any excess of cash paid upon the exercise of Purchase Warrants shall be paid to the New Company.

The amounts of any new Common Stock deliverable upon the exercise of Purchase Warrants shall be taken from the stock deliverable to RFC, RCC and ACJ, as hereinbefore provided, in the same proportions; and the amount of stock which may thereafter become deliverable to them, as hereinbefore provided, shall be correspondingly reduced. [151]

If the New Company shall have exercised the right to redeem the Escrow Certificates as hereinbefore provided, the proceeds of the exercise of the Purchase Warrants shall be paid to it, and, upon such payment, it shall issue and deliver the new Common Stock issuable in respect of such Purchase Warrants.

Subject to the terms and conditions hereinafter in Article V provided, Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company shall also have the contingent right to subscribe for new First Mortgage Bonds and new Common Stock to be issued to provide new money.

4. The Western Pacific Railroad Corporation, as the holder of substantially the entire unsecured debt and all the outstanding Preferred and Common Stock of the Railroad Company, shall receive, upon release and surrender of said indebtedness and stock:

(a) Purchase Warrants issued under the Escrow Agreement, as hereinbefore provided, in respect of 189,995 shares of new Common Stock; and

(b) Subscription Warrants for $10,000,000 of new First Mortgage Bonds and 150,000 shares of new Common Stock, to be issued to provide new money, as hereinafter in Article V provided, at the price of $100 and accrued interest on said Bonds, for each unit of $100 of new First Mortgage Bonds and 1½ shares of new Common Stock.

V

Provision for New Money

$10,000,000 of new money is required by the New Company for the following purposes:

$3,000,000 to retire Trustees' Certificates issued to provide for the 1936 expenditures under the rehabilitation program;

$6,500,000 for completion of the rehabilitation program (or to retire any further Trustees' Certificates or other obligations issued to provide therefor), or to the extent that the Board of Directors may so determine, for other addi-

tions and betterments, or to provide for fixed charges for which the New Company cannot, in the opinion of the Board of Directors, provide without unduly impairing working capital;

$500,000 as a Contingency Reserve Fund, to be available only for the purpose of paying fixed interest charges, principal of and dividends on equipment trust obligations, and operating expenses which cannot otherwise be provided for, without, in the opinion of the Board of Directors, unduly impairing working capital.

To provide said $10,000,000 there will be issued to or on the order of The Western Pacific Railroad Corporation Subscription Warrants, in such form as may be determined by the Committee, evidencing the right to subscribe for an aggregate of

$10,000,000 of new First Mortgage Bonds and

150,000 shares of new Common Stock,

at the price of $100, plus accrued interest on said Bonds, for each unit of

$100 of new First Mortgage Bonds and

1½ shares of new Common Stock.

It is contemplated that the bonds to be covered by the Subscription Warrants shall be dated January 1, 1937, shall mature January 1, 1967, shall bear interest at the rate of 4% per annum, payable semi-annually, and shall be redeemable in whole or in part on any interest payment date upon thirty days' no-

tice at their principal amount and accrued interest; but if the Committee shall determine that it is advisable, in order to insure the raising of the new money, and to that end to obtain underwriting of the offerings provided for in this Article V, the Committee may, with the approval of the Interstate Commerce Commission and of the Court in the Reorganization Proceeding, cause the First Mortgage Bonds so to be offered to bear interest at a greater rate, but not exceeding 5% per annum, payable semi-annually, to mature at an earlier date, but not earlier than January 1, 1952, and to be redeemable at a higher price, but not exceeding 105% of their principal amount and accrued interest. [152]

Such subscription Warrants shall entitle the holders thereof to subscribe for said units at said price for a period to be specified therein, and which, as to not less than $7,000,000 principal amount of Bonds represented thereby, shall be not less than 60 nor more than 120 days after the date of final confirmation of the Plan by the Court in the Reorganization Proceeding, and as to any remainder of said $10,000,000 of Bonds may, if the Board of Directors of the New Company shall so determine, be a further period expiring not later than December 31, 1937.

Opportunity to provide such part of the new money as is not provided by the exercise of said Subscription Warrants shall be offered to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company in propor-

tion to the General and Refunding Mortgage Bonds now held by them, that is to say, in the proportions of 56.581% to Reconstruction Finance Corporation, 21.053% to The Railroad Credit Corporation, and 22.366% to A. C. James Company. Said corporations shall be entitled to provide their respective portions of such new money, by subscribing for such new First Mortgage Bonds as are covered by the Subscription Warrants expired and not exercised, together with new Common Stock, at the price of $100, plus accrued interest on said Bonds, for each unit of

$100 of new First Mortgage Bonds and
2 shares of new Common Stock;

If any of said corporations shall fail to subscribe for its full proportion as aforesaid, the other or others of said corporations may subscribe for the unsubscribed balance, in the proportion which the existing General and Refunding Mortgage Bonds of the Railroad Company held by them respectively bear to the total amount of General and Refunding Mortgage Bonds held by the corporations so electing to subscribe for their full proportion.

The contingent rights of subscription thus granted to Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company shall be evidenced by appropriate Warrants in such form as may be determined by the Committee, and such rights shall, in the case of each offering, run concurrently with the rights evidenced by the Subscription Warrants to be issued to, or on the order

of, The Western Pacific Railroad Corporation. Holders of such Warrants will be required to elect prior to the expiration of such Subscription Warrants, in each case, the extent to which they will exercise their subscription rights. Notice of the amount of new First Mortgage Bonds and new Common Stock allotted against such subscriptions will be given by registered mail as promptly as possible after the expiration of the Subscription Warrants in each case, and payments for such allotments will be required to be made at a bank or trust company in New York City, to be specified in such notice, within ten days after the mailing of such notice. Upon failure of any holder of such Warrant to take up and pay for the new First Mortgage Bonds and new Common Stock allotted to it, at the price hereinbefore provided, the holder of such Warrant shall cease to have any rights in respect of such new First Mortgage Bonds and new Common Stock.

Should holders of the Subscription Warrants fail to exercise any thereof and Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company provide the entire $10,000,000 of required new money, there would thus be issued, to provide said new money, an aggregate of

$10,000,000 of new First Mortgage Bonds and
200,000 shares of new Common Stock.

If holders of the Subscription Warrants, Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company fail to pro-

vide all or any part of said $10,000,000 of new money, as aforesaid, holders of the existing First Mortgage Bonds of the Railroad Company shall be entitled to provide the same by subscribing for new First Mortgage Bonds and new Common Stock at the price of $100, plus accrued interest on said Bonds, for each unit of

$100 of new First Mortgage Bonds and
3 shares of new Common Stock.

The contingent rights of subscription thus granted to holders of existing First Mortgage Bonds shall be evidenced by appropriate Warrants in such form as may be determined by the Committee and such rights shall, in the case of each offering, run concurrently with the rights evidenced by the Subscription Warrants to be issued to, or on the order of, The Western Pacific Railroad Corporation. Holders of such Warrants shall be [153] entitled, upon each offering, to subscribe for as many of said units as they may elect, but if there shall be an oversubscription by the holders of such Warrants, the Committee shall allot the new First Mortgage Bonds and new Common Stock in the proportion which the respective holdings of First Mortgage Bonds of the Railroad Company held by the respective original issues of the exercised Warrants bear to the total amount of such Bonds held by the original issuees of all the Warrants so exercised. Notice of the amount of new First Mortgage Bonds and new Common Stock allotted against such subscriptions

will be given, in respect of each offering, by registered mail as promptly as possible after the expiration of the rights of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company to take up and pay for their allotments as hereinbefore provided; and payments for the allotments against such subscriptions will be required to be made at a bank or trust company in New York City, to be specified in such notice within ten days after the mailing of such notice. Upon failure of any holder of such Warrant to take up and pay for the new First Mortgage Bonds and new Common Stock allotted to it, at the price hereinbefore provided, the holder of such Warrant shall cease to have any rights in respect of such new First Mortgage Bonds and new Common Stock.

Should holders of the Subscription Warrants, Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Company provide none of the $10,000,000 of required new money, there would thus be issued, to provide said new money, an aggregate of

$10,000,000 of new First Mortgage Bonds and
300,000 shares of new Common Stock.

New First Mortgage Bonds issued to provide new money will be issued and allotted in multiples of $100 and no subscription for fractional amounts of $100 will be received.

The Committee or the New Company may in their discretion effect such arrangements for underwrit-

ing the exercise of all or any part of the foregoing subscription rights upon such terms and conditions as they may determine, with the approval of the Interstate Commerce Commission and of the Court in the Reorganization Proceeding. If such arrangements for underwriting shall be made with Reconstruction Finance Corporation, the compensation for such underwriting may be, or include, the exchange by the New Company of new Income Mortgage Bonds and new Participating Preferred Stock, in such proportions as the Committee with like approval shall determine, in exchange for the RFC Escrow Certificate, to be issued to Reconstruction Finance Corporation as provided in Article IV hereof. Such exchange, however, shall not constitute a cancelation of said RFC Escrow Certificate, or be deemed equivalent to a deposit by the New Company of cash against said RFC Escrow Certificate, as contemplated by said Article IV; but the New Company shall succeed to all the rights of Reconstruction Finance Corporation in respect of the RFC Escrow Certificate under said Article IV. [154]

VI

Table of Distribution of New Securities

Present Liabilities as of July 1, 1936	Amount	Undisturbed	New First Mortgage Bonds	New Income Mortgage 5% Bonds	New Participating 6% Preferred Stock	New Common Stock
Equipment Trusts, Baldwin Lease and Pullman Contracts	$ 2,048,190	$2,048,190				
First Mortgage 5% Bonds due 1946	49,290,108		$ 9,858,020 (20%)	$19,716,040 (40%)	$19,716,040 (40%)	
First Mortgage Bond Interest (Unpaid)	8,214,766				8,214,766	
New Money			$10,000,000			Not less than 150,000 nor more than 300,000 shares (See Article V)
General & Refunding Bonds. RFC for $2,963,000 Note) 426,753 Int.)	$3,389,753	750,000				Escrow Ctfs. for 107,500 shares (See Article IV)
RCC for $2,482,218 Note) 114,156 Int.)	$2,596,374	4,000,000				Escrow Ctfs. for 40,000 shares (See Article IV)
ACJ for $4,999,800 Note) 749,870 Int.)	$5,749,670	4,249,500				Escrow Ctfs. for 42,495 shares (See Article IV)
The Western Pacific R. R. Corporation, for						
Advances (including Realty Co.)	7,245,274		Subscription Warrants for above mentioned $10,000,000 (See Article V)			Purchase Warrants for above mentioned 189,995 shares (See Article IV)
Preferred Stock	28,300,000					
Common Stock	47,500,000					Subscription Warrants for above mentioned 150,000 shares (See Article V)
Aggregate principal	$161,597,830	$2,048,190	$19,858,020	$19,716,040	$27,930,806	Not less than 339,995 shares Not more than 489,995 shares
Annual fixed charges	$ 3,348,314*	$ 86,473	$794,320**			
Annual contingent interest				$ 985,802		
Annual Preferred 6% dividend					$ 1,675,848	

*Without interest on interest accrued and unpaid on First Mortgage Bonds, or on RFC, RCC or ACJ Notes; and computing interest on said Notes rather than on their collateral, interest on the RCC Note being computed at 1½% per annum, the N. Y. Federal Reserve Bank rediscount as of April 20, 1936.

**Assuming that all such Bonds bear interest at the rate of 4% per annum. As hereinbefore in Articles III and V provided the $10,000,000 thereof to be issued to provide new money may bear interest at a rate not exceeding 5% per annum.

VII.

Claims Not Affected by the Plan

The following claims are not affected by the Plan: (a) current liabilities of the Railroad Company incurred in the ordinary conduct of its business prior to the institution of the Reorganization Proceeding, including claims for personal injury and property damage, (b) current liabilities and obligations of the Railroad Company and of any trustee or trustees of the estate incurred during the Reorganization Proceeding, and (c) all other claims, liabilities or obligations for which specific provision is not made in the Plan. To the extent that such claims, liabilities or obligations are not paid by the Railroad Company or any trustee or trustees of the estate pursuant to order of the Court in the Reorganization Proceeding, they are to be paid in cash or assumed by the New Company. All such claims, liabilities, and obligations, including any claims arising from the disaffirmance of executory leases or other contracts of the Railroad Company or any trustee or trustees of the estate in the Reorganization Proceeding pursuant to order of the Court, in respect of which claims are filed or evidenced in accordance with orders of the Court, may be adjusted or compromised and dealt with or paid or discharged by the New Company, all as may be justed or compromised and dealt with or paid or discharged by the New Company, all as may be determined by the Board of Directors of the New Company and approved by the Court.

The New Company shall be deemed to have assumed such of the contracts of the Railroad Company which are executory in whole or in part, including any executory leases and liabilities under guaranties, as shall have been affirmed by the Railroad Company or any trustee or trustees of the estate in the Reorganization Proceeding with the approval of the Court in the Reorganization Proceeding and prior to the date of confirmation of the Plan, and also any executory contracts made by the Railroad Company or any trustee or trustees of the estate with the approval of the Court in the Reorganization Proceeding which, by their terms, do not terminate at the conclusion of the Reorganization Proceeding.

VIII.

Method of Participation in, and Consummation of, the Plan

No holder of any security of the Railroad Company affected by the Plan shall be requested to accept the Plan until after a public hearing upon the Plan, held as provided by Section 77 of the Bankruptcy Act as it now exists or may hereafter be amended (hereinafter called Section 77), and a report and order of the Interstate Commerce Commission approving the Plan (in its present form or as it may be modified as hereinafter provided) and finding that the Plan complies with said Section 77, or until the Court in the Reorganization Proceeding shall have taken such action as may be

required by Section 77 prior to the submission of a plan thereunder to the security holders of the Railroad Company. Thereafter the Plan shall be submitted to the security holders of the Railroad Company in accordance with the provisions of said Section 77.

The Plan shall not be carried out until it shall have been accepted by or on behalf of the holders of at least two-thirds in principal amount of the outstanding existing First Mortgage 5% Bonds of the Railroad Company, nor unless either (1) the Plan shall have been accepted by or on behalf of the creditors of each class, as the same may be classified by the Court in the Reorganization Proceeding, holding at least two-thirds in principal amount of the total allowed claims of such class, and by or on behalf of the stockholders of each class holding at least two-thirds of the stock of such class, or (2) provision shall have been made for protecting the interests of such non-assenting classes of creditors and stockholders as hereinafter in Article IX provided.

Messrs. Frederick H. Ecker, John W. Stedman and Reeve Schley have heretofore acted as a Committee to represent certain large institutional holders of existing First Mortgage Bonds, being not more than 25 bona fide holders thereof, in respect of the extension of interest maturing during 1934 upon such First Mortgage Bonds, in respect of the performance of the Railroad Company's agreements made in connection with said extension, in

the negotiation of the plan of reorganization heretofore submitted by the Railroad Company in the Reorganization Proceeding, and in the preparation of this Plan. If, and when, this Plan shall be submitted to [156] the security holders of the Railroad Company for their acceptance or rejection, as hereinbefore provided, said Committee shall comply with the provisions of said Section 77 to qualify it to act as the representative of all holders of existing First Mortgage 5% Bonds of the Railroad Company assenting to the Plan, and otherwise to perform the duties and exercise the rights provided in the Plan.

The Plan may be carried out either by re-vesting the properties formerly of the Railroad Company in the Railroad Company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which such properties are vested of the new mortgages and the issue by it of the new securities contemplated by the Plan. The corporation so acquiring said properties and issuing the new securities is herein referred to as the New Company.

The method of carrying out the Plan shall be determined by the Committee in its discretion, and the Committee shall also determine the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, purchase warrants, subscription warrants, acceptances, assents, and all other instruments in the judgment of the Committee

necessary or desirable in connection with carrying out the Plan.

The Committee may from time to time add to its members, and any vacancy from time to time occurring in the Committee may be filled by the remaining members of the Committee. The Committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The Committee may employ such agents, attorneys and others as it may deem desirable for the purposes of the Plan. The Committee may from time to time delegate to others any power or discretion conferred upon it by the Plan; and the members of the Committee shall not be liable for any action taken by them in good faith or by any person employed by the Committee in good faith, or otherwise, except for their respective individual malfeasance or neglect.

The Committee may from time to time, whether before or after acceptance of the Plan by the holders of securities, modify the Plan or adopt a substitute plan, in accordance with, and subject to, the provisions of said Section 77; and the term "Plan" as used herein shall be deemed to include any such modification or substitute plan.

The members of the Committee have agreed to serve without compensation, but the expenses of the Committee shall be reimbursed as hereinafter provided.

Unless otherwise provided in said Section 77 or any order or orders of the Court in the Reorgani-

zation Proceeding or of the Interstate Commerce Commission, whenever notice shall be required or permitted to be given under or pursuant to the Plan, such notice shall be given by publishing a copy of such notice once in each week in one newspaper published and of general circulation in the Borough of Manhattan, the City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the Plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the Plan, by mailing such notice, postage prepaid, to such security holders whose names and addresses appear on the books of the Railroad Company or of the New Company, as the case may be.

IX.

Provision for Dissenting Creditors and Stockholders

If the holders of more than one-third in principal amount of any class of creditors of the Railroad Company, as they may be classified by the Court in the Reorganization Proceeding, or the holders of more than one-third of the shares of stock of any class of the Railroad Company shall not have accepted the Plan within such period as the Com-

mittee, with the approval of the Commission and the Court, may determine after holders of at least two-thirds in principal amount of the existing First Mortgage 5% Bonds of the Railroad Company shall have accepted the Plan, the property of the Railroad Company shall be sold at public auction at a fair upset price as determined by the Court in the Reorganization Proceeding, and the non- [157] assenting creditors of such class or the non-assenting stockholders of such class, as the case may be, shall be entitled to receive their aliquot portion of the proceeds of the sale of such property, after deducting therefrom all expenses of such sale and the amount which would be required to pay in full, principal and interest to the date of such sale, all creditors whose claims are prior in lien or superior in equity to the claims of such non-assenting creditors or the rights of such non-assenting stockholders.

Upon any such sale, the property shall be purchased for the benefit of the New Company in the reorganization by the Committee, or by a purchaser nominated by the Committee, and there shall be applied on account of the purchase price the distributive share of the proceeds of sale of all securities the holders of which have assented to the Plan, and the securities, though not assenting to the Plan, of all classes two-thirds or more in amount of which have assented to the Plan.

X.

Expenses of the Reorganization

All expenses in connection with the Plan and its consummation, and all costs of administration and other allowances made by the Court in the Reorganization Proceeding, shall be paid by the New Company, subject to the provisions of Section 77 of the Bankruptcy Act, and shall constitute a charge upon the properties of the New Company as a cost of administration prior in lien to all new securities issued under the Plan.

There shall be included in such expenses such reasonable compensation for necessary services rendered and reimbursement for actual expenses incurred in connection with the Reorganization Proceeding and the Plan by the Trustees under the present First Mortgage and the present General and Refunding Mortgage of the Railroad Company, the Committee (including reimbursement for actual expenses incurred by the Committee in connection with the extension of interest on the existing First Mortgage 5% Bonds accruing during 1934, in respect of the performance of the Railroad Company's agreements made in connection with said extension, in the negotiation of the plan heretofore proposed by the Railroad Company in the Reorganization Proceeding, and in connection with this Plan), and by other parties in interest, committees or other representatives of creditors and security holders of the Railroad Company, and the

attorneys or agents of any thereof (including the Railroad Company), as may be approved by the Interstate Commerce Commission and the Court in the Reorganization Proceeding pursuant to said Section 77.

Dated as of January 1, 1937.

[Endorsed]: Filed with Interstate Commerce Commission Sep. 28, 1936. Filed with Clerk May 26, 1937. [158]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of

The Western Pacific Railroad Company,
Debtor,

PLAN OF REORGANIZATION FOR THE WESTERN PACIFIC RAILROAD COMPANY, PROPOSED BY A. C. JAMES CO., A JUNIOR CREDITOR.

The following outline Plan of Reorganization for The Western Pacific Railroad Company is submitted by A. C. James Co., an intervening junior creditor, to the Interstate Commerce Commission for consideration by the Commission.

A. Basic principles upon which proposed Plan of Reorganization is constructed.

It is submitted that a sound plan for the readjustment of the capital structure of The Western Pacific Railroad Company (hereinafter called the "Railroad Company"), should meet the following standards:

(1) It should provide for the securing of new money, presently required, on the most economical basis; [161]

(2) It should furnish vehicles for financing future capital requirements on a sound basis;

(3) It should preserve, so far as possible, the simplicity of the present capital structure of the Railroad Company;

(4) In view of the favorable ratio of property valuation to present debt,* it should preserve present debt as debt;

(5) It should refrain from capitalizing unearned and unpaid interest, as a permanent part of the capital structure; and

(6) Necessarily, it should so reduce fixed charges as to render unlikely the recurrence of the present difficulties of the Railroad Company, even though we again pass through a pe-

*Interstate Commerce Commission valuation of the physical property of the Western Pacific System, plus additions at cost to present time, is approximately $145,000,000 and total funded debt of Railroad Company (exclusive of holding company open account advances and accrued interest) is approximately $63,000,000, or less than 44% of the property valuation.

riod in which business conditions are comparable with those of the past seven years.

B. General comments as to proposed Plan of Reorganization.

It is recommended that no new corporation be substituted for the Railroad Company, to effect the proposed capital readjustments, as it is believed the powers vested in the Interstate Commerce Commission and the Courts under Section 77 of the Bankruptcy Law are adequate to accomplish the necessary changes in capital structure without substitution of a new corporation.

The amounts of existing indebtedness are stated as of July 1, 1936, and in no case is reference made to interest accrued and unpaid thereon, as it is definitely proposed [162] that such unearned and unpaid interest be not capitalized in any form. Current liabilities of the Railroad Company or the Trustees, and executory leases and other similar contracts are not mentioned, and it is assumed they will be preserved as current obligations of the enterprise.

It is proposed that the Plan be put into effect on January 1, 1937.

C. Proposed provision for new money and necessary modifications in existing capital structure.

1. New Money required by enterprise $10,000,000

Upon the record heretofore presented to the Commission in this proceeding, it appears that the

Railroad Company presently requires approximately $10,000,000 of new money for capital purposes (aside from equipment needs, to be financed under equipment trusts, and minor capital requirements for which provision can be made from current earnings). The Trustees of the Railroad Company, appointed in the Section 77 proceeding, have already secured temporarily $3,000,000 of such new money upon their Trustees' Certificates, and propose shortly to secure an additional $3,700,000 in like manner.

It is here proposed that the entire $10,000,000 of required new money be represented by First Mortgage 4% Bonds, secured by a new mortgage which shall be a direct first lien on the railroad.

This new mortgage is intended to furnish the vehicle for future senior financing.

The $10,000,000 of First Mortgage 4% Bonds, presently to be sold, shall first be offered directly to the stockholders of The Western Pacific Railroad Corporation (the Delaware holding company, which, at present, [168] holds all the preferred and common stock of the Railroad Company) with a bonus at the rate of 15 shares of Common Stock, of $100 par value, of the Railroad Company for each $1,000 First Mortgage Bond purchased.

It is proposed that the entire $10,000,000 of new money so raised shall be used for the rehabilitation program now under way, or for subsequent additions and betterments, and no part of it is to be

set aside as a reserve fund to provide for fixed charges or operating expenses.

2. Existing Equipment Trusts, Baldwin lease and Pullman contracts $2,048,190.

These are to remain undisturbed. It should be borne in mind that additional equipment trust obligations will probably be created in the near future to provide the necessary motive power and rolling stock.

3. Present First Mortgage Bonds $49,290,100.

These bonds are to be refunded into a like principal amount of General Mortgage 4% Income Bonds, having a lien junior to the First Mortgage Bonds described under Subdivision 1 above. Each present First Mortgage bondholder is to receive for each $1,000 bond now held, $1,000 principal amount of General Mortgage 4% Income Bonds, together with a bonus of five shares of Common Stock of the Railroad Company, of $100 par value.

4. Secured Notes of Junior Creditors $10,450,263

These obligations represent advances made by Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Co., during the depression, and accrued to the benefit of the First Mortgage bondholders, either by (1) paying charges which were liens prior to the First Mortgage lien, or (2) paying un- [164] earned interest on the First Mortgage bonds, or (3) being directly applied to the construction of income producing property, which is an essential part of the railroad.

These Secured Notes are supported by the pledge of General and Refunding Bonds of the Railroad Company in the principal amount of $18,999,500. These bonds are all the bonds issued under the General and Refunding Mortgage of January 1, 1932. These bonds are held, as between the three junior creditors, in varying ratios, to the amounts of the actual advances, but in each case solely as collateral.

It is proposed that the Secured Notes be refunded into Four Percent. Convertible Debentures, in like principal amount, together with a bonus of five shares of Common Stock of the Railroad Company, for each $1,000 of Secured Notes so refunded, and the collateral held by the junior creditors surrendered and cancelled.

5. Advances on Open Account $5,807,650

These advances, made by The Western Pacific Railroad Corporation, the Delaware holding company, as to $5,757,650.30 principal amount, and by Western Realty Company, a subsidiary of The Western Pacific Railroad Corporation, as to $50,000, are to be refunded into 6% Preferred Stock of the Railroad Company, on a dollar for dollar basis.

6. Present 6% Preferred Stock $28,300,000

All of this is now held by The Western Pacific Railroad Corporation, the present Delaware holding company. Under this Plan, the Preferred Stock is to be delivered to the Railroad Company, and,

to the extent of $5,807,650 used to refund the Advances on Open Account referred to in Subdivision 5 above; to the ex- [165] tent of $15,675,395 held in the Treasury of the Railroad Company against the possible exercise of conversion rights by the holders of the Four Percent. Convertible Debentures mentioned under Subdivision 4 above; and the balance $6,816,955 used, from time to time, with the approval of the Commission, to provide a vehicle for junior financing of future capital needs of the Railroad Company.

7. Common Stock $47,500,000

All of this Common Stock is now held by The Western Pacific Railroad Corporation, the present Delaware holding company. Of this total, $24,645,050 will be given to the present First Mortgage bondholders as a bonus with the General Mortgage 4% Income Bonds, which they are to receive in exchange for their present debt, and $5,225,132 as a like bonus, to the junior creditors, with the Four Percent. Convertible Debentures, which they are to receive in exchange for their present debt. Of the balance, $15,000,000 will be given as a bonus with the new First Mortgage 4% Bonds, to be issued for the new money, and offered to the existing stockholders of the Delaware holding company. The balance of $2,629,818 is to be delivered to the Reorganization Committee, constituted as hereinafter provided, and to be used by the Reorganization Committee, with the approval of the Commission,

for (a) compensation of underwriters of the First Mortgage 4% Bonds, if such underwriting shall be deemed necessary, (b) compensation of the Reorganization Committee, and (c) to the extent not so used, cancelled. [166]

D. Description of new securities.

1. First Mortgage 4% Bonds

The new First Mortgage is to be a direct first lien upon the railroad and other fixed property and equipment (subject, of course, to equipment trust priorities), of the Railroad Company, and to be further secured by a pledge of the entire interest of the Railroad Company in its subsidiary feeders.

It is proposed that the new First Mortgage shall be an open end mortgage, under which additional series, differing as to date of maturity and interest rate, but with equal lien, may be issued from time to time with the approval of the Commission, to provide for additions, betterments, improvements or extensions, in principal amounts, from time to time, not in excess of 75% of the actual cost of the specific additions, betterments, improvements or extensions which are the basis of the particular issue.

In the event it is deemed advisable by the Reorganization Committee, with the approval of the Commission, to limit the principal amount of said First Mortgage 4% Bonds which may ultimately be issued, then it is suggested that such limitation be fixed at $50,000,000.

The $10,000,000 principal amount of First Mortgage 4% Bonds, presently to be issued under this Plan, are to be dated January 1, 1937, to mature January 1, 1967, and to bear 4% interest, unless, in the opinion of the Reorganization Committee, approved by the Commission, a higher rate of interest shall be required, at the time of such issue, to insure the raising of the necessary new money.

The First Mortgage 4% Bonds, presently to be issued, and subsequent series of bonds to be issued from time to time, under the First Mortgage, shall contain ap- [167] propriate provisions for redemption, in whole or part, prior to maturity, at their principal amount and accrued interest, with such premium or premiums as may be determined from time to time, and approved by the Commission.

2. General Mortgage 4% Income Bonds

The General Mortgage shall be a lien on all the property covered by the First Mortgage, subject only to the lien of the First Mortgage. The bonds to be issued under the General Mortgage are to be limited to $49,290,100 and are to be exchanged, dollar for dollar, for the present First Mortgage Bonds of the Railroad Company.

The General Mortgage Income Bonds are to be dated January 1, 1937, are to mature January 1, 1987, and are to bear interest at the rate of 4% per annum, payable only out of Available Net Income, as herein defined.

Under the terms of said General Mortgage, Available Net Income shall be determined for each

period of six months ending June 30 or December 31 (hereinafter called "Income Period"), beginning with the Income Period ending June 30, 1937. Available Net Income for any Income Period shall be determined by deducting from income of the Railroad Company available for fixed charges for such Income Period (determined in accordance with accounting rules of the Interstate Commerce Commission), all interest charges on equipment trusts and equipment leases, and all interest charges on the First Mortgage 4% Bonds.

Interest on General Mortgage 4% Income Bonds shall be paid only in amounts equal to one-fourth of 1% or multiples thereof; smaller fractional amounts being carried forward and added to that portion of the Available Net Income for the next succeeding income period re- [168] quired to be applied to the payment of interest on such bonds. Except insofar as such smaller fractional amounts are carried forward, as hereinabove provided, such interest payments are to be non-cumulative.

General Mortgage 4% Income Bonds are to be redeemable in whole or part, upon thirty days' notice on any interest payment date, at their principal amount, together with any interest thereon payable on said date, out of Available Net Income, as hereinabove defined.

3. Four Percent. Convertible Debentures

The Four Percent. Convertible Debentures are to be issued in the amount of $10,450,263 to the pres-

ent junior creditors of the Railroad Company in exchange for the Secured Notes now held by those creditors dollar for dollar (the collateral held by the junior creditors being surrendered and cancelled at the time of such exchange) and such debentures are to be limited to the amount necessary for such exchange with the junior creditors.

These Four Percent. Convertible Debentures are to be dated January 1, 1937, and to mature January 1, 1957, and are to bear interest at the rate of 4% per annum, payable only out of Available Net Income, after interest payments at the rate of 4% per annum shall have been made, or provided for, on the General Mortgage 4% Income Bonds. Interest on these Four Percent. Convertible Debentures is to be non-cumulative.

The Four Percent. Convertible Debentures are by their terms, to be convertible, at any time before the actual call and retirement of such debentures into 15 shares of 6% Preferred Stock of the Railroad Company, at $100 par value for each $1,000 principal amount of convertible debentures. [169]

E. Formation of Reorganization Committee.

To facilitate the definitive formulation and submission to security holders of this Plan, if it shall be approved by the Commission, it is proposed that there be organized a Reorganization Committee, consisting of five members. Subject to the approval of the Commission, one member of this Reorganization Committee shall be nominated by the Institu-

tional Bondholders' Committee, one by the Commission, to represent other First Mortgage bondholders, one by the junior creditors as a group, one by The Western Pacific Railroad Corporation, to represent the present equity owners, and one by the United States District Court for the Northern District of California, Southern Division, to represent the public served by the Railroad Company.

Subject to the approval of the Commission, said Reorganization Committee shall, in its discretion, determine the method of carrying out the Plan, the form, and except as herein otherwise expressly provided, the terms and provisions of all mortgages, debenture agreements, bonds, debentures, coupons, purchase warrants, subscription warrants, acceptances, assents, and all other instruments necessary or convenient for the carrying out of the Plan.

The Committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The Committee may employ such agents, attorneys and others as it may deem desirable for the purposes of the Plan. The Committee may from time to time delegate to others any power or discretion conferred upon it by the Plan; and the members of the Committee shall not be liable for any action taken by them in good faith or by any person employed by the Committee in good faith, or for other acts or [170] omissions, except for their respective individual malfeasance or neglect.

The Committee may from time to time, whether before or after acceptance of the Plan by the holders of securities, modify the Plan, in accordance with, and subject to, the provisions of said Section 77; and the term "Plan" as used herein shall be deemed to include any such modification.

All the expenses of the Committee, when and as approved by the Commission, are to be paid by the Railroad Company. The members of the Reorganization Committee shall be compensated for their services, to the extent the Commission shall approve, in Common Stock of the Railroad Company provided for the purpose as hereinabove set forth.

The Reorganization Committee shall, in its discretion, but subject to the approval of the Commission, make such agreement or agreements for the underwriting of the First Mortgage 4% Bonds of the Railroad Company, presently to be issued under this Plan, as it may deem necessary and advisable, but compensation for such underwriter or underwriters shall be paid solely in Common Stock of the Railroad Company, provided for the purpose as hereinabove set forth.

F. Method of participation in, and consummation of, the Plan.

The Plan shall not be carried out until it shall have been approved by the Commission and the Court in the Reorganization Proceeding, pursuant to the requirements of Section 77 of the Bankruptcy Act, and until it shall have been accepted by two-thirds of the creditors of each class, as the

same may be classified by the Court in the Reorganization Proceeding, and by two-thirds of the stock of each class. [171]

G. Expenses of the Plan.

Subject to the approval of the Commission, all expenses of the Plan, and all costs of administration and other allowances made by the Court in the Reorganization Proceeding, shall be paid by the Railroad Company, from its current cash balances, at the time the Plan is made effective.

Dated October 26, 1936. [172]

SCHEDULE A

PRESENT CAPITAL LIABILITIES

(Stated as of July 1, 1936, and exclusive of unpaid interest)

		Principal	Fixed Charges
Equipment Trusts, Baldwin Lease and Pullman Contract		$ 2,048,190	$ 86,473
First Mortgage 5% Bonds, due 1946		48,290,100	2,464,505
Secured Notes:*			
Reconstruction Finance Corporation	$2,963,000		
Railroad Credit Corporation	2,487,463		
A. C. James Co.	4,999,800	10,450,263	435,072
Open account debt to affiliated companies		5,807,650	290,382
Preferred Stock		28,300,000	
Common Stock		47,500,000	
Totals		$143,396,203	$3,276,432

*No reference is made above to General and Refunding Mortgage 5% Bonds of the Railroad Company, which are outstanding solely as collateral to the Secured Notes.

[173]

SCHEDULE B

PROPOSED NEW CAPITALIZATION

(As of January 1, 1937)

		Principal	Fixed Charges	Contingent Interest
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract		$ 2,048,190	$ 86,473	
First Mortgage 4% Bonds		10,000,000	400,000	
General Mortgage 4% Income Bonds		49,290,100		$1,971,604
Four Percent. Convertible Debentures		10,450,263		418,011
Preferred Stock (Balance held in Treasury of Railroad Company		5,807,650		
Common Stock:				
Bonus to present First Mortgage bondholders	$24,645,050			
Bonus to present junior creditors	5,225,132			
Bonus to purchasers of new First Mortgage 4% bonds	15,000,000			
Available for use under Plan	2,629,818	47,500,000		
Totals		$125,096,203*	$486,473	$2,389,615

*This should be compared with the Interstate Commerce Commission valuation of property of Railroad System, including additions to date, amounting to approximately $145,000,000.

[Endorsed]: May 26, 1937. [174]

Interstate Commerce Commission

Finance Docket No. 10913

The Western Pacific Railroad Company

Reorganization

Submitted Decided

Plan of reorganization of the Western Pacific Railroad Company, pursuant to section 77 of the Bankruptcy Act, as amended, recommended.

Frank C. Nicodemus, Jr., for The Western Pacific Railroad Company.

Robert E. Coulson for A. C. James Company.

James B. Alley, C. C. McChord, and C. M. Clay for Reconstruction Finance Corporation.

Daniel Willard, Jr., for Railroad Credit Corporation.

Robert T. Swaine for Institutional Bondholders' Committee.

Orville W. Wood for Crocker First National Bank of San Francisco and Samuel Armstrong.

H. C. McCollom and Orrin G. Judd for Irving Trust Company.

PROPOSED REPORT OF THE BUREAU OF FINANCE

The Western Pacific Railroad Company, hereinafter called the debtor, on August 2, 1935, filed a petition in the District Court of the United States for the Northern District of California, Southern

Division, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization under the provisions of section 77 of the act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended. The court, on the same day, made and entered an order approving the petition as properly filed and, among other things, authorizing and directing the debtor, pending further order of the court, to operate and maintain the railroad and property of the debtor and to manage and conduct the debtor's business as a railroad company. Trustees were appointed on September 23, 1935, and their appointments were ratified by the Commission on October 30, 1935. Copies of the debtor's petition and the order thereon have [175] been transmitted to the Commission by the clerk of the court; and in like manner the Commission has received lists of all known creditors and stockholders of the debtor, and copies of the orders of the court determining the time within which the claim of creditors might be filed or evidenced and dividing the creditors and stockholders into classes. These documents and other documents similarly received are now of record in the proceeding before the Commission.

The debtor, on February 8, 1936, filed a plan of reorganization with the court and the Commission. Pursuant to the provisions of section 77(d) of the Bankruptcy Act, the Commission, after due notice, began public hearings upon the debtor's plan of re-

organization on March 23, 1936. Two other plans for the reorganization of the debtor were filed during the proceedings; one, on behalf of certain institutional bondholders, on September 28, 1936, and the other, on behalf of A. C. James Company, a secured creditor of the debtor, on October 26, 1936. These parties intervened in the proceeding and were represented by counsel at the hearing. Other interveners, similarly represented, included the trustees under the mortgages, the Reconstruction Finance Corporation and the Railroad Credit Corporation, secured creditors. Hearings in this proceeding were completed on December 9, 1936, and briefs were filed on January 11, 1937.

Location and General Description of Property

The debtor owns or operates a total of 1207.51 miles of standard-gage, steam railroad. The main lines extend 924.17 miles eastward from Oakland, Calif., to Salt Lake City, Utah, and northward 111.81 miles from Keddie to Bieber, Calif., (with operating rights over the Great Northern Railway 46.38 miles from Bieber to Hambone, Calif.). The debtor also operates 4.2 miles of ferry service from Oakland to San Francisco and 185.30 miles of second [176] main track, of which 182.91 miles between Wiso and Alazon, Nevada, are owned by the Southern Pacific. This territory is known as the "Paired Track" district since the two lines are used as a double-track railroad by both companies. Various

branch lines springing from the Oakland-Salt Lake City line are as follows:

Niles to San Jose, Calif.	23.07 miles
Calpine Junction to Calpine, Calif.	12.62 "
Hawley to Loyalton, Calif.	12.79 "
Reno Junction to Reno, Nevada	33.11 "
Burmester to Warner, Utah	15.52 "
Miscellaneous	21.79 "
Total	118.90 miles

Owned or Controlled and Jointly Affiliated Railroad Companies

The debtor owns all the outstanding capital stock of Sacramento Northern Railway, an electrically operated standard-gage, freight and passenger railroad aggregating 276.2 miles of road serving and connecting San Francisco and Oakland with various Sacramento Valley cities, principally Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa and Oroville, all in California.

By ownership of more than 99 per cent of the outstanding capital stock, the debtor controls the Tidewater Southern Railway which operates a standard-gage, steam freight line aggregating 61.38 miles of road connecting Stockton with Manteca, Escalon, Modesto and Turlock in the San Joaquin Valley of California.

The debtor owns all the outstanding capital stock of the Deep Creek Railroad Company, which owns and operates a standard-gage, steam railroad from Wendover to Gold Hill, Nevada, a distance of 44.6 miles. In addition it owns 50 per cent of the capital

stock of The Salt Lake City Union Depot and Railroad Company; 33⅓ per cent of the capital stock of the Central California Traction Company, operating an electrically operated freight railroad from Stockton to Sacramento, Calif., with a road mileage of 53.78 miles; and 50 per cent of the capital stock of the Alameda Belt Line, [177] operating 15.86 miles of terminal switching line in the city of Alameda on the San Francisco Bay.

None of the above subsidiary or affiliated companies have filed a petition under Section 77 of the Bankruptcy Act.

Corporate and Financial History

The debtor was incorporated under California laws on June 16, 1916, and as of July 14, 1916, succeeded to the railroads, properties, etc., of The Western Pacific Railway Company sold at foreclosure on June 28, 1916. Upon incorporation, the debtor had an authorized capital stock of $75,000,000 consisting of 475,000 shares of common and 275,000 shares of preferred stock of the par value of $100 each.

The debtor by its first mortgage dated June 26, 1916, to the First Federal Trust Company and Henry E. Cooper, trustees, (Crocker First National Bank, of San Francisco, and Samuel Armstrong, now successor trustees) authorized a maximum of $50,000,000 of first mortgage bonds at any one time outstanding. A principal amount of $20,000,000 thereof was issued and sold after its organization

and as a part of the plan of reorganization. These bonds were sold at 90 and realized $18,000,000 in cash. Of this amount, approximately $2,000,000, together with cash from receivers, was applied in defraying expenses of incorporation, expenses incurred in connection with foreclosure and reorganization proceedings, payment of distributive shares of non-participating first mortgage bondholders of the old company; and $1,000,000 was retained as working capital. The balance of approximately $15,000,000 was deposited under the debtor's first mortgage and applied to capital purposes as provided in the mortgage.

The debtor thus commenced operations with $75,000,000 par value of capital stock issued and outstanding, and $20,000,000 of [178] its first mortgage bonds outstanding. Additional bonds were not issued by the debtor until 1921, in which year $4,180,000 of its first mortgage bonds were sold at 85 and the $3,553,000 realized was used to purchase properties of the Sacramento Northern Railroad through the Sacramento Northern Railway. As of September 30, 1936, a total of $19,290,100 face amount of the debtor's first mortgage bonds were outstanding, the additional bonds having been issued for the following purposes: $3,000,000 in 1922 to retire outstanding equipment trust certificates; $4,000,000 in 1925 for general capital purposes; $2,600,000 in 1926 for general capital purposes; $2,950,000 in 1927 in substitution of the $3,000,000 issued in 1922 then outstanding in the aggregate

amount of $2,950,000; $5,000,000 in 1929 for general capital purposes; $572,800 in 1930 for purchase of San Francisco & Railroad Company properties through Sacramento Northern Railway; $5,000,000 in 1930 for general capital purposes of debtor and of subsidiary, Sacramento Northern Railway; $5,000,000 in 1931 and 1932 to finance in part construction and/or acquisition of Northern California Extension; and $645,000 in 1931 for general capital purposes. Interest on the bonds was paid on the semi-annual interest payment dates until March 1, 1934. The interest payment due on that date was not paid, and no interest payment has since been made.

Since its organization the debtor has created equipment trust obligations in the total amount of $13,400,000; there being $1,930,000 face amount of such obligations outstanding as of September 30, 1936, and on that date there also remained unpaid on a conditional sale lease of locomotives $314,665. All interest and principal payments on equipment trusts and conditional sale lease have been met. [179]

The debtor, in addition to the $5,000,000 of its first mortgage bonds, issued in 1931 and 1932, $5,000,000 of gold debentures to finance the cost of its Northern California Extension. These debentures were retired in 1932 through the issue of notes payable to A. C. James Co., for $4,999,800 ($200 being paid in cash), which notes were secured by $6,249,-

500 face amount of the debtor's general and refunding mortgage, series "A", 5 per cent gold bonds. The latter bonds were issued under the debtor's general and refunding mortgage, dated January 1, 1932, The Chase National Bank of the City of New York, trustee, authorizing a maximum of $100,000,000 of general and refunding bonds to be at any one time outstanding, but reserving $49,292,300 principal amount thereof for the purpose of refunding, paying, purchasing, redeeming or otherwise acquiring the first mortgage bonds then outstanding in that amount, and reserved $5,000,000 principal amount thereof against the outstanding debentures. The reserved bonds were issuable upon the retirement of the securities against which they were reserved.

None of the debtor's general and refunding bonds have been sold; but $18,999,500 principal amount have been nominally issued and are nominally outstanding solely as collateral to secure certain of the debtor's promissory notes. In November, 1936, The Chase National Bank resigned as trustee of the mortgage and the Irving Trust Company of New York City, was appointed successor trustee.

Present Financial Structure

The trustees' balance sheet as of November 30, 1916, shows total assets of $171,096,992.80. Investments included therein total $160,868,348.32. Of total investments, road and equipment amounts to $139,371,768.08; sinking fund and deposits, $124,-

155.96; and miscellaneous physical property $3,670,041.32. Investments in affiliated companies pledged under the debtor's first mortgage [180] amount to $10,224,421.66 and consist of $99,500.40 for capital stock of The Salt Lake City Union Depot and Railroad Co., $999,500.00 for capital stock of Sacramento Northern Railway, $450,000.00 for capital stock of Deep Creek Railroad Company, $175,220.75 for capital stock of Standard Realty and Development Company, $3,975,456.13 for Sacramento Northern Railroad 5 per cent twenty year gold bonds, and $4,524,744.38 notes receivable from Sacramento Northern Railway. Investments in affiliated companies pledged under the debtor's general and refunding mortgage amount to $3,159,061.78, and consist of $1,223,848.94 capital stock of Tidewater Southern Railway Company, $128,651.56 common stock, $264,715.47 preferred stock and $270,375.50 first mortgage 5 per cent gold bonds of Central California Traction Company, $1,318.63 capital stock of other companies, and $804,551.68 notes receivable from Tidewater Southern Railway Company, Standard Realty and Development Company, and Deep Creek Railroad Company. Investments in affiliated companies unpledged amount to $4,240,257.27, and consist of $3,405,356.42 advances to Sacramento Northern Railway, $770,834.73 advances to other affiliated companies, $5,500.00 capital stock of Alameda Belt Line, and $58,566.12 due from The Railroad Credit Corporation. Other investments amount to $78,678.25, and consist principally of

$74,472.88 advances to Railway Equipment and Realty Co. Ltd.

Current assets are shown in the amount of $7,653,809.28, and comprise $3,290,601.55 cash, $4,722.28 special deposits, $176,241.25 traffic and car service balances receivable, $189,208.77 net balances receivable from agents and conductors, $814,321.64 miscellaneous accounts receivable, $2,113,166.60 materials and supplies, $1,054,447.57 interest receivable from affiliated companies, and other current assets of $10,099.62. Of the $1,054,447.57 interest receivable, $369,287.81 is accrued interest [181] on Sacramento Northern Railroad bonds, $420,729.87 is accrued interest on Sacramento Northern Railway notes receivable, $224,453.74 is accrued interest on Sacramento Northern Railway advances, and the remainder accrued interest on advances to other affiliates and notes receivable.

Deferred assets are shown in the amount of $141,222.55 and unadjusted debits in the amount of $2,433,612.65. The latter item consists of $24,516.77 rents and insurance premiums paid in advance, $1,266,699.29 discount on funded debt, and other unadjusted debits $1,142,396.59.

Liabilities shown on the balance sheet of the same date are capital stock, $75,800,000.00 consisting of $47,500,000.00 common and $28,300,000.00 preferred stock. Total long-term debt is shown in the amount of $69,476,379.26. Included therein is $59,504,805.56 funded debt unmatured, consisting of $49,290,100.00 first mortgage 5 per cent gold bonds, $4,999,800.00

notes payable to A. C. James Company, $2,963,000.00 notes payable to Reconstruction Finance Corporation, $314,665.00 Baldwin Locomotive Works locomotive lease, $80,240.56 The Pullman Company —purchase of lounge cars, and $1,857,000.00 equipment trust certificates. There is also included in long-term debt $3,000,000.00 trustee's certificates, and $6,971,573.70 non-negotiable debt to affiliated companies, of which latter amount $6,915,115.37 is due The Western Pacific Railroad Corporation.

Total current liabilities are shown in the amount of $14,288,810.44. Included therein are $2,452,875.24 loans and bills payable, consisting of notes payable to the Railroad Credit Corporation, $849,649.23 traffic and car service balances payable, $1,159,297.40 audited accounts and wages payable, $278,729.95 miscellaneous accounts payable, of which $203,450.09 are United States [182] Federal Retirement tax employees deduction, and $8,606,565.43 interest matured unpaid. The latter amount consists of $97,069.29 interest on The Railroad Credit Corporation notes, $406,988.88 interest on Reconstruction Finance Corporation notes, $687,472.50 interest on A. C. James Co. notes, $18,590.00 interest on equipment trust certificates, and $7,396,444.78 interest on first mortgage 5 per cent gold bonds. There are also included in the total current liabilities $761,834.34 accrued unmatured interest, $2,079.16 accrued unmatured rents, and $177,749.69 other current liabilities.

Total deferred liabilities are shown in the amount of $1,153.68, and total unadjusted credits in the amount of $11,643,121.37. The latter amount is comprised of $479,026.00 tax liability, $11,053,713.23 accrued depreciation on equipment, and $110,382.14 other unadjusted credits.

The liabilities above mentioned amount to a total of $171,209,464.75. Two additional items totaling $7,171,169.07, described as surplus-investment in road equipment and cash materials and other property purchased, representing value of Western Pacific Railway property purchased in excess of cash paid and for value of capital stock issued in exchange for same, are shown also on the liability side of the balance sheet. This amount added to the figure of $171,209,464.75 produces an amount of $178,380,633.82.

The balance sheet shows a deficit of $7,283,641.02 in corporate surplus. This consists of appropriated surplus amounting to $12,072,584.18, represented principally by additions to property through income and surplus and an accumulated debit balance in profit and loss of $19,356,225.20.

Rehabilitation Program

By reports and orders of March 5, and October 15, 1936, and January 25, 1937, the Commission granted authority to the debtor's [183] trustees to issue not exceeding $6,700,000 of trustee's certificates and to assume obligation and liability in respect of not exceeding $2,320,000 of equipment-trust

certificates: 212 I.C.C. 356, 217 I.C.C. 393, 217 I.C.C. 395, 217 I.C.C. 777. The proceeds from the sale of those securities were to be used in the rehabilitation and improvement of the debtor's fixed plan and existing motive power and cars, and the acquisition of additional equipment. Studies by the debtor, the Reconstruction Finance Corporation and the bondholders' committee show the necessity of expending approximately $13,375,906 over a period of three years for such purposes in order to place the debtor in proper physical condition to meet the reasonable requirements of existing and future traffic. Under authority of the court, the trustees have initiated the rehabilitation program and it is well under way.

The debtor estimates that $9,500,000 of new money, exclusive of the $2,320,000 of equipment-trust certificates, will be required by the reorganized company for the purpose of retiring outstanding trustees' certificates and completing the rehabilitation of the debtor's property. The necessary new money is to be raised by the sale of bonds by the reorganized company.

Under the Commission's accounting rules a part of the rehabilitation expenditures is chargeable to operating expenses. The trustee's report that $1,585,530 of the rehabilitation expenditures were included in the debtor's operating expenses for 1936. The inclusion of these extraordinary expenses with the debtor's normal expenses obviously reduces the showing of net income available for interest and other charges in that year.

Traffic and Revenue

The main line of the debtor's railroad extending from Oakland, Calif., to Salt Lake City, Utah, forms an important part of a through [184] route from the Pacific Coast to Chicago, Illinois, and other important Middle Western points. Fast through schedules are maintained by the debtor and the Denver & Rio Grande Western Railroad and Missouri Pacific Railroad Company, with which companies the debtor has close affiliations. Its line also connects with the Atchison, Topeka & Santa Fe Railroad at Stockton, Calif., and with the Great Northern Railroad Company at Bieber, Calif., thus forming a link in a north and south route on the Pacific Coast. The latter route is comparatively new, having been established by the extension of the debtor's line northward from Keddie to Bieber, known as the Northern California Extension, and the extension of the line of the Great Northern southward from Klamath Falls, Oregon, to Bieber in the latter part of 1931.

Although operations over the debtor's Northern California Extension commenced in the depth of the depression considerable traffic has moved over it from the start. Traffic over this extension and revenue derived therefrom is, therefore, considered separately from the debtor's other traffic and revenues. During the years 1924 to 1929, inclusive, the debtor and its subsidiary, Sacramento Northern Railway, had an agreement with the Southern Pacific Company for the transportation for the South-

ern Pacific of Certain carload traffic between Chico, Calif., and Weso, Nevada, for $60 per car, of which the debtor received $54 per car. This agreement was terminated at the end of 1929, and since the tonnage moved under this agreement and the revenue therefrom was quite large, the statistical data shown below relating to the debtor's traffic have been adjusted by excluding the freight moved under that agreement.

Freight traffic handled and freight revenue received by the [185] debtor for the years 1923 to 1935, inclusive, excluding traffic and revenue under the Chico-Weso Bridge agreement and via Northern California Extension, was as follows:

Year	Cars	Tons	Revenue	Revenue Per Ton	Percent of Increase or Decrease Over or Under Preceding Year	
					Tons	Revenue
1923	96,531	2,875,108	$10,513,455	$3.66	—	—
1924	98,297	2,854,602	10,562,340	3.69	—0.7	—0.5
1925	113,633	3,198,214	11,736,434	3.67	+12.0	+11.1
1926	120,545	3,326,637	12,252,189	3.68	+4.0	+4.4
1927	121,071	3,486,668	12,697,985	3.64	+4.8	+3.6
1928	124,110	3,567,798	13,887,953	3.89	+2.3	+9.4
1929	124,181	3,616,927	14,287,250	3.95	+1.4	+2.9
1930	131,242	3,776,046	13,796,125	3.65	+4.4	—3.4
1931	106,321	3,070,577	11,078,891	3.61	—18.7	—19.7
1932	83,549	2,330,505	8,558,209	3.67	—24.1	—22.8
1933	83,957	2,359,810	8,520,315	3.61	+1.3	—0.4
1934	93,115	2,616,182	9,173,115	3.51	+10.9	+7.7
1935	92,902	2,489,273	9,910,386	3.98	—4.9	+8.0

Agricultural and manufactured and miscellaneous products comprised the greater part of the traffic moving over the debtor's line from Salt Like City

to Oakland. In the period 1928 to 1935, inclusive, for example, of the total carloads of commodities carried, manufactured and miscellaneous products constituted 33⅓ percent, and agricultural products 33⅓ percent. Forest products accounted for 7½ percent, mineral products 19⅔ percent, and animal products 6 percent. Of the total freight revenue received from the transportation of this freight, approximately 40 percent was derived from manufactured products, 28 percent from agricultural products, 5 percent from forest products, 13½ percent from mineral products, 5⅔ percent from animal products, and the remainder from L.C.L. freight.

The above tabulation shows that the debtor's freight traffic for 1930, amounting to 3,776,946 tons, was the greatest for any of the years. It moved an average of 2,573,269 tons in the following five years, 1931-1935, inclusive, a decrease of 32 percent as [186] compared with 1930. During the same period, agricultural products transported declined an average of 20 percent, animal products 16.7 percent, mineral products 42.2 percent, forest products 44.4 percent, manufactured products 28 percent, and L.C.L. freight 29.7 percent as compared with 1930.

Freight carried in 1935 amounted to 2,489,273 tons, a decrease of 35-percent under 1930. In 1935, traffic in agricultural products declined 25.1 percent, animal products 27.9 percent, mineral products 51.4 percent, forest products 45.6 percent, manufactured products 20.6 percent, and L.C.L. freight 20.8 percent under 1930.

Revenue from freight in 1930 amounted to $13,796,125. During the period 1931-1935, inclusive, freight revenue averaged $9,448,183, a decline of 32.3 percent as compared with 1930. In the same period revenue from agricultural products declined an average of 29.3 percent, animal products 20.8 percent, mineral products 60.9 percent, manufactured products 31.1 percent, and L.C.L. freight 28.2 percent.

Freight revenue amounted to $9,910,386 in 1935, a decrease of 28.9 percent as compared with 1930. In 1935, revenue received from agricultural products decreased 28 percent, animal products 34.7 percent, mineral products 43.4 percent, forest products 40.3 percent, manufactured products 19.6 percent, and L.C.L. freight 37.2 percent under 1930.

Forty-three percent or 1,637,984 tons of the debtor's freight traffic in 1930 consisted of traffic interchanged with the Denver & Rio Grande Western, Oregon Short Line and Union Pacific. During the period 1931-1935, inclusive, traffic interchanged with those lines averaged 1,196,971 tons, or a decrease of 20 percent under 1930. For the year 1935, traffic interchanged with the same lines amounted to 1,381,186 tons, or a decrease of 15 percent under 1930. [187] It should be noted also that for many years the debtor was dependent upon connections for the greater part of its traffic, and although to a less degree than formerly, it still receives more than one-half of its total freight from connecting car-

riers, and approximately one-third of it is received from and delivered to connections.

The debtor estimates that revenue from freight moving over its line from Oakland to Salt Lake City will amount to $10,084,951 in 1936, $10,857,252 in 1937, $11,629,553 in 1938, $12,518,672 in 1939, and $13,747,996 in 1940. The latter amount is an increase of $3,837,610, or 38.7 percent, over 1935 revenue, and approximately equals that received in 1930.

Freight moved over the Northern California extension in 1932 amounted to 340,107 tons, and $1,098,016 revenue was derived therefrom. For the year 1933, tonnage and revenue amounted to 396,862 tons and $1,491,466 revenue, in 1934, to 596,378 tons and $2,119,427 revenue and in 1935 to 639,980 tons and $2,289,858 revenue. The principal commodities carried consisted of forest, manufactured and agricultural products. The debtor estimates that revenue from freight moved over this line will amount to $2,550,524 in 1936, $2,973,750 in 1937, $3,406,978 in 1938, $3,819,559 in 1939, and $4,171,625 in 1940. The latter amount is an increase of $1,881,767 or 82 percent over 1935 revenue.

Total revenue to be derived from freight in the period 1936 to 1940, inclusive, is estimated by the debtor to amount to $12,635,475 in 1936, $13,831,002 in 1937, $15,036,531 in 1938, $16,338,231 in 1939, and $17,919,621 in 1940. This would be an increase of 3.5 percent in 1936 over 1935, 13.3 percent in 1937, 23.3 percent in 1938, 33.9 percent in 1939, and 46.8 percent in 1940.

A witness for the debtor testified that the increased revenues estimated for the future were based on expected increases in traffic [188] and freight rates. The drastic decline in revenues recently suffered by the debtor, in the opinion of this witness, resulted not only from the past depression but, also, to intense competition from water and motor carriers.

The debtor and other lines with which it has a joint freight rate arrangement have water competition on transcontinental traffic via the Panama Canal between the Pacific Coast and Atlantic and Gulf ports, and in connection with canal lines and inland waterways. There is also strong competition coastwise between California and Washington. It was the opinion of the debtor's witness that increased operating expenses would compel water carriers to increase rates and thereby would divert traffic to railroads. The witness also was of the opinion that railroad freight rates as a whole are as low today as they will be for a number of years, and the tendency in the immediate future will be towards a higher level of rates.

This witness stated that prior to the advent of motor truck competition, practically all the debtor's traffic between California and Utah moved under class rates, which for the first four classes were $2.16½, $1.84½, $1.62½ and $1.35 per 100 pounds between San Francisco and Utah common points. Motor truck competition made it necessary for the debtor to publish pick-up and delivery rates of $1.00

and $1.25 per 100 pounds, on a great many commodities, and today at least 90 percent of such traffic of the debtor moves under the reduced rates. It was his opinion that effective regulation of motor carriers would tend to divert traffic to the railroads.

Passenger, mail, express and other related revenues received by the debtor for the years 1923 to 1935, inclusive were as follows:

Year	Revenues	Year	Revenues
1923	$3,250,677	1929	$2,135,828
1924	2,891,137	1930	1,738,881
1925	2,697,899	1931	1,288,093
1926	2,515,900	1932	645,760
1927	2,350,320	1933	433,959
1928	2,217,421	1934	457,481
		1935	559,816

[189]

It thus appears that such revenues steadily declined from 1923 to 1934, the decrease amounting to 79.7 percent in 1933 under 1923. In 1935 such revenues had increased 22.5 percent over 1933, but were still 73.8 percent below those for 1923. The debtor estimates that revenues from these sources will amount to $654,710 in 1936, $1,063,058 in 1937, $1,299,060 in 1938, $1,860,815 in 1939, and $1,535,372 in 1940. A witness for the debtor testified that the debtor expected to inaugurate additional passenger service between San Francisco and Salt Lake City in May, 1937, only one passenger train daily

between those points having been operated since April 24, 1932. He stated that by reason of shortening of schedules and greater advertising of the improved service of the Denver & Rio Grande Western via the Dotsero Cut-Off, which road with the debtor provides one of the most scenic trips between California and the East, passenger revenues should be materially increased.

The debtor filed a forecast that total railway operating revenues would amount to $13,438,342 in 1936, $15,053,934 in 1937, $16,507,579 in 1938, $18,383,490 in 1939, and $19,654,935 in 1940.

As a bridge line to and from the Pacific Coast the debtor's railroad may as a result of the completion of the Dotsero Cut-off in 1934, come into still greater use. The railroad distance between Denver and Salt Lake City and points east of the former and west of the latter is greatly shortened by use of this Dotsero Cut-off and the Denver and Salt Lake's Moffet Tunnel. The rehabilitation program of the debtor's road now in progress and the betterment of its equipment should enable it to give improved service. As a consequence the debtor and the lines with which it is closely affiliated should be in better position to compete with the Southern Pacific and Union Pacific for transcontinental traffic. Increased traffic over its Northern California Extension reasonably may be expected. Greater through and local traffic should result from a further revival in general business conditions. Whether revenues in the future will reach the level estimated by the

debtor in 1940, is open to doubt. To the extent that the debtor relies upon increased freight rates, and a recovery of the traffic lost to competing forms of transportation under present state and federal regulatory conditions, its estimates rest upon [190] uncertainties.

Traffic and revenue of subsidiaries

The main line of the Sacramento Northern Railway extends from Oakland to Chico, Calif., and both freight and passenger services are rendered over it. Its freight traffic consists largely of agricultural, manufactured and miscellaneous and mineral products.

Freight traffic and revenue derived therefrom for the years 1930 to 1935, inclusive, were as follows:

Year	Tons	Revenue
1930	840,306	$1,234,696
1931	743,220	971,482
1932	629,792	769,412
1933	649,554	717,435
1934	704,472	760,033
1935	697,464	760,528

A witness for the debtor testified that the decline in traffic was occasioned primarily by competition of motor trucks, depressed economic conditions, and the displacement of coal by oil and natural gas. It was his opinion, however, that the Sacramento Northern's freight earnings in the future should increase quite materially since it was reasonable to expect an improvement in the market demand for

California fruits and vegetables, and that improved facilities recently had been made available to the carrier's shippers. He further testified that general business conditions were improving and that the carrier was in a better position to meet truck competition. The witness was of the opinion that the carrier's gross revenues from transportation and other railway operations would amount to $1,322,676 in 1936, $1,417,458 in 1937, $1,528,492 in 1938, $1,616,891 in 1939, and $1,689,038 in 1940. The latter amount is a 38.3 percent increase over gross revenues [191] for 1935, and is approximately $40,775 greater than the actual gross revenue for 1931, but is approximately $394,000 less than the actual for 1930.

The main line of the Tidewater Southern Railway extends from Stockton to Hillmar, Calif., serving a territory predominantly agricultural. The carrier's freight traffic consisted principally of agricultural products and manufactured and miscellaneous commodities.

Freight traffic and revenue derived therefrom for the years 1930 to 1935, inclusive, were as follows:

Year	Tons	Revenue
1930	199,607	$425,506
1931	227,856	264,796
1932	249,820	230,450
1933	255,833	202,434
1934	266,274	271,519
1935	211,264	272,299

A witness for the debtor testified that the Tidewater Southern's total railway operating revenues would amount to $287,136 in 1936, slightly higher than those in 1935, but that since the small area served by the line does not afford much opportunity for increased acreage production, earnings are not expected to increase materially in the future.

The Deep Creek Railroad Company operates 44.6 miles south from Wendover, Utah, serving a territory devoted principally to mining. Its freight revenues are dependent largely on mining activities in the Gold Hill District at the southerly terminus of the line, although some revenue is derived from the movement of sheep to winter ranges in the fall and out in the spring. [192]

A witness for the debtor testified that the revenues of this line have in the past few years been nominal, but with a revival in mining it is possible for a traffic to develop that would increase materially the revenue. For example, in 1923 revenues were $42,385, in 1924, $71,670, and in 1925, $40,268. In 1934 and 1935, however, they were only $7,383 and $5,355, respectively. For the next several years revenues are not expected to increase.

Earnings Available for Charges

The reported consolidated net income of the debtor's system available for payment of interest on funded debt for the years 1926-1935, inclusive, was $4,759,282 in 1926, $2,674,494 in 1927, $2,964,371 in 1928, $2,529,846 in 1929, $1,552,487 in 1930, $486,-

708 deficit in 1931, $252,706 in 1932, $674,007 in 1933, $1,084,244 in 1934, and $805,589 in 1935. Operating ratio percentages for the same years were, respectively, 70.3, 79.2, 80.3, 83.2, 84, 91, 85.8, 83, 81.1, and 83.7.

It would appear, however, that before the foregoing amounts may be considered indicative of future earnings they are subject to adjustment. It was testified, for example, that a substantial amount of deferred maintenance had been permitted to accrue in debtor's property by 1927. Beginning in that year and continuing into 1931, considerable sums were expended yearly in an effort to overcome existing deferred maintenance. It was stated that $687,605 was so expended in 1927, $1,305,681 in 1928, $1,075,330 in 1929, $711,462 in 1930, and $122,735 in 1931. This program of rehabilitation was discontinued in 1931 by reason of drastically declining revenues, and it was testified that approximately $5,000,000 of deferred maintenance still existed in the debtor's property at the end of 1935. Witnesses for the debtor were unable [193] to allocate any specific amount for undermaintenance to any of the years shows above.

It was further pointed out that in arriving at the foregoing figures an average of approximately $140,000 per annum had been deducted for amortization of bond discount and that deduction would not be required following reorganization.

There also are reflected in the above earnings for the years 1926-1929, inclusive, substantial amounts received by the debtor under the Chico-Weso agreement with the Southern Pacific for movement of Southern Pacific cars, which was terminated at the close of 1929. On the other hand revenues from traffic over the debtor's Northern California Extension are not reflected in the net income available for interest shown for the years 1926-1931, inclusive, and future earnings from that source are not reasonably reflected in the amounts shows for the years 1932 and 1933.

The above amounts do not reflect the effect on future income of taxes under the Social Security Act, approved August 14, 1935, and the Railroad Retirement Act and related Excise Tax Act, approved August 29, 1935, which impose additional taxes upon carriers. It is estimated by the Commission's Bureau of Accounts that the debtor's proportion of such taxes would have amounted to approximately $537,653 in 1930, $488,633 in 1931, $365,498 in 1932, $331,149 in 1933, and $257,345 in 1934. While data of record are insufficient to permit accurate mathematical adjustments of the amounts reported available for interest in the years 1926-1935, inclusive, in the light of the above-mentioned factors, it is apparent that such amounts should be considered in determining the debtor's probable future earnings available for interest and dividends.

For the year ended December 31, 1936, total operating revenues of the debtor's system were reported as $16,547,344 and total [194] operating expenses as $14,449,275, of which $1,585,530 was attributed to the debtor's current program of rehabilitation. If these extraordinary expenditures were eliminated, the consolidated net income of the system available for interest on funded debt for the year would be $1,766,632, instead of $181,102. For the year 1935 (when no substantial amount of expenditures was made on account of the rehabilitation program) net income available for interest was $805,589.

In statements filed in this proceeding the debtor has estimated that total operating revenues of its system for the years 1936-1940, inclusive, will be, respectively, $15,050,200, $16,761,200, $18,325,200, $20,288,200, and $21,632,200. Excluding operating charges incident to its rehabilitation program, the estimated consolidated income available for interest on funded debt for the same years is respectively, $1,524,086, $2,342,586, $2,929,586, $3,652,486, and $4,056,486, or an average of $2,901,040. Operating ratios estimated for the same years are, respectively, 77.3 per cent, 75.1 per cent, 72.4 per cent, 70.8 per cent, and 69.6 per cent. Expenditures incident to the debtor's rehabilitation program and which normally are chargeable to operating expense under the Commission's accounting rules, are estimated by the debtor at $1,747,384 in 1936, $2,021,312 in 1937, and $1,280,074 in 1938, which sums are included in the foregoing estimates.

These estimates are based on assumed revenues, previously analyzed; and assumed operating ratios, which, of course, are influenced greatly by operating revenues. Future expenditures for both maintenance and transportation should be affected favorably by the debtor's current rehabilitation program. It should be noted, however, that the estimates, according to the testimony of witnesses [195] for the debtor, are based not only upon the assumption that there will be increases in rates but that there will be no increase in operating costs, either through prices of materials or wages. Furthermore, the estimates of income available for interest on funded debt omit deductions of any amount for the creation and maintenance of the various funds proposed under the debtor's plan.

Although the net income available for interest of the debtor for the year 1936 exceeded its estimate for 1936, the debtor's estimates of net income available for interest for the future, when considered in the light of its past earning experience, appear unduly optimistic. It is reasonably certain that some traffic diverted in recent years to motor carriers will not be regained. Strenuous competition must be expected not only from those carriers but from water carriers and, especially, from other strong railroads serving the same territory as the debtor. This latter competition compels the movement of trains on schedule regardless of the load. Long stretches of the territory through which the debtor's road extends is sparsely populated and productive of little

or no traffic. The debtor's volume of traffic is subject to wide fluctuations, and the topography of the country entails expensive helper service over sharp summits. These factors have and necessarily will have considerable effect on the debtor's income.

Value for Rate-making Purposes

Under section 19a of the Interstate Commerce Act, the Commission, by division 1, in Western Pacific Ry. Co., 29 Val. Rep. 239, reported the value for rate-making purposes of the property owned by the debtor to be $63,321,000 as of June 30, 1914. In similar proceedings, the Commission, by division 1, reported the value for rate-making purposes of the properties of the debtor's wholly owned [196] subsidiaries, Sacramento Northern Railway, Tidewater Southern Railway Company and Deep Creek Railroad Company in the total amount of $18,336,529 as of their respective valuation dates. If there be added to the above amounts capital expenditures between valuation dates and December 31, 1935, the total would be $144,619,851.

Classes of Creditors and Stockholders

Pursuant to the provisions of the Bankruptcy Act, the district court entered an order, on August 20, 1935, dividing creditors and stockholders for the purposes of the plan and its acceptance, into the following classes: Class 1, first mortgage bonds; Class 2, general and refunding bonds; Class 3, debtor's secured promissory notes to A. C. James Co.; Class 4, debtor's secured promissory notes to Reconstruction Finance Corporation; Class 5, debtor's

secured promissory notes to the Railroad Credit Corporation; Class 6, equipment obligations to Baldwin Locomotive Works (assigned to Fidelity-Philadelphia Trust Co., trustees); Class 7, equipment trust certificates under agreement March 1, 1923; Class 8, equipment trust certificates under agreement dated March 15, 1924; Class 9, equipment trust certificates under agreement dated May 1, 1929; Class 10, debtor's obligations as to advances made on open account by the Western Pacific Railroad Corporation; Class 11; debtor's obligations as to advances made on open account by The Western Realty Company; Class 12, debtor's preferred stock; Class 13, debtor's common stock; Class 14, all other claims, obligations and liabilities not hereinbefore specifically described.

As of December 31, 1936, Class 1 items consisted of $49,290,100 principal amount of first mortgage 5 percent bonds, on which unpaid interest amounted to $8,214,766; Class 2 items consisted of $18,999,500 principal amount of general and refunding mortgage 5 percent bonds, entirely pledged as collateral for certain of the [197] debtor's notes; Class 3 items consisted of $4,999,800 face amount of notes to A. C. James Company, on which unpaid interest amounted to $749,970, and which are secured by $4,249,500 principal amount of debtor's general and refunding bonds, and a second lien upon $2,000,000 principal amount of the same issue of bonds held by the Railroad Credit Corporation; Class 4 items consisted of $2,963,000 face amount of notes

to the Reconstruction Finance Corporation, on which that corporation claims unpaid interest of $544,310, the notes being secured by $10,750,000 principal amount of debtor's general and refunding bonds, and voting trust certificates for half of the voting stock of The Denver and Rio Grande Western Railroad Company, and a second lien upon $2,000,000 principal amount of the same issue of bonds held by the Railroad Credit Corporation; Class 5 items consisted of $2,482,218 face amount of notes to the Railroad Credit Corporation, on which that corporation claims unpaid interest of $114,156; which notes are secured by $4,000,000 principal amount of debtor's general and refunding bonds, and a second lien upon the security held by the Reconstruction Finance Corporation, and an assignment of certain advances by The Western Pacific Railroad Corporation, and an assignment of the distributive share of the debtor under the Marshalling and Distributing Plan, 1931; Class 6, 7, 8 and 9 items consisted of various equipment obligations aggregating $2,048,190; Class 10 items consisted of $5,757,650 principal amount of advances to the debtor by The Western Pacific Railroad Corporation, on which unpaid interest amounted to $1,430,957; Class 11 item consisted of $50,000 principal amount of advances to the debtor by the Western Realty Company, on which unpaid interest amounted to $6,667; Class 12 items consisted of $28,300,000 par value of the debtor's preferred stock; Class 13 items consisted of [198] $47,500,000 par value of

the debtor's common stock; and Class 14 items consisted of various other claims not specifically described by the court.

Proposed Plans of Reorganization.

The capital structures proposed for the reorganized company in the three plans filed and which would result if modified in accordance with suggestions of the debtor during the hearing and on brief, the distribution of the new securities to be issued under the plans, and the main features thereof, are summarized below.

Existing equipment obligations would not be disturbed under any of the plans. As filed, the debtor's plan would become effective as of January 1, 1936. The debtor later suggested January 1, 1937, as the effective date the same as in the other plans.

The plan of reorganization originally submitted by the debtor contemplated the initial issue of $25,675,900 principal amount of new first mortgage 4 percent bonds, $41,774,796 principal amount of new 5½ percent income mortgage bonds (cumulative for the income period in which such interest is payable and for the 4 income periods next succeeding the income period in respect of which such interest is payable), of which $20,887,398 would be series A bonds, and $20,887,398 would be series B bonds, $8,092,709 principal amount of new non-cumulative junior lien 6 percent income bonds, or a total of $75,543,405 principal amount of bonds. The plan further provides that 926,622 shares of new no-

par common stock be authorized, of which 300,000 shares would be issued forthwith, and 626,622 shares would be reserved for issue upon conversion of $20,887,398 of the new income bonds.

Under the debtor's plan, its existing first mortgage 5 percent bonds would be exchanged for 30 percent of the new first mortgage 4 percent bonds, and 70 percent of new income mortgage 5½ percent [199] bonds plus additional income bonds equal in face amount to the unpaid interest. Ten million dollars of the new first mortgage 4 percent bonds would be sold at par to the Reconstruction Finance Corporation to provide new money for the reorganized company. In consideration of that purchase, the Reconstruction Finance Corporation would be given for its claim against the debtor treatment equivalent to that given to the holders of the existing first mortgage bonds.

The new junior lien income 4 percent bonds would be issued to the Railroad Credit Corporation and A. C. James Company in settlement of their claims, each to receive new bonds equal in fact amount to the principal of their claims plus unpaid interest.

All the new stock would be placed in a voting trust under which 3 voting trustees nominated by the debtor and approved by the bondholders' committee would act pursuant to a voting trust agreement which would be acceptable to the debtor and the bondholders' committee. The voting trust would continue until 10 years from the date of confirma-

tion of the plan. A majority of the debtor's board of directors would be nominees of the holders of income bonds, and as long as the Reconstruction Finance Corporation holds more than $500,000 of the first mortgage bonds, the voting trustees would elect to the board of directors a person designated or nominated by that corporation. In respect of the 300,000 shares of common stock immediately issuable under the plan and of the shares which may be issued on conversion of the income bonds, voting trust certificates would be issued. The certificates for 150,000 shares of the common stock would be placed in escrow with the trustee of the income mortgage and would be given to the holders of income mortgage bonds if, commencing April 1, 1941, full interest was not paid on the income bonds in respect of the next preceding income period for any [200] deficiency in payment of full interest at the price of $27.50 per share.

The debtor's plan further provided that there be created a contingency reserve fund of $500,000 to be available for the purpose of paying fixed interest charges, principal of and dividends on equipment obligations and operating expenses which could not otherwise be provided for without, in the opinion of the board of directors, unduly impairing free working capital. The fund would be created initially from the proceeds of the $10,000,000 of new first mortgage bonds to be sold in the reorganization, and thereafter maintained out of the net income remaining after the payment of fixed charges.

There would be created also out of available net income before the payment of interest on income bonds a capital fund to be applied for capital investments made in the calendar year in which the fund is set aside, and no additional securities would be issued against such expenditures. The amount set aside in the capital fund for any calendar year would not exceed $500,000 during the years 1936 to 1940, inclusive, $1,000,000 during the years 1941 to 1945, inclusive, and in all subsequent years not more than 3 percent of gross revenues.

Provision for a sinking fund in an amount not exceeding in any calendar year one-half of 1 percent of the principal amount of the new income bonds, Series A, also is made in the plan. The fund would be created and maintained out of net income remaining after payment of fixed charges, maintenance of the reserve fund, capital fund, and interest payments on income bonds, and would be applied to the redemption of the series A income bonds.

The debtor's plan also provides for an additional interest fund to be created and maintained out of net income remaining after [204] payment of fixed charges, payments in respect of the reserve fund and the capital fund, interest on income mortgage bonds and junior lien bonds. The fund would not exceed one year's interest on all outstanding first mortgage bonds and would be available only for the payment of interest on such bonds.

During the hearing and on brief, counsel for the debtor suggested that the debtor's plan be modified by providing that, (1) the rate of interest on all bonds be 4 percent per annum, (2) there be created sinking funds of not less than ½ percent or more than 1 percent for the redemption of all bonds, (3) the escrow agreement in respect of the 150,000 shares of common stock be modified so that there would not be a peremptory forfeiture on the due date of interest, because such interest may be paid in cash out of the available net income of the next four income periods, and be further modified so that there would be no forfeiture at all if the failure to earn interest was caused by excessive maintenance or undue capital expenditures, (4) the voting trust be eliminated from the plan, and (5) there be issued $7,245,274 par value of 4 percent noncumulative preferred stock to the Western Pacific Railroad Corporation and the Western Realty Company.

With the effective date of the plan as of January 1, 1937, and modified as suggested, the plan would provide for the initial issue of $25,675,900 principal amount of new first mortgage 4 percent bonds, $45,219,530 principal amount of new income mortgage 4 percent bonds, $8,386,040 principal amount of new junior lien income 4 percent bonds, or a total of $79,281,470 principal amount of bonds, $7,245,274 par value of new 4 percent preferred stock, and 300,000 shares of no par common stock.

Under the bondholders' plan, the reorganized company would issue initially $19,858,020, principal amount, of new first mortgage [202] 4 percent bonds, $19,716,040 principal amount of new income mortgage 5 percent bonds (cumulative against only 3 years income); or a total of $39,574,060 principal amount of new bonds. The plan further proposes the issue of $27,930,800 par value of new participating 6 percent preferred stock (cumulative only to the extent that dividends are earned), and not less than 339,995 shares nor more than 489,995 shares of new no par common stock.

The existing first mortgage 5 percent bonds would be exchanged 20 percent for new first mortgage 4 percent bonds, 40 percent for new income mortgage 5 percent bonds, and 40 percent for new participating 6 percent preferred stock, accrued interest also being commuted into the latter stock. As provided in the debtor's plan, $10,000,000 of the new first mortgage 4 percent bonds would be sold to provide new money for the reorganized company.

The claims of the Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company would be converted into the new common stock (taken at $100 per share) on the basis of the collateral pledged under the debtor's notes to those creditors. Such stock, amounting to 189,995 shares, would be deposited under an escrow agreement subjecting the stock to purchase warrants.

The Western Pacific Railroad Corporation would be allotted purchase warrants, entitling the holders thereof to purchase on or before December 1, 1941, all or any part of the 189,995 shares of the new common stock at the price of $62 per share, plus interest thereon at the rate of 4 percent per annum from January 1, 1937. In addition to its option under the escrow agreement the Western Pacific Railroad Corporation would be granted, through issue to it of subscription warrants, the first opportunity to provide the $10,000,000 of required new money, receiving therefor the $10,000,000 [203] new first mortgage 4 percent bonds and 150,000 shares of the new common stock.

To the extent that the Western Pacific Railroad Corporation should fail to exercise the subscription warrants, the bondholder's plan provides that the new money be provided upon less favorable terms to the debtor by the Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company; and to the extent that they in turn should fail to provide it, the plan provides that it be supplied upon still less favorable terms by the present first mortgage bondholders.

The bondholders' plan further provides that control of a majority of the board of directors of the reorganized company be vested in the new preferred stock until the reorganized company shall have demonstrated its capacity to pay a continuous return on that stock. A contingency reserve fund and a capital fund, similar in all respects to those proposed

by the debtor also are provided for in the bondholders' plan. It also provides for a one-half percent sinking fund for the redemption of the new income bonds, but only after payment of fixed and other contingent charges and the payment of dividends on preferred stock.

The plan submitted by the A. C. James Company proposes that the reorganized company issue initially $10,000,000 principal amount of new first mortgage 4 percent bonds, $49,290,100 principal amount of new general mortgage 4 percent income bonds (cumulative only to the extent that interest is earned), and $10,450,263 principal amount of new noncumulative 4 percent debentures (convertible into 150 percent of their principal amount in 6 percent preferred stock), or a total of $69,740,363 principal amount of new bonds and debentures. The preferred stock of the debtor, of which $28,300,000 par value is now outstanding, would be delivered to the debtor under this plan [204] and $5,807,650 par value of such stock would be reissued. The common stock of the debtor, now outstanding of the par value of $47,500,000, would be delivered to the debtor and be reissued.

The existing first mortgage 5 percent bonds would be exchanged for the new general mortgage 4 percent income bonds, with a bonus of $500 par value of common stock for each $1,000 bond. The new noncumulative 4 percent debentures would be allotted to the Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Com-

pany, and those creditors would be given also a bonus of $500 par value of common stock for each $1,000 of the debtor's notes owned by them. The $5,807,650 par value of preferred stock would be issued to the Western Pacific Railroad Corporation and the Western Realty Company in settlement of the principal amount of their claims against the debtor.

Under this plan all accrued interest upon all outstanding debt would be canceled.

The $10,000,000 principal amount of new first mortgage bonds would be sold to provide new money for the reorganized company and the Western Railroad Corporation would be given the right first to purchase such bonds, with a bonus at the rate of 15 shares of the common stock for each $1,000 first mortgage bond purchased.

No reserve capital or sinking funds are provided for under the James plan.

Each of the three plans sets forth in more or less detail the proposed manner of participation of the stockholders and creditors in the plan and the method of consummation. The debtor's plan provides that it shall not be declared operative or carried out until finally approved by the Commission and confirmed by the court after acceptance by the holders of each class or classes of securities or claims affected by the plan as shall be sufficient under the [205] provisions of the Bankruptcy Act. The James plan provides that it shall not be carried out until it shall have been approved by the

Commission and the court, pursuant to the requirements of the Bankruptcy Act, and until it shall have been accepted by two-thirds of the creditors of each class, and by two-thirds of the stock of each class. The bondholders' committee plan provides that the plan shall not be carried out until it shall have been accepted by the holders of at least two-thirds in principal amount of the debtor's outstanding first mortgage bonds, nor unless either (1) the plan shall have been accepted by creditors holding at least two-thirds in principal amount of the total allowed claims of such class, and by the holders of at least two-thirds of the stock of each class, or (2) provision shall have been made for the sale of the debtor's property at public auction at a fair upset price as determined by the court, and the payment to the non-assenting creditors of such class or the non-assenting stockholders of such class, of their aliquot portion of the proceeds of the sale of such property.

None of the proposed plans is agreed to by all the parties to the proceeding.

The debtor's plan is objected to by the bondholders' committee on the grounds that it proposes an unsound capital structure in that the ratio of debt to capital stock is disproportionate, and that the total of fixed and contingent interest charges proposed is excessive in the light of the debtor's past earning experience and probable future earnings. The James plan is objected to for the same reasons. The bondholders further contend that the debtor's

plan discriminates unfairly in favor of the Reconstruction Finance Corporation and against the first mortgage bondholders and the Railroad Credit Corporation in that it proposes to place the Reconstruction Finance Corporation on a parity with the present first mortgage [206] bondholders as compensation for furnishing the $10,000,000 of new money by the Finance Corporation. In proposing to give the A. C. James Company and the Railroad Credit Corporation securities on the basis of the principal amount of their notes, irrespective of the amount of their collateral security, the bondholders allege that the Railroad Credit Corporation is discriminated against. By granting all the new common stock of the reorganized company to the Western Pacific Railroad Corporation without requiring any contribution or sacrifice by that corporation to or in the reorganization, the bondholders allege that undue preference is proposed.

The James plan is further protested by the bondholders' committee on the grounds that it is discriminatory in that it does not provide any fixed interest obligations for the present first mortgage bonds; it proposes the issue of new securities having the sole first lien upon the property of the reorganized company exclusively to the Western Pacific Railroad Corporation along with a bonus of $150 par value of new common stock for each $100 bond; proposes the waiving of all accrued interest without any compensation therefor; disregards the relative priorities of the various creditors by giv-

ing the same bonus of new common stock; proposes no sinking funds for retirement of debt; makes the new bonds proposed to be given the present first mortgage bondholders mature in 1987 as against a maturity in 1977 for the obligations which are proposed to be given to the so-called junior creditors; and proposes to treat the claims of the Reconstruction Finance Corporation, the Railroad Credit Corporation and the A. C. James Company on the basis of the principal amounts of the notes rather than upon the basis of the collateral held. The bondholders' committee also objects to the James' plan proposal to give the Reconstruction Finance Corporation, the [207] Railroad Credit Corporation and the A. C. James Company the principal amount of their notes in new 4 percent debentures, convertible into 150 percent in principal amount of 6 percent preferred stock. The bondholders' committee points out that if the debentures are converted, the new preferred stock would rank in the scale of distribution of the reorganized company's earnings substantially at the same point at which interest would be paid upon the debentures, and that this would result in a 9 percent annual return upon the present claims; and also would operate to depress the value of the common stock of the reorganized company.

The bondholders' plan is objected to by the A. C. James Company on the grounds that it proposes an unsound capital structure in that it does not furnish appropriate vehicles for senior and junior

financing of future capital requirements; proposes an unduly complicated capital structure; does not preserve debt as debt; capitalizes unearned and unpaid interest as a permanent part of the capital structure; proposes for certain of the new securities to be issued excessive interest rates; and proposes excessive fixed charges. Certain of those objections also are advanced by that company to the debtor's plan. It further alleges that the bondholders' plan discriminates unfairly against the other creditors and in favor of the bondholders, and does not accord sufficient recognition to the debtor's equity. [208]

Conclusions

By the provision of subsection (b) of section 77 of the Bankruptcy Act, as amended, a plan of reorganization shall include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through the issue of new securities of any character or otherwise; shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; and shall provide adequate means for the execution of the plan. Subsection

(c) of section 77 provides that the judge shall approve the plan certified to the court by the Commission if satisfied, after hearing, and without hearing if no objections are filed, that the plan complies with the provisions of subsection (b), is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; that the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of the hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; that the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in [209] interest and by reorganization managers and committees or other representatives of creditors and stockholders, and the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection there-

with by trustees under indentures, depositaries, and such assistants as the Commission with the approval of the judge may especially employ, may be paid in securities provided for in the plan if those entitled thereto will accept such payment. The plan approved by the Commission must meet with these requirements of subsections (b) and (e) and be compatible with the public interest.

It will be observed that in so far as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization should not exceed a conservative valuation of the assets to be taken over by the reorganized company, and that proposed charges are within its probable earning power. It is of primary importance, therefore, to ascertain whether the capital structures proposed in the various plans are properly related to assets and earning power.

The aggregate capitalization, exclusive of no-par value stock, under the debtor's plan, if modified as suggested by its counsel, would amount to $88,-

574,934, or a reduction of $65,876,850 under its present debt and capitalization. Treating the proposed no-par value stock at $100 per share, the aggregate capitalization would amount to $118,574,934, or a reduction of $35,876,850. Fixed [210] interest bearing obligations would amount to $27,724,090, but total fixed and contingent interest bearing obligations would amount to $81,329,660, or an actual increase of $2,677,876 over present debt. The ratio of debt to total capitalization would be 68.6 percent. The fixed interest charges would be $1,113,509 per annum, or a decrease of $2,264,736 under present fixed charges, but total fixed and contingent charges, excluding charges on the so-called interest fund, would amount to $4,654,139 per annum, or an increase of $1,275,894 over present interest charges. With $289,811 dividends on preferred stock, a total of $4,943,950 would be required before payment of any dividends on common stock.

It is thus seen that under the debtor's plan existing debt is preserved as debt although a larger amount of interest and other charges are made dependent upon earnings. While such provisions might afford temporary relief, the debtor still would be faced with debt maturities which, if they occurred in a period of low earning power or if the debtor had consistently failed to earn the interest charges on the principal, would be difficult or impossible to refund. A capital structure proposing an increase of $1,275,894 in charges when for several years past present charges have not been met,

cannot be considered as sound or in the public interest.

The bondholders' plan, exclusive of no-par value stock, contemplates an aggregate capitalization of $69,553,056, or a reduction of $84,898,728 under the debtor's present debt and capitalization. Treating the proposed no-par value stock at $100 per share, the aggregate capitalization would be a minimum of $103,552,556, and a maximum of $118,552,556, or a reduction of $50,899,228 or $35,899,228 respectively under present debt and capitalization. Fixed interest bearing obligations would amount to $21,906,210, and the total of fixed and contingent interest bearing obligations would [211] be $41,622,250, or a reduction of $37,029,534 under present debt. The ratio of debt to total capitalization would be 41 percent or 35 percent. Fixed interest charges would be $880,793 per annum, or a reduction of $2,497,452, and total fixed and contingent charges $3,063,755 or a reduction of $314,490 below present interest charges. Including dividends of $1,675,848 on preferred stock, a total of $4,739,603 would be required before any dividends could be paid on common stock. Total charges of $4,542,443 would have to be met before any amount could be applied to the proposed sinking fund for income bonds.

Under the James plan, the total capitalization would be $125,096,203, or a reduction of $29,355,581 under present debt and capitalization. Fixed interest bearing obligations would amount to $12,048,190, or a reduction of $66,603,594, but total fixed

and contingent debt would amount to $71,788,553, or a reduction of only $6,863,131 under present debt. The ratio of debt to total capitalization would be 57 percent. While fixed interest charges of only $486,473, or a reduction of $2,891,772, are proposed, total fixed and contingent interest would amount to $2,876,088, exclusive of any provisions for capital sinking funds. It is thus seen that the James plan proposes a debt structure quite similar to that proposed by the debtor.

Considering the past and present earning power of the debtor on the basis of the facts heretofore recited with respect to traffic and earnings, the Commission should find that none of the debt structures, as proposed in the plans before it, should be approved as compatible with sound financing and the public interest.

From a consideration of the data herein set out, it is clear that the effect of adjusting the earnings of the debtor's system available for interest during the period 1931 to 1935, inclusive, to reflect normal maintenance, social security and retirement legislation [212] now in effect, and by elimination of amortization of bond discount included in the accounts, would be to show deficits in earnings available for interest amounting to approximately $850,000 in 1931 and $400,000 in 1932, and practically no earnings would be available in 1933, $500,000 in 1934, and $250,000 in 1935. But limitation of the fixed charges of the reorganized company on the basis of such hypothetical adjustments can hardly

be justified, since other factors, now unknown, tending to increase net earnings may later affect the situation. Further, limitation of fixed charges in this case on the basis of the minimum of earnings shown to have been available would appear too severe and an average of the available earnings over a period in which the company might be expected to finance its need through short term borrowing seems reasonable. It is observed that after substantial earnings in 1930 and with deficits in earnings available in 1931 and 1932, the debtor earned in 1933 the sum of $674,007 for fixed charges. And the adjusted earnings would show after substantial earnings in 1930, deficits or no earnings in the next three years, and available earnings of close to $500,000 in 1934. These data cover the critical period through which the debtor has recently passed, and indicate that fixed charges of $500,000 could have been paid with reasonable support from the banks. They show equally clearly that no fixed charges in excess of that approximate sum should be carried, since actual earnings were insufficient for three consecutive years, to pay substantially more than $500,000, and the adjusted earnings would have been insufficient for four years in succession.

With annual interest charges on existing equipment obligations amounting to $86,473 per annum, it is recommended that the plan approved by the Commission provide for the immediate issue of not to exceed $10,000,000, principal amount, of new

first mortgage bonds, [213] and that no other fixed interest obligations be permitted. These bonds should be secured by a new first mortgage which should be a first lien upon all property, real and personal, and equipment of the reorganized company now pledged under existing mortgages of the debtor. To facilitate future capital financing, the total authorized issue of bonds thereunder should be limited to $50,000,000, of which $10,000,000 should be sold to provide the new money required in the reorganization, and the remainder reserved to be issued to provide for, or to reimburse the reorganized company for expenditures for additions, betterments, improvements or extensions made after the effective date of the reorganization, in a principal amount not exceeding 75 percent of the actual cost of such additions, betterments, improvements or extensions. The bonds should mature in 30 years, bear interest at the rate of 4 percent per annum payable semi-annually, and be redeemable, in whole or in part, on any interest payment date upon 30 days notice, at their principal amount and accrued interest.

Considering the limited amount of fixed interest bonds recommended herein, there would seem to be no real reason for the creation and maintenance of the so-called contingency reserve fund of $500,000 to be available for the payment of interest on the new first mortgage bonds as proposed in the debtor's and bondholders' plans. It is recommended,

therefore, that no provision be made for such a fund.

Since new first mortgage bonds would not be issued in principal amount to exceed 75 percent of future capital expenditures, the balance of such expenditures must be financed through the issue of junior securities or from earnings. Under both the debtor's plan and the bondholders' plan funds for such expenditures would be secured from the hereinbefore described capital fund contemplated by their plans. While the A. C. James Company opposes the creation [214] of such a fund, as well as a sinking fund for the redemption of bonds, it does not contend such funds are not in accordance with the principles of sound financing, but that the Revenue Act of 1936 places too great a penalty on the retention of earnings for such purposes. It is essential, however, that the reorganized company should not be embarrassed in securing funds for future capital expenditures. It also is believed to be desirable that provision be made at least for the retirement of the income bonds. It is recommended, therefore, that the plan approved by the Commission provide for the creation of a capital fund out of available net income remaining after payment of fixed interest. To avoid too heavy a sacrifice by present security holders, payments into the fund should not exceed $500,000 in any one year, nor, in any event, the sum needed to raise the totals of the fund to $1,000,000 at any time, and payment

into the fund should be dependent upon earnings and non-cumulative.

Available net income should be determined for each period of six months ending June 30 or December 31, (called income periods) beginning with the income period ending June 30, 1937. Available net income for each income period should be determined by deducting from the consolidated income of the reorganized company and its subsidiaries available for fixed charges for such income period, determined in accordance with accounting rules of the Commission, all fixed charges of the reorganized company and its subsidiaries accrued during such income period; provided, however, that in determining available net income there shall not be deducted any amounts expended in connection with the rehabilitation program out of the $10,000,000 of new money to be provided in the reorganization (or out of the proceeds of any trustees' certificate or other obligations retired out of said money), notwithstanding that under the accounting rules [215] hereinbefore mentioned certain of such expenditure may be chargeable as operating expenses.

With respect to sinking funds, the debtor suggests that such a fund should be provided for all bonds, while the bondholders propose that it apply to income bonds only. The debtor also proposes that such a fund should be created and maintained out of available net income remaining after payment of interest and provision for the capital fund, while the bondholders propose that payments into

the fund should not be made until after payment of dividends on preferred stock. The latter provision, however, would not only delay but possibly preclude the retirement of such bonds. On the other hand with such a limited amount of fixed interest bonds as recommended herein, it would not seem essential to provide for their retirements through a sinking fund. It is recommended, therefore, that provision should be made in the plan approved by the Commission for the creation and maintenance of a sinking fund of one-half of 1 per cent to be used for the retirement of income bonds hereafter recommended out of available net income remaining after the payment of fixed charges, payment into the capital fund, and interest on income bonds.

In order that the contingent interest bonds issued in the reorganization should be a saleable security easily refundable at maturity, their interest charges should be well within the apparent earning power of the company under reasonably favorable business conditions. The marked increase in the net earnings of the debtor in 1936 over 1935 indicates a substantial recovery of traffic. Forecasts of higher earnings in 1937 may be supported by the record, but at this time the period during which such higher earnings may continue is problematical. It appears that the period of marked low earning power of the debtor embraces the years 1931 to 1935, inclusive. The total of the fixed and

contingent interest charges plus sinking [216] fund requirements and the capital fund of the reorganized company should be not more than the earnings of the debtor available for interest in 1936. The last year prior to 1936 in which the debtor's earnings were sufficient to pay such charges was 1929.

If the above recommendations are approved, charges on equipment obligations, new first mortgage bonds and proposed capital fund, would require $986,473 per annum. Since the amount available for interest in 1936, the most recent full calendar year, after eliminating the extraordinary expenditures for rehabilitation, amounted to $1,766,632, it is recommended that the new income bonds to be issued should not exceed $19,716,040 in principal amount, and should bear interest at the rate of 4 percent per annum. Interest on such bonds would amount to $788,642, and including charges for the sinking fund, the total of the fixed and contingent charges recommended would amount to $1,873,695.

The new income bonds should be secured by a mortgage, such mortgage to constitute a lien, subject only to the lien of the first mortgage, upon all property from time to time subject to the lien of the first mortgage. The total authorized issue of bonds thereunder should be limited to $19,716,040. The bonds should be dated as of the effective date of the reorganization and should mature in 50 years, bearing interest payable semi-annually only out of the available net income, such interest to be cumu-

lative only as against such available net income for the income period in respect of which such interest is payable. The bonds should be redeemable on any interest payment date at their principal amount plus any interest payable thereon on such interest payment date. The available net income out of which such interest is payable should be that remaining after the payment of fixed charges and such amounts [217] as may be required to maintain the capital fund. Such bonds also should be entitled to the benefit of a one-half of 1 percent cumulative sinking fund, payable out of available net income remaining after the payment of all prior charges hereinbefore recommended.

The debtor's assets consisting of real and personal property have been described, and its investment in such property has been stated. While these data alone would seem to support the total capitalization proposed in each of the three plans, yet when considered in connection with its record of earnings, it appears that the total capitalization of the reorganized company should be less than that proposed in any of the plans if any material return in the future on the reorganized company's capital stock is to be expected.

The maximum of earnings available for interest forecast by the debtor is approximately $4,000,000 for 1940, based on assumed revenues of $21,632,200, 7.5 percent in excess of the maximum of the debtor's revenues in any year since 1922. Prior charges heretofore provided for amount to $1,873,695 which

deducted from $4,000,000 leaves $2,126,305 of possible additional annual earnings under the debtor's estimate, to be capitalized, if there is to be a reasonable prospect of a return on the securities to be issued. This sum would pay preferred stock dividends of 5 percent and common stock dividends of 3 percent on slightly less than $60,000,000 par value of stock divided equally between preferred and common. The Commission should approve the issue under the plan of 295,740 3/5 shares of preferred stock, $100 par value, and 300,682 1/5 shares of $100 par value common stock, and in view of the data of record relating to past earnings and the forecasts of future earnings, should find that such issue, together with the securities hereinbefore approved, constitute the maximum amount of capitalization which may be issued under the plan. [218]

The new preferred stock, which should be authorized in the total amount of 500,000 shares, should be entitled to receive dividends at the rate of 5 percent per annum in respect of each calendar year before any dividends be paid or declared upon the common stock. Such dividends should be cumulative to the extent earned in respect of any calendar year but not paid; but such dividends should otherwise be noncumulative. After dividends shall have been paid or declared on any new common stock at the rate of $3 per share in respect of any year, each share of new preferred stock should be entitled to share equally with each share of any new common stock in any dividends paid or declared in re-

spect of such year. In event of liquidation the new preferred stock should be entitled to receive out of the assets of the reorganized company its par value before any distribution is made to any new common stock but should not be entitled to any further participation in such assets. The new preferred stock should be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends.

The plan should provide further that the reorganized company should not, without the vote or consent of the holders of at least two-thirds in par value outstanding new preferred stock (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage and new income mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes or other evidences of indebtedness maturing more than 2 years from their date, except purchase money obligations [219] given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to or on a parity with, the new preferred stock, or (4) permit any subsidiary, all of whose stock except directors' shares, shall be owned by the reorganized company, to create any mortgage or other lien upon any of its properties or issue any such bonds, notes or

other evidences of indebtedness (except purchase money liens or obligations as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall be acquired by the reorganized company. Each share of the new preferred stock should have equal voting rights and privileges with any new common stock.

The total authorization of the common stock should be 500,000 shares. Including the above charges, an amount of $4,254,445 would be required before the reorganized debtor could pay a 3 percent dividend on an issue of $30,068,220 par value of common stock.

Under the above recommendations, the total capitalization would be $91,406,510, consisting of $2,048,190 equipment obligations, $10,000,000 first mortgage 4 percent bonds, $19,716,040 non-cumulative income mortgage 4 percent bonds, $29,574,060 noncumulative 5 percent preferred stock, and $30,068,220 common stock. Total fixed interest charges would be $486,473, total fixed and contingent charges including capital and sinking funds, would be $1,873,695, total preferred dividends would be $1,478,703 or a grand total of $3,352,398.

The allocation of the new securities of the reorganized company must comply with the provisions of subsection (e) of section 77, hereinbefore stated. The language comprising those provisions has long had a settled meaning in equity reorganizations.

[226] Briefly stated it is to the effect that no plan of reorganization will be fair and equitable if it attempts to secure the rights and interests of stockholders at the expense of the prior rights of secured or unsecured creditors. Subsection (e) specifically commands that the rights of each class of creditors and stockholders be accorded due consideration.

All three plans before the Commission are predicated on the priority of the first mortgage over the general mortgage, and all parties admit that the first mortgage is a first lien on the main line of the debtors' railroad and the securities physically pledged under that mortgage. The trustee under the first mortgage and the holders of bonds secured by that mortgage contend that the first mortgage is a first lien on substantially all the debtor's property, except equipment subject to existing leases, conditional sale agreements or equipment trust agreements. The general mortgage trustee and those creditors with whom are pledged general mortgage bonds contend, however, that the first mortgage is not a lien, or is a lien only to the extent of the proceeds of first mortgage bonds expended thereon, on cash and collateral held by the trustees under the general mortgage, or the Northern California extension, on the debtor's equity in rolling stock subject to leases, conditional sale agreements or equipment trust agreements, and on property, in general, purchased either in whole or in part from free funds. Those parties contend further

that most of the property just described is not only free from the lien of the first mortgage but is subject to the lien of the general mortgage, and that its value is sufficient for the full payment of all the debts secured under the general mortgage, with interest. With the exception of the A. C. James Company, they assert that the first mortgage bondholders are not entitled to preferential treatment.

[221]

While final adjudication of this and similar questions must be made by the court, in the absence of such adjudications, it becomes the duty of the Commission to preliminarily determine them for the purposes of consideration of any of the plans before it. Since most of the property which is in dispute was acquired after the date of the first mortgage, the primary question involved is whether such property is covered by the after-acquired property clause contained in the granting clauses of the first mortgage.

Clause First of the granting clauses covers both in detail and by a general statement all property which had been owned by the debtor's predecessor, except only cash items.

Granting Clause Third covers "any and all property and facilities of any and every kind and description * * * which may from time to time hereafter be acquired or constructed by or belong to" the debtor if such after-acquired property falls within one of four specified categories:

(1) If any "First Mortgage Bonds or proceeds thereof or cash deposited" under the first mortgage have been authenticated or paid out "on account of the purchase, acquisition or construction thereof or work therein;" or

(2) If the property constitutes "an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien" of the first mortgage; or

(3) If the property is "used or acquired for use in or for the maintenance or operation of or pertaining to" any of the property subject to the lien of the first mortgage; or

(4) If the property consists of shares of stock or of other securities of the Salt Lake City Union Depot and Railroad Company or Standard Realty and Development Company or any subsidiary as defined. [222]

Granting Clause Fifth covers almost every kind of property and facility used or useful in the operation of a railroad (including additional tracks, spurs, equipment, material and supplies, land) ending with the generality "all other property of every description and all rights and interests in or with respect to the use of property * * * whether now owned * * * or at any time hereafter acquired," if "appurtenant to or used or held for use as, or as a part of or as parts of, or to facilitate or safe-

guard the maintenance or operation of, any lines of railroad, extensions, branches * * * or other properties now or at any time hereafter subject to the lien" of the first mortgage.

Following granting Clause Sixth is a proviso permitting the debtor by the use of free funds to acquire property free of the lien of the first mortgage if such property is not of the character described in the four subdivisions of granting Clause Third.

The Northern California extension, various branches and spurs, and equipment used under leases, or contracts or equipment trust agreements are the principal items of property in dispute. With respect to the first two classes of property we are satisfied from the record that substantial amounts of the proceeds of first mortgage bonds were used in their acquisition or construction or at least "on account of the purchase, acquisition or construction thereof or work thereon." We construe the latter language to mean that the lien of the first mortgage attaches to after acquired extensions if the purchase, acquisition or construction thereof, or any work thereon, be financed in any part with first mortgage bonds or cash deposited under that mortgage.

While the construction of the Northern California extension was financed in part with the proceeds of certain debentures which were subsequently exchanged for general and refunding bonds, it is [223] not contended that the debentures were secured by

a lien on the extension. Moreover the record is clear that there was no intent to create a purchase money lien on the extension in favor of the debentures. The same is true with respect to the advances from the Reconstruction Finance Corporation; and the general and refunding mortgage was not executed and delivered until several months after the completion of the extension.

The Commission should conclude, that, in determining the equitability of plans of reorganization for the debtor, the lien of the general mortgage on the Northern California extension and various branches and spurs in question should be considered subject to the lien of the first mortgage.

The debtor's equity in rolling stock subject to leases, conditional sale agreements or equipment trust agreements, would seem to be covered by the after-acquired property clause in the third paragraph, as well as by the fifth paragraph, of the granting clauses unless the proviso at the end of the granting clauses negatives such a construction. The proviso reads as follows:

> * * *; and the company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor

secured by mortgage or pledge of such equipment superior to the lien of this indenture.

The latter provision, however, should be construed both in the light of the language which precedes it in the same paragraph [224] and in the light of the paragraph which follows the habendum clause. The latter paragraph reads as follows:

> "Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby * * *"

If all equipment acquired under equipment trusts was to be entirely free of the lien of the first mortgage, it is not understood why the words "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby" were made part of the last quoted provision. The Commission should consider, for the purposes of a plan of reorganization, that since the equipment in question was acquired for use, and was actually used, on the mortgage lines, the debtor's equity in that equipment is subject to the lien of the first mortgage.

The Commission also should consider that the property characterized as non-carrier real estate which was owned by the predecessor of the debtor and which the general and refunding mortgage trustee contends did not become subject to the lien

of the first mortgage because the reorganization plan, pursuant to which the present first mortgage bonds were issued, contemplated that they should have a lien only upon railway properties, is covered by the first mortgage. No such distinction as urged by the general mortgage trustee, appears in the language of the mortgage itself, and it is not clear that the use of the words "railway properties" in the plan of reorganization was intended to exclude property which was classified as non-carrier for valuation purposes by the Commission many years thereafter. [225]

With the exception of the notes of the Deep Creek Railroad Company and the Standard Realty & Development Company, there is no contention that the cash and collateral held by the trustee under the general and refunding mortgage are not free from the lien of the first mortgage. While due recognition must be accorded to the rights of the creditors with whom are pledged general mortgage bonds, those creditors are not entitled to the same treatment as first mortgage bond holders; who should be considered as having a first lien upon practically all of the assets of the debtor. It follows that holders of the debtor's first mortgage bonds should receive securities of a higher rank than other creditors, at least to the extent that existing conditions will permit.

Proceeding to the allocation of the new securities, it has been seen that it is imperative that $10,-

000,000 of new money be raised for the purpose of retiring trustees' certificates and completing the rehabilitation program. Provision should be made in the plan for the immediate sale of the $10,000,000 principal amount of the new first mortgage 4 percent bonds hereinbefore recommended. To facilitate the sale of the bonds at par, it is recommended that the plan provide that 10 shares of the new common stock be given to the purchaser of each $1,000 principal amount of the new bonds.

Existing first mortgage bonds are outstanding in the principal amount of $49,290,100. Unpaid interest thereon as of January 1, 1937, amounted to $8,214,766. In this connection the A. C. James Company proposes that all unpaid interest should be waived. It is not contended by that company that such interest is not equally secured with the principal but it is urged that it is improper in a proceeding, such as this to capitalize unearned and unpaid interest. But the Commission should base the capitalization of the [226] reorganized company upon a consideration of assets and earning power rather than on the amount of existing claims, leaving the matter of unpaid interest for consideration in determining the relative rights of the creditors. Circumstances may be such as to render inequitable the allotment of securities to cover unpaid interest but the rights represented by unpaid interest should be recognized with the principal of the debt.

It is recommended, in view of the priority of the existing first mortgage bonds, that all of the new income bonds, $19,716,040 principal amount, all of the new preferred stock, $29,574,060 par value, and $8,214,766 par value of the new common stock hereinbefore recommended be allotted to the holders of existing first mortgage bonds. On this basis the holders of first mortgage bonds would receive 40 percent of the principal of their debt in income bonds, 60 percent in preferred stock, and the unpaid interest thereon in common stock.

Of the total of new securities hereinbefore recommended there thus remains only $11,853,454 par value of common stock for allocation among the debtor's other creditors and stockholders. That equals the total of the claims of the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company. Since their claims are secured by $18,999,500 principal amount of general mortgage bonds pledged by the debtor, they are clearly entitled to priority over the unsecured claims of the Western Pacific Railroad Corporation and over the claim of the Western Realty Company, a subsidiary of the Western Pacific Railroad Corporation, the latter being also the owner of all of the debtor's capital stock. Obviously, if due recognition is to be given the rights of these secured creditors, the entire amount [227] of common stock remaining for distribution should be allotted to them.

While, as stated, the par value of the stock available for distribution equals the principal and unpaid interest on the secured creditors' notes, the collateral pledged by the debtor as security for the notes is of varying amounts. For instance, the total of the Reconstruction Finance Corporation's claim is $3,507,310 although it holds as pledgee 56.6 percent of the debtor's general mortgage bonds. The total claim of the Railroad Credit Corporation amounts to $2,596,374 and 21.1 percent of the general mortgage bonds are pledged thereunder. The total of the A. C. James Company's claim amounts to $5,749,770 and only 22.3 percent of the general mortgage bonds are pledged thereunder. Under these circumstances it is recommended that the allotment of th common stock to these secured creditors be made on the basis of the collateral held rather than on the amount of the claims. Such allotment would result in the Reconstruction Finance Corporation receiving $6,709,055 par value, the Railroad Credit Corporation $2,501,079 par value, and the A. C. James Company $2,643,320 par value of new common stock.

Since all of the securities that the reorganized company would be justified in issuing are required for the adjustment of the claims of secured creditors and the securing of necessary new capital, the only provision by which the Western Pacific Railroad Corporation, as an unsecured claimant and owner of the debtor's outstanding capital stock,

may properly participate in the reorganization, is by the issue to it of rights to subscribe to the new first mortgage bonds to be sold by the reorganized company. It is recommended therefore that there be issued to that corporation subscription warrants entitling it to purchase at par within, but not [228] later than sixty days after the effective date of the reorganization, all or any part of the $10,000,000 principal amount of new first mortgage bonds. The Commission should find that the equity of the preferred and common stockholders of the debtor has no value. The claim of the Western Realty Company should be canceled.

The plan should provide further that opportunity to provide such part of the new money as is not provided by the exercise of the subscription warrants allotted to the Western Pacific Railroad Corporation be offered to the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company in proportion to the general mortgage bonds now held by them, upon the same terms as offered to the Western Pacific Railroad Corporation. If any of those secured creditors should fail to subscribe for its full proportion, the other or others of such creditors should be permitted to subscribe for the unsubscribed balance, in the proportion which the existing general mortgage bonds held by them respectively bear to the total amount of general mortgage bonds held by the corporations so electing to subscribe for their

full proportion. The contingent rights of subscription granted to those secured creditors should be evidenced by appropriate warrants, and such rights should, in the case of each offering, run concurrently with the rights evidenced by the warrants to be issued to, or on the order of, the Western Pacific Railroad Corporation. Holders of such warrants should be required to elect prior to the expiration of such warrants, in each case, the extent to which they will exercise their subscription rights. Should the Western Pacific Railroad Corporation, or the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company fail to provide the new money in accordance with the above terms, holders of first mortgage bonds should be entitled to provide the same upon the same terms and conditions as those parties, and [229] warrants evidencing such rights should be granted to such bondholders.

If the new securities are allocated as recommended above, it would result in preserving the priority of the first mortgage bondholders as to the principal amount of their bonds over all other existing creditors and stockholders in so far as new securities are available. The holders would receive securities bearing a rate of interest 1 percent lower for 40 percent of the principal of their bonds, and the payment of interest and dividends would be contingent on earnings. On the other hand, present stockholders, both preferred and common, as such,

would receive nothing, and the stock allocated to other secured creditors would be subordinate to the securities received by the first mortgage bondholders for the principal of their bonds. The provision for the participation of the unsecured creditor would not discriminate against either the first mortgage bondholders or the other secured creditors because such unsecured creditor must contribute $1,000 in cash for each new $1,000 bond and 10 shares of new common stock received.

Under both the debtor's plan and the bondholders' committee plan current liabilities of the debtor incurred in the ordinary conduct of its business prior to the institution of this proceeding, current liabilities and obligations of the debtor and of its trustees incurred during this proceeding, and all other claims, liabilities or obligations for which specific provision is not made in those plans are not to be affected by the plans, but to the extent that such claims, liabilities, or obligations are not paid by the debtor or its trustees pursuant to order of the court, they are to be paid in cash or assumed by the reorganized company. According to the record current liabilities incurred in the ordinary conduct of the debtor's business prior to this proceeding were of a nominal amount. The Commission should approve such provisions. [230]

Each of the three plans before the Commission propose different conditions under which a plan shall be consummated. The James plan affirma-

tively provides that its plan shall not be consummated until accepted by two-thirds of each class of creditors and two-thirds in amount of each class of stock. Reorganizations under section 77 are primarily premised upon the acceptance of plans by two-thirds or more of each class of creditors and stockholders. Congress recognized, however, that the public interest might, under certain circumstances, require the confirmation of a plan of reorganization even though it was not accepted by all classes of creditors and stockholders, and provisions to this effect are included in section 77. To approve a provision in a plan of reorganization by which a minority of a class of creditors or stockholders could effectively block the reorganization although the plan conformed to the requirements of the statute in all respects would, in our opinion, give such a minority a right not contemplated by the law, and, also, would be contrary to the intent if not the letter thereof.

The provision in the bondholders' committee plan to the effect that its plan shall not be confirmed until at least two-thirds of the holders of the debtor's first mortgage bonds accepted it, would seem to be in the same category as the provision in the James plan. With respect to the bondholders' proposal that the plan provide for the sale of the debtor's property in the event of the refusal of more than one-third of any other class of the debtor's creditors and stockholders to accept the plan, we are unable to accept the bondholders' argument that the

provision contained in clause (5) in the first paragraph of subsection (b) of the act to the effect that a plan may provide for the sale of all or any part of the property of the debtor, contemplates the equivalent of a foreclosure and judicial sale. In our opinion the provisions of subsection (e) [231] of the act, outlining the procedure to be followed in the event of a failure of confirmation of a plan, clearly shows that the Congress intended that reorganization should be accomplished through confirmation of a plan, or that the proceeding should be dismissed. The Commission should not approve the provision for sale of the debtor's property upon failure of acceptance of the plan. The plan approved by the Commission should provide that the plan shall be accepted and confirmed in accordance with the provisions of section 77.

Both the bondholders' plan and the James plan contemplates the formation of a reorganization committee with broad powers. No provision for such a committee is made in the debtor's plan, although it does provide that representatives of the bondholders' committee shall represent the members of that committee in the reorganization, and that the form and provision of the several indentures, bonds, stock certificates and other instruments in connection with the reorganization shall be first approved by the bondholders' committee.

It is recognized that it is impracticable to specify in detail the form and provisions of the various indentures, bonds, stock certificates and other in-

struments which must necessarily be executed in consummating the reorganization proceeding although the terms and provisions thereof, are of great importance to those participating in the proceeding. For this reason the Commission should recommend that the plan provide for the formation of a committee, after approval of the plan by the Commission and the court, with power to determine, subject to the approval of the Commission, the form and provisions of the indentures, bonds, stock certificates and other instruments in connection with the carrying out of the plan. The committee also should have power, but only such power as necessary, to carry out the plan in accordance with [232] its provisions. The committee should consist of three members, one member of which should be nominated by the bondholders' committee, one by the Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company as a group, and one by the Western Pacific Railroad Corporation.

Under the foregoing recommendations, the plan of reorganization would provide as follows:

1. The immediate issue by the reorganized company of $10,000,000 principal amount of 30-year first mortgage 4 percent bonds, $19,716,040 principal amount of 50-year income mortgage 4 percent bonds, $29,574,060 par value of noncumulative 5 percent preferred stock ($100 par value a share), and $30,068,220 par value of common stock, ($100 par value a share). The debtor's existing equip-

ment obligation would be assumed by the reorganized company.

2. The sale of the $10,000,000 principal amount of new first mortgage bonds, the purchasers to receive 10 shares of the new common stock for each $1,000 principal amount of first mortgage bonds purchased.

3. The creation and maintenance of a capital fund of not to exceed $500,000 in any one year or $1,000,000 at any time, to be accumulated out of available net income remaining after payment of fixed charges.

4. The creation and maintenance of a one-half of 1 percent sinking fund for the retirement of the new income bonds out of available net income remaining after the payment of fixed charges, payments into the capital fund, and payment of interest on the new income bonds.

5. The holders of the debtor's existing first mortgage bonds to receive in exchange therefor and for accrued unpaid interest thereon all of the new income bonds and preferred stock, and $8,214,766 par value of the new common stock; and contingent rights [233] to subscribe for the purchase of the new first mortgage bonds.

6. The Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, holders of the debtor's notes which are secured by the pledge of the debtor's general mortgage bonds, to receive in exchange therefor and for accrued unpaid interest thereon, $11,853,454 par

value of new common stock, the stock to be distributed among them on the basis of the general mortgage bonds held by each creditor, and contingent rights to subscribe for the purchase of the new first mortgage bonds.

7. The Western Pacific Railroad Corporation, an unsecured creditor to receive in exchange therefor subscription warrants for the purchase at par of the new first mortgage bonds to be sold.

8. The formation of a committee with such power as may be necessary to carry out the plan, and to determine, subject to the approval of the Commission, the form and provisions of the indentures, bonds, stock certificates and other instruments in connection with the carrying out of the plan; the committee to consist of three members, one member to be named by the bondholders' committee, one by the Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company as a group, and one by the Western Pacific Railroad Corporation.

9. The plan to be accepted and carried out in accordance with its terms and the provisions of section 77 of the Bankruptcy Act.

10. The obligations of the debtor not specifically provided for to be paid by the debtor or the reorganized company or *the* assumed by the reorganized company.

11. The plan should be effective as of January 1, 1937.

Prior to the approval of the plan by the court, the Commission should fix maximum limits of allowances for fees and expenses which [234] are to be paid by the debtor or the reorganized debtor with the approval of the court, as incidental to the reorganization, upon the basis of representations theretofore made to it, and pursuant to appropriate petition of interested parties to the court, transmitted to the Commission in accordance with the provisions of paragraph 2(1) of the General Orders in Bankruptcy XLIX of the United States Supreme Court.

In view of the provisions of subsection (f) of section 77, the Commission, when a plan is finally adopted, should give consideration to the granting of such authorization for the issue of such securities as may be required and appropriate for the execution of the plan.

The Bureau of Finance recommends that the Commission find that the plan as recommended herein will meet with the requirements of subsections (b) and (e) of section 77 of the Bankruptcy Act, and will be compatible with the public interest.

The journal entries covering the necessary accounting adjustments should be submitted to the Commission for approval before they are recorded on the books of the debtor or of the reorganized company.

An appropriate certificate should be issued.

[Endorsed on first page]: Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before Aug. 23, 1937.

[Endorsed]: Filed Aug. 6, 1937. [235]

Interstate Commerce Commission

Finance Docket No. 10913

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION.

REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION IN PROCEEDING UNDER SECTION 77 OF THE BANKRUPTCY ACT.

Submitted, November 17, 1937.

Decided, October 10, 1938. [236]

Plan of reorganization of the Western Pacific Railroad Company, pursuant to section 77 of the Bankruptcy Act, as amended, approved.*

Frank C. Nicodemus, Jr., for Western Pacific Railroad Company.

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*Previous report in this proceeding, 207 I.C.C. 793.

Robert E. Coulson, James B. Alley, C. C. McChord, C. M. Clay, W. Meade Fletcher, Jr., Daniel Willard, Jr., Robert T. Swaine, Orville W. Wood, H. C. McCollom, and Orrin G. Judd for interveners.

REPORT OF THE COMMISSION

By the Commission:

Exceptions to the report proposed by our Bureau of Finance were filed by The Western Pacific Railroad Company, hereinafter called the debtor, by a committee for certain institutional bondholders, the A. C. James Company, the Railroad Credit Corporation, the Reconstruction Finance Corporation, and the Irving Trust Company, trustee under the debtor's general and refunding mortgage. The proceeding has been argued orally before us. Our conclusions differ somewhat from those of the Bureau.

The debtor, on August 2, 1935, filed a petition in the District Court of the United States for the Northern District of California, [237] Southern Division, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization under the provisions of section 77 of the act of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States", as amended. The court, on the same day, made and entered an order approving the petition as properly filed, and among other things, authorizing and directing the debtor, pending further order of the court, to operate and

maintain the railroad and property of the debtor and to manage and conduct the debtor's business as a railroad company. Trustees were appointed on September 23, 1935, and their appointments were ratified by division 4 on October 30, 1935. 207 I.C.C. 793. Copies of the debtor's petition and the order thereon have been transmitted to us by the clerk of the court; and in like manner we have received lists of all known creditors and stockholders of the debtor, and copies of the orders of the court determining the time within which the claims of creditors might be filed or evidenced and dividing the creditors and stockholders into classes. These documents and other documents similarly received are now of record in the proceeding before us.

On February 8, 1936, the debtor filed a plan of reorganization with the court and us. Pursuant to the provisions of section 77(d) of the Bankruptcy Act, after due notice, we began public hearings upon the debtor's plan of reorganization on March 23, 1936. Two other plans for the reorganization of the debtor were filed during the proceeding; one on behalf of certain institutional bondholders on September 28, 1936, and the other on behalf of the A. C. James Company, a secured creditor of the debtor, on October 26, 1936. These parties intervened in the proceeding and were represented by counsel at the hearing. Other interveners, similarly represented, included the trustees under the mortgages, the Reconstruction Finance Corporation, and the Railroad Credit Corporation, secured creditors.

Hearings in this proceeding were closed on December 9, 1936, and briefs were filed on January 11, 1937.

Location and General Description of the Property.

The debtor owns or operates a total of 1,207.51 miles of standard-gage, steam railroad. The main lines extend 924.17 miles eastward from Oakland, Calif., to Salt Lake City, Utah, and north- [238] ward 111.81 miles from Keddie to Bieber, Calif., with operating rights over the Great Northern Railway, 46.38 miles, from Bieber to Hambone, Calif. The debtor also operates 4.2 miles of ferry service from Oakland to San Francisco, and 185.3 miles of second main track, of which 182.91 miles between Weso and Alazon, Nev., are owned by the Southern Pacific. This territory is known as the "Paired Track" district since the two lines are used as a double-track railroad by both companies. Various branch lines springing from the Oakland-Salt Lake City line are as follows:

Niles to San Jose, Calif.	23.07 miles
Calpine Junction to Calpine, Calif.	12.62 "
Hawley to Loyalton, Calif.	12.79 "
Reno Junction to Reno, Nev.	33.11 "
Burmester to Warner, Utah	15.52 "
Miscellaneous	21.79 "
Total	118.90 miles

Owned or Controlled and Jointly Affiliated Railroad Companies.

The debtor owns all the outstanding capital stock of the Sacramento Northern Railway, an electrically operated standard-gage, freight and passenger railroad, consisting of 276.2 miles of road serving and connecting San Francisco and Oakland with various Sacramento Valley cities, principally Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa, and Oroville, all in California.

By ownership of more than 99 percent of the outstanding capital stock, the debtor controls the Tidewater Southern Railway, which operates a standard-gage, steam freight line 61.38 miles in length, connecting Stockton with Manteca, Escalon, Modesto, and Turlock in the San Joaquin Valley of California.

The debtor owns all the outstanding capital stock of the Deep Creek Railroad Company, which owns and operates a standard-gage, steam railroad extending from Wendover to Gold Hill, Nev., a distance of 44.6 miles. In addition it owns 50 percent of the capital stock of the Salt Lake City Union Depot & Railroad Company; 33⅓ percent of the capital stock of the Central California Traction Company, operating an electrically operated freight railroad extending from Stockton to Sacramento, Calif., with a road mileage of 53.78 miles; and 50 percent of the capital stock of the [239] Alameda Belt Line, operating 15.86 miles of terminal switch-

ing line in the city of Alameda on San Francisco Bay.

None of the above subsidiary or affiliated companies has filed a petition under section 77 of the Bankruptcy Act, as amended.

Corporate and Financial History.

The debtor was incorporated under California laws on June 16, 1916, and as of July 14, 1916, acquired the railroads and all other properties of the Western Pacific Railroad Company sold at foreclosure on June 28, 1916. Upon incorporation, the debtor had an authorized capital stock of $75,000,000, consisting of 475,000 shares of common and 275,000 shares of preferred stock of the par value of $100 each.

The debtor, by its first mortgage dated June 26, 1916, to the First Federal Trust Company and Henry E. Cooper, trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, now successor trustees), authorized a maximum of $50,000,000 of first-mortgage bonds to be at any time outstanding. A principal amount of $20,000,000 thereof was issued and sold as a part of the 1916 plan of reorganization, at 90, producing $18,000,000 in cash. Of this amount, approximately $2,000,000, together with cash from receivers, was applied in defraying the expenses of incorporation, expenses incurred in connection with foreclosure and reorganization proceedings, and payment of the distributive shares of non-participating first-mort-

gage bondholders of the old company; and $1,000,000 was retained as working capital. The balance of approximately $15,000,000 was deposited under the debtor's first mortgage and applied to capital purposes as provided in the mortgage.

The debtor thus commenced operations with $75,000,000, par value, of capital stock, and $20,000,000 of its first-mortgage bonds outstanding. Additional bonds were not issued by the debtor until 1921, in which year $4,180,000 of its first-mortgage bonds were sold at 85 and the $3,553,000 realized was used to purchase the properties of the Sacramento Northern Railroad through the Sacramento Northern Railway. As of September 30, 1936, a total of $49,290,100, face amount, of the debtor's first-mortgage bonds were outstanding, the additional bonds having been issued for the following purposes: $3,000,000 in 1922 to retire outstanding equip- [240] ment-trust certificates; $4,000,000 in 1925 for general capital purposes; $2,600,000 in 1926 for general capital purposes; $2,950,000 in 1927 in substitution of the $3,000,000 issued in 1922 then outstanding in the aggregate amount of $2,950,000; $5,090,000 in 1929 for general capital purposes; $572,800 in 1930 for purchase of San Francisco-Sacramento Railroad Company properties through the Sacramento Northern Railway; $5,000,000 in 1930 for general capital purposes of the debtor and its subsidiary, the Sacramento Northern Railway; $5,000,000 in 1931 and 1932 to finance in part construction and acquisition of the Northern

California extension; and $645,000 in 1931 for general capital purposes. Interest on the bonds was paid as due until March 1, 1934. The interest payment due on that date was not paid, and no interest payment has since been made.

The debtor issued in 1931 and 1932, in addition to the above-mentioned $5,000,000 of its first-mortgage bonds, $5,000,000 of gold debentures, to finance the cost of its Northern California extension. These debentures were retired in 1932 through the issue of notes payable to the A. C. James Company for $4,999,800 ($200 being paid in cash), which notes were secured by $6,249,500, face amount, of the debtor's general and refunding mortgage, series A, 5-percent gold bonds. The latter bonds were issued under the debtor's general and refunding mortgage, dated January 1, 1932, authorizing a maximum of $100,000,000 of general and refunding bonds to be at any one time outstanding, but reserving $49,292,300, principal amount, thereof for the purpose of refunding, paying, purchasing, redeeming, or otherwise acquiring the first-mortgage bonds then outstanding in that amount, and reserved $5,000,000, principal amount, thereof against the outstanding debentures. The reserved bonds were issuable upon the retirement of the securities against which they were reserved. None of the debtor's general and refunding bonds have been sold, but $18,999,500, principal amount, of such bonds have been nominally issued and are nominally outstanding solely as collateral to secure certain of the debtor's promissory

notes. Of these pledged bonds, $10,750,000 are now pledged as part security for the debtor's promissory notes to the Reconstruction Finance Corporation, $4,000,000 are pledged under its promissory notes to the Railroad Credit Corporation, and the remaining $4,249,500 are still pledged under the A. C. James [241] Company note. The indebtedness to the Reconstruction Finance Corporation and the Railroad Credit Corporation was contracted in 1932 and 1933.

Prior to the date of trusteeship, the debtor created equipment-trust obligations in the total amount of $13,400,000, of which $637,000 was outstanding as of June 30, 1938. On that date there also remained unpaid $220,265.50 on a conditional sale and lease of locomotives. All interest and principal payments on equipment trusts and the conditional sale lease have been met when due.

Subsequent to the date of trusteeship, by reports and orders of March 5 and October 15, 1936, January 25, 1937, and November 4, 1937, and by order of February 12, 1937, division 4 granted authority to the debtor's trustees to issue not exceeding $13,000,000 of trustees' certificates, and to assume obligation and liability in respect to not exceeding $2,320,000 of equipment-trust certificates. 212 I.C.C. 356; 217 I.C.C. 393, 395, and 777; and 224 I.C.C. 150. (The $3,000,000 trustees' certificates authorized by the order of October 15, 1936, were for the purpose of refunding the $3,000,000 trustees' certificates authorized by the order of March 5, 1936.)

The proceeds from the sale of those securities were to be used in the rehabilitation and improvement of the debtor's fixed plant and existing motive power and cars, and the acquisition of additional equipment. Under authority of the court, the trustees have initiated the rehabilitation program and it is now practically complete. Under our accounting rules such expenditures are chargeable in part to operating expenses. The inclusion of large amounts of normal operating expenses obviously reduces the amount of income available for interest and other fixed charges, and consideration should be given to this fact in studying the debtor's income accounts during periods when extraordinary expenditures were being incurred.

Present Financial Structure.

The trustees' balance sheet as of June 30, 1938, shows total assets of $173,650,980.19. Investments included therein total $165,785,843.99, including road and equipment $143,447,447.51, sinking fund and deposits $207,387.09, and miscellaneous physical property $4,650,137.02. Investments in affiliated com- [242] panies pledged under the debtor's first mortgage amount to $10,224,421.66, and consist of $99,500.40 of capital stock of the Salt Lake City Union Depot & Railroad Company, $999,500 of capital stock of the Sacramento Northern Railway, $450,000 of capital stock of the Deep Creek Railroad Company, $175,220.75 of capital stock of the Standard Realty & Development Company, $3,-

975,456.13 of Sacramento Northern Railroad 5-percent 20-year gold bonds, and $4,524,744.38 of notes receivable from the Sacramento Northern Railway. Investments in affiliated companies pledged under the debtor's general and refunding mortgage total $3,159,061.78, and consist of $1,223,848.94 of capital stock of the Tidewater Southern Railway Company, $128,651.56 of common stock, $264,715.47 of preferred stock, and $270,375.50 of first-mortgage 5-percent gold bonds of the Central California Traction Company; $465,600 of capital stock of the Alameda Belt Line, $1,318.63 of capital stock of other companies, and $804,551.68 of notes receivable from the Tidewater Southern Railway Company, Standard Realty & Development Company, and Deep Creek Railroad Company. Investments in affiliated companies unpledged amount to $5,019,210.68, of which $4,175,356.42 represent advances to the Sacramento Northern Railway, $798,422.82 advances to other affiliated companies, $5,500 represents capital stock of the Alameda Belt Line, and $39,931.44 due from the Railroad Credit Corporation. Other investments amount to $78,178.25 and consist principally of $74,472.88 of advances to the Railway Equipment & Realty Company, Limited.

Current assets are shown in the amount of $5,481,640.99, and comprise $1,108,785.85 in cash, $171,976.04 in special deposits, $1[illegible],057.66 of traffic and car service balances receivable, $156,068.64 of net balances receivable from agents and con-

ductors, $548,913.37 of miscellaneous accounts receivable, $3,140,625.85 of material and supplies, $14,377.91 of interest receivable from affiliated companies, $181,337.70 rents receivable, and other current assets of $23,497.97.

Deferred assets are shown in the amount of $317,418.69 and unadjusted debits in the amount of $2,066,076.52. The latter item consists of $5,541.17 of rents and insurance premiums paid in advance, $1,051,067.23 of discount on funded debt, and $1,009,468.12 of other unadjusted debits. [243]

Liabilities shown on the balance sheet of the same date are capital stock, $75,800,000, consisting of $47,500,000 of common and $28,300,000 of preferred stock. Government grants are shown at $169,281.11, and total long-term debt is shown as $68,926,004.44. Included in the latter item is $50,147,365.50 of funded debt unmatured, consisting of $49,290,100 of first-mortgage 5-percent gold bonds, $637,000 of equipment-trust certificates, and $220,265.50 due under the Baldwin Locomotive Works lease. The long-term debt includes also $11,108,851.83 of receivers' and trustees' certificates, and $7,669,787.11 of nonnegotiable debt to affiliated companies. Of this last item, $7,609,370.43 is due the Western Pacific Railroad Corporation.

Total current liabilities are shown as $26,316,674.89. They include $2,445,609.88 of notes payable to the Railroad Credit Corporation, $461,787.30 of traffic and car service balances payable, $1,175,129.61 of audited accounts and wages payable, $112,-

639.10 of miscellaneous accounts payable, and $12,989,714.34 of interest matured unpaid. The latter amount consists of $131,779.15 of interest on Railroad Credit Corporation notes, $639,217.91 of interest on Reconstruction Finance Corporation notes, $1,124,955 of interest on A. C. James Company notes, $440 of interest on equipment-trust certificates, $11,093,019.78 of interest on first-mortgage 5-percent gold bonds, and $302 of interest on trustees' certificates. There also are included in the total current liabilities $894,935 accrued unmatured interest, $8,987.48 accrued unmatured rents, $4,999,800 of notes payable to A. C. James Company, $2,963,000 of notes payable to the Reconstruction Finance Corporation, $3,000 trust certificates, and $262,322.18 other current liabilities.

Total deferred liabilities are shown as $19,521.96, and total unadjusted credits as $11,334,893.42. The latter comprises $433,529.54 of tax liability, $6,890.25 of premium on equipment-trust certificates, $10,811,559.91 of accrued depreciation on equipment, and $82,913.72 of other unadjusted credits.

The above-mentioned liabilities total $182,566,375.82. Two additional items totaling $7,171,169.07, are described as a surplus-investment in road equipment and cash materials, and other property purchases, representing the value of Western Pacific Railway property purchased in excess of cash paid, and for value of capital [244] stock issued in exchange for same. This amount, added to the figure of $182,566,375.82, produces the sum of $189,737,544.89.

The balance sheet shows a deficit of $16,086,564.70 in corporate surplus. This consists of appropriated surplus amounting to $10,871,559.44 represented principally by additions to property through income and surplus, and an accumulated debit balance in profit and loss of $26,958,124.14.

Traffic and Revenue.

The main line of the debtor's railroad extending from Oakland, Calif., to Salt Lake City, Utah, forms an important part of a through route from the Pacific coast to Chicago, Ill., and other important Middle Western points. Fast through schedules are maintained by the debtor and the Denver & Rio Grande Western Railroad and Missouri Pacific Railroad Company, with which companies the debtor has close affiliations. Its line also connects with that of the Atchison, Topeka & Santa Fe Railway Company at Stockton, Calif., and with that of the Great Northern Railroad Company at Bieber, Calif., thus forming a link in a north and south route on the Pacific coast. The latter route is comparatively new, having been established in the latter part of 1931 by the construction of the debtor's line northward from Keddie to Bieber, known as the Northern California extension, and the extension of the line of the Great Northern southward from Klamath Falls, Oreg., to Bieber.

Although operations over the debtor's Northern California extension began in the depth of the depression, considerable traffic has moved over it from

the start. Traffic over this extension and revenue derived therefrom are considered separately from the debtor's other traffic and revenues. During the years 1924 to 1929, inclusive, the debtor and its subsidiary, the Sacramento Northern Railway, had an agreement with the Southern Pacific Company for the transportation for the Southern Pacific of certain carload traffic between Chico, Calif., and Weso, Nev., at the rate of $60 per car, of which the debtor received $54 per car. This agreement was terminated at the end of 1929, and since the tonnage moved under agreement and the revenue therefrom were large, the statistical data shown below relating to the debtor's traffic have been adjusted by excluding the freight moved under that agreement. [245]

The freight traffic handled and the freight revenue received by the debtor in the years 1923 to 1935, inclusive (traffic and revenue of subsidiaries will be discussed hereinafter), excluding traffic and revenue under the Chico-Weso Bridge agreement and that handled via the Northern California extension, were as follows:

Year	Cars	Tons	Revenue	Revenue per ton	Percent of increase or decrease over or under preceding year. Tons	Revenue
1923	96,531	2,875,108	$10,513,355	$3.66	—	—
1924	98,297	2,854,602	10,562,340	3.69	—0.7	—0.5
1925	113,633	3,198,214	11,736,434	3.67	+12.0	+11.1
1926	120,545	3,326,637	12,252,189	3.68	+ 4.0	+ 4.4
1927	121,071	3,486,668	12,697,985	3.64	+ 4.8	+ 3.6
1928	124,110	3,567,798	13,887,953	3.89	+ 2.3	+ 9.4
1929	124,181	3,616,927	14,287,250	3.95	+ 1.4	+ 2.9
1930	131,242	3,776,046	13,796,125	3.65	+ 4.4	— 3.4
1931	106,321	3,070,577	11,078,891	3.61	—18.7	—19.7
1932	83,549	2,330,505	8,558,209	3.67	—24.1	—22.8
1933	83,957	2,359,810	8,520,315	3.61	+ 1.3	— 0.4
1934	93,115	2,616,182	9,173,115	3.51	+10.9	+ 7.7
1935	92,902	2,489,273	9,910,386	3.98	— 4.9	+ 8.0

Agricultural and manufactured and miscellaneous products comprised the greater part of the traffic moving over the debtor's line from Salt Lake City to Oakland. In the period 1928 to 1935, inclusive, for example, of the total carloads of commodities carried, manufactured and miscellaneous products constituted 33⅓ percent, and agricultural products 33⅓ percent. Forest products accounted for 7.5 percent, mineral products 19⅔ percent, and animal products 6 percent. Of the total freight revenue received from the transportation of this freight, approximately 40 percent was derived from manufactured products, 28 percent from agricultural products, 5 percent from forest products, 13.5 percent from mineral products, 5⅔ percent from animal

products, and the remainder from less-than-carload freight.

The above tabulation shows that the debtor's freight traffic in 1930, amounting to 3,776,046 tons, was the greatest for any of the years. There was moved an average of 2,573,269 tons in the following five years, 1931-35, inclusive, a decrease of 32 percent as compared with 1930. During the same period, agricultural products transported declined 20 percent, animal products 16.7 percent, mineral products 42.2 percent, forest products 44.4 percent, manu- [246] factured products 28 percent, and less-than-carload freight 29.7 percent, as compared with 1930.

Freight carried in 1935 amounted to 2,489,273 tons, a decrease of 35 percent under 1930. In 1935, traffic in agricultural products declined 25.1 percent, animal products 27.9 percent, mineral products 51.4 percent, forest products 45.6 percent, manufactured products 20.6 percent, and less-than-carload freight 20.8 percent under 1930.

Revenue from freight in 1930 amounted to $13,796,125. During the period 1931-35, inclusive, freight revenue averaged $9,448,183, a decline of 32.3 percent as compared with 1930. In the same period revenue from agricultural products declined 29.3 percent, animal products 20.8 percent, mineral products 60.9 percent, manufactured products 31.1 percent, and less-than-carload freight 28.2 percent.

Freight revenue amounted to $9,910,386 in 1935, a decrease of 28.9 percent as compared with 1930.

In 1935, revenue received from agricultural products decreased 28 percent, animal products 34.7 percent, mineral products 43.4 percent, forest products 40.3 percent, manufactured products 19.6 percent, and less-than-carload freight 37.2 percent under 1930.

Forty-three percent, or 1,637,984 tons, of the debtor's freight traffic in 1930 consisted of traffic interchanged with the Denver & Rio Grande Western, Oregon Short Line, and Union Pacific. During the period 1931-35, inclusive, traffic interchanged with those lines averaged 1,196,971 tons, or a decrease of 20 percent under 1930. For the year 1935, traffic interchanged with the same lines amounted to 1,381,186 tons, or a decrease of 15 percent under 1930. It should be noted also that for many years the debtor was dependent upon connections for the greater part of its traffic, and, although to a less degree than formerly, it still receives more than one-half of its total freight from connecting carriers, and approximately one-third of it is received from and delivered to connections.

The debtor estimates that the revenue from freight moving over its line from Oakland to Salt Lake City will amount to $10,084,951 in 1936, $10,857,252 in 1937, $11,629,553 in 1938, $12,518,672 in 1939, and $13,747,996 in 1940. The latter amount is an increase of $3,837,610, or 38.7 percent, over 1935 revenue, and approximately equals that received in 1930. [247]

Freight moved over the Northern California extension in 1932 amounted to 340,107 tons, and $1,098,016 in revenue was derived therefrom. In the year 1933, tonnage and revenue amounted to 396,862 tons and $1,491,466 revenue, in 1934 to 596,378 tons and $2,119,427 revenue, and in 1935 to 639,980 tons and $2,289,858 revenue. The principal commodities carried consisted of forest, manufactured, and agricultural products. The debtor estimates that revenue from freight moved over this line will amount to $2,550,524 in 1936, $2,973,750 in 1937, $3,406,978 in 1938, $3,819,559 in 1939, and $4,171,625 in 1940. The latter amount is an increase of $1,881,767, or 82 percent, over 1935 revenue.

Total revenue to be derived from freight in the period 1936 to 1940, inclusive, is estimated by the debtor to amount to $12,635,475 in 1936, $13,831,002 in 1937, $15,036,531 in 1938, $16,338,231 in 1939, and $17,919,621 in 1940. Compared with 1935, these amounts represent an increase of 3.5 percent in 1936, 13.3 percent in 1937, 23.3 percent in 1938, 33.9 percent in 1939, and 46.8 percent in 1940.

A witness for the debtor testified that the increased revenues estimated for the future were based on expected increases in traffic and freight rates. He further testified that the drastic decline in revenues recently suffered by the debtor resulted not only from the business depression but also from intense competition from water and motor carriers.

The debtor and other lines with which it has joint freight rate arrangements have water competition

via the Panama Canal between the Pacific coast and Atlantic and Gulf ports, as well as in connection with canal lines and inland waterways. There is also strong competition coastwise between California and Washington. It was the opinion of the debtor's witness that increased operating expenses would compel water carriers to increase rates and thereby would divert traffic to railroads. The witness also was of the opinion that railroad freight rates, as a whole, are as low as they will be for a number of years, and the tendency in the immediate future will be towards a higher level of rates.

This witness stated that prior to the advent of motor truck competition, practically all the debtor's traffic between California and Utah moved under class rates, which for the first four classes were $2.165, $1.845, $1.625, and $1.35 per 100 pounds between San Francisco and Utah common points. Motor truck competition [248] made it necessary for the debtor to publish pick-up and delivery rates of $1 and $1.25 per 100 pounds on a great many commodities, and today at least 90 percent of such traffic of the debtor moves under the reduced rates. It was his opinion that effective regulation of motor carriers would tend to divert traffic to the railroads.

Passenger, mail, express, and other related revenues received by the debtor in the years 1923 to 1935, inclusive, were as follows:

Year	Revenues	Year	Revenues
1923	$3,250,677	1930	$1,738,884
1924	2,891,137	1931	1,288,093
1925	2,697,899	1932	645,760
1926	2,515,900	1933	433,959
1927	2,350,320	1934	457,481
1928	2,217,421	1935	559,816
1929	2,135,828		

It thus appears that such revenues steadily declined from 1923 to 1934, the decrease amounting to 79.7 percent between 1923 and 1933. In 1935 such revenues had increased 22.5 percent over 1933, but were still 73.8 percent below those for 1923. The debtor estimates that revenues from these sources will amount to $654,710 in 1936, $1,063,058 in 1937, $1,299,060 in 1938, $1,860,815 in 1939, and $1,535,372 in 1940. At the time of the hearing the debtor expected to inaugurate additional passenger service between San Francisco and Salt Lake City in May, 1937, only one passenger train daily between those points having been operated since April 24, 1932. By shortening of schedules and with greater advertising of the improved service of the Denver & Rio Grande Western via the Dotsero Cut-off, one of the most scenic routes between California and the East, passenger revenues should be increased materially.

The debtor filed a forecast showing that total railway operating revenues would amount to $13,438,342 in 1936, $15,053,934 in 1937, $16,507,579 in 1938, $18,383,490 in 1939, and $19,654,935 in 1940.

As a bridge line to and from the Pacific coast the debtor's railroad may, as a result of the completion of the Dotsero Cut-off in 1934, come into greater use. The railroad distance between Denver and Salt Lake City and points east of the former and west of the latter is greatly shortened by use of this Cut-off and the Moffat Tunnel. The rehabilitation program of the debtor's road now in [249] progress and the betterment of its equipment should enable it to give improved service. As a consequence, the debtor and the lines with which it is closely affiliated should be in better position to compete with the Southern Pacific and Union Pacific for transcontinental traffic. Increased traffic over its Northern California extension reasonably may be expected. Greater through and local traffic should result from a further revival in general business conditions. Whether revenues in the future will reach the level estimated by the debtor for 1940, is open to doubt. To the extent that the debtor relies upon increased freight rates, and a recovery of the traffic lost to competing forms of transportation under present State and Federal regulatory conditions, its estimates rest upon uncertainties.

Traffic and Revenue of Subsidiaries.

The main line of the Sacramento Northern Railway, separately operated, extends from Oakland to Chico, Calif., and both freight and passenger services are rendered over it. Its freight traffic consists

largely of agricultural, manufactured and miscellaneous, and mineral products.

Freight traffic and revenue derived therefrom for the years 1930 to 1935, inclusive, were as follows:

Year	Tons	Revenue
1930	840,306	$1,234,696
1931	743,220	971,482
1932	629,792	769,412
1933	649,554	717,435
1934	704,472	760,033
1935	697,464	760,528

A witness for the debtor testified that the decline in traffic was occasioned by competition of motor trucks, depressed economic conditions, and the displacement of coal by oil and natural gas. It was his opinion, however, that the Sacramento Northern's freight earnings in the future should increase materially from an improvement in the market demand for California fruits and vegetables, and that improved facilities recently had been made available to the carrier's shippers. He further testified that general business conditions were improving and that the carrier was in a better position to meet truck competition. The witness was of the opinion that the carrier's [250] gross revenues from transportation and other railway operations would amount to $1,322,676 in 1936, $1,417,458 in 1937, $1,528,492 in 1938, $1,616,891 in 1939, and $1,689,038 in 1940. The latter amount is a 38.3 percent increase over gross revenues for 1935, and is approximately

$40,775 greater than the actual gross revenue for 1931, but is approximately $394,000 less than the actual for 1930.

The main line of the Tidewater Southern Railway extends from Stockton to Hillmar, Calif., serving a territory predominantly agricultural. The carrier's freight traffic consisted principally of agricultural products and manufactured and miscellaneous commodities.

Freight traffic and revenue derived therefrom for the years 1930 to 1935, inclusive, were as follows:

Year	Tons	Revenue
1930	199,607	$425,506
1931	227,856	264,796
1932	249,820	230,450
1933	255,833	202,434
1934	266,274	271,519
1935	211,264	272,299

A witness for the debtor testified that the Tidewater Southern's total railway operating revenues would amount to $287,136 in 1936, slightly higher than those in 1935, but that since the small area served by the line does not afford much opportunity for increased acreage production, earnings are not expected to increase materially in the future.

The Deep Creek Railroad Company operates 44.6 miles of line south from Wendover, Utah, serving a territory devoted principally to mining. Its freight revenues are dependent largely on mining activities in the Gold Hill District at the southerly terminus

of the line, although some revenue is derived from the movement of sheep to winter ranges in the fall and out in the spring.

A witness for the debtor testified that the revenues of this line have in the past few years been nominal, but with a revival in mining it is possible for a traffic to develop which would increase materially the revenue. For example, in 1923 revenues were $42,385, in 1924 $71,670, and in 1925 $40,268. In 1934 and 1935, however, they were only $7,383 and $5,355, respectively. For the next several years revenues are not expected to increase. [251]

Earnings Available for Charges.

The reported consolidated net income of the debtor's system available for payment of interest on funded debt for the years 1926-35, inclusive, was $4,759,282 in 1926, $2,674,494 in 1927, $2,964,371 in 1928, $2,529,846 in 1929, $1,552,487 in 1930, $186,708 deficit in 1931, $252,706 in 1932, $674,007 in 1933, $1,084,244 in 1934, and $805,589 in 1935. Operating ratio percentages for the same years were, respectively, 70.3, 79.2, 80.3, 83.2, 84, 91, 85.8, 83, 81.1, and 83.7.

It would appear from the record, however, that before the foregoing amounts may be considered indicative of future earnings, certain factors should be taken into consideration. It was testified, for example, that a substantial amount of deferred maintenance had been permitted to accrue on the debtor's property by 1927. Beginning in that year

and continuing into 1931, considerable sums were expended yearly in an effort to overcome existing deferred maintenance. This program of rehabilitation was discontinued in 1931 by reason of drastically declining revenues, and it was testified that approximately $5,000,000 of deferred maintenance existed in the debtor's property at the end of 1935. Although the witnesses were unable to allocate any specific amount for undermaintenance to particular years, it is reasonably certain that maintenance was deficient during the years 1930 to 1935, inclusive. Total system maintenance expenditures for the years 1922 to 1935, inclusive, were $73,673,799, and total system operating revenues were $219,808,043. By dividing total maintenance expenditures, plus the $5,000,000 of deferred maintenance, by total operating revenues, a ratio of 35.79 percent results which may, for the purposes of this proceeding, be considered as normal for the period. If this ratio is applied to the operating revenues for the years 1931 to 1935, inclusive, and the resulting amounts are substituted for the amounts reported for maintenance expenditures in those years, the deficit in income reported available for interest for 1931 would be increased $263,231, and the amounts reported for 1932 would be decreased $692,282, for 1933 $408,488, for 1934 $843,627, and for 1935 $585,633. If such adjustments are made, however, the results should be further adjusted by adding $122,735 for 1931, $161,286 for 1934, and [252] $436,036 for 1935, since those amounts were re-

ported expended in those years for rehabilitation and improvements.

To be indicative of probable future earnings, further adjustments should also be made. The amounts reported as income available for interest reflect amortization of discount on funded debt of $139,698 in 1931, $144,911 in 1932, $146,878 in 1933, $144,063 in 1934, and $143,433 in 1935. Since the reorganized company's income would not be affected by such items, those amounts should be credited to the income reported in those years. The income reported for 1934 and 1935 should also be adjusted for the $97,683 accrued by the debtor for railroad retirement in 1934 and credited in 1935. The report of our Bureau of Accounts also shows that deductions of $279,946 in 1931, $98,696 in 1932, and $333,408 in 1933, and a credit of $17,057 in 1934, should be made for improper accounting.

If the foregoing adjustments were made, the consolidated system income available for interest for the years 1931 to 1935, inclusive, would be $467,000 deficit in 1931, $393,000 for deficit in 1932, $80,000 in 1933, $661,000 in 1934, and $702,000 in 1935, or an average of $116,600 per annum for the period. It is true that such amounts would not reflect probable increased earnings from the debtor's Northern California extension, calculated by the debtor at $500,000 per annum if operations over the line had become seasoned. On the other hand, they do not reflect present social security and railroad retirement

taxes on a retroactive basis, nor increases in wages or prices since the hearing.

For the year ended December 31, 1936, the debtor reported total system operating revenue of $16,547,344 and total system operating expenses of $14,449,275, of which $1,585,530 was attributed to the current rehabilitation program. If the latter expenses, as well as $135,401 for amortization of discount on funded debt, be eliminated, the income available for interest would be $1,902,033, as compared to the $181,102 actually reported. For the year ended December 31, 1937, the debtor reported total system operating revenue of $17,918,485, and total system operating expenses of $16,987,490, of which $1,837,495 was attributed to the current rehabilitation program. Eliminating the latter and the item of $135,401 reported for amortization of discount on funded debt; the income available for interest for the period would be $1,069,785 instead of the reported deficit of $903,112. [253]

In statements filed in this proceeding the debtor estimated that total operating revenues of its system for the years 1936-40, inclusive, would be $15,050,200, $16,761,200, $18,325,200, $20,288,200 and $21,632,000, respectively. Excluding operating charges incident to its current rehabilitation program, it estimated that consolidated income available for interest would be $1,521,386 in 1936, $2,180,585 in 1937, $2,738,886 in 1938, $3,365,836 in 1939, and $3,769,836 in 1940, or an average of $2,715,306 for the period. Operating ratios estimated for the same years were, respectively, 79.28, 76.01, 73.56,

72.28, and 75.6, and expenditures incident to its current rehabilitation program were estimated at $1,747,384 in 1936, $2,021,312 in 1937, and $1,280,071 in 1938.

These estimates were based on assumed revenues, previously analyzed, and assumed operating ratios, which are influenced greatly by operating revenues. It is significant that the estimates were based, among other things, upon the assumption that there would be increases in rates but that there would be no increases in operating costs, either through prices of material or wages. The estimates also ignored necessary deductions for the creation and maintenance of the various funds proposed under the debtor's plan. It is reasonably certain that some traffic diverted to motor carriers in recent years will not be regained. Strenuous competition must be expected not only from those carriers, but from water carriers and, especially, from other strong railroads serving the same territory as the debtor. This latter competition compels the movement of trains on schedule regardless of the load. Long stretches of the territory through which the debtor's road extends are sparsely populated and productive of little or no traffic. The debtor's volume of traffic is subject to wide fluctuations, and the topography of the country entails expensive helper service over high summits.

Although the 1936 adjusted income available for interest exceeded the debtor's estimate, it is significant to note that the amount reported for 1937,

when adjusted, was $832,248 less than the adjusted amount reported for 1936, and $1,110,801 less than the debtor's estimate for 1937. The decrease in income available for interest occurred despite the large increase in operating revenues in the 1937 period over the 1936 period. The decreased income is undoubtedly accounted for by reason of increased costs. [254] We have heretofore stated that the debtor's forecast of future earnings was based on assumed increases in rates but no increases in costs. The results for 1937 clearly demonstrate the fallacy of the latter assumption. The results of operation reported for the first six months of 1938 cast further doubt upon the accuracy or trustworthiness of the debtor's estimate of future earnings. For those months there was a deficit of $1,120,403, in available income, after adjustment similar to that made in 1936 and 1937, in the system's consolidated income available for interest. It is true that ordinarily the debtor's earnings are much greater in the last six months than the first six months of the calendar year. However, the results for the 12 months, July, 1937, to June, 1938, show a deficit of $264,000 in the system's consolidated income available for interest. A consideration of these recent data (reported subsequent to the preparation of the debtor's estimate), together with other data of record, convinces us that too great reliance may not be placed upon the debtor's estimate of future earnings, and that the capital structure of the reorganized company must be conservative.

Value for Rate-making Purposes.

Under section 19a of the Interstate Commerce Act, this Commission, by division 1, in Western Pacific Ry. Co., 29 Val. Rep. 239, reported the value for rate-making purposes of the property owned by the debtor to be $63,321,000 as of June 30, 1914, excluding working capital. In other proceedings, we reported the value for rate-making purposes of the properties of the debtor's wholly owned subsidiaries, Sacramento Northern Railway, Tidewater Southern Railway Company, and Deep Creek Railroad Company, in the total amount of $18,123,283, as of their respective valuation dates. If there be added to the above amounts the net costs of additions and retirements between valuation dates and December 31, 1935, the total would be $139,600,455.

Classes of Creditors and Stockholders.

Pursuant to section 77(g)(7) of the Bankruptcy Act, the district court entered an order, on August 20, 1935, dividing creditors and stockholders, for the purposes of the plan and its [255] acceptance, into the following classes: Class 1, first-mortgage bonds; class 2, general and refunding bonds; class 3, debtor's secured promissory notes to the A. C. James Company; class 4, debtor's secured promissory notes to the Reconstruction Finance Corporation; class 5, debtor's secured promissory notes to the Railroad Credit Corporation; class 6, equipment obligations to the Baldwin Locomotive Works (assigned to Fidelity-Philadelphia Trust Company, trustee); class 7, equipment-trust certificates un-

der agreement of March 1, 1923; class 8, equipment-trust certificates under agreement dated March 15, 1924; class 9, equipment-trust certificates under agreement dated May 1, 1929; class 10, debtor's obligations as to advances made on open account by the Western Pacific Railroad Corporation; class 11, debtor's obligations as to advances made on open account by the Western Realty Company; class 12, debtor's preferred stock; class 13, debtor's common stock; class 14, all other claims, obligations, and liabilities not hereinbefore specifically described.

As recorded on the trustees' balance sheet of June 30, 1938, class 1 items consisted of $49,290,100, principal amount, of first-mortgage 5-percent bonds, on which accrued and unpaid interest amounted to $11,914,521; class 2 items consisted of $18,999,500, principal amount, of general and refunding mortgage 5-percent bonds, entirely pledged as collateral for certain of the debtor's notes; class 3 items consisted of $4,999,800, face amount, of notes to the A. C. James Company, on which accrued and unpaid interest amounted to $1,124,955, and which are secured by $4,249,500, principal amount, of the debtor's general and refunding bonds, and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 4 items consisted of $2,963,000, face amount, of notes to the Reconstruction Finance Corporation, on which accrued and unpaid interest amounted to $649,181, the notes being secured by $10,750,000, principal amount, of the debtor's gen-

eral and refunding bonds, and voting trust certificates for half of the voting stock of the Denver & Rio Grande Western Railroad Company; and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 5 items consisted of $2,445,610, face amount, of notes to the Railroad Credit Corporation, on which accrued and unpaid interest amounted to [256] $135,296, which notes are secured by $4,000,000, principal amount, of the debtor's general and refunding bonds, and a second lien upon the security held by the Reconstruction Finance Corporation, an assignment of certain advances by the Western Pacific Railroad Corporation, and an assignment of the distributive share of the debtor under the marshaling and distributing plan, 1931; class 6, 7, 8, and 9 items consisted of various equipment obligations aggregating $857,265; class 10 items consisted of $5,766,309, principal amount, of advances to the debtor by the Western Pacific Railroad Corporation, on which accrued and unpaid interest amounted to $1,843,061; class 11 items consisted of $50,000, principal amount, of advances to the debtor by the Western Realty Company, on which unpaid interest amounted to $10,417; class 12 items consisted of $28,300,000, par value, of the debtor's preferred stock; class 13 items consisted of $47,500,000, par value, of the debtor's common stock; and class 14 items consisted of various other claims not specifically described by the court.

The proceeds from the loans comprising class 3, 4, and 5 items were applied by the debtor in partial

payment of the cost of constructing its Northern California extension, for payment of interest on its first-mortgage bonds and equipment obligations, miscellaneous capital expenditures, payment of taxes, and for advances to subsidiary railroad operating companies.

Proposed Plans of Reorganization.

The capital structures proposed for the reorganized company in the three plans filed, in the debtor's plan, if modified in accordance with the debtor's suggestions during the hearing and on brief, the distribution of the new securities to be issued under the plans, and the main features thereof, are summarized below.

Existing equipment obligations would not be disturbed under any of the plans. As filed, the debtor's plan would become effective as of January 1, 1936. The debtor later suggested January 1, 1937, as the effective date, that being the effective date of the other plans.

The plan of reorganization originally submitted by the debtor contemplated an initial issue of $25,675,900 of new first-mortgage 4-percent bonds, $41,774,796 of new 5½-percent income mortgage [257] bonds (cumulative for the income period in which such interest is payable and for the four income periods next succeeding the income period in respect to which such interest is payable), of which $20,887,398 would be series-A bonds, and $20,887,398 would be series-B bonds, $8,092,709 of new noncumulative junior lien 6-percent income bonds, or a

total of $75,543,405, principal amount, of bonds. The plan further provides that 926,622 shares of new no-par common stock be authorized, of which 300,000 shares would be issued forthwith, and 626,622 shares would be reserved for issue upon conversion of $20,887,398 of the new income bonds.

Under the debtor's plan, its existing first-mortgage 5-percent bonds would be exchanged on the basis of 30 percent in the new first-mortgage 4-percent bonds, and 70 percent in new income mortgage 5½-percent bonds plus additional income bonds equal in face amount to the unpaid interest. Ten million dollars of the new first-mortgage 4-percent bonds would be sold at par to the Reconstruction Finance Corporation to provide new money for the reorganized company. In consideration of that purchase, the Reconstruction Finance Corporation would receive for its claim against the debtor treatment equivalent to that given to the holders of the existing first-mortgage bonds.

The new junior lien income 4-percent bonds would be issued to the Railroad Credit Corporation and A. C. James Company in settlement of their claims, each to receive new bonds equal in face amount to the principal of the claim plus unpaid interest.

All the new stock would be placed in a voting trust under which three voting trustees nominated by the debtor and approved by the bondholders' committee would act pursuant to a voting trust agreement which would be acceptable to the debtor and the bondholders' committee. The voting trust would con-

tinue until 10 years from the date of confirmation of the plan. A majority of the debtor's board of directors would be nominees of the holders of income bonds, and as long as the Reconstruction Finance Corporation holds more than $500,000 of the first-mortgage bonds, the voting trustees would elect to the board of directors a person designated or nominated by that corporation. In respect to the 300,000 shares of common stock immediately issuable under the plan and to the shares which may be issued on conversion of the income bonds [258] voting trust certificates would be issued. The certificates for 150,000 shares of the common stock would be placed in escrow with the trustee of the income mortgage and would be transferred to the holders of income mortgage bonds at $27.50 per share if, commencing April 1, 1941, full interest was not paid on the income bonds in respect to the next preceding income period.

The debtor's plan further provided that there be created a contingency reserve fund of $500,000 to be made available for the purpose of paying fixed interest charges, principal of and dividends on equipment obligations and operating expenses which could not otherwise be provided for without, in the opinion of the board of directors, unduly impairing free working capital. The fund would be created initially from the proceeds of the $10,000,000 of new first-mortgage bonds to be sold in the reorganization, and thereafter maintained out of the net income remaining after the payment of fixed charges.

There would be created also out of available net

income before the payment of interest on income bonds a capital fund to be applied for capital investments made in the calendar year in which the fund is set aside, and no additional securities would be issued against such expenditures. The amount set aside in the capital fund for any calendar year would not exceed $500,000 per year during the years 1936 to 1940, inclusive, $1,000,000 per year during the years 1941 to 1945, inclusive, and in all subsequent years not more than 3 percent of gross revenues.

Provision for a sinking fund in an amount not exceeding in any calendar year one-half of 1 percent of the principal amount of the new income bonds, series A, also is made in the plan. The fund would be created and maintained out of net income remaining after payment of fixed charges, maintenance of the reserve fund, capital fund, and interest payments on income bonds, and would be applied to the redemption of the series-A income bonds.

The debtor's plan also provides for an additional interest fund to be created and maintained out of net income remaining after payment of fixed charges, payments in respect to the reserve fund and the capital fund, and interest on income mortgage bonds and junior lien bonds. The fund would not exceed one year's interest on all outstanding first-mortgage bonds and would be available only for the payment of interest on such bonds. [259]

During the hearing and on brief, counsel for the debtor suggested that the debtor's plan be modified

by providing that (1) the rate of interest on all bonds be 4 percent per annum, (2) there be created sinking funds of not less than one-half of 1 percent or more than 1 percent for the redemption of all bonds, (3) the escrow agreement with respect to the 150,000 shares of common stock be modified so that there would not be a peremptory forfeiture on the due date of interest, because such interest may be paid in cash out of the available net income of the next four income periods, and be further modified so that there would be no forfeiture at all if the failure to earn interest were caused by excessive maintenance or undue capital expenditures, (4) the voting trust be eliminated from the plan, and (5) there be issued $7,245,274, par value, of 4-percent noncumulative preferred stock to the Western Pacific Railroad Corporation and the Western Realty Company.

With the effective date of the plan as of January 1, 1937, the plan, modified as suggested, would provide for the initial issue of $25,675,900, principal amount, of new first-mortgage 4-percent bonds, $45,219,530, principal amount, of new income mortgage 4-percent bonds, $8,386,040, principal amount, of new junior lien income 4-percent bonds, or a total of $79,281,470 principal amount, of bonds $7,245,274, par value, of new 4-percent preferred stock, and 300,000 shares of no-par common stock.

Subsequent to the issue of the report proposed by our Bureau of Finance, counsel for the debtor suggested on brief in support of exceptions to the report that the debtor's plan be modified further by

providing that the reorganized company issue $19,858,020, principal amount, of new first-mortgage 4-percent bonds, $39,432,100, principal amount, of new income 4-percent bonds, $10,487,707, principal amount, of 15-year income notes to be secured by $18,999,500, par value, of new prior-lien 4-percent preferred stock, $9,503,664, par value, of new 4-percent participating preferred stock, $7,188,607, par value, of new junior 4-percent convertible preferred stock, and 300,000 shares of new no-par-value common stock. Under the proposed modifications, existing first-mortgage bondholders would receive new first-mortgage bonds for 20 percent of the principal of their bonds, new income bonds for the remaining 80 percent, and new prior-lien preferred stock for accrued interest. The present holders of secured notes would receive new 15-year [260] notes for the face value of their notes and presumably new prior-lien preferred stock for accrued interest. The unsecured creditors would receive new junior convertible preferred stock in settlement of their claims, and the holders of present capital stock would receive in exchange therefor all the new no-par-value common stock.

Under the bondholders' plan, the reorganized company would issue initially $19,858,020, principal amount, of new first-mortgage 4-percent bonds, $19,716,040, principal amount, of new income mortgage 5-percent bonds (cumulative against only 3 years' income), or a total of $39,574,060, principal amount, of new bonds. The plan further proposes the issue of $27,930,800, par value, of new participating 6-

percent preferred stock (cumulative only to the extent that dividends are earned), and not less than 339,995 shares, nor more than 489,995 shares, of new no-par common stock.

The existing first-mortgage 5-percent bonds would be exchanged on the basis of 20 percent in new first-mortgage 4-percent bonds, 40 percent in new income mortgage 5-percent bonds, and 40 percent in new participating 6-percent preferred stock, accrued interest also being commuted into the latter stock. As provided in the debtor's plan, $10,000,000 of the new first-mortgage 4-percent bonds would be sold in order to provide new money for the reorganized company.

The claims of the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company would be converted into the new common stock (taken at $100 per share) on the basis of the collateral pledged under the debtor's notes to those creditors. Such stock, amounting to 189,995 shares, would be deposited under an escrow agreement subjecting the stock to purchase warrants. The reorganized company would be entitled to purchase any of the certificates to be issued under the escrow agreement under certain terms. The certificates to be issued to the Reconstruction Finance Corporation could be purchased by the other two secured creditors, and those of the Railroad Credit Corporation by the A. C. James Company.

The Western Pacific Railroad Corporation would be allotted purchase warrants, entitling the holders

thereof to purchase on or before December 1, 1941, all or any part of the 189,995 shares of the new common stock at the price of $62 per share, plus interest thereon at the rate of 4 percent per annum from January 1, [261] 1937. In addition to its option under the escrow agreement the Western Pacific Railroad Corporation would be granted, through issue to it of subscription warrants, the first opportunity to provide the $10,000,000 of required new money, receiving therefor the $10,000,000 new first-mortgage 4-percent bonds and 150,000 shares of the new common stock.

To the extent that the Western Pacific Railroad Corporation should fail to exercise the subscription warrants, the bondholders' plan provides that the new money be provided upon less favorable terms to the debtor by the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company; and to the extent that they, in turn, should fail to provide it, the plan provides that it be supplied upon still less favorable terms by the present first-mortgage bondholders.

The bondholders' plan further provides that control of a majority of the board of directors of the reorganized company be vested in the new preferred stock until the reorganized company shall have demonstrated its capacity to pay a continuous return on that stock. A contingency reserve fund and a capital fund similar in all respects to those proposed by the debtor are provided for in the bondholders' plan. It also provides for a one-half of 1 percent sinking

fund for the redemption of the new income bonds, but only after payment of fixed and other contingent charges and the payment of dividends on preferred stock.

On briefs in support of exceptions to the proposed report of our Bureau of Finance, the bondholders' committee proposed that its plan be modified (1) by eliminating the provision for the contingency reserve fund, (2) to make the sinking fund payable out of available net income before preferred dividends, but reduce it to an annual one-half of 1 percent fund instead of a 1-percent fund, (3) to clarify the provisions respecting the offering of new securities to provide new money, by providing that it be made to the unsecured creditors or their assignees proportionately to the amounts of their respective claims, (4) to include in the escrow certificates to be delivered to the Reconstruction Finance Corporation and the Railroad Credit Corporation for their notes, express provisions that their acceptance shall not prejudice the rights of the Reconstruction Finance Corporation or the Railroad Credit Corporation against collateral which has been delivered by third persons to [262] secure the obligations of the debtor and which does not itself constitute a claim against the debtor or the debtor-property, (5) to provide that the reorganization committee shall be constituted of such number of members, not more than five, as we may determine, but that a majority of whom shall be elected by the bondholders in any manner which we may prescribe, and (6) to elim-

inate the provisions requiring the consent of two-thirds of the bondholders to the confirmation of the plan, but extend the provision for protecting a dissenting class through a judicial sale at a fair upset price to include the bondholders as a class.

The plan submitted by the A. C. James Company proposes that the reorganized company issue initially $10,000,000, principal amount, of new first-mortgage 4-percent bonds, $49,290,100, principal amount, of new general-mortgage 4 percent income bonds (cumulative only to the extent that interest is earned), and $10,450,263, principal amount, of new noncumulative 4-percent debentures (convertible into 150 percent of their principal amount in 6 percent preferred stock), or a total of $69,740,363, principal amount, of new bonds and debentures. The preferred stock of the debtor, of which $28,300,000, par value, is now outstanding, would be delivered to the debtor under this plan, and $5,807,650, par value, of such stock would be reissued. The common stock of the debtor, now outstanding of the par value of $47,500,000, would be delivered to the debtor and be reissued.

The existing first-mortgage 5-percent bonds would be exchanged for the new general-mortgage 4-percent income bonds, with a bonus of $500, par value, of common stock for each $1,000 bond. The new noncumulative 4-percent debentures would be allotted to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, and those creditors would be given also a

bonus of $500, par value, of common stock for each $1,000 of the debtor's notes owned by them. The $5,807,650, par value, of preferred stock would be issued to the Western Pacific Railroad Corporation and the Western Realty Company in settlement of the principal amount of their claims against the debtor.

Under this plan all accrued interest upon all outstanding debt would be canceled. [263]

The $10,000,000, principal amount, of new first-mortgage bonds would be sold to provide new money for the reorganized company and the Western Pacific Railroad Corporation would be given the first right to purchase such bonds, with a bonus at the rate of 15 shares of the common stock for each $1,000 first-mortgage bond purchased.

No reserve capital or sinking funds are provided for under the James plan.

The A. C. James Company also proposed modifications of its plan on brief in support of exceptions to the report proposed by our Bureau of Finance. Under the proposed modifications, the reorganized company would issue $9,623,202, par value, of noncumulative 5-percent preferred stock for unpaid interest on the present first-mortgage bonds, and on the claims of the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company; $5,807,650, par value, of common stock to the unsecured creditors in satisfaction of the principal amount of their claims; $10,000,000, par value, of common stock as a pro rata bonus with

the new first-mortgage bonds; $14,260,570, par value, of common stock to the Western Pacific Railroad Corporation in recognition of the interest which it has as sole stockholder in the debtor.

Each of the three plans sets forth in more or less detail the proposed manner of participation of the stockholders and creditors in the plan and the method of consummation. The debtor's plan provides that it shall not be declared operative or carried out until finally approved by the Commission and confirmed by the court after acceptance by the holders of each class or classes of securities or claims affected by the plan as shall be sufficient under the provisions of section 77. The James plan provides that it shall not be carried out until it shall have been approved by the Commission and the court, pursuant to the requirements of section 77, and until it shall have been accepted by two-thirds of the creditors of each class, and by two-thirds of the stock of each class. The bondholders' committee plan provides that it shall not be carried out until it shall have been accepted by the holders of at least two-thirds in principal amount of the debtor's outstanding first-mortgage bonds, nor unless either (1) the plan shall have been accepted by creditors holding at least two-thirds in prin- [264] cipal amount of the total allowed claims of such class, and by the holders of at least two-thirds of the stock of each class, or (2) provision shall have been made for the sale of the debtor's property at public auction at a fair upset price as determined by the court, and

the payment to the nonassenting creditors of such class or the nonassenting stockholders of such class of their aliquot portion of the proceeds of the sale of such property.

None of the proposed plans is agreed to by all the parties to the proceeding.

The debtor's plan is objected to by the bondholders' committee on the grounds that it proposes an unsound capital structure in that the ratio of debt to capital stock is disproportionate, and that the total of fixed and contingent interest charges proposed is excessive in the light of the debtor's past earning experience and probable future earnings. The James plan is objected to for the same reasons. The bondholders further contend that the debtor's plan discriminates unfairly in favor of the Reconstruction Finance Corporation, and against the first-mortgage bondholders and the Railroad Credit Corporation in that it proposes to place the Reconstruction Finance Corporation on a parity with the present first-mortgage bondholders as compensation for furnishing the $10,000,000 of new money. In proposing to give the A. C. James Company and the Railroad Credit Corporation securities on the basis of the principal amount of their notes, irrespective of the amount of their collateral security, the bondholders allege that the Railroad Credit Corporation is discriminated against. By granting all the new common stock of the reorganized company to the Western Pacific Railroad Corporation without requiring any contribution or sacrifice by that cor-

poration to or in the reorganization, the bondholders allege that undue preference is proposed.

The James plan is further protested by the bondholders' committee on the grounds that it is discriminatory in that it does not provide any fixed interest obligations for the present first-mortgage bonds; that it proposes the issue of new securities having the sole first lien upon the property of the reorganized company exclusively to the Western Pacific Railroad Corporation along with a bonus of $150 of new common stock for each $100 bond; proposes the waiving of all accrued interest without any compensation therefor; disregards the relative priorities of the various creditors by [265] giving the same bonus of new common stock; proposes no sinking funds for retirement of debt; makes the new bonds alloted to the present first-mortgage bondholders mature in 1987 as against a maturity in 1957 for the obligations which are proposed to be given to the so-called junior creditors; and proposes to treat the claims of the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company on the basis of the principal amounts of the notes rather than upon the basis of the collateral held. The bondholders' committee also objects to the James plan proposal to give the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company the principal amount of their notes in new 4-percent debentures, convertible into 150 percent in principal amount of 6-percent pre-

ferred stock. The bondholders' committee points out that if the debentures are converted, the new preferred stock would rank in the scale of distribution of the reorganized company's earnings substantially at the same point as the debentures; that this would result in a 9 percent annual return upon the present claims and also would operate to depress the value of the common stock of the reorganized company.

The bondholders' plan is objected to by the A. C. James Company on the grounds that it proposes an unsound and complicated capital structure, does not furnish appropriate vehicles for senior and junior financing of future capital requirements; does not preserve debt as debt; capitalizes unearned and unpaid interest as a permanent part of the capital structure; proposes excessive interest rates for certain new securities; and proposes excessive fixed charges. Certain of those objections also are advanced in regard to the debtor's plan. It is further alleged that the bondholders' plan discriminates unfairly against the other creditors and in favor of the bondholders, and does not accord sufficient recognition to the debtor's equity.

Conclusions

By the provision of section 77(b) of the Bankruptcy Act, as amended, a plan of reorganization shall include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through the issue of new securities of any character or otherwise; shall

provide for fixed [266] charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; and shall provide adequate means for the execution of the plan. Subsection (e) of section 77 provides that the judge shall approve the plan certified to the court by us, if satisfied, after hearing, and without hearing if no objections are filed, that the plan complies with the provisions of subsection (b), is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; that the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of the hearing, are reasonable, are within such maximum limits as are fixed by us, and are within such maximum limits to be subject to the approval of the judge; that the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge,

except that allowances for the actual and reasonable expenses (including reasonable attorney's fees) incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries, and such assistants as we, with the approval of the judge, may especially employ, may be paid in securities provided for in the plan if those entitled thereto will accept such payment. By the provisions of subsection (d) of section 77, the plan approved by us must meet with these requirements of subsections (b) and (e) and be compatible with the public interest, but such plan may be different from any which has been proposed. [267]

It will be observed that insofar as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization should not exceed

a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent, be within its probable earning power.

The present reorganization of the debtor is the second since it began complete operations in 1911. A review of its financial history shows that due to an inherent lack of earning power its past operations have resulted in financial failure, and that the investment in its property has not been justified by its earnings. In Denver & Rio Grande Investigation, 113 I.C.C. 75, we pointed out that economically the original construction of the debtor was an ill-advised undertaking. If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably forseeable for the future.

As will have been noted, January 1, 1937 is proposed as the effective date of reorganization in each of the filed plans. The obligations of the debtor, including accrued and unpaid interest, have increased considerably since that date, however, and the approval plan should provide that July 1, 1938 shall be the effective date of reorganization. Under the provisions of the debtor's plan, if modified as suggested by its counsel, the total capitalization of the reorganized company, as of that date, exclusive of no-par-value stock, would be $94,258,367. Treating the proposed no-par-value stock at $100 per

share, the total capitalization would be $124,258,367. Fixed interest charges would be $905,321, contingent interest charges $1,993,620 (assuming interest at 4 percent on proposed collateral income notes), and total fixed and contin- [268] gent interest, together with capital and sinking funds requirements, would be $3,695,391 per annum.

Under the bondholders' plan, computed as of July 1, 1938, the total capitalization, excluding no-par-value stock, would be $74,270,738. Treating the proposed no-par-value stock at $100 per share, the total minimum capitalization would be $108,270,238, and the maximum $123,270,238. Fixed interest would be $905,322, contingent interest would be $985,802, and total fixed and contingent interest, plus capital and sinking funds requirements, would be $2,489,704 per annum.

Under the James plan, computed as of July 1, 1938, the total capitalization would be $116,665,459. Fixed interest would be $511,001, contingent interest $2,387,940, and total fixed and contingent interest would be $2,898,941 per annum. It will be noted that this plan does not provide for any capital fund or sinking fund.

The fixed interest charges proposed in each of these plans are substantially lower than the debtor's present fixed charges. From data hereinbefore set out it is apparent that the reported consolidated income of the debtor's system available for interest would have been insufficient to have met the fixed charges proposed under the James plan in 1931 and

1932, and under the debtor's and bondholders' plan in 1931, 1932, and 1933. During the 5-year period 1931-35 the debtor's average reported consolidated income available for interest was $525,967, and if adjusted as hereinbefore suggested, it would be much less. While the earnings of the debtor showed improvement in 1936 and 1937 over those for the period 1931-35, inclusive, being $1,902,033 in 1936 and $1,069,785 in 1937, after eliminating extraordinary expenditures for rehabilitation and amortization for discount of funded debt, and assuming that reported expenditures for maintenance were sufficient normally to maintain the property, the decline in earnings in 1937 from 1936, and the lack of any earnings in the first six months of 1938, there having been a deficit of $1,120,403 in those months, show conclusively, if these data are not to be ignored, that the fixed interest charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and secure necessary new capital in the future. In this latter connection, it is essential that provision be made to raise $10,000,000 of new money for the purpose of retiring outstanding trustees' certificates. [269]

Interest at 4 percent on $10,000,000 of new bonds would be $400,000, and, including charges of $111,001 on present equipment obligations of the debtor and its trustees which are to be assumed by the reorganized company, the reorganized company would be immediately faced with fixed interest charges of $511,001 per year. We conclude, there-

fore, after a consideration of the debtor's past, present, and probable future earnings, that the plan of reorganization should provide for the immediate issue and sale of not to exceed $10,000,000 of new first-mortgage bonds, the proceeds of which should be used to retire outstanding trustees' certificates. In the event the new bonds are not salable at par, it may be necessary for the reorganized company to obtain a loan of $10,000,000 from the Reconstruction Finance Corporation. The approved plan should provide, therefore, that if no commitment for the purchase of such bonds is deposited with us within 60 days after approval of the plan by the court, the $10,000,000 of bonds authorized to be issued, together with such additional bonds as may be required by us and the Reconstruction Finance Corporation in proceedings under section 5 of the Reconstruction Finance Corporation Act, shall be deposited as security for a loan of $10,000,000 to the reorganized company. The purchase of any of the bonds by the Reconstruction Finance Corporation, or any loan by that corporation upon such bonds as collateral, will be subject to our approval under the provisions of the Reconstruction Finance Corporation Act. In view of the present unsatisfactory earnings of the debtor, and in order to provide against financial embarrassment should conditions not improve, the payment of interest on such bonds should be made only at such time as earnings are available therefor for a period of five years from the effective date of reorganization.

These bonds should be secured by a new first mortgage which should be a first lien upon all property, real and personal, and equipment now subject to existing mortgages of the debtor or at any time acquired by the reorganized company, subject, however, to the lien of obligations issued for equipment purchased or outstanding on equipment acquired in the reorganization. To facilitate future capital financing, the total authorized issue of bonds thereunder should be limited to $50,000,000, of which $10,000,000, and such additional amount as may be necessary, should be sold or [270] pledged to provide the new money required in the reorganization, and the remainder should be available for issue, with our approval, to provide for expenditures for additions, betterments, improvements or extensions made after the effective date of the reorganization, in a principal amount not exceeding 75 percent of the actual cost of such additions, betterments, improvements, or extensions. The bonds should be dated as of the effective date of reorganization, should mature in 50 years, and should bear interest at the rate of 4 percent per annum, payable semiannually. It should be provided, however, that interest accruing for a period not exceeding five years from the effective date of reorganization, or any portion thereof, on such bonds should accumulate, if not currently earned, and the payment thereof should be made only at such time as earnings are available therefor, but interest on such bonds accruing subsequent to a period not exceeding five years from the effective date of reorganization

should be a fixed charge. The bonds should be redeemable in whole or in part on any interest payment date upon 30 days' notice, at not to exceed 105 and accrued interest.

Suggestions have been made by parties to this proceeding that the authorized issue of the new bonds should not materially exceed those to be issued immediately or that restrictions against the issuance of additional bonds, when there is insufficient earnings coverage, should be provided. The latter restriction is not an unusual one, and while it may at times prove embarrassing to the reorganized company in the future, we find that the mortgage indenture of the new first-mortgage bonds should provide that new bonds in excess of the $10,000,000 to be immediately issued for sale, or such additional amount as may be necessary for pledge in order to secure a loan of $10,000,000, should not be issued on the basis of additional property of any kind or additions and betterments, unless the income of the reorganized company available for fixed charges in a period of 12 consecutive calendar months within the 18 calendar months immediately preceding the date of authentication and delivery of the bonds equals or exceeds 1.5 times the fixed charges, including interest on the bonds then applied for.

Considering the limited amount of fixed interest bonds approved herein, there would seem to be no real reason for the creation and maintenance of the so-called contingency reserve fund of [271] $500,000 to be available for the payment of interest on the new first-mortgage bonds as proposed in the debt-

or's plan and the bondholders' original plan. We find, therefore, that no provision should be made for such a fund.

Since new first-mortgage bonds would not be issued in principal amount to exceed 75 percent of future capital expenditures, the balance of such expenditures must be financed through the issue of junior securities or from earnings. Under both the debtor's plan and the bondholder's plan, funds for routine expenditures for additions and betterments would be secured from the hereinbefore described capital fund contemplated under their plans. The A. C. James Company opposes the creation of such a fund, as well as sinking funds for the redemption of bonds, contending that such funds are not in accordance with the principle of sound financing, and that the Revenue Act of 1936 imposed too great a penalty on the retention of earnings for such purposes. However, the reorganized company, like other railroad companies, must secure funds for future capital expenditures. To avoid embarrassment in the securing of funds, especially for future routine additions and betterments, which are estimated by the debtor at $500,000 annually, we find that the plan should provide for the creation of a capital fund out of the available net income remaining after payment of fixed charges. To prevent too heavy a sacrifice by present security holders, payments into the fund should not exceed $500,000 in in any one year, nor, in any event, should the total fund exceed $1,000,000 at any time. Annual payments into the fund should be $500,000 or such lesser

sum as may be required together with unappropriated accumulations in the fund as of the close of the calendar year prior to that for which the payment is to be computed, less charges for additions and betterments during the latter year, to bring the total in the fund to $1,000,000. Capital expenditures reimbursed out of the capital fund should not be capitalized through the issue of additional fixed or contingent interest-bearing bonds.

The debtor proposes that sinking funds be provided for all bonds, and the bondholders propose that they apply to income bonds only. The debtor also proposes that payments into sinking funds should not be made until payment of all interest charges and payments to the capital fund have been made. The bondholders originally proposed that payment into both funds should not be made until after [272] payment of dividends on the preferred stock. The latter proposal is not now urged. In view of the relatively small issue of fixed interest bonds which we have herein found should be issuable immediately, we do not believe that provision for their retirement through a sinking fund is required. We are of the opinion, however, that provision should be made for the creation of a sinking fund for the retirement of such bonds when and if $20,000,000, principal amount thereof, shall have been issued. Immediate provision should be made for the retirement of income bonds hereinafter approved under the plan. We find, therefore, that the plan should provide for the immediate creation, out of available net income remaining after the pay-

ment into the capital fund and interest on income bonds, of a cumulative sinking fund, in an amount up to, but not exceeding, in respect to any calendar year, one-half of 1 percent of the total principal amount of income bonds hereinafter approved for issue in the reorganization. This sinking fund should be applied to the purchase of income bonds at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds $50,000 and income bonds are not tendered or can not otherwise be purchased at less than their redemption price, the funds then in the sinking fund should be applied to the redemption of income bonds on the next succeeding interest payment date. Bonds purchased or redeemed out of the sinking fund should not thereafter be reissued.

As hereinbefore stated, the debtor's plan, modified as suggested by counsel, contemplates the issue of $39,432,100 of 4-percent income bonds. Under the bondholders' plan, $19,716,040 of 5-percent income bonds should be issued, and under the James plan, $49,290,100 of 4-percent income bonds would be issued. Including the interest on fixed debt, and the requirements of the capital and sinking funds herein approved, the charges of the reorganized company under the debtor's proposal would be $2,785,445, under the bondholders' proposal $2,095,383, and under the James proposal, $3,229,055. In order that any income bonds issued in the reorganization and remaining outstanding at maturity should be easily refundable, their interest charges should be well within the apparent earning power of the company

under reasonably favorable business conditions. Forecasts of higher earnings than those of the present and recent past may be supported by the record, and the annual [273] earnings of the debtor may not again descend to the lows reached in the depression, but the total of the fixed and contingent charges of the reorganized company should be limited by a consideration of the actual experience of the debtor rather than future possibilities if financial embarrassment is to be avoided. The record shows that the last year in which the debtor's unadjusted system earnings were sufficient to pay such charges as would accrue under the debtor's proposal was in 1928, under the bondholders' proposal was in 1929, and under the James proposal was in 1926. The average earnings forecast by the debtor for the period 1936 to 1940, inclusive, would be insufficient to meet the charges proposed by the debtor and the A. C. James Company. Even though interest is made dependent on earnings, the principal of any income bonds issued is debt and must be met at maturity. On the basis of the facts heretofore recited with respect to traffic and earnings, we find that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital and sinking funds should not exceed $2,000,000 per annum. With fixed charges and the requirements of the capital fund herein approved amounting to $1,011,001, interest charges and sinking fund requirements on new income bonds should be less than $989,000, these two sums equaling $2,000,001.

The bondholders urge that the rate of interest on the new income bonds should be 5 percent. With limited income, it is axiomatic that the higher the rate of interest the smaller the principal of bonds that may be issued. In order to allot as large an amount of new bonds as possible to present creditors, we find that the new income bonds should bear interest at the rate of 4 percent per annum. We further find that the principal amount of such bonds should not exceed $19,716,040. Interest at 4 percent thereon would be $788,642, and including annual requirements for a sinking fund of one-half of 1 percent for such bonds, the total of the fixed and contingent charges herein approved would amount to $1,898,223.

The bondholders also urge that contingent interest on the income bonds be made cumulative for three years, maintaining that though low earnings might be more than offset in a subsequent period by high earnings, the benefit of those high earnings, without such accumulation, could not recoup the losses of income bondholders but would inure progressively downward to the lower classes of securi- [274] ties. In our opinion such provision for accumulation of contingent interest is fair.

The plan should provide that the new income bonds be secured by a mortgage constituting a lien, subject only to the lien of the first mortgage, upon all property from time to time subject to the lien of the first mortgage. The total authorized issue of bonds thereunder should be limited to approxi-

mately $19,716,040. The bonds should be dated as of the effective date of the reorganization and mature in 75 years, bear interest at the rate of 4 percent per annum, payable annually, only out of the available net income of the reorganized company, and such interest should be cumulative whether earned or not, up to a maximum of 12 percent at any time. Provision should be made, however, that such interest shall not be cumulative if and as long as any deficit exists in the payment of interest on the first-mortgage bonds herein approved. The bonds should be redeemable on any interest payment date at their principal amount, plus any interest payable thereon on such interest payment date. They should be entitled to the benefit of a one-half of 1 percent sinking fund, payable out of available net income remaining after the payment of all prior charges herein approved.

The debtor's plan, if modified as suggested by counsel, and adjusted to June 30, 1938, would also provide for the issue of $10,408,410 of collateral notes to mature in 15 years, secured by $18,999,500 of prior-lien 4-percent preferred stock. No definite rate of interest for the notes is suggested. The James plan, also adjusted, would provide for the issue of $10,408,410 of convertible 4-percent debentures to mature in 60 years. The proposed note issue, unless provisions were made for its extension, would, of course, impose on the reorganized company the burden of the payment of the principal amount of the notes in 15 years, that is, prior to

the maturity of the new first-mortgage and income bonds. On the other hand, the collateral consisting of stock would be junior to the obligation which it secured, and thus would be of doubtful value. We can not approve this proposal, nor the James proposal, for the reasons hereinbefore stated with respect to the limitation of interest charges which may be incurred by the reorganized company.

Issues of capital stock in varying amounts are contemplated under the debtor's, the bondholders', and the James plans. The [275] amounts and the character of the stock proposed were undoubtedly influenced by the debtor's existing obligations and by the amount of debt proposed for the reorganized company under the various plans. If these plans were adjusted by providing for the issue of stock for the difference between the debt herein approved and the total capitalization (treating no-par-value stock at $100 per share), proposed under each of them, the debtor's plan would provide for the issue of $91,476,210 of stock, the bondholders' plan a minimum of $75,488,081, and a maximum of $90,488,081 of stock, and the James plan $83,883,302 of stock. In order to meet the prior charges herein approved and to pay dividends at the rate of 5 per cent on $91,476,210 of stock, the reorganized company's income available for interest would have to be $6,472,034; on $75,488,081 an amount of $5,672,627; on $90,488,081 an amount of $6,422,627; and on $83,883,302 an amount of $6,092,388.

As hereinbefore stated, the debtor's estimate of income available for interest averaged $2,715,306 per year for the period 1936-40, inclusive, the maximum amount for any one year in the period (1940) being $3,769,836. That amount, with prior charges of $1,898,223, would permit the payment of dividends at the rate of 5 percent on only $37,432,000 of stock. It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however; the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740-3/10 shares of preferred stock of the par value of $100 per share, and not more than 313,703 shares of no-par-value common stock.

The new preferred stock, which should be authorized in the total amount of 500,000 shares, should be entitled to receive dividends at [276] the rate of 5 percent per annum in respect to each cal-

endar year before any dividends should be paid or declared upon the common stock. Such dividends should be cumulative to the extent earned in respect to any income period, but not paid; but such dividends should otherwise be non-cumulative. In event of liquidation the new preferred stock should be entitled to receive out of the assets of the reorganized company its par value plus accumulated unpaid dividends before any distribution is made to any new common stock, but should not be entitled to any further participation in such assets. The new preferred stock should be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends.

The plan should provide that the reorganized company shall not, without the vote or consent of the holders of at least two-thirds in par value of outstanding new preferred stock, (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage and new income mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes, or other evidences of indebtedness maturing more than two years from their date, except purchase money obligations, given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock, other than that authorized herein, ranking either as to assets or dividends, in priority to or on a parity with the new preferred stock; or

(4) permit any subsidiary, substantially all of whose stock shall be owned by the reorganized company, to create any mortgage or other lien upon any of the properties of the subsidiaries or issue any such bonds, notes, or other evidences of indebtedness (except purchase money liens or obligations as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall first be offered for acquisition by the reorganized company. Each share of the new preferred stock should have equal voting rights and privileges with any new common stock.

The total authorization of common stock should be 500,000 shares, without par value, of which about 313,703 shares may be issued forthwith. [277]

Upon the issue of the securities above approved, and assuming the sale of the new bonds, the total capitalization, excluding 313,703 shares of no-par-value common stock, would be $62,356,217, consisting of $3,066,117 of equipment obligations, $10,000,000 of first-mortgage 4-percent bonds, $19,716,040 of income mortgage 4-percent bonds, and $29,574,060 of 5-percent preferred stock. Treating the no-par-value common stock at $100 per share, the total capitalization would be $93,726,517. Total fixed interest charges would be $511,001, total fixed and contingent interest charges, plus the payments into the capital fund and sinking fund, would be $1,898,223, and preferred dividends would be $1,478,703, a grand total of $3,376,926 per annum.

The available net income of the new company should be determined for the six-months' period ending December 31, 1938, and thereafter for each calendar year ending December 31 (hereinafter called income period, except that the six-month period ending December 31, 1938, also should be considered an income period) as promptly as possible after the termination thereof. The available net income for each income period should be determined by deducting from the consolidated income of the reorganized company and its subsidiaries available for fixed charges for such income period (determined in accordance with this Commission's accounting rules) all fixed charges of the reorganized company and its subsidiaries accrued during such income period, together with an amount representing any deficit in fixed charges, including any deficit in interest payments on the reorganized company's first-mortgage bonds which may have accrued in previous periods. The plan should provide, however, (1) that in determining available net income there should not be deducted any amounts expended from the proceeds of the trustees' certificates issued for rehabilitation purposes, notwithstanding that under our accounting rules such expenditures may be chargeable to operating expenses; and (2) notwithstanding that the reorganized company should not have come into ownership and possession of the properties now operated by the trustees of the debtor on or before July 1, 1938, available net income for any period after July 1, 1938, until the

reorganized company comes into possession and operation of such properties, should be computed as if the reorganized company had come into such ownership or possession on July 1, 1938, and had issued, as [278] of that date, the new securities issuable under the plan, other than the $10,000,000 of new first-mortgage bonds, and in lieu of interest on such bonds there should be charged the amount of interest actually accruing during such period upon any trustees' certificates or other obligations issued to provide funds for the rehabilitation program.

All three plans before us are predicated on the priority of the existing first mortgage over the general mortgage, and all parties admit that the first mortgage is a first lien on the main line of the debtor's railroad and the securities physically pledged under that mortgage. The trustee under the first mortgage and the holders of bonds issued under that mortgage contend that the first mortgage is a first lien on substantially all the debtor's property, except equipment subject to existing leases, conditional-sale agreements, or equipment-trust agreements. The general mortgage trustee and those creditors with whom general-mortgage bonds are pledged contend, however, that the first mortgage is not a lien, or is a lien only to the extent of the proceeds of first-mortgaged bonds expended thereon, on cash and collateral held by the trustees under the general mortgage, on the Northern California extension, on the debtor's equity in rolling stock subject to leases, conditional sale agreements,

or equipment trust agreements, and on property, in general, purchased either in whole or in part from free funds. Those parties contend further that most of the property just described is not only free from the lien of the first mortgage but is subject to the lien of the general mortgage, and that its value is sufficient for the full payment of all the debts secured under the general mortgage, with interest. With the exception of the A. C. James Company, they assert that the first-mortgage bondholders are not entitled to preferential treatment.

While final adjudication of this and similar questions must be made by the court, it becomes our duty, in the absence of such adjudications, to determine them preliminarily for the purposes of consideration of the plans before us.

Since most of the property which is in dispute was acquired after the date of the first mortgage, the primary question involved is whether such property is covered by the after-acquired clause contained in the granting clauses of the first mortgage.

[279]

Clause first of the granting clauses covers in detail and by a general statement all property which had been owned by the debtor's predecessor, except only cash items. Granting clause third covers "any and all property and facilities of any and every kind and description * * * which may from time to time hereafter be acquired or constructed by or belong to" the debtor, if such after-acquired property falls within one of the four following categories:

(1) If any "First mortgage bonds or proceeds thereof or cash deposited" under the first mortgage have been authenticated or paid out "on account of the purchase, acquisition or construction thereof or work therein"; or

(2) If the property constitutes "an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien" of the first mortgage; or

(3) If the property is "used or acquired for use in or for the maintenance or operation of or pertaining to" any of the property subject to the lien of the first mortgage; or

(4) If the property consists of shares of stock or of other securities of the Salt Lake City Union Depot & Railroad Company or Standard Realty & Development Company, or any subsidiary as defined.

Granting clause fifth covers almost every kind of property and facility used or useful in the operation of a railroad (including additional tracks, spurs, equipment, material and supplies, and land), ending with the generality "all other property of every description and all rights and interests in or with respect to the use of property * * * whether now owned * * * or at any time hereafter acquired", if "appurtenant to or used or held for use as, or as a part of or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches * * * or other prop-

erties now or at any time hereafter subject to the lien" of the first mortgage.

Following granting clause sixth is a proviso permitting the debtor by the use of free funds to acquire property free of the lien of the first mortgage if such property is not of the character described in the four subdivisions of granting clause third. [280]

The Northern California extension, various branches and spurs, and equipment used under leases, contracts, or equipment-trust agreements, are the principal items of property in dispute. With respect to the first two classes of property we are satisfied from the record that substantial amounts of the proceeds of first-mortgage bonds were used in their acquisition or construction, or at least "on account of the purchase, acquisition or construction thereof or work thereon". We construe the latter language to mean that the lien of the first mortgage attaches to after-acquired extensions if the purchase, acquisition, or construction thereof, or any work thereon, be financed in any part with first-mortgage bonds or cash deposited under that mortgage.

While the construction of the Northern California extension was financed in part with the proceeds of certain debentures which were subsequently exchanged for general and refunding bonds, it is not contended that the debentures were secured by a lien on the extension. Moreover, the record is clear that there was no intent to create a purchase money

lien on the extension in favor of the debentures. The same is true with respect to the advances from the Reconstruction Finance Corporation.

We conclude that, for the purpose of determining the equity of plans of reorganization for the debtor, the lien of the general mortgage on the Northern California extension and various branches and spurs in question should be considered subject to the lien of the first mortgage.

The debtor's equity in rolling stock subject to leases, conditional-sale agreements, or equipment-trust agreements, would seem to be covered by the after-acquired property clause in the third paragraph, as well as by the fifth paragraph, of the granting clauses unless the proviso at the end of the granting clauses negatives such a construction. The proviso reads as follows:

> * * *; and the company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture. [281]

The latter provision, however, should be construed both in the light of the language which precedes it in the same paragraph and in the light of the paragraph which follows the habendum clause. The latter paragraph reads as follows:

> Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby * * *.

If all equipment acquired under equipment trusts was to be entirely free of the lien of the first mortgage, it is not apparent why the words "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby", were made part of the last quoted provision. We consider, for the purposes of a plan of reorganization, that since the equipment in question was acquired for use, and was actually used, on the mortgaged lines, the debtor's equity in that equipment is subject to the lien of the first mortgage.

We consider that the property characterized as non-carrier real estate is also covered by the lien of the first mortgage. This property was owned by the predecessor of the debtor, and the general and refunding trustee contends that it did not become subject to the lien of the first mortgage because the reorganization plan, pursuant to which the present first-mortgage bonds were issued, contemplated that

such bonds should constitute a lien upon only railway properties. No such distinction as urged by the general-mortgage trustee appears in the language of the mortgage itself, and it is not clear that the use of the words "railway properties" in the previous plan of reorganization was intended to relate only to property used in carrier service.

With the exception of the notes of the Deep Creek Railroad Company and the Standard Realty & Development Company, there is no contention that the cash and collateral held by the trustee under the general and refunding mortgage are not free from the lien of the first mortgage. While due recognition must be accorded to the rights of the creditors with whom are pledged general-mortgage bonds, those creditors are not entitled to the same treatment as first-mortgage bondholders, who should be considered as having a first lien upon practically all the assets of the debtor. It follows [282] that holders of the debtor's first-mortgage bonds should receive securities of a higher rank than those allotted to other creditors, at least to the extent that existing conditions will permit.

Since the notes held by the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company are secured by the pledge of the debtor's general-mortgage bonds, they clearly are entitled to priority over the unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company. In turn, the claims of

the latter are entitled to priority over the existing stockholders.

According to the trustees' balance sheet of June 30, 1938, existing first-mortgage bonds were outstanding in the principal amount of $49,290,100 and accrued and unpaid interest thereon amounted to $11,914,521, a total of $61,204,621; the indebtedness of the debtor to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, including accrued and unpaid interest, totaled $12,317,842; the indebtedness of the debtor to the Western Pacific Railroad Corporation, including accrued and unpaid interest, was $7,609,370; the debtor's indebtedness to the Western Realty Company, including accrued and unpaid interest, was $60,417; a grand total of $81,192,250. Under the capital structure herein approved, there will be available for distribution to these creditors in the order of their priority $19,716,040 of new income mortgage bonds, $29,574,060 of new preferred stock, and 313,703 shares of no-par-value common stock. Treating the no-par-value common stock at $100 per share, a total par value of $80,660,400 of securities will thus be available for distribution. Obviously, if the creditors' claims are to be accorded priority over the stockholders, there will remain no securities available for distribution to stockholders under the capital structure herein approved.

Under the provisions of section 77 stockholders are not entitled to participate in the plan if we find,

and the judge affirms the finding, that at the time of the finding the equity of such stockholders has no value. Section 77 also contains a similar provision with respect to creditors whose claims have been found to have no value. We have hereinbefore found that considering the past, present, and probable future earnings of the debtor, its investment, the data of record pertaining to its rate-making value, and all other relevant data of record, we can not approve the issue of [283] new securities in a greater amount than that hereinbefore approved. On the same basis and for the same reasons we find, therefore, that there is no equity over and above the securities hereinbefore approved; that the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan. Further, considering that the reorganized company's income available for interest and dividends must total $4,318,035, plus any undistributed profits tax that will be payable, before dividends of $3 per share may be paid on the new common stock, it is clear that even though all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims. For this reason, and for the reasons stated with respect to the finding that the equity of the existing stock has no value, we find that the claims of the unsecured creditors, of the Western Pacific Railroad Corporation, and of the Western Realty Company,

have no value, and hence no securities or cash should be distributed under the plan in respect to those claims.

Proceeding to the allocation of the available securities, the plan should provide that all of the new income bonds, $19,716,040, principal amount, all of the new preferred stock, $29,574,060, par value, and 154,241 shares of the new no-par-value common stock, should be allotted to the holders of existing first-mortgage bonds. The remaining 159,462 shares of the no-par-value common should be allotted to the secured noteholders on the basis indicated below. The holders of the first-mortgage bonds (with March 1, 1934, and subsequent coupons) should receive for each $1,000, principal amount, of such bonds and accrued and unpaid interest thereon approximately (a) $400 of new income 4-percent bonds, (b) $600 of new 5-percent preferred stock, and (c) 3.13 shares of new no-par-value common stock.

While each of the notes held by the A. C. James Company, Reconstruction Finance Corporation, and Railroad Credit Corporation is secured by the pledge of the debtor's general and refunding bonds, the bonds pledged thereunder are of varying amounts. Thus, the debtor's total indebtedness to the Reconstruction Finance Corporation, according to the trustees' balance sheet, is $3,612,181, although that corporation holds as pledgee 56.6 per- [284] cent of that amount of such bonds. The debtor's indebtedness to the Railroad Credit Corporation

amounts to $2,580,906, and 21.1 percent of that amount is represented by the bonds pledged. The total indebtedness to the A. C. James Company amounts to $6,124,755, and 22.3 percent of that amount is represented by bonds pledged. Having found that 159,462 shares of common stock available for distribution are inadequate in value to satisfy the aggregate claims of these parties, it follows that it would be inequitable to distribute such stock in the proportion that each claim bears to the total amount of such stock. The value of each of the claims is proportionate to the collateral securing it, and we find that the allotment of the stock should be made on the basis of the collateral held rather than on the amount of the claims. This would result in the Reconstruction Finance Corporation receiving 90,255½ shares, the Railroad Credit Corporation 33,646½ shares, and the A. C. James Company 35,560 shares of common stock.

The plan should provide, however, that its approval and confirmation in no wise disturbs or alters the rights of the Reconstruction Finance Corporation and the Railroad Credit Corporation in collateral pledged with them by parties other than the debtor.

The plan should further provide that subscription warrants, entitling the holders thereof to purchase the new first-mortgage bonds at par not later than 45 days after the confirmation of the plan, should be issued to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C.

James Company, in proportion to the amounts of general-mortgage bonds now held by them respectively. If any of these creditors should fail to subscribe for its full proportion, the other or others of such creditors should be permitted to subscribe for such unsubscribed balance, in the proportion which the existing general-mortgage bonds held by them, respectively, bear to the total amount of general-mortgage bonds held by those electing to subscribe for their full proportion. Should the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company fail to subscribe for the new bonds in accordance with the above terms, holders of first-mortgage bonds should be entitled to subscribe for them upon the same terms and conditions as those parties within a period of 60 [285] days after confirmation of the plan, and the contingent rights of subscription granted to the first-mortgage bondholders should be evidenced by appropriate warrants. Holders of warrants should be required to elect prior to the expiration of the warrants, in each case, the extent to which they will exercise their subscription rights.

Under both the debtor's plan and the bondholders' committee plan current liabilities of the debtor incurred in the ordinary conduct of its business prior to the institution of this proceeding, current liabilities and obligations of the debtor and of its trustees incurred during this proceeding, and all other claims, liabilities, or obligations for which specific provision is not made in those plans, are

not to be affected by the plans, but to the extent that such claims, liabilities, or obligations are not paid by the debtor or its trustees pursuant to order of the court, they are to be paid in cash or assumed by the reorganized company. According to the record, current liabilities incurred in the ordinary conduct of the debtor's business prior to this proceeding were of a nominal amount. We approve such provisions.

Each of the three plans before us propose different conditions under which the plan shall be consummated. The James plan affirmatively provides that it shall not be consummated until accepted by two-thirds of each class of creditors and two-thirds in amount of each class of stock. Reorganizations under section 77 are primarily premised upon the acceptance of plans by two-thirds or more of each class of creditors and stockholders voting thereon. Congress recognized, however, that the public interest might, under certain conditions, require the confirmation of a plan of reorganization even though it were not accepted by all classes of creditors and stockholders, and provisions of this effect are included in section 77. To approve a provision in a plan of reorganization by which a minority of a class of creditors or stockholders effectively could block the reorganization, although the plan conformed to the requirements of the statute in all respects would, in our opinion, give such a minority a right not contemplated by the law, and,

also, would be contrary to the intent, if not the letter, thereof.

The provision in the bondholders' committee plan to the effect that its plan shall not be confirmed until at least two-thirds of the [286] holders of the debtor's first-mortgage bonds accepted it, would seem to be objectionable for the same reason as that applying to the provision in the James plan. The bondholders' proposal that the plan provide for the sale of the debtor's property at an upset price as determined by the court in the event the holders of more than one-third in principal amount of any class of creditors, or the holders of more than one-third of the shares of stock of any class, shall not have accepted the plan, after the holders of at least two-thirds in principal amount of the existing first-mortgage bonds shall have accepted the plan, is, in our opinion, an unnecessary and objectionable provision, at least insofar as the instant proceeding is concerned. Section 77(e) provides that the submission of the plan to any class of stockholders and any class of creditors shall not be necessary if we have found, and the judge shall have affirmed the finding, that the equity of such class of stockholders and the interests of such class of creditors have no value. Under our previous findings herein, and if the judge approves the plan, it will be necessary to submit the plan only to the holders of the debtor's first mortgage bonds and to the holders of its secured notes. To require the submission of the plan to unsecured creditors and to stockholders, as would

be necessary under the bondholders' proposal, would be the requiring of an act not called for by the statute, if not contrary thereto, and unnecessary for the execution of the plan. Considering the first mortgage bondholders and the secured creditors alone, the effect of the proposal would be possibly, if not probably, to influence the secured note holders to accept the plan even though such holders would not voluntarily accept the plan were it not for such a provision. We see no necessity for the possible coercion of the secured note holders to accept the plan, and, therefore, do not approve the proposal. The plan should provide that it shall be accepted and confirmed, or confirmed without acceptance, in accordance with the provisions of section 77.

Both the bondholders' plan and the James plan contemplate the formation of a reorganization committee with broad powers. No provision for such a committee is made in the debtor's plan, although it does provide that representatives of the bondholders' committee shall represent the members of that committee in the [287] reorganization, and that the form and provisions of the several indentures, bonds, stock certificates, and other instruments in connection with the reorganization shall be approved by the bondholders' committee.

We recognize that it is impracticable to specify in detail the form and provisions of the various indentures, bonds, stock certificates, and other instruments which must be executed in consummating the reorganization proceeding, although the terms and

provisions thereof are of great importance to those participating in the proceeding. For this reason the plan approved by us will provide for the formation of a committee, after approval of the plan by us and by the court, with power to determine, subject to the approval of the court, the form and provisions of the indentures, bonds, stock certificates, and other instruments, in connection with the carrying out of the plan. The committee also will have power, but only such power as necessary, to carry out the plan in accordance with its provisions subject to the direction of the court. The committee should consist of three members, one of whom should be nominated by the committee representing the first-mortgage bondholders, one by the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, as a group, and the remaining member by purchasers of the new first-mortgage bonds to be issued to provide the new money in the reorganization, or, if no commitment be received for the purchase of such bonds, by the party or parties advancing the money for the retirement of the trustees' certificates.

Submission of the plan to the creditors for acceptance or rejection will be contingent upon the deposit with us, not more than 60 days after its approval by the court, of tentative commitments for the purchase of all the $10,000,000 of new first-mortgage bonds to be sold under the plan, or, within 75 days after such approval, a tentative commitment on the part of the Reconstruction

Finance Corporation, to make the required loan of $10,000,000.

Under the foregoing, the plan of reorganization would provide as follows:

1. The assumption by the reorganized company of the outstanding equipment trusts, Baldwin lease, and Pullman contract of the debtor and its trustees.

[288]

2. The immediate issue by the reorganized company of $10,000,000, principal amount, or such additional amount as may be necessary in the event a loan of $10,000,000 must be secured, of 50-year first-mortgage 4-percent bonds, $19,716,040, principal amount, of 75-year income mortgage 4-percent bonds, $29,574,060, par value, of 5-percent preferred stock, and 313,703 shares of no-par-value common stock.

3. The sale of the $10,000,000 principal amount, of new first-mortgage bonds at par or the borrowing of $10,000,000 through the pledge of new first-mortgage bonds.

4. The creation and maintenance of a capital fund of not to exceed $500,000 in any one year, nor $1,000,000 at any time, to be accumulated out of available net income.

5. The immediate creation and maintenance of a one-half of 1 percent sinking fund for the retirement of the new income bonds out of available net income remaining after payments into the capital fund, and payment of interest on the new income

bonds; and the creation out of available net income remaining after payment of fixed charges of a similar fund for the retirement of first-mortgage bonds, when and if $20,000,000, principal amount, thereof are issued.

6. The holders of the debtor's existing first-mortgage bonds (with March 1, 1934, and subsequent coupons) to receive in exchange for each $1,000, principal amount, of such bonds and accrued and unpaid interest thereon approximately (a) $400 of new income 4-percent bonds, (b) $600 of new 5-percent preferred stock, and (c) 3.13 shares of new common stock, and, subject to the terms and conditions herein provided, the contingent right to subscribe for new first-mortgage bonds to be issued to provide new money.

7. The Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, holders of the debtor's notes which are secured by the pledge of the debtor's general mortgage bonds, to receive in exchange therefor and for accrued unpaid interest thereon, 159,462 shares of new no-par-value common stock, the stock to be distributed among them on the basis herein- [289] before described, together with warrants to subscribe for the purchase of the new first-mortgage bonds.

8. The formation of a committee with such power as may be necessary to carry out the plan, and to determine, subject to the approval of the court, the form and provisions of the indentures, bonds, stock certificates, and other instruments, in

connection with the carrying out of the plan; the committee to consist of three members, one to be named by the committee representing first-mortgage bondholders, one by the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, as a group, and the remaining member by the purchasers of the new first-mortgage bonds to be issued to provide the new money in the reorganization, or by the party or parties advancing the money necessary to retire the trustees' certificates.

9. The obligations of the debtor (other than to the Western Pacific Railroad Corporation and the Western Realty Company, unsecured claimants) not specifically herein provided for shall be paid by the debtor or the reorganized company or assumed by the reorganized company.

10. The Western Pacific Railroad Corporation and the Western Realty Company, unsecured claimants, to receive no securities or cash in satisfaction of their claims, since such claims are found to be without value.

11. The present holders of the debtor's capital stock not to participate in the plan, since the present stock of the debtor is found to be without value.

12. The plan to be accepted and carried out in accordance with its terms and the provisions of section 77 of the Bankruptcy Act, under the direction of the court.

13. The plan to be effective as of July 1, 1938.

The plan also will provide that existing mortgages on the debtor's properties be released and canceled, and all funds on deposit with the debtor's mortgage trustees representing sums paid from time to time to the trustees for the release of properties, sale of scrap, and otherwise, and all collateral pledged under the mortgages, be surrendered to the reorganized company free from existing mort- [290] gage liens, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of the mortgages and consistent with the plan of reorganization herein approved. The plan should provide further that all collateral pledged by the debtor as security for its notes to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company shall be surrendered to the reorganized debtor. The Railroad Credit Corporation also should release and surrender to the reorganized company its rights and interests in the debtor's distributive shares under the marshaling and distributing plan, 1931, from and after the effective date of the plan, and any proceeds from such shares applied by the Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by authority of the court of competent jurisdiction, shall be turned over to the reorganized company.

In view of the provisions of section 77(b), when a plan finally is adopted, we shall give considera-

tion to the granting of such authorization for the issue of such securities as may be required and appropriate for the execution of the plan.

We find that the plan herein approved will meet with the requirements of section 77(b)(e) of the Bankruptcy Act, and will be compatible with the public interest.

The journal entries covering the necessary accounting adjustments should be submitted to us for approval before they are recorded on the books of the debtor or of the reorganized company.

An appropriate order will be issued.

Eastman, Commissioner, concurring in part:

I am in accord with the findings of the majority with two exceptions. For the reasons stated in my expression of partial concurrence in Spokane International Ry. Co. Reorganization, 228 I.C.C. 387, 408-411, I do not favor the provision for the creation and maintenance of a so-called capital fund. Nor do I favor the provision that additional first mortgage bonds "shall not be issued on the basis of additional property of any kind or additions and betterments, unless the income of the reorganized company available for [291] fixed charges in a period of 12 consecutive months within the 18 calendar months immediately preceding the date of authentication and delivery of the bonds equals or exceeds 1.5 times the fixed charges, including inter-

est on the bonds then applied for". This may be, and I think is, a very wise general rule to follow, but we have entire control of the matter under section 20a of the Interstate Commerce Act. No additional bonds can at any time be issued without our specific approval. That being so, I see no good reason for tying our own hands for the future by the incorporation in the plan of reorganization of an inflexible rule of this character. Exceptional conditions may arise making the application of such a rule unwise and contrary to the public interest in some particular instance.

Commissioner Aitchison authorizes me to state that he does not favor provision for the creation and maintenance of a capital fund in this case.

Miller, Commissioner, dissenting in part:

In view of the possibility of legislation at the next session of the Congress to compel consolidation of railroads into a few systems, or even into one system, which would obviate the necessity of reorganization of the railroads now in bankruptcy and also taking into consideration the fact that railroads can not be reorganized to the best advantage under present economic conditions, I am of the opinion that it would be in the interest of the security holders to defer this reorganization.

I agree with the conclusions in the report that present fixed charges must be practically eliminated

if the reorganization is now to be effectuated. I disagree in some particulars with other conclusions reached by the majority. This applies especially as to the capital fund required and the amount of capitalization allowed. The reasons for my objection to a capital fund are well stated in Commissioner Eastman's concurring-in-part expression in Spokane International Ry. Co. Reorganization, 228 I.C.C. 387, 408-411, in which I concurred.

In connection with capitalization the majority state (page 52, mimeograph):

> It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, [292] would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital strueture for the reorganized company.

With this conclusion I can not agree but am strongly of the view that the capitalization should be generally on the basis of original cost less depreciation amounting to something over $120,000,000, which is about the same as is proposed in two of the three plans referred to in the above quotation. The no-par-value common stock may have little or no market value when the company is reorganized, but the issuance in the neighborhood of $30,000,000 more than the majority authorize would

give the present stockholders a chance to participate in the future profits of the reorganized company.

Commissioner Rogers did not participate in the disposition of this proceeding. [293]

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of October, A. D. 1938.

Finance Docket No. 10913

The Western Pacific Railroad Company
Reorganization

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and this Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, and a full statement of the reasons for its conclusions, which report is hereby referred to and made a part hereof:

It is ordered, That the following plan of reorganization of the Western Pacific Railroad Company, debtor, be, and it is hereby, approved:

A. The effective date of said plan shall be July 1, 1938.

B. The term "reorganized company", as used herein, means the corporation in which will be vested the assets of the debtor pursuant to the plan. It may be the existing company with a modified charter, or a new corporation organized for the purpose.

C. The capitalization of the reorganized company, immediately after the consummation of the plan, shall be substantially as follows: Undisturbed equipment trusts, Baldwin lease, and Pullman contract $3,066,117; first-mortgage 4-percent bonds $10,000,000, or a short-term note for $10,000,000; income mortgage 4-percent bonds $19,716,040; 5-percent preferred stock $29,574,060; common stock without par value 313,703 shares.

D. The first-mortgage bonds shall be secured by a mortgage constituting a first lien upon all property, real and personal, and equipment at any time acquired by the reorganized company, subject, however, to the lien of any equipment obligations issued and [294] outstanding on equipment acquired by the reorganized company in the reorganization. The total authorized issue of bonds thereunder shall be limited to $50,000,000, of which $10,000,000 shall be sold on terms to be approved by this Commission, to provide the new money required in the reorganization, or shall, with such additional amount of such bonds as may be necessary, be pledged under a $10,000,000 short-term note; and the remainder shall be reserved to be issued, with our approval, to provide

for, or to reimburse the reorganized company for, expenditures for additions, betterments, improvements, or extensions made after the effective date of the reorganization, in a principal amount not exceeding 75 percent of the actual cost of such additions, betterments, improvements, or extensions. The bonds shall be dated as of the effective date of reorganization and shall mature in 50 years; shall bear interest at the rate of 4 percent per annum payable semiannually; provided, however, that interest accruing for a period not exceeding five years from the effective date of reorganization, or any portion thereof, on such bonds shall accumulate and payment thereof shall be made only at such time as earnings are available therefor; and provided further, that interest on such bonds accruing subsequent to a period not exceeding five years from the effective date of reorganization shall be a fixed charge. The bonds shall be redeemable, in whole or in part, on any interest payment date upon 30 days' notice, at not to exceed 105 and accrued interest. Bonds in excess of the $10,000,000 to be sold, or in excess of such additional amount as may be necessary for pledge, to provide the new money required in the reorganization, shall not be issued on the basis of additional property of any kind or additions and betterments, unless the income of the reorganized company available for fixed charges in a period of 12 consecutive calendar months within the 18 calendar months immediately preceding the date of authentication and delivery of the bonds equals or

exceeds 1.5 times the fixed charges, including interest on the bonds then applied for. Whenever $20,000,000 of such bonds shall have been issued, a one-half of 1 percent sinking fund, payable out of available net income remaining after the payment of all fixed charges, shall be created for the redemption of such bonds.

E. The income-mortgage bonds shall be secured by a mortgage constituting a lien, subject only to the lien of the first mortgage, [295] upon all property from time to time subject to the lien of the first mortgage. The total authorized issue of bonds thereunder shall be limited to $19,716,040. The bonds shall be dated as of the effective date of the reorganization and shall mature in 75 years, shall bear interest at the rate of 4 percent, payable annually, and only out of available net income of the reorganized company, and such interest shall be cumulative, whether earned or not, up to a maximum of 12 percent at any time; provided, however, that no interest shall be cumulative if and as long as any deficit exists in the payment of interest on the first-mortgage bonds herein approved. The bonds shall be redeemable on any interest payment date at their principal amount, plus any interest payable thereon upon such interest payment date. They shall be entitled to the benefit of a one-half of 1 percent sinking fund, payable out of available net income remaining after the payment of all prior charges herein and hereafter approved.

F. The preferred stock shall be authorized in the total amount of 500,000 shares of the par value of $100 per share, of which 295,740-3/5 shares shall be issued forthwith for distribution to the present first-mortgage bondholders, and shall be entitled to receive dividends at the rate of 5 percent per annum in respect to each calendar year before any dividends shall be paid, or declared, upon the common stock. Such dividends shall be cumulative to the extent earned in respect to any income period, but not paid; but such dividends shall otherwise be noncumulative. In event of liquidation the preferred stock shall be entitled to receive out of the assets of the reorganized company its par value plus accumulated unpaid dividends before any distribution is made to any common stock, but shall not be entitled to any further participation in such assets. The preferred stock shall be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends. . .

The reorganized company shall not, without the vote or consent of the holders of at least two-thirds in par value of outstanding preferred stock (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage and new income mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired; given [296] for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes, or other evidence of indebtedness ma-

turing more than two years from their date, except purchase money obligations, given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock, other than that authorized herein, ranking, either as to assets or dividends, in priority to or on a parity with, the preferred stock; or (4) permit any subsidiary, substantially all of whose stock shall be owned by the reorganized company, to create any mortgage or other lien upon any of the properties of the subsidiaries or issue any such bonds, notes, or other evidences of indebtedness (except purchase money liens or obligations as aforesaid), or issue any additional stock of any class, unless the obligations or such stock shall first be offered for acquisition by the reorganized company. Each share of preferred stock shall have equal voting rights and privileges with any common stock issued by the reorganized company.

G. The common stock shall be authorized in a total amount of 500,000 shares, without par value, of which 313,703 shares shall be issued forthwith for distribution to the first-mortgage bondholders, Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company.

H. Available net income shall be determined for the six-month period ending December 31, 1938, and thereafter for each calendar year ending December 31 (hereinafter called income period, except that the six-month period ending December 31, 1938, also shall be considered an income period), as promptly

as possible after the termination thereof. Available net income for each income period shall be determined by deducting from the consolidated income of the reorganized company and its subsidiaries available for fixed charges for such income period (determined in accordance with this Commission's accounting rules) all fixed charges of the reorganized company and its subsidiaries accrued during such income period, together with an amount representing any deficit in fixed charges including deficit in interest payments on the reorganized company's first-mortgage bonds which may have accrued in previous periods; provided, however, (1) that in determining available net income there shall not be deducted any amounts expended from the pro-
[297] ceeds of the trustees' certificates issued for rehabilitation purposes, notwithstanding that under our accounting rules such expenditures may be chargeable to operating expenses; and (2) notwithstanding that the reorganized company shall not have come into ownership and possession of the properties now operated by the trustees of the debtor on or before July 1, 1938, available net income for any period after July 1, 1938, until the reorganized company comes into possession and operation of such properties, shall be computed as if the reorganized company had come into such ownership or possession on July 1, 1938, and had issued, as of that date, the new securities issuable under the plan, other than the $10,000,000 of new first-mortgage bonds, and in lieu of interest on such bonds there should be charged the amount of interest actually

accruing during such period upon any trustees' certificates or other obligations issued to provide funds for the rehabilitation program.

I. Available net income for each income period shall be applied to the following purposes and in the following order:

1. To the creation, if and when $20,000,000 of first-mortgage bonds hereinbefore approved shall have been issued, of a cumulative sinking fund, in an amount up to, but not exceeding, in respect to any calendar year, one-half of 1 percent of the total principal amount of such bonds issued by the reorganized company. Such sinking fund shall be applied to the purchase of first-mortgage bonds at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds $50,000 and first-mortgage bonds are not tendered or can not otherwise be purchased at less than their redemption price, the fund then in the sinking fund shall be applied to the redemption of the income-mortgage bonds on the next succeeding interest payment date. Bonds purchased or redeemed out of the sinking fund shall not thereafter be reissued.

2. To the creation of a capital fund to be applied to, or to provide for, or to reimburse the treasury of the reorganized company for capital investments (as defined by this Commission's Classification of Income Profit and Loss and General Balance Sheet Accounts for Steam Railroads, and including therein initial and principal payments upon equipment leased under equipment trusts or pur-

chased under conditional sale agreements). Annual pay- [298] ments into the fund shall be $500,000, or such lesser sum as may be required, together with unappropriated accumulations in the fund as of the close of the calendar year prior to that for which the payment is to be computed, less charges for additions and betterments during the latter year, to bring the total in the fund to $1,000,000; provided, however, that (a) the capital fund shall not exceed $1,000,000 at any one time; and (b) capital expenditures reimbursed out of the capital fund shall not be capitalized through the issue of additional fixed or contingent interest-bearing bonds.

3. Any then available net income shall be applied to the payment of the contingent interest on the outstanding income-mortgage 4-percent bonds accruing during the income period ending on the next preceding December 31, and, to the extent unpaid, any accumulations thereof.

4. Any then remaining available net income shall be applied to the creation of a cumulative sinking fund, in an amount up to, but not exceeding, in respect to any calendar year, one-half of 1 percent of the total principal amount of income-mortgage bonds issued in the reorganization. Such sinking fund shall be applied to the purchase of income-mortgage bonds at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds $50,000 and income-mortgage bonds are not tendered or can not otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of

the income-mortgage bonds on the next succeeding interest payment date. Bonds purchased or redeemed out of the sinking fund shall not thereafter be issued.

5. Any then remaining available net income shall be applied if, and to the extent that, such dividends shall be declared by the board of directors of the reorganized company, to the payment of dividends at the rate of 5 percent per annum upon the preferred stock in respect to the income period ending on the next preceding December 31.

6. Any then remaining available net income may be applied to any proper corporate purpose of the reorganized company, including dividends on the common stock. [299]

J. The existing securities of the debtor and its trustees shall be treated as follows:

(1) Outstanding existing equipment trusts, Baldwin lease, and Pullman contract of the debtor and its trustees shall remain undisturbed and shall be assumed by the reorganized company.

(2) Holders of existing first-mortgage bonds (with March 1, 1934, and subsequent coupons) shall receive for each $1,000, principal amount, of such bonds and accrued and unpaid interest thereon approximately (a) $400 of new income-mortgage 4-percent bonds, (b) $600 of new 5-percent preferred stock, (c) 3.13 shares of new common stock, and (d) subject to the terms and conditions hereinafter provided, the contingent right to subscribe for new first-mortgage bonds to be issued to provide new money.

(3) Notes to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, together with interest accrued thereon to July 1, 1938, shall be dealt with as follows: The Reconstruction Finance Corporation shall receive for the principal amount of its note and accrued unpaid interest approximately 90,255½ shares of new no-par-value common stock and the right to subscribe for new first-mortgage bonds to be issued to provide new money; the Railroad Credit Corporation shall receive for the principal amount of its note and accrued unpaid interest approximately 33,646½ shares of new no-par-value common stock and the right to subscribe for new first-mortgage bonds to be issued to provide new money; and The A. C. James Company shall receive for the principal amount of its note and accrued unpaid interest approximately 35,560 shares of new no-par-value common stock and the right to subscribe for new first-mortgage bonds to be issued to provide new money.

(4) The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company are found to be without value, and no securities or cash shall be distributed under the plan in respect to these claims.

(5) The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan. [300]

(6) Current liabilities of the debtor incurred in the ordinary conduct of its business prior to the institution of this proceeding; current liabilities and

obligations of the debtor and its trustees incurred during this proceeding; and all other claims, liabilities, or obligations which have not hereinbefore been dealt with, are not to be affected by the plan, but to the extent that such claims, liabilities, or obligations are not paid by the debtor or its trustees pursuant to the order of the court, they shall be paid in cash or assumed by the reorganized company.

K. There will be issued to or on the orders of the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, subscription warrants, in proportion to the general-mortgage bonds held by them, entitling the holders thereof to purchase at par, plus accrued interest, the $10,000,000, principal amount, of new first-mortgage bonds to provide the new money in the reorganization. The warrants shall provide that they must be exercised within, but not later than, 45 days after the confirmation of the plan by the court. If any of these parties shall fail to subscribe for its full proportion, the other or others of such parties shall be entitled to subscribe for the unsubscribed balance in the proportion which the general-mortgage bonds held by them respectively bear to the total amount of general-mortgage bonds held by the parties so electing to subscribe for their full proportion. Should these parties fail to provide the new money in accordance with the above terms, holders of the debtor's first-mortgage bonds shall be entitled within 60 days of confirmation of the plan to provide the same upon the same terms and conditions as those provided for the aforesaid parties,

and appropriate subscription warrants will be issued to them. The holders of the warrants will be required to elect prior to the expiration of the warrants, in each case, the extent to which they will exercise their subscription rights.

In the event that none of the aforesaid creditors or the Reconstruction Finance Corporation subscribes for the bonds, a loan of $10,000,000 shall be obtained from the Reconstruction Finance Corporation, secured by the pledge of such new first-mortgage bonds as division 4 of this Commission and the Reconstruction Finance Corporation may require in proceedings under section 5 [301] of the Reconstruction Finance Corporation Act. The purchase of any of the bonds by the Reconstruction Finance Corporation, or any loan by that Corporation upon such bonds as collateral will be subject to our approval under the provisions of the Reconstruction Finance Corporation Act.

L. A committee will be formed, after approval of the plan by this Commission and the court, with such power as may be necessary to carry out the plan, and to determine, subject to the approval of the court, the form and provisions of the indentures, bonds, stock certificates, and other instruments in connection with the carrying out of the plan. The committee shall consist of three members, one to be named by the first-mortgage bondholders, one by the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, as a group, and the remaining member by the purchasers of the new first-mortgage bonds to be issued

to provide the new money in the reorganization, or if no commitment be received for the purchase of such bonds, by the party or parties advancing the new money necessary to retire the trustees' certificates.

M. The authority of the reorganization committee shall be auxiliary to, and supplementary of, the authority, powers, and duties of the debtor and any other corporation organized for the purpose of carrying out the plan to "put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge", as provided in section 77(f) of the Bankruptcy Act.

N. Existing mortgages on the debtor's properties shall be released and canceled, and all funds on deposit with the debtor's mortgage trustees representing sums paid from time to time to the trustees for the release of properties, sale of scrap, and otherwise, and all collateral pledged under the mortgage, shall be surrendered to the reorganized company free from existing mortgage liens, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of the mortgages and consistent with the plan of reorganization herein approved. All collateral pledged by the debtor as security for its notes to the Reconstruction Finance Corporation, Railroad Credit Corporation, [302] and A. C. James Company, shall be surrendered to the reorganized company and canceled. The Railroad Credit Corporation also shall release and surrender the reorganized

company all its right and interest in the debtor's distributive shares under the marshaling and distributing plan, 1931, from and after the effective date of the plan, and any proceeds from such shares applied by the Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by authority of the court of competent jurisdiction, shall be turned over to the reorganized company.

O. The approval and confirmation of the plan shall in no wise disturb or alter the right and interest of the Reconstruction Finance Corporation and the Railroad Credit Corporation in collateral pledged with them by parties other than the debtor.

P. Acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and this Commission, to the same effect as though the terms of such instruments were set forth in full herein.

Q. The acceptance and confirmation of the plan, or the confirmation of the plan without acceptance, and the carrying of the plan, shall be provided in the Bankruptcy Act.

It is further ordered, That submission of the plan to the creditors for acceptance or rejection will be contingent upon the deposit with us in not more than 60 days after its approval by the court, of tentative commitments for the purchase of all of the

$10,000,000 of new first-mortgage bonds to be issued under the plan, or within 75 days after such approval, a tentative commitment on the part of the Reconstruction Finance Corporation to make the required loan of $10,000,000.

It is further ordered, That the authorization and approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustment under this order will be submitted to this Commission for approval before they are recorded on the books of the debtor or the reorganized company. [303]

It is further ordered, That nothing herein contained shall be, or be construed, as a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation, or merger of the debtor's property, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act until further appropriate action by this Commission upon confirmation of the plan by the court.

By the Commission.

[Seal] W. P. BARTEL,
Secretary.

A true copy.

W. P. BARTEL,
Secretary of the Interstate
Commerce Commission.

[Endorsed]: Filed Oct. 21, 1938. [304]

Finance Docket No. 10913

WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION IN PROCEEDING UNDER SECTION 77 OF THE BANKRUPTCY ACT.

Submitted, January 20, 1939.

Decided, June 21, 1939. [307]

TABLE OF CONTENTS

	Page of I. C. C. Report and Order	Page of This Printed Record
Report of the Commission	1	302
Opinion of Chairman Eastman, Concurring in Part	35	355
Opinion of Commissioner Miller, Concurring in Part	36	357
Order of the Commission	40	362

[308]

Upon further consideration, pursuant to appropriate petitions, plan for the reorganization of the Western Pacific Railroad Company modified and approved.*

Appearances as in prior reports.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

By the Commission:

By our report and order issued October 10, 1938, in this proceeding, we approved a plan of reorganization of the Western Pacific Railroad Company, hereinafter called the debtor, pursuant to the provisions of section 77 of the Bankruptcy Act, as amended. 230 I.C.C. 61. On December 9, 1938, petitions for modification of our report and order of October 10, 1938, supra, were filed by the debtor, and the following interveners: Institutional Bondholders Committee, hereinafter called the bondholders committee; A. C. James Company, hereinafter called the James Company; Reconstruction Finance Corporation, hereinafter called the Finance Corporation; Railroad Credit Corporation, hereinafter called the Credit Corporation; and the Irving Trust Company, trustee under the debtor's general and refunding mortgage, hereinafter called the general-mortgage trustee. Under the provisions of section 77(d) of the Bankruptcy Act, as

*Previous reports 207 I.C.C. 793, and 230 I.C.C. 61.

amended, we may, upon petition for good cause [309] shown filed within 60 days of the date of our order approving a plan, in a supplemental report and order modify any plan which we have approved. By our order of December 30, 1938, we reopened the proceeding for consideration of the modifications requested by the petitioners, and since additional evidence was not required for a consideration of the modification sought, we did not deem a further hearing necessary. The petitions for modification have been the subject of oral argument before us.

Requested Modifications

Under the modifications requested by the Credit Corporation, the effective date of the plan would be January 1, 1939, and the capitalization of the reorganized company would be comprised of $2,750,050 of undisturbed equipment obligations, $10,000,000 of first-mortgage 4-percent bonds, due 1989, $20,901,240 of income-mortgage 4-percent bonds, due 2014, $33,797,670, par value, of participating 5-percent preferred stock, $14,190,318, par value, of participating 4-percent preferred stock, and 343,730 shares of common stock without par value.

Present holders of the debtor's first-mortgage bonds and the Finance Corporation would receive for the principal of their claims 40 percent thereof in new 4-percent income-mortgage bonds and 60 percent thereof in new 5-percent preferred stock,

and for the interest accrued and unpaid thereon 1 share of new 4-percent preferred stock for each $100 thereof. The Credit Corporation would receive for the principal of its claim 100 percent thereof in new 5-percent preferred stock, and for the interest accrued and unpaid thereon 1 share of new 4-percent preferred stock for each $100 thereof. The James Company would receive for the principal of its claim and for interest accrued and unpaid thereon new common stock at the rate of approximately 3 shares for each $100 thereof. The Western Pacific Railroad Corporation and the Western Realty Company would receive for the principal of their claims and for interest accrued and unpaid thereon new common stock at the rate of approximately 2 shares for each $100 thereof. The capital fund provided for in the approved plan would be decreased to $300,000.

Counsel for the debtor concurred in the Credit Corporation's proposed modification on oral argument. [310]

The James Company requests that the capitalization provided for in the approved plan be substantially increased so that participation may be allowed to the debtor's unsecured creditors and stockholders in the reorganization but proposes no specific amount in its modifications. It further requests that the approved plan be modified to provide for the allocation to it, the Finance Corporation, and the Credit Corporation of new securities

on the basis of their respective claims rather than on the basis of the collateral pledged to secure the claims.

The bondholders committee incorporated its proposed modifications in a modified plan of reorganization and requests that such modified plan be approved by us in its entirety. The Finance Corporation concurs in the bondholders committee's modified plan.

Under the modified plan of the bondholders committee, the effective date of the plan would be January 1, 1939, and the capitalization of the reorganized company would be comprised of $2,750,050 of undisturbed equipment obligations, $10,000,000 of first-mortgage 4-percent bonds, series A, due 1964; $20,901,240 of income-mortgage 4½-percent bonds, series A, due 2014, $31,351,900 of participating 5-percent preferred stock, and 287,025 shares of common stock without par value.

Existing first-mortgage bondholders and the Finance Corporation would receive for the principal of their claims 40 percent thereof in new income mortgage bonds and 60 percent thereof in new preferred stock, and for interest accumulated and unpaid thereon new common stock equal to the amount of such interest, at the rate of $66⅔ a share. The Credit Corporation would receive new common stock equal to the principal of its claim and interest accrued and unpaid thereon, taking the stock at a price of $70 a share. The James Company would receive for the principal of its claim and interest

accrued and unpaid thereon an amount of new common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation as collateral for its claim. Neither unsecured creditors nor stockholders would be entitled to participate in the reorganization.

The $19,000,000 of new first-mortgage bonds would be sold at par and accrued interest to the Finance Corporation and the pro- [311] ceeds thereof used to retire the $10,000,000 of the debtor's trustees' certificates now held by the Finance Corporation. The purchase of these bonds at par is relied on as the consideration for the allocation to the Finance Corporation for the debtor's secured notes held by it of new securities of the same kind and amount as allotted to the holders of the debtor's existing first-mortgage bonds.

The modified plan of the bondholders committee also would modify and supplement the provisions in the plan approved in our prior report and order with respect to (1) the payment of interest and the date of maturity of the first-mortgage bonds, the issue of additional such bonds, and the lien of the first mortgage; (2) the rate of interest on the income-mortgage bonds, the issue of additional such bonds, and the lien of the income mortgage; (3) the

determination and application of available net income; (4) the issue of additional preferred stock, and the rights and interests of the holders of such stock; (5) the issue of additional common stock, and the rights and interests of the holders of such stock; (6) the claims not affected by the plan; (7) sale of the properties of the debtor at a fair upset price in the discretion of the court; (8) the capital fund; (9) the number, right of appointment, and functions of the reorganization managers; and (10) miscellaneous matters. These proposals will be more fully stated hereinafter.

The trustee under the debtor's general and refunding mortgage urges that there is such substantial value in certain assets pledged under the general and refunding mortgage as to which that mortgage admittedly constitutes a first lien as to require the allocation to the holders of the debtor's notes secured by general and refunding mortgage bonds a fair proportion of their claims in new securities of the same character as those allocated to the holders of the debtor's first-mortgage bonds.

Effective Date of the Plan

Under the plan approved in our prior report and order, the effective date of the plan would be July 1, 1938.

Conclusion.—Upon further consideration we approve January 1, 1939, as the effective date of the plan, and as the date from which interest shall run on the new securities provided in the plan. In view

of this modification, the modified plan will provide for the treatment of claims as of the effective date of the plan. [312]

Capitalization and Charges

The outstanding capitalization of the reorganized company under the plan approved in our prior report and order would be comprised of $3,066,117 of undisturbed equipment obligations, $10,000,000 of first-mortgage 4-percent bonds, or a note for a like amount, $19,716,040 of income-mortgage 4-percent bonds, $29,574,060 of 5-percent preferred stock of the par value of $100 a share, and 313,703 shares of common stock without par value.

Under the Credit Corporation's proposed modifications, the total funded debt of the reorganized company would be $33,651,290 and the total annual fixed and contingent interest charges thereon, plus requirements for the capital and sinking funds proposed therein, would be $1,734,758. Under the modified plan of the bondholders committee the total funded debt would be the same as under the Credit Corporation's plan but the total annual fixed and contingent interest charges, plus requirements for the capital and sinking funds, would be $2,039,264. Under the Credit Corporation's modifications the new income bonds would bear interest at the rate of 4 percent per annum and the annual installment on the capital fund would be $300,000 as compared to a rate of interest of 4½ percent on the income bonds and an annual installment of

$500,000 on the capital fund proposed under the bondholders committee's modified plan.

In our prior report we stated that the total annual charges on the funded debt of the reorganized company, plus requirements of capital and sinking funds, should not exceed $2,000,000, although the total of such amounts resulting under the provisions of the approved plan was only $1,898,223. The income bonds provided for in the approved plan would bear interest at the rate of 4 percent per annum and the annual installment on the capital fund was fixed at $500,000 with certain qualifications. We were influenced in fixing a rate of 4 percent on the income bonds in order to approve as large an amount of such bonds as we then considered practicable. The $500,000 installment on the capital fund was based on the debtor's evidence that at least $500,000 was needed for routine additions and betterments.

Conclusions.—We do not approve the decrease of capital fund installments from $500,000 to $300,000. Since the total funded [313] debt, including interest at 4½ percent on the income bonds, plus requirements of the capital and sinking funds, proposed under the bondholders committee's modified plan, plus the securities hereinafter provided for recognition of the first-lien position of the general and refunding bonds, would not result in charges materially exceeding $2,000,000, we find that the reorganized company would be justified in issuing in consummation of the plan $21,219,075 of income

mortgage 4½-percent bonds, and we will modify our previous report and order accordingly.

In our prior report we stated that the entire capital structure of the reorganized company must be realistically related to its actual earning power, and in determining such capital structure consideration should be given to the investment in the property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future if the reorganization was to be successful. With these considerations in mind, and for the reasons there set forth, and upon consideration of the investment of the debtor in its property, the probable rate-making value thereof, and its traffic and earnings, we conclude that we cannot approve the total capital structure under the Credit Corporation's proposed modification. Upon further consideration of the above factors, however, we find that the issue by the reorganized company in the reorganization of 318,502 97/100 shares of 5-percent preferred stock of the par value of $100 a share, and 319,441 shares of common stock without par value would be justified, and we will modify our prior report and order accordingly.

Under the above modifications the capitalization of the reorganized company upon reorganization will be comprised of $2,750,050 of undisturbed equipment obligations, $10,000,000 of first-mortgage 4-percent bonds, $21,219,075 of income-mortgage 4½-percent bonds, $31,850,297 of 5-percent pre-

ferred stock, and 319,441 shares of common stock without par value.

Provisions for New Money

The plan approved in our prior report and order provides that the $10,000,000 of first-mortgage bonds be sold at par, or, as an alternative, the borrowing of $10,000,000 from the Finance Corporation, in order to secure funds to retire trustees' certificates out- [314] standing in the total amount of $10,000,000. These certificates are now held by the Finance Corporation as collateral security for a loan of $10,000,000. They rank equally and ratably with other expenses of administration and constitute a charge upon the estate prior to the claims of the first-mortgage bondholders and the secured noteholders. From representations of the intended purchasers and the possible loaner, it appears that the most feasible method for obtaining the necessary $10,000,000 is to provide for the purchase of the new first-mortgage bonds by the Finance Corporation. But the Finance Corporation is unwilling to purchase the bonds at par unless the payment of interest on them is made an immediate fixed charge instead of a contingent charge for the first five years as now provided in the approved plan. Our conclusion that the payment of interest on the bonds should be contingent for the first five years was based on the then current earnings of the debtor, and the possibility that the depressed business conditions then being experienced might continue.

Conclusions.—The present earnings justify the conclusion that the reorganized company should be able to meet the charges on the first-mortgage bonds. Under these circumstances, and in order to insure the raising of the new money which is absolutely necessary to effect a reorganization, we conclude and find that the interest on the first-mortgage bonds should be a fixed charge from the date of issue. We will modify our prior report and order accordingly, and will also provide that the Finance Corporation purchase the bonds at par and accrued interest and that in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the debtor's existing first-mortgage bonds. However, the proposed purchase of the new first-mortgage bonds or any part thereof by the Finance Corporation from the reorganized company is subject to and dependent upon our approval thereof in a separate proceeding.

Assets Pledged under the General and Refunding Mortgage

Upon further consideration, we also are of the opinion that the *that the* value of the assets pledged under the general and refund- [315] ing mortgage upon which that mortgage admittedly constitutes a first lien requires a reexamination of the allocation of new securities to the holders of the debtor's notes

secured by the general and refunding mortgage bonds. These assets consist of cash in the hands of the mortgage trustee amounting to $223,732, note of the Tidewater Southern Railway Company for $508,278 representing that company's total funded debt, $1,147,955, par value, of the capital stock of the Tidewater Southern, being about 97.5 percent of the total amount outstanding, $270,000, principal amount, of bonds and $360,834, par value, of stock of the Central California Traction Company, and $465,300, par value, of the capital stock of the Alameda Belt Line.

Under section 19a of the Interstate Commerce Act, this Commission, by division 1, in Tidewater S. Ry. Co. 46 Val. Rep. 540, reported the value for rate-making purposes of the Tidewater Southern's property owned and used for common carrier purposes to be $1,440,000 as of December 31, 1927. From December 31, 1927, to December 31, 1935, the carrier reported the net for additions and betterments, less retirements, to be $168,882, and claims for items which were in existence, but omitted from the basic inventory to be $1,910. Deducting depreciation accrued on equipment from January 1, 1928, to December 31, 1935, of $4,184, as reported by the carrier, gives a net property change of $166,608, which, if added to the final value for rate-making purposes, makes a total of $1,606,608. In addition to the property owned and used for carrier purposes, the carrier owned and held for purposes other than those of a common carrier property the present value of

which was stated in the report, supra, to be $272,951. The net additions and retirements on this class of property between January 1, 1928, and December 31, 1935, is reported as $35,691. If these amounts be added to the total for common-carrier property, the total for property owned would be $1,915,250. On the basis of the depreciation ratio of the property in 1927 the rate-making value as of December 31, 1935, plus the value of noncarrier property, would approximate $1,850,000.

During the 6-year period 1930-35 the Tidewater Southern's earnings available for payment of interest averaged $72,991 a year. In 1934 and 1935 such earnings were $113,967 and $114,512, respectively. During the same two years the debtor derived [316] revenues of $549,069 and $544,748, respectively, from traffic interchanged with the Tidewater Southern. For the 6-year period 1930-35 such revenues averaged $532,820 a year.

The holdings of the debtor in the securities of the Central California Traction Company and the Alameda Belt Line, which are pledged under the general and refunding mortgage, do not appear to be of much value, except as the debtor through such holdings may be able to secure traffic for its lines which it might not otherwise be able to secure. The Central California Traction Company's stock is owned equally by the debtor, the Atchison, Topeka & Santa Fe Railway Company, and the Southern Pacific Company. The parent companies have agreed to share equally any operating deficits or profits as

well as advances for bond interest, sinking fund, or additions and betterments. In 1934 and 1935, for example, the company reported net income of $48,690 and $6,314, but the parent companies contributed $91,638 to the company in 1934 and $61,373 in 1935. The stock of the Alameda Belt Line is owned in equal shares by the Atchison, Topeka & Santa Fe and the debtor. The parent companies have agreed to share equally any operating deficits or profits as well as advances for additions and betterments or other requirements. The parent companies contributed $18,305 to the company in 1934 and $27,727 in 1935. The company reported no net income in 1934 and $480 in 1935. Thus the lien on the securities of these two companies has no material value.

Conclusions.—It is apparent that the Tidewater Southern is a paying railroad and also a valuable feeder for the debtor. But its earnings are, to a large extent, dependent upon the divisions of joint rates accorded it by the debtor. From the foregoing, it appears that the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955. Applying to these amounts the proportionate amounts of general and refunding mortgage bonds securing the notes of the Finance Corporation, The Credit Corporation, and the James Company, the Finance Corporation would receive $414,175 of income mortgage bonds and $649,518

of new preferred stock, the Credit Corporation $154,111 of income-mort- [317] gage bonds and $241,681 of new preferred stock, and the James Company $163,724 of income bonds and $256,756 of new preferred stock for part of their claims. However, this allocation will apply only to the Credit Corporation and the James Company, for, as appears herein, we approve the allocation of new securities to the Finance Corporation on a different basis, i.e. on the basis upon which securities are allotted to the holders of existing first-mortgage bonds. In this connection we also find that such allocation of reorganization securities to the Finance Corporation exhausts the value of the collateral pledged by the debtor under the notes held by the Finance Corporation, and that the equity of the Credit Corporation in such collateral has no value.

The above modifications require further modification of our prior report and order with respect to the allocation of the reorganization securities. Under the modified capitalization there will be available for distribution among the creditors of the debtor, other than the holders of equipment obligations and trustees' certificates, $21,219,075 of income mortgage bonds, $31,850,297 of preferred stock, and 319,441 shares of no-par-value common stock. These securities represent the equitable equivalent of the debtor's assets available for the satisfaction of claims. The total of the claims of secured creditors other than the holders of equipment obligations and trustees' certificates, including interest accrued and

unpaid to January 1, 1939, amounts to $75,138,610, and is comprised of the following: First-mortgage bondholders $49,290,100 principal and $13,143,777 interest; Finance Corporation $2,963,000 principal and $899,870 interest; Credit Corporation, $2,445,610 principal and $146,503 interest; and James Company $4,999,800 principal and $1,249,950 interest.

Conclusions in General as to Allotment of Securities

Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-mortgage bondholders, $19,716,040 of income-mortgage bonds, $29,574,060 of preferred stock, and 230,593 shares of common stock (the common stock to be taken at the price of $57 a share); (2) Finance Corpora- [318] tion, $1,185,200 of income-mortgage bonds, $1,777,800 preferred stock, and 15,788 shares of common stock (the common stock to be taken at a price of $57 a share); (3) Credit Corporation, $154,111 of income mortgage bonds, $241,681 preferred stock, and 35,425 shares of common stock, (the common stock to be taken at a price of $62 a share); and (4) James Company, $163,724 of income mortgage bonds, $256,756 preferred stock, and 37,635 shares of common stock (being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of gen-

cial and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim). We will modify our prior report and order accordingly.

New First Mortgage and Bonds

Under the modified plan of the bondholders' committee the first mortgage would be a lien, subject only to liens upon equipment, on all properties and assets owned by the reorganized company on consummation of the plan, and all property acquired after reorganization, except that (a) if the reorganized company should acquire properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939) constituting a class 1 carrier, such properties would not be subject to the lien of the first mortgage unless acquired in whole or in part by the use of first-mortgage or income-mortgage bonds, or moneys deposited under those mortgages, and (b) if the reorganized company should be consolidated with, or merged into, or should sell its assets substantially as an entirety to any other class 1 carrier, no properties theretofore owned or thereafter acquired by such other company would be subject to the lien of the first mortgage except properties thereafter acquired which would be appurtenant or incident to properties subject to the lien of the first mortgage, or which would be within the maintenance or replacement covenants of the first mortgage, or which would be acquired by the use of first-mortgage or

income-bonds or moneys deposited under those mortgages. [319]

The amount of bonds issuable under the first mortgage would be limited to $50,000,000. The mortgage would provide (1) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding should equal or exceed $20,000,000 the reorganized company would pay to the trustee under the mortgage as a sinking fund a sum equal to one-half of 1 percent of the maximum principal amount of such bonds theretofore at any one time authenticated and uncanceled; and (2) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding plus all other funded debt bearing fixed interest should exceed either (a) 35 percent of the total capitalization of the reorganized company or (b) 50 percent of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the reorganized company, in addition to the above-stated sums provided for the sinking fund for first-mortgage bonds, would pay into the sinking fund a sum equal to 50 per cent of the available net income of the next preceding calendar year that remains after providing for all income-mortgage sinking funds and charges prior thereto. Such sinking fund would be applied to the retirement of first-mortgage bonds, by purchase in the open market or by call for tenders at not exceeding the redemption price (or in case of bonds not redeemable, the principal amount and accrued inter-

est) and whenever the amount in the sinking fund exceeds $50,000 and first-mortgage bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund would be applied to the redemption of new first-mortgage bonds on the next succeeding interest payment date. All bonds so acquired would be canceled and no bonds would be issued to refund any such bonds. First-mortgage bonds and income-mortgage bonds outstanding would be deemed to include all bonds authenticated and delivered to the reorganized company which would not have been canceled or assured of retirement through the deposit of cash. Funded debt would include an amount equal to the capitalized value, at 5 percent per annum, of fixed rents payable for leased roads, other than terminal or bridge properties, but would not include (a) obligations (other than mortgage bonds or equipment-trust obligations) maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge [320] of bonds having a lien on property of the reorganized company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the reorganized company as to interest or principal or both (other than bonds of a terminal or bridge company) would be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the reorganized company's basic obligation of the principal

liability. There would be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without par value, at $100 a share in case of the stock issuable under the plan, and, in case of other stock, at the capital value at which such stock is carried on the books of the company, not exceeding, however, (except to the extent that earned surplus would have been duly capitalized), the net amount received by the reorganized company on the issue thereof.

The first-mortgage bonds would be issuable in series, subject to such limitations and restrictions as may be specified in the first mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds, and having such other characteristics as may be prescribed by the board of directors of the new company at the time of issue, but with respect to the lien of the first mortgage all equally secured, and $10,000,000, series A, would be issued in the reorganization to provide the $10,000,000 of new money required in the reorganization. So long as any of the series A bonds are outstanding no additional first-mortgage bonds would be issued having a maturity earlier than January 1, 1964. The series A bonds would be dated January 1, 1939, would mature January 1, 1964, would bear interest at 4 percent per annum, payable

semiannually, and would be redeemable, in whole or in part, at any time on 30 days' notice, at their principal amount and accrued interest, plus a premium of 3 per cent of their principal amount if redeemed on or before December 31, 1941, 2½ percent if redeemed thereafter and on or before December 31, 1945, 2 percent if redeemed thereafter and on or before December 31, 1949, 1½ percent if redeemed [321] thereafter and on or before December 31, 1953, 1 percent if redeemed thereafter and on or before December 31, 1957, and one-half of 1 percent if redeemed thereafter and on or before December 31, 1960, and without any premium if redeemed on or after January 1, 1961.

First-mortgage bonds, in addition to those authenticated in the reorganization, could be authenticated from time to time; (a) to refund first-mortgage bonds (excluding bonds issued solely by way of pledge, except as hereinafter stated) or outstanding obligations secured by first-mortgage bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the reorganized company for, not exceeding 75 percent of expenditures made after December 31, 1938, but not more than three years prior to the date of authentication (including expenditures for the acquisition or construction of new railroad equipment, free from other lien, but not including expenditures for the making of additions and betterments to

equipment) which are properly chargeable to capital account under our accounting rules; provided, that (a) except when bonds are authenticated in respect of new mileage or in respect of new equipment, the 75 per cent would be applied to the net amount of such capital expenditures after deducting therefrom credits to capital account after December 31, 1938; (b) if any first-mortgage bonds are authenticated or cash deposited under the first mortgage is withdrawn to acquire railroad equipment, a sinking fund would be established, payable in equal annual installments sufficient to retire within the expected efficient service life of such equipment a principal amount of first-mortgage bonds equal to (1) the principal amount of bonds so authenticated or (2) the amount of deposited cash so paid; (c) if any property is acquired subject to existing liens the amount of additional first-mortgage bonds issuable therefor or issued to refund prior-lien obligations thereon, together with the aggregate amount of existing liens to which such property is subject, would not exceed 75 percent of the net cost thereof; and (d) no bonds would be issued on the basis of the acquisition of equipment under equipment-trust obligations or any obligations for the deferred payment of [322] the purchase price for equipment or on the basis of the retirement of any such obligations.

The first mortgage would contain a covenant to the effect that no first-mortgage bonds (other than those authenticated under the plan) would be sold

or pledged unless (1) the reorganized company should have contracted forthwith to sell or pledge such bonds and (2) two-thirds of the directors of the reorganized company should have determined that it was impracticable to provide the needed money (a) by the sale of income-mortgage bonds, or preferred stock, or common stock on specified terms and conditions. The first mortgage would also contain a covenant that the excess of the aggregate principal amount of all first-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured would not exceed 10 per cent of the aggregate principal amount of all first-mortgage bonds then authenticated and uncanceled.

Conclusions.—Upon further consideration we find that the foregoing provisions with respect to the new first-mortgage bonds and the new first mortgage should be substituted for the corresponding provisions in our previous report and order, and we will modify our previous report and order accordingly, except that (1) the issue of all such bonds subsequent to the reorganization should be subject to our approval or to the approval of such regulatory body or tribunal as may have jurisdiction thereof; (2) the bonds of series A should be dated January 1, 1939, and should mature January 1, 1974; and (3) the premium payable in the event of their redemption should be at the following rates and on the following conditions: At the rate of 3 percent of their principal amount if redeemed on or before De-

cember 31, 1943, 2½ percent if redeemed thereafter and on or before December 31, 1948, 2 per cent if redeemed thereafter and on or before December 31, 1953, 1½ percent if redeemed thereafter and on or before December 31, 1958, 1 per cent if redeemed thereafter and on or before December 31, 1963, one-half of 1 per cent if redeemed thereafter and on or before December 31, 1968, and without any premium if redeemed on or after January 1, 1969. [323]

Income Mortgage and Bonds

The income mortgage under the bondholders' committee's modified plan would constitute a lien, subject to the lien of the first mortgage, upon all property from time to time subject to the lien of the first mortgage. The income-mortgage bonds would be issuable, without limit as to aggregate amount or within such limit as might be specified in the income mortgage, from time to time in different series, subject to such limitations and restrictions as might be specified in the income mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds, and having such other characteristics as may be prescribed by the board of directors of the new company at the time of issue, but with respect to the lien of the income mortgage all equally secured. No interest would be mandatorily payable on in-

come-mortgage bonds of any series (except at maturity or redemption) except out of available net income, as hereinafter provided. A total amount of $20,901,240 of income-mortgage bonds would be authenticated and issued in the reorganization. The series A income bonds would be dated January 1, 1939, would mature January 1, 2014, would bear interest at the rate of 4½ percent per annum, due and payable as hereinafter stated and would be redeemable, in whole or in part, on May 1 in any year on 30 days' notice at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of 4½ percent per annum from the last preceding December 31 to the redemption date. The series A bonds would be convertible into shares of common stock, as at the time constituted, at any time at the rate of 20 shares for each $1,000, principal amount, of such bonds.

The interest on the series A income bonds, accruing for each calendar year would (up to the limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but would be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest would be mandatorily payable (except as hereinafter stated) only out of [324] available net income remaining after providing for the capital fund hereinafter described and charges prior to the capital fund. All interest due and not paid on the next following May 1 would accumulate up to the

maximum amount of 13½ percent at any one time, but not beyond. Accumulated interest, within the limitations stated, would be mandatorily payable (a) whenever, and to the extent that, there is available net income for any subsequent year remaining after the deductions made pursuant to the provisions for the first-mortgage bond sinking fund, and the capital fund (in which case such amount would be paid on the next following May 1), or (b) in any event (whether earned or not) at the maturity or on redemption of the series A income bonds.

The income mortgage would provide for the payment on May 1 of each year while any series A income-mortgage bonds are outstanding of an installment of sinking fund, if earned, as, and in the amount hereinafter stated. Such installment would be payable only out of available net income for the last preceding calendar year that remains after meeting the requirements of the first mortgage bond sinking fund and the capital fund and payment of interest on outstanding income-mortgage bonds. The installment would equal (a) one-half of 1 percent of the principal amount of income-mortgage bonds, series A, theretofore at any one time authenticated and uncanceled, plus (b) an amount equal to interest on all income-mortgage bonds, series A, theretofore purchased or redeemed out of the sinking fund, calculated at the rate paid on such May 1 upon outstanding series A income-mortgage bonds. Accruals of such sinking fund installments would not be cumulative. The sinking

fund would be applied to the retirement of income-mortgage bonds, series A, by purchase in the open market or by call for tenders at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds $50,000 and income-mortgage bonds, series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of the income-mortgage bonds, series A, on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds. Income-mortgage bonds in addition to those to [325] be issued at reorganization would be issuable from time to time to refund outstanding income-mortgage bonds or in lieu of first-mortgage bonds for the purposes and subject to the restrictions described as to the issue of additional first-mortgage bonds to the extent first-mortgage bonds are not issued for such purposes. No income-mortgage bonds, other than those to be issued in reorganization, could be issued under the bondholders' committee's proposals, unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of pre-

ferred stock at a price which would give a current dividend return of 6 percent or less, or (b) by the sale of common stock at a price (not less than $50 a share) which would give a dividend return (based on the regular dividend rate then in effect, or if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last 12 calendar months) of 6 percent or less. Provision would also be made in the mortgage substantially to the effect that the excess of the aggregate principal amount of all income-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured should not exceed 10 percent of the aggregate principal amount of all income-mortgage bonds then authenticated and uncanceled. The mortgage would contain a further covenant for its modification and alteration and of the rights and obligations of the reorganized company and of the holders of the income-mortgage bonds, at any time by the concurrent action of the reorganized company and the holders of not less than 66⅔ percent in aggregate principal amount of the bonds then outstanding, but the covenant would contain a proviso that no such change or modification would alter or impair the obligation of the reorganized company to pay the principal of any bond without the consent of the holder of such bond.

Conclusions.—Upon further consideration we approve the foregoing provisions relative to the income mortgage and bonds, except that (1) $21,219,

075 of such bonds should be issued in [326] the reorganization; and (2) the issue of income-mortgage bonds subsequent to the reorganization should be subject to our approval or to the approval of such regulatory body or tribunal as may have jurisdiction thereof. We find that the provisions so modified should be substituted for the corresponding provisions in our previous report and order.

Determination and Application of Available Net Income

Available net income under the bondholders' committee's modified plan would be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any income-mortgage bonds remain outstanding.

Available net income for each calendar year would be determined by deducting all fixed charges of the reorganized company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the reorganized company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with our accounting rules). It would be provided, however, that if the reorganized company should not come into ownership and possession of the properties now operated by the debtor's trustees on or before January 1, 1939, available net income for any period after January 1, 1939, until the reorganized company comes into ownership and possession of such properties, would be computed

as if the reorganized company had come into such ownership and possession on January 1, 1939, and had issued as of that date, the new securities issuable under the plan, other than the $10,000,000 of new first-mortgage bonds, series A, and in lieu of interest on such bonds there would be charged the amount of interest actually accruing during such period upon any then outstanding trustees' certificates or other obligations issued to provide funds for rehabilitation purposes.

Available net income would be ascertained for each such calendar year, as the accounts would be stated on the books of the reorganized company during such calendar year, without adjustments, except that (1) in determining available net income there would not be deducted any amounts from the proceeds of the trustees' certificates issued for rehabilitation purposes, notwith- [327] standing that under our accounting rules such expenditures may be chargeable as operating expenses; (2) if in respect of any calendar year the available net income is a deficit, the amount of the deficit may, in the discretion of the reorganized company, be carried forward and deducted in determining available net income for the succeeding calendar year or calendar years until such deficits (or accumulated deficits) be extinguished by earnings which in the absence of such deficits would be available net income; and (3) debits or credits to adjust income in prior years would be treated as income items for the year in which entered on the books, whether

cleared through income or profit and loss accounts, so far, but only insofar, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available net income for each calendar year would be applied to the following purposes and in the following order:

(1) To the creation, if and when the aggregate principal amount of first-mortgage bonds outstanding should equal or exceed $20,000,000, of the sinking fund hereinbefore described in connection with the first-mortgage indenture, in an amount up to, but not exceeding, in any calendar year, one-half of 1 percent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and uncanceled.

(2) If the directors of the reorganized company in their discretion should so determine, available net income of each calendar year may be applied to the creation of a capital fund to be applied to, or to provide for, or to reimburse the treasury for, capital investments, as defined by our Classification of Income, Profit and Loss, and General Balance Sheet Accounts for Steam Railroads, Accounts Nos. 701, 702, and 705 (or advances to subsidiaries for expenditures, which, if made directly by the reorganized company in respect of its owned or leased properties, would be charged to such accounts), or such substituted accounts as may at the time be in effect, to the extent that such capital investments have been made or contracted for during such cal-

endar year or within three months thereafter, and including therein (but only to the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar [328] year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or purchased under conditional-sale agreements and installments of sinking funds proposed in the event proceeds of additional first-mortgage bonds are issued in the purchase of equipment, provided, however, that

(a) The amount set aside in the capital fund should not exceed $500,000 in respect of any calendar year, or such lesser sum as may be required, together with unappropriated accumulations in the fund as of the close of the calendar year prior to that for which the payment is to be computed, less charges for additions and betterments during such calendar year for which payment is to be computed, to bring the total in the fund to $1,000,000; provided, however, that the capital fund should not exceed $1,000,000 at any one time;

(b) The capital funds may be applied only to such part of the cost of the capital investments as hereinbefore defined as remains after deducting from such cost all retirements of roadway and structures charged against income in such calendar year; and

(c) To the extent that expenditures are so provided for or reimbursed out of the capital fund, the company would not thereafter have the right to issue any bonds or other evidence of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the preferred stock of series A to capitalize or reimburse such expenditures; provided, however, that such expenditures may, within such limits, if any, as may be specified in the first mortgage or the income mortgage, be used to supply the excess of capital expenditures required to be certified under either mortgage over the principal amount of the bonds that may be issued under the terms thereof; and

(3) Any then remaining available net income for any calendar year would be applied to the payment on the next succeeding May 1 of interest on the then outstanding income mortgage bonds (not including any thereof held in the sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon.

(4) Any then remaining available net income for any calendar year would be applied to the payment of the sinking fund installment provided for the income bonds, series A. [329]

(5) Any then remaining net income for any calendar year might be applied to the creation of a sinking fund for income-mortgage bonds of series

other than A, if any such sinking fund should have been provided for at the time of the creation of any such series.

(6) Any then remaining available net income for any calendar year would be applied to the payment of the installment, if any, then due under the sinking fund provided in the event first-mortgage bonds are outstanding in excess of certain limits.

(7) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company (except dividends on the new common stock), including, if and to the extent that such dividends are declared by the directors, the payment of dividends upon the preferred stock in respect of such year and of any accrued and unpaid cumulative dividends on the preferred stock.

(8) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company, including dividends on common stock (but only after all accrued and unpaid cumulative dividends on the preferred stock have been paid).

No interest would need to be paid on income-mortgage bonds if the amount to be paid is less than one-fourth of 1 percent. Any excess available for interest but not paid because of the foregoing provision would be reserved and added to income available for interest on the income-mortgage bonds for the next succeeding calendar year.

If there are outstanding income-mortgage bonds of different series, the amount applicable to interest

on such bonds would be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

Dividends could be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the directors should have determined that the available net income [330] for such year applicable for the purposes specified in the foregoing paragraphs (1), (3), (4), (5), and (6) would be more than sufficient to pay the amounts payable out of such available net income pursuant to such paragraphs and such amounts should have been deposited in trust for the purposes specified in such paragraphs. Dividends on common stock would be so declared only if, prior to such declaration, the directors should have determined that the applicable part of available net income for such year would be more than sufficient to pay the amount hereinabove specified for dividends (including accumulations) on the preferred stock and such amount should have been deposited in trust for the purpose of paying such dividends.

Conclusions.—In our opinion payments into the capital fund should be mandatory upon the board of directors and the plan should so provide. It should also provide that the amount required to be set aside for the capital fund each calendar year be $500,000

less amounts charged during the calendar year to operating expenses in respect of retirements of road property, and in respect of depreciation of road property if reserves for depreciation of road property be established, provided that the amount in the capital fund at the end of the calendar year, including the amount set aside for the fund in respect of that calendar year, should not exceed $1,000,000. The plan should further provide that the capital fund may be applied only to such part of the cost of capital investments defined in the foregoing proposals as remains after deducting from such cost the amounts charged to operating expenses for retirement of road property and all amounts charged to operating expenses for any reserves for depreciation of road property that may be established. In all other respects we find that the foregoing provisions for the determination and application of available net income should be substituted for the corresponding provision in our previous report and order.

Preferred Stock

Under the modified plan of the bondholders committee, preferred stock would be authorized in the total amount of 750,000 shares each of the par value of $100, of which 313,519 shares of series A would be issued in the reorganization. The additional [331] authorized preferred stock not issued in the reorganization would be issuable from time to time in the discretion of the board of directors of the reorganized company, but (unless for the purposes

for which first-mortgage bonds might otherwise have been issued) only after the concurring vote or consent of the holders of a majority of the outstanding preferred stock. So far as permitted by law, such additional preferred stock would be of series A, or of any other series, one or more, and preferred stock of any such other series might bear dividends at such rate, cumulative or noncumulative, might be redeemable or nonredeemable, convertible or nonconvertible, and might have such other rights and privileges and be subject to such limitations and restrictions, as should be from time to time determined by the board of directors prior to the issue of preferred stock of any such other series. If there should be outstanding shares of preferred stock of different series, the earnings applicable to dividends thereon would be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively. In any liquidation or winding up of the reorganized company, whether voluntary or involuntary, the preferred stock would be entitled to receive, out of the assets of the reorganized company, its par value, plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution would be made on the common stock, but would not be entitled to any further participation in such assets. Holders of preferred stock would be entitled to one vote per share on all matters, except that in the elections of directors, which would be by cumu-

lative voting, each holder of stock of either class would be entitled to as many votes per share as the number of directors to be elected. The reorganized company could not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new preferred stock,

(1) Create or permit to be created any mortgage or other lien upon any of the properties, excepting the new first mortgage, the new income mortgage, or purchase-money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; [332]

(2) Create or issue any bonds, notes, or other evidence of indebtedness maturing more than two years from their date, except new first-mortgage bonds and new income-mortgage bonds and except purchase-money obligations given for not more than 75 percent of the purchase price of the property hereafter acquired;

(3) Create any stock ranking either as to assets or dividends, in priority to, or on a parity with, the new preferred stock, or

(4) Permit any subsidiary, all of the stock of which except directors' shares, shall be owned by the reorganized company, to create any mortgage or lien upon any of its properties or issue any bonds, notes, or other evidences of indebtedness or any additional stock, unless the obligations secured by such mortgage or other lien or such other obligation or such stock would be acquired by the reorganized company.

The preferred stock, series A, would be entitled to receive all accumulated unpaid dividends and current dividends at the rate of 5 percent per annum in respect of any calendar year before any dividends could be paid or declared or set apart for payment on the common stock in respect of such year. Such dividends would be cumulative to the extent earned in any calendar year but not paid; but such dividends would otherwise be noncumulative. For the purposes of the next preceding sentence herein above, preferred stock dividends would be considered to be earned in any calendar year to the extent covered by available net income for such year that remains after providing for prior charges. After dividends shall have been paid or declared on the new common stock at the rate of $3 a share in respect of any calendar year, each share of preferred stock, series A, would be entitled to share equally with each share of new common stock in any dividends paid or declared in respect of such year. The preferred stock, series A, would be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year. The holders of preferred stock, series A, would not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class.

Conclusion.—We find that the foregoing provisions should be substituted for corresponding provisions of our previous report [333] and order, ex-

cept that (1) 318,502 97/100 shares of preferred stock, series A, should be issued in the reorganization; and (2) no preferred stock, after reorganization, should be issued without our approval or the approval of such regulatory body or tribunal as may have jurisdiction thereof.

Common Stock

Under the modified plan of the bondholders committee, common stock would be authorized in the total amount of 1,000,000 shares, without par value, of which 287,025 shares would be issued in the reorganization and 418,026 shares would be reserved for the conversion of income-mortgage bonds, series A. Holders of common stock would be entitled to one vote on all matters except that directors would be elected by cumulative voting.

Conclusion.—We find that the foregoing provisions should be substituted for the corresponding provisions of our prior report and order, except that (1) 319,441 shares of common stock should be issued in the reorganization and 424,382 shares should be reserved for the conversion of income-mortgage bonds, series A; and (2) no new common stock additional to that actually issued in connection with the reorganization shall be issued without our approval or the approval of such regulatory body or tribunal as may have jurisdiction thereof.

Claims Not Affected by the Plan

The modified plan of the bondholders committee would provide that the following claims would not

be affected by the plan: (a) Current liabilities of the debtor incurred in the ordinary conduct of its business prior to the institution of the reorganization proceeding, which are entitled to priority over one or more of the mortgages of the debtor, and (b) current liabilities and obligations of the debtor's trustees incurred during the reorganization proceeding. It would further provide that to the extent that such claims, liabilities, or obligations are not paid by the debtor or its trustees pursuant to order of the court, they would be paid in cash or assumed by the reorganized company. All such claims, liabilities, and obligations may be adjusted or compromised [334] and dealt with or paid or discharged by the reorganized company, all as may be determined by the directors of the reorganized company subject to approval by the court. The reorganized company would be deemed to have assumed such of the contracts of the debtor which are executory in whole or in part, including any executory leases and liabilities under guaranties, as shall have been affirmed by the debtor's trustees with the approval of the court prior to the date of confirmation of the plan, and also any executory contracts made by the debtor's trustees with the approval of the court which, by their terms, do not terminate at the conclusion of the reorganization proceeding.

Conclusions.—We are unable to approve all of the foregoing provisions. The plan should provide that claims *against* the debtor entitled to priority over any mortgage of the debtor, current liabilities,

and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by us should be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, we find that claims against the debtor entitled to priority over any mortgage of the debtor are not affected by the plan. We further find that the claims of the holders of the debtor's equipment-trust certificates, and obligations under the Baldwin lease and Pullman contract are not materially and adversely affected by the plan. The plan should further provide that the reorganized company should be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees, with the approval of the court, prior to the confirmation of the plan and also any executory contracts made by the trustees with the approval of the court which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding. The plan also should provide that the reorganized company will assume the liability for, and will pay in full in due course, any and all taxes due to the United States from the debtor or the

debtor's trustees [335] for any taxable period prior to the date of the confirmation of the plan, whether or not proof thereof has been made in this proceeding and without prejudice by reason of not having made proof thereof. We will modify our previous report and order accordingly.

Method of Executing the Plan

Under the bondholders' committee's modified plan, existing mortgages on the debtor's properties would be released and canceled, and all funds on deposit with the trustees under the debtor's mortgages representing sums paid from time to time for the release of properties, sale of scrap, and otherwise, and all collateral pledged under the mortgages, would be surrendered to the reorganized company free from liens of the debtor's mortgages, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of such mortgages and consistent with the plan. All collateral pledged by others than the debtor as security for the debtor's notes to the Finance Corporation, Credit Corporation, and James Company, would be surrendered to the pledgors thereof, and all collateral pledged by the debtor as security for such notes would be reduced to possession by the respective pledgees thereof, and would then be by them surrendered to the reorganized company and canceled, except that the Credit Corporation would not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries

under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan, would become the property of and be retained by the Credit Corporation, but to the extent to which received prior to the issue of the new securities under the plan would be applied in reduction of the claim of the Credit Corporation.

Conclusion.—We do not approve that part of the foregoing provisions which states that all collateral pledged by others than the debtor as security for the debtor's notes to the Finance Corporation, Credit Corporation, and James Company would be surrendered to the pledgors thereof. With this provision eliminated we approve the foregoing provisions. The court by orders of March 11, 1936, and March 20, 1936, authorized the Chase Na- [336] tional Bank of the City of New York to pay from funds which had been deposited with it by the debtor all outstanding first-mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment. In the absence of later information it is assumed that not all of these coupons will have been presented at the consummation of the reorganization and that the plan should make provision for them. Our order of approval of a plan will provide that such coupons shall be paid in cash by the new company if and when presented by the holders thereof.

Under the bondholders' committee's modified plan, the plan would be carried out under the supervision of a reorganization committee consisting of five persons, three of whom would be designated by holders of existing first-mortgage bonds in such manner as we may prescribe, one by the Finance Corporation, and one by the Credit Corporation and the James Company jointly. The plan would be carried out either by revesting the properties formerly of the debtor in the debtor or by transferring such properties to a new corporation organized for the purpose, and the execution by the corporation in which such properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan. The method of carrying out the plan would be determined by the reorganization committee in its discretion, and the reorganization committee would also determine, subject to the approval of the court, the form and, except as otherwise expressly provided in the modified plan, the provisions of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the reorganization committee necessary or desirable in connection with carrying out the plan. The reorganization committee would act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The reorganization committee could from time to time delegate to others any power or discretion conferred upon it by the plan; and the

members of the committee would not be liable for any action taken by them in good faith or by any person employed by the committee in good faith, except for their respective individual malfeasance or wilful neglect. [337]

Conclusions.—Upon further consideration, we find that the foregoing provisions respecting the appointment and functions of the reorganization committee and the carrying out of the plan should be substituted for the corresponding provisions in our prior report and we will modify our previous report and order accordingly except that

(1) The reorganization committee should consist of three persons, all to be approved by the court, one of whom should be designated by the bondholders committee, one by the Finance Corporation, and one by the Credit Corporation and the James Company jointly. Should the bondholders committee, or the Finance Corporation, or the Credit Corporation and the James Company jointly, fail to designate a representative for membership on the committee within such time as the court considers reasonable, the court should appoint such a representative.

(2) Should the reorganization committee solicit deposits of securities, or authorization to represent holders of the debtor's existing securities in the reorganization, the terms and conditions upon which such solicitation and representation would be made should be subject to our prior approval.

The modified plan of the bondholders committee would provide that in case any class of creditors or stockholders does not accept the plan, any party in interest would have the right to move the court to confirm the plan on the ground that the interests of such class of creditors have no value, or that the equity of such class of stockholders has no value, or on the ground that the plan provides for the payment in cash to such class of an amount not less than the value of their interests or equity, if any, in accordance with subsection (e) of section 77, through the sales described in the following paragraph in accordance with clause (5) of subdivision (b) of section 77:

If so ordered by the court the plan would be executed by a sale at public auction, at not less than a fair upset price as determined by the court, of all or any part of the properties and assets of the debtor, free from all liens or claims, other than those expressly stated in the plan not to be affected by the plan. Upon any such sale the properties and assets offered for sale may be purchased for the benefit of the reorganized company by the reor- [338] ganization committee, or by a purchaser nominated by the reorganization committee, and in that event there would be applied on account of the purchase price the distributive share, if any, of the proceeds of such sale of all securities the holders of which should have accepted the plan, and the securities, though not accepting the plan, of all classes which, as a class, have accepted the plan in accord-

ance with section 77. All properties and assets so sold which are purchased by the reorganization committee would be transferred to the reorganized company. In the event of any such sale, the reorganization committee might in its discretion sell all or any portion of the new securities distributable under the plan in respect of the securities of any creditor, if neither such creditor nor the class to which such creditor belongs should have accepted the plan in accordance with section 77. The proceeds of any such sale, together with any other funds, which in the judgment of the reorganization committee are available among the assets of the debtor estate or of the reorganized company, might be used to pay the portion of the purchase price payable in cash on any such sale. Upon any such sale, nonassenting secured creditors of any class, which, as a class, should not have accepted the plan in accordance with section 77 and the unsecured creditors and the stockholders of either class, would be entitled to receive, in lieu of the securities, if any, otherwise issuable under the plan, their aliquot proportion of the proceeds of such sale, after deducting therefrom all expenses of such sale and the amount which would be required to pay in full, or principal and unpaid interest accrued to the date of such sale, all creditors whose claims are prior in lien or superior in equity to the claims of such nonassenting secured creditors or the rights of such unsecured creditors or stockholders. If any properties and assets are purchased at any such sale by others than

the reorganization committee, security holders having an interest in such properties and assets would be entitled, in accordance with the priorities of their respective interests, to receive, in lieu of such securities, if any, issuable to them, their aliquot portion of the proceeds of the sale of such property and assets, after deducting therefrom all expenses of such sale. In such event the reorganization committee would, with the approval of this Commission and the court, make such modification in the plan as may be appropriate under the circumstances.

[339]

In our prior report we declined, for reasons stated therein, to approve a provision in the plan for the public sale of the property at a fair upset price. The foregoing terms and conditions for such a sale, however, are materially different from those proposed originally. Under the foregoing provision, the determination as to whether a sale should be had would be in the discretion of the court.

Conclusions.—Since, in our opinion, the plan of reorganization approved herein conforms to the requirements of section 77, and believing that the public interest would be promoted by an early consummation of this proceeding, we approve the substance of the foregoing provisions respecting the sale of the debtors' properties, but not all of the detailed provisions proposed in connection therewith. We approve the following in lieu of the foregoing provisions:

If deemed desirable and so ordered by the court, the plan, after it has been found fair and equitable

and confirmed by the court, may be executed by a sale at not less than a fair upset price to be fixed by the court, of all or any part of the property of the debtor, all on such conditions and in such manner as the court may direct. Upon any such sale the property and assets offered for sale may be purchased for the benefit of the reorganized company by the reorganization committee, and in that event there shall be applied on account of the purchase price the distributive share of the proceeds of such sale of all securities the holders of which shall have assented to the plan, and of the securities, though not assenting to the plan, of all classes which shall have accepted the plan.

In the event of a sale of the properties of the debtor to the reorganization committee, the committee may in its discretion sell all or any portion of the new securities, if any, distributable under the plan to holders of existing securities, if neither such security holder nor the class to which such security holder belongs shall have accepted the plan, provided that security holders in a class which shall not have accepted the plan, and who themselves shall not have accepted the plan shall have the right, if they shall so notify the committee within a period of 30 days after the confirmation of such sale, to assent to the plan and receive the securities allocated to them under the plan in lieu of their aliquot share of [340] the proceeds of such sale of the properties. The proceeds of any such sale of securities may be used to pay the portion of the purchase

price payable in cash on any such sale of the properties.

Method of Giving Notice

The modified plan of the bondholders committee provides that unless otherwise provided in section 77 or any order or orders of the court or of this Commission, whenever notice would be required or permitted to be given under or pursuant to the plan, such notice should be given by publishing a copy of such notice once in each week on any secular day in each such week for two successive weeks in one newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the plan, by mailing such notice to such security holders at the addresses set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the plan, by mailing such notice to such security holders whose names and addresses appear on the books of the debtor or of the reorganized company, as the case may be, but failure to mail any such notices, would not invalidate the notice by publication above provided for, which alone would be sufficient.

Conclusion.—We approve the foregoing provisions and will incorporate them in the modified plan.

Expenses of the Reorganization

The bondholders' committee's modified plan provides that all expenses in connection with the plan and its consummation, and all costs of administration and other allowances made by the court would be paid by the reorganized company, subject to the provisions of section 77, and would constitute a charge upon the properties of the reorganized company as a cost of administration prior in lien to all new securities issued under the plan. There would be included in such expenses such reasonable compensation for necessary services rendered and reimbursement for actual expenses incurred in connection with the reorganization [341] proceeding and the plan by the trustees under the mortgages, the reorganization committee, the bondholders committee, and other parties in interest and the attorneys or agents of any thereof, as may be approved by this Commission and the court pursuant to section 77, but no compensation would be paid to members of the bondholders committee for their services as such members.

Conclusion.—In view of the definite provisions of section 77 relative to allowances for compensation and expenses of a reorganization, and in view of the other provisions of the plan, we see no necessity for including the foregoing provisions in the plan and, therefore, do not approve them.

Management

Under the modified plan of the bondholders' committee the board of directors of the reorganized company would consist of not less than 7 nor more than 11 members, who would be elected by the stockholders of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors would consist of such persons as may be designated by the reorganization committee with the approval of the court.

Conclusion.—We find that the foregoing provisions should be incorporated in the modified plan.

General Conclusions

We find that the plan of reorganization approved in our report and order of October 19, 1938, supra, modified as herein indicated, will meet with the requirements of section 77 (b) and (e) of the Bankruptcy Act, as amended, and will be compatible with the public interest.

In view of the provisions of section 77(f), we will give consideration, when a plan is finally adopted, to the granting of such authorizations as may be requisite and appropriate for the execution of the plan, including the issue of securities.

The authorization and approval herein granted by us should be upon the condition that the journal entries covering the necessary accounting adjustments under such authorization and approval

should be submitted to us for approval before they are recorded [342] on the books of the reorganized company under the plan of reorganization herein approved.

An appropriate order, superseding our order of October 10, 1938, in this proceeding, will be entered.

Eastman, Commissioner, concurring in part:

For the reasons indicated in my expression of partial concurrence in connection with the prior report in this proceeding, 230 I.C.C. 81, 107, I do not favor the provision for a mandatory capital fund.

Nor am I satisfied with the following provision of the report:

> (2) if in respect of any calendar year the available net income is a deficit, the amount of the deficit may, in the discretion of the reorganized company, be carried forward and deducted in determining available net income for the succeeding calendar year or calendar years until such deficits (or accumulated deficits) be extinguished by earnings which in the absence of such deficits would be available net income;

It seems to me that this provision should be mandatory and should not be left to the discretion of the railroad management.

While I do not dissent from other provisions of the plan, I venture to add a word of comment in

regard to one problem which has engaged much attention in the consideration of this and other reorganization plans. It is recognized that it is one thing to bring a railroad out of bankruptcy with a sound financial structure and quite another thing to keep the structure sound for the future. There are, broadly speaking, two ways to promote the latter result. One way is to incorporate more or less automatic safeguards in the plan, in the way of mortgage limitations upon the issue of bonds, capital funds, sinking funds, and the like. The other way is to rely upon a sound and intelligent management of the company as a first line of defense, and upon sound and intelligent regulation by this Commission as a second line of defense.

The difficulty with the first way is that it is impossible to foresee all contingencies of the future, and rigid provisions of the automatic type may, on this account, prove of dubious benefit under some conditions, if not of actual harm. While I by no [343] means oppose all such provisions, they do not impress me as being entirely satisfactory.

The second way ought to be the better way. Its weakness lies in the frailties of human beings. In one respect neither the Commission nor the managements made a very distinguished record for soundness and intelligence in connection with the issue of railroad securities in the decade which preceded the depression. The record was not so bad as some think, for there were notable issues of stock, and the ratio of indebtedness to total in-

vestment for the railroads in the aggregate decreased materially, but I think it cannot be denied that insufficient advantage was taken of opportunities to issue stock in preference to bonds, and that too little foresight was exhibited in this respect. I am hopeful, however, that experience has taught its lesson and that the managements may be counted upon as a more effective safeguard for the future against the development of unsound financial structures than they have proved to be in the past, and I am confident that this will be true of the Commission.

Miller, Commissioner, concurring in part:

As stated in my dissent to our previous decision in this case (Western Pacific Reorganization, 230 I.C.C. 61), I do not agree with the provision for a mandatory capital fund. I am also unable to agree that the stockholders of the old company are not entitled to participate in the reorganization. If capitalization were based on the original cost of the property less depreciation, as I also suggested in the decision referred to above, the stockholders could be given an opportunity to participate to some extent in the future profits, if any, either with or without a cash contribution as might be appropriate.

While I do not feel warranted at this time nor at this stage of the proceedings in connection with the reorganization of this road, in dissenting upon

any other points, I do wish to draw attention to certain questions which this plan raises in my mind. All these questions are closely related to the possibility that under this plan the future financing of the Western Pacific will be done primarily by expanding fixed interest debt. Although the junior income indenture under the present plan has quite properly been opened up for future financing, we still permit the increase of fixed interest [344] first mortgage bonds up to a total of 50 million dollars. This permission, when considered in connection with the par value of the preferred stock, the cumulation of income bond interest and the covenants relating to the issuance of the first mortgage bonds, strengthens an impression that this plan may facilitate the creation of first mortgage fixed interest debt and militate against financing by junior incomes and capital stock.

The par value provision naturally tends to prevent the preferred stock from being sold at less than par, while the provision for the accumulation of interest charges on the income bonds, even though only a partial one, will tend to prevent the preferred stock price from reaching a par level.

The new plan attempts to guard against the overissue of fixed interest bonds by requiring that whenever the fixed interest debt of the corporation exceeds 35 percent of the total capitalization of the reorganized company or 50 percent of such total capitalization less the principal amount of contin-

gent interest funded debt, the corporation shall pay into the sinking fund 50 percent of the available net income of the preceding calendar year after providing for all income mortgage sinking funds and charges prior thereto, such fund to be applied to the amortization of the first mortgage bonds.

The total capitalization of the company, taking the no par common stock at $100 per share, has been fixed at $97,763,522. The fixed interest debt is $12,750,050. The total capitalization less the present fixed interest debt, therefore, is $85,013,472. If neither the income bonds, other debt, nor the stock are increased, the first mortgage fixed interest debt may be expanded to a total of $45,776,485, or 35 percent of a total capitalization of $130,789,957 before the penalty sinking fund under the 35 percent of total capitalization covenant becomes effective. On similar assumptions the total fixed interest debt, including these bonds, may rise to a higher total before the penalty sinking fund under the 50 percent of total capitalization less the contingent interest debt becomes operative.

Although the amortization of the income bonds is to begin immediately under the plan, no sinking fund is provided for the first mortgage fixed interest debt until or unless the amount of such debt is double the 10 million dollars of first mortgage bonds presently to be issued. [345]

The lien and the earning capacity of the income bonds and consequently their availability for financing would no doubt be greatly improved (1) by

the limitation of the first mortgage issue to 10 million or perhaps a slightly larger amount to provide for emergencies, and (2) by the requirement of sinking fund payments on the first mortgage bonds at a rate sufficiently high to eliminate them from the capitalization at a comparatively early date. The sinking fund payments on the income bonds might be postponed for a time in order to increase those on the first mortgage debt, and the amounts to be paid to the capital fund could be diverted to the same purpose.

If the preferred stock were made a no par issue and the cumulative feature of the income bonds eliminated, the availability of the former for future financing would presumably be greatly enhanced. The loss of protection from the elimination of the cumulative feature might be compensated by giving the bondholders in its place a participation in the earnings after income bond interest, such participation to be applicable only in so far as the specified rate has not been paid on the incomes in any and all prior years.

The proposed restriction on the issuance of fixed interest first mortgage bonds would appear to imply that it is the amount of fixed interest debt in relation to the capitalization which determines the ability of the corporation to meet fixed interest payments. Is it not rather the amount of fixed interest in relation to the earnings which determines the ability of the corporation to meet its interest charges? Certainly the question may be raised as

to whether the sounder method of checking the undue expansion of fixed interest debt does not lie in covenants restricting the expansion of that debt in terms of demonstrated capacity to meet fixed interest charges during the immediately preceding years. Nor would it be necessary to make this earnings type of covenant less elastic than the one now proposed. Although we have jurisdiction over the future issuance of securities by this road, an indenture limitation on the issuance of bonds in terms of the relation of fixed interest obligations to total capitalization is no less a restriction of our jurisdiction than a similar limitation framed in terms of adequate coverage of interest charges by the earnings. [346]

The amortization of the first mortgage bonds could be begun immediately. If the bonds were limited as indicated above, to the amount presently to be issued or slightly higher, the sinking fund payments should be fixed at whatever percentage of the earnings (estimated as nearly as possible) after fixed or contingent interest is calculated to redeem the entire debt in some limited period of years. If the mortgage were left open up to 50 million dollars, the percentage of earnings after fixed or after contingent interest, as might be determined, should be so adjusted that the sinking fund payments would progressively increase with the expansion of borrowing to an extent sufficient to redeem all the first mortgage bonds by maturity regardless of the

extent or frequency of first mortgage borrowing in the meantime.

Aitchison, Commissioner, did not participate in the disposition of this case. [347]

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of June A. D. 1939.

Finance Docket No. 10913

Western Pacific Railroad Company Reorganization

It appearing, That this Commission, by its report and order of October 10, 1938, approved a plan of reorganization for the debtor; and

It further appearing, That upon the filing of petitions by the debtor and five other interveners, requesting that certain modifications be made in the approved plan, the proceeding was reopened and oral argument was heard on the question of such proposed modifications; and

It further appearing, That the Commission upon reconsideration of the record herein in the light of the aforesaid argument, has, on the date hereof, made and filed its supplemental report containing its findings of fact and conclusions thereon with respect to the modifications of plan requested, and a full statement of the reasons therefor, which

report is hereby referred to and made a part hereof.

It is hereby ordered, That the following plan of reorganization of the aforesaid debtor be, and it is hereby, approved:

Terms used herein shall have the following meanings respectively:

The debtor.—The Western Pacific Railroad Company;

Consummation of the plan—The transfer to the reorganized company, to the extent contemplated by the plan, of the properties and assets of the debtor.

Court.—The District Court of the United States for the Northern District of California, Southern Division. [348]

Effective date of the plan.—The date from which interest shall run on the new securities provided in the plan, namely, January 1, 1939.

First-mortgage bonds.—Bonds issued under the first mortgage dated June 26, 1916, from the company to the First Federal Trust Company and Henry E. Cooper, as trustees (Crocker First National Bank and Samuel Armstrong successor trustees), designated as the first mortgage.

General and refunding bonds.—Bonds issued under the mortgage dated January 1, 1932, from the company to the Chase National Bank of the City of New York as trustee (Irving Trust Company now successor trustee), designated as the general and refunding mortgage.

Reorganized company.—The corporation, whether the debtor or a new corporation, which shall acquire substantially all of the properties now held by the bankruptcy trustees and issue the new securities provided for by the plan.

A. The effective date of said plan shall be January 1, 1939.

B. The capitalization of the reorganized company, upon consummation of the plan, shall consist substantially of undisturbed equipment trusts, Baldwin lease, and Pullman contract, $2,750,050; new first-mortgage 4-percent bonds $10,000,000; new income-mortgage 4½-percent bonds $21,219,075; new 5-percent preferred stock $31,850,297; new common stock without par value 319,441 shares.

C. The first-mortgage bonds shall be secured by a first mortgage, which will be a lien, directly or through pledge of securities, subject only to liens upon equipment, on all the properties and assets owned by the reorganized company on the consummation of the plan, including securities, equipment, and the equity in such equipment as is subject to equipment obligations. The first mortgage will also be a lien on all similar property acquired by the reorganized company after the reorganization, except that (a) if the reorganized company shall acquire the properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939) constituting a class I carrier as defined by the rules of this Commission or other public regula- [349] tory bodies having

jurisdiction at the time, such properties shall not be subject to the lien of the first mortgage unless acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds, or moneys deposited under the first mortgage or the income mortgage, and (b) if the reorganized company shall be consolidated with, or shall be merged into, or shall sell its assets substantially as an entirety to, any other company which at the time is a class I carrier defined as aforesaid, no properties theretofore owned or thereafter acquired by such other company shall be subject to the lien of the first mortgage except properties thereafter acquired which shall be appurtenant or incident to properties subject to the lien of the first mortgage, or which shall be within the maintenance or replacement covenants of the first mortgage, or which shall be acquired in whole or in part by the use of first-mortgage bonds or income-mortgage bonds or moneys deposited under the first mortgage or the income mortgage.

D. The amount of bonds issuable under the first mortgage will be limited to $50,000,000.

The first mortgage will provide (1) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding shall equal or exceed $20,000,000, the reorganized company will pay to the trustee under the first mortgage as a sinking fund a sum equal to one-half of 1 percent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and

uncanceled; and (2) that on each May 1 when the aggregate principal amount of first-mortgage bonds outstanding plus all other funded debt bearing fixed interest shall exceed either (a) 35 percent of the total capitalization of the reorganized company, determined as hereinafter provided, or (b) 50 percent of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the reorganized company, in addition to the sums provided in this subdivision D to be paid, will pay into said sinking fund a sum equal to 50 percent of the available net income of the next preceding calendar year that remains after providing for all income mortgage sinking funds and charges prior thereto (i. e., that remains after the deductions made pursuant to subparagraphs (1), (2), (3), (4), and (5) of *of* the fourth paragraph of subdivision L hereof; or after the [350] provisions of said subdivision L shall have ceased to be operative, 50 percent of net income as defined by the accounting rules or practice referred to in said subdivision L). Such sinking fund shall be applied to the retirement of first-mortgage bonds, by purchase in the open market or by call for tenders at not exceeding the redemption price (or in the case of bonds not redeemable, the principal amount and accrued interest), and whenever the amount in the sinking fund exceeds $50,000 and first-mortgage bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in-

the sinking fund shall be applied to the redemption of new first-mortgage bonds on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds. First-mortgage bonds and income-mortgage bonds outstanding shall be deemed to include all bonds authenticated and delivered to the reorganized company which shall not have been canceled or assured of retirement through the deposit of cash. Funded debt shall include an amount equal to the capitalized value, at 5 percent per annum, of fixed rents payable for leased roads, other than terminal or bridge properties, but shall not include (a) obligations, other than mortgage bonds or equipment-trust obligations, maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge of bonds having a lien on property of the reorganized company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the reorganized company as to interest or principal or both, other than bonds of a terminal or bridge company, shall be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the reorganized company's basic proportion of the principal liability. There shall be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without

par value, at $100 a share in case of the stock issuable under the plan, and, in case of other stock, at the capital value at which such stock is carried on the books of the company, not exceeding, however (except to the extent that earned surplus shall have been duly capitalized), the net amount received by the reorganized company on the issue thereof. [351]

E. The first-mortgage bonds may be issued from time to time in different series, subject to the approval of this Commission or the approval of such regulatory body or tribunal as may have jurisdiction thereof, and to such limitations and restrictions as may be specified in the first mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration, and sinking funds and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with respect to the lien of the first mortgage all equally secured. So long as any first-mortgage bonds, Series A, shall be outstanding no additional first-mortgage bonds shall be issued having a maturity earlier than January 1, 1974.

F. Ten million dollars first-mortgage bonds, series A, are to be authenticated and issued in the reorganization for the purpose of providing the $10,000,000 of new money required in the reorganization.

The bonds of series A shall be dated January 1, 1939, shall mature January 1, 1974, shall bear interest at the rate of 4 percent per annum, payable semiannually, and shall be redeemable, in whole or in part, at any time on 30 days' notice, at their principal amount and accrued interest, plus a premium of 3 percent of their principal amount if redeemed on or before December 31, 1943, 2½ percent if redeemed thereafter and on or before December 31, 1948, 2 percent if redeemed thereafter and on or before December 31, 1953, 1½ percent if redeemed thereafter and on or before December 31, 1958, 1 percent if redeemed thereafter and on or before December 31, 1963, one-half of 1 per cent if redeemed thereafter and on or before December 31, 1968, and without any premium if redeemed on or after January 1, 1969.

G. First-mortgage bonds, in addition to those to be authenticated in the reorganization, may be authenticated from time to time, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof: (a) to refund first-mortgage bonds (excluding bonds issued solely by way of pledge, except as hereinafter provided) or outstanding obligations secured [352] by first-mortgage bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the reorganized company, for, not exceeding 75 percent of expenditures made after December 31, 1938, but not more than three

years prior to the date of such authentication (including expenditures for the acquisition or construction of new railroad equipment, free from other lien, but not including expenditures for the making of additions and betterments to equipment) which, under the accounting rules of this Commission or other Federal regulatory bodies having jurisdiction in the premises, at the time in force, are properly chargeable to capital account; provided, however, that

(a) Except when bonds are authenticated in respect of new mileage (or securities representative thereof) or in respect of new equipment, the said 75 percent shall be applied to the net amount of said capital expenditures after deducting therefrom, to such extent and on such basis as may be specified in the first mortgage, credits to capital account after December 31, 1938;

(b) If any first-mortgage bonds are authenticated or cash deposited under the first mortgage is withdrawn to provide or reimburse for the acquisition of railroad equipment, a sinking fund shall be established (in addition to any other sinking fund then in effect for any series of first-mortgage bonds) payable in equal annual installments in an amount sufficient to retire (at par) within the expected efficient service life of such equipment (in no case to exceed 15 years) a principal amount of first-mortgage bonds equal to (1) the principal

amount of bonds so authenticated or (2) the amount of deposited cash so paid;

(c) If any property is acquired subject to existing liens the amount of additional first-mortgage bonds issuable therefor or issued to refund prior-lien obligations thereon, together with the aggregate amount of existing liens to which such property is subject, shall not exceed 75 percent of the net cost thereof, including as part of such cost the amount of such existing liens whether or not the indebtedness secured thereby is assumed by the reorganized company; and

(d) No bonds shall be issued on the basis of the acquisition of equipment under equipment-trust obligations or any [353] obligations for the deferred or serial payment of the purchase price for equipment, or on the basis of the retirement of any such obligations.

H. The first mortgage will contain a covenant substantially to the effect that no first-mortgage bonds (other than those to be authenticated under the plan) will be sold or pledged unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the

sale of income-mortgage bonds having a maturity of 20 years or more at a price which would give a yield to maturity of 5 percent or less, or (b) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (c) by the sale of common stock at a price (not less than $50 a share) which would give a current dividend return (based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6 per cent or less.

The first mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all first-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all first-mortgage bonds then authenticated and uncanceled.

I. The income mortgage shall constitute a lien, subject to the lien of the first mortgage, upon all property from time to time subject to the lien of the first mortgage.

The income-mortgage bonds may be issued, without limit as to aggregate amount or within such limit as may be specified in the income mortgage, from time to time in different series, subject to the approval of this Commission or such regulatory body or tribunal as may have jurisdiction thereof, and subject to such limitations and restrictions as

may be specified in the income mortgage, payable on such date or dates, in such denominations, bearing interest [354] at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or ~~moneys of p~~yment, registration, and sinking funds, and having such other characteristics as may be prescribed by the board of directors of the reorganized company at the time of issue, but with respect to the lien of the income mortgage all equally secured. No interest shall be mandatorily payable on income-mortgage bonds of any series (except at maturity or redemption) except out of available net income, as hereinafter provided.

J. Twenty-one million two hundred nineteen thousand seventy-five dollars of income-mortgage bonds, series A, are to be authenticated and issued in the reorganization, as set out in subdivision P below.

The income-mortgage bonds of series A shall be dated January 1, 1939, shall mature January 1, 2014, shall bear interest at the rate of 4½ percent per annum, due and payable as hereinafter provided, and shall be redeemable, in whole or in part, on May 1 in any year, on 30 days' notice, at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of 4½ percent per annum from the last preceding December 31 to the redemption date.

The income-mortgage bonds of series A shall be convertible into shares of common stock, as at the time constituted, at any time at the rate of 20 shares per $1,000, principal amount, of such bonds.

Interest on income-mortgage bonds, series A, accruing for each calendar year shall (up to the limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but shall be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest shall be mandatorily payable (except as hereinafter provided) only out of available net income of the reorganized company that remains after providing for the capital fund and charges prior thereto (i.e., that remains after the deductions made pursuant to subparagraphs (1) and (2) of the fourth paragraph of subdivision L). All interest that comes due and is not paid on the next following May 1 shall accumulate up to the maximum amount of 13½ percent at any one time; but not beyond. Accumulated interest shall be mandatorily payable (a) whenever, and to the extent that, there is available net income [355] for any subsequent year remaining after the deductions made pursuant to said subparagraphs (1) and (2) of the fourth paragraph of subdivision L (in which case such amount shall be paid on the next following May 1), or (b) in any event (whether earned or not) at the maturity or on redemption of the income-mortgage bonds of series A. For the purposes of the two sentences next hereinabove, payments of

interest shall be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The board of directors of the reorganized company may at any time, in its discretion, pay any interest accrued on the income-mortgage bonds, series A, even if not earned, out of any funds lawfully available therefor.

The income-mortgage will provide for the payment on May 1 of each year while any income-mortgage bonds, series A, are outstanding, of an installment of the sinking fund, if earned, as, and in the amount, hereinafter specified. Such installment shall be payable only out of available net income for the last preceding calendar year that remains after paying interest on outstanding income-mortgage bonds (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2) and (3) of the fourth paragraph of said subdivision L). The amount of such installment shall equal (a) one-half of 1 percent of the maximum principal amount of income-mortgage bonds, series A, theretofore at any one time authenticated and uncanceled, plus (b) an amount equal to interest on all income-mortgage bonds, series A, theretofore purchased or redeemed out of the sinking fund, calculated at the rate paid on said May 1 upon outstanding income-mortgage bonds of series A. Such accruals of the sinking-fund installments shall not be cumulative. The sinking fund shall be applied from time to time to the retirement of income-mortgage bonds, series A, by purchase in the open market or by call for tenders

at not exceeding their redemption price, and whenever the amount in the sinking fund exceeds $50,000 and income-mortgage bonds, series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the sinking fund shall be applied to the redemption of the income-mortgage bonds, series A, on the next succeeding interest payment date. All bonds so acquired shall be canceled and no bonds may be issued to refund any such bonds. [356]

Income-mortgage bonds, in addition to those to be issued in the reorganization, may be issued from time to time, subject to the approval of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof, to refund outstanding income-mortgage bonds or in lieu of first-mortgage bonds, for the purposes and subject to the restrictions stated in respect of the issue of additional first-mortgage bonds above, to the extent that first-mortgage bonds are not issued for such purposes.

K. No income-mortgage bonds (other than those to be issued under the plan) may be authenticated and delivered unless (1) the reorganized company shall have contracted forthwith to sell or pledge such bonds and (2) the board of directors of the reorganized company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount

of money needed (a) by the sale of preferred stock at a price which would give a current dividend return of 6 percent or less, or (b) by the sale of common stock at a price (not less than $50 a share) which would give a current dividend return (based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last 12 calendar months) of 6 percent or less.

The income mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all income-mortgage bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10 percent of the aggregate principal amount of all income-mortgage bonds then authenticated and uncanceled.

The income mortgage will provide, within conditions and limits to be therein prescribed, for the modification and alteration thereof and of the rights and obligations of the reorganized company and of the holders of the income-mortgage bonds thereunder, at any time by the concurrent action of the reorganized company and of the holders of not less than 66⅔ percent in aggregate principal amount of the bonds then outstanding; provided, however, that no such change or modification shall alter or impair the obligation of the reorganized company to pay the principal of any bond without [357] the consent of the holder of such bond. In the event of any unification of the properties of the reorganized com-

pany with the properties of any other company, the modifications hereinabove authorized may include provisions excluding in whole or in part the earnings from such other properties in determining available net income and providing for the determination of such available net income without the maintenance of separate accounts.

L. Available net income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any income-mortgage bonds remain outstanding. When no income-mortgage bonds remain outstanding, the provisions of this subdivision L shall cease to be operative.

Available net income for each such calendar year shall be determined by deducting all fixed charges of the reorganized company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the reorganized company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with the accounting rules of this Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice); provided, however, that if the reorganized company shall not come into ownership and possession of the properties now operated by the bankruptcy trustees on or before January 1, 1939, available net income for any period after January 1, 1939, until the reorganized com-

pany comes into ownership and possession of such properties shall be computed as if the reorganized company had come into such ownership and possession on January 1, 1939, and had issued, as of that date, the new securities issuable under the plan, other than the $10,000,000 of new first-mortage bonds, series A, and in lieu of interest on such bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding trustees' certificates or other obligations issued to provide funds for rehabilitation purposes.

Available net income shall be ascertained for each such calendar year as the accounts shall be stated on the books of the reorganized company during such calendar year, without adjust- [358] ments, except that (1) in determining available net income there shall not be deducted any amounts from the proceeds of the trustees' certificates issued for rehabilitation purposes, notwithstanding that under the accounting rules hereinbefore mentioned such expenditures may be chargeable as operating expenses; (2) if in respect of any calendar year the available net income is a deficit, the amount of such deficit may, in the discretion of the board of directors of the reorganized company, be carried forward and be deducted in determining available net income for the succeeding calendar year or calendar years until such deficit (or accumulated or remaining deficits) be extinguished by earnings which in the absence of such deficit or deficits, would be available net income; and (3) debits or credits to

adjust income in prior years shall be treated as income items for the year in which entered on the books, whether cleared through income or profit and loss accounts, so far but only insofar, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available net income for each calendar year shall be applied to the following purposes and in the following order:

(1) To the creation, if and when the aggregate principal amount of first-mortgage bonds outstanding shall equal or exceed $20,000,000, of the sinking fund provided for in subdivision D hereinabove, in an amount up to, but not exceeding, in respect of any calendar year, one-half of 1 percent of the maximum principal amount of first-mortgage bonds theretofore at any one time authenticated and uncanceled.

(2) To the creation of a capital fund to be applied to, or to provide for, or to reimburse the treasury of the reorganized company for, capital investments, as defined by this Commission's Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701, Investment in road and equipment, 702, Improvements on leased railway property, and 705, Miscellaneous physical property (or advances to subsidiaries for expenditures which, if made directly by the reorganized company in respect of its owned or

leased properties, would be charged to said accounts), or such substituted accounts as may at the time be in effect, to the extent that such capital investments have been made or contracted for during such calendar year or within three months thereafter, and including therein but only to [359] the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or purchased under conditional-sale agreements and installments of sinking fund provided for by subparagraph (b) of subdivision G (relating to first-mortgage bonds issued for equipment), provided, however, that

(a) The amount set aside in the capital fund each calendar year shall be $500,000 less amounts charged during the calendar year to operating expenses in respect of retirements of road property, and in respect of depreciation of road property if reserves for depreciation of road property be established, provided that the amount in the capital fund at the end of the calendar year, including the amount set aside for the fund in respect of that calendar year, shall not exceed $1,000,000.

(b) The capital fund may be applied only to such part of the cost of capital investments as hereinabove defined as remains after deducting from such cost the amounts charged

to operating expenses for retirement of road property and all amounts charged to operating expenses for any reserves for depreciation of road property that may be established.

(c) To the extent that expenditures are so provided for or reimbursed out of the capital fund, the company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the preferred stock of series A to capitalize or reimburse such expenditures; provided, however, that such expenditures (if for purposes for which first-mortgage bonds or income-mortgage bonds may be issued) may, within such limits, if any, as may be specified in the first mortgage or the income mortgage, be used to supply, in whole or in part, the excess of capital expenditures required to be certified under either such mortgage over the principal amount of the bonds that may be issued under the terms thereof; and

(3) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1, of interest on the then outstanding income-mortgage bonds (not including any thereof then held in any sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon. [360]

(4) Any then remaining available net income for any calendar year shall be applied, so long as any income-mortgage bonds, series A, are outstanding, to the payment on the next succeeding May 1, of the sinking fund installment provided for in subdivision J (relating to income-mortgage bonds, series A).

(5) Any then remaining available net income for any calendar year may be applied to the creation of a sinking fund for income-mortgage bonds of series other than series A, if any such sinking fund shall have been provided for at the time of the creation of any such series.

(6) Any then remaining available net income for any calendar year shall be applied to the payment on the next succeeding May 1 of the installment, if any, then due under the sinking fund provisions of subdivision D hereinabove (relating to first-mortgage bonds when outstanding in excess of certain limits).

(7) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company (except dividends on the new common stock), including, if and to the extent that such dividends shall be declared by the board of directors of the reorganized company, the payment of dividends upon the preferred stock in respect of such year and of any accrued and unpaid cumulative dividends on the preferred stock; such dividends to be paid, except as here-

inafter provided, on such date or dates in the next succeeding year as may be specified in the certificate of incorporation or by-laws of the reorganized company, or in the certificates for the preferred stock.

(8) Any then remaining available net income for any calendar year may be applied to any proper corporate purpose of the reorganized company, including (but only after all accrued and unpaid cumulative dividends on the preferred stock to the end of such year shall have been paid, or declared and set apart for payment) dividends on the common stock.

No interest need be paid on income-mortgage bonds if the amount to be paid is less than one-fourth of 1 percent. Any excess available for interest but not paid because of the foregoing provision shall be reserved and added to the income available for interest on the income-mortgage bonds for the next succeeding calendar year. [361]

If there are outstanding income-mortgage bonds of different series, the amount applicable to interest on such bonds shall be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

Dividends may be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the board

of directors shall have determined that the available net income for such year applicable for the purposes specified in the foregoing paragraphs (1), (2), (3), (4), (5), and (6) will be more than sufficient to pay the amounts payable out of such available net income pursuant to said paragraphs and such amounts shall have been deposited in trust for the purposes specified in said paragraphs. Dividends on common stock may be so declared only if, prior to such declaration, the board of directors shall have determined that the applicable part of available net income for such year will be more than sufficient to pay the amount hereinabove specified for dividends including accumulations) on the preferred stock and such amount shall have been deposited in trust for the purpose of paying such dividends.

M. There will be authorized 750,000 shares of preferred stock, each of the par value of $100, of which 318,502 97/100 shares of series A are to be issued in the reorganization as set out in subdivision P below.

The additional authorized preferred stock not issued in the reorganization will be issuable from time to time, subject to the approval of this Commission, or of such regulatory body or tribunal as may have jurisdiction thereof, in the discretion of the board of directors of the reorganized company, but (unless for purposes for which first-mortgage bonds might otherwise have been issued) only after the concurring vote or consent of the holders of a

majority of the outstanding preferred stock. So far as permitted by law, such additional preferred stock may be of series A, or of any other series, one or more, and preferred stock of any such other series may bear dividends at such rate, cumulative or noncumulative, may be redeemable or nonredeemable, convertible or non- [362] convertible, and may have such other rights and privileges and be subject to such limitations and restrictions, as may be from time to time determined by the board of directors prior to the issue of preferred stock of any such other series. If there are outstanding shares of preferred stock of different series, the earnings applicable to dividends thereon shall be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively.

In any liquidation or winding up of the reorganized company, whether voluntary or involuntary, the preferred stock shall be entitled to receive, out of the assets of the reorganized company, its par value, plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution shall be made on the common stock, but shall not be entitled to any further participation in such assets.

The reorganized company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new preferred stock,

(1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new first mortgage, the new income mortgage, or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75 percent of the purchase price of such property; (2) create or issue any bonds, notes, or other evidences of indebtedness maturing more than two years from their date, except new first-mortgage bonds and new income-mortgage bonds and except purchase money obligations given for not more than 75 percent of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new preferred stock, or (4) permit any subsidiary, all of the stock of which, except directors' shares, shall be owned by the reorganized company, to create any mortgage or other lien upon any of its properties or issue any such bonds, notes, or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall be acquired by the reorganized company.

The preferred stock, series A, shall be entitled to receive all accumulated unpaid dividends and, current dividends at the rate [363] of 5 percent per annum in respect of any calendar year before any dividends shall be paid or declared or set apart for payment on the common stock in respect of such

year. Such dividends shall be cumulative to the extent earned in any calendar year but not paid; but such dividends shall otherwise be noncumulative. For the purposes of the next preceding sentence hereinabove, preferred stock dividends shall be considered to be earned in any calendar year to the extent covered by the available net income for such year that remains after providing for prior charges (i.e., that remains after the deductions made pursuant to subparagraphs (1), (2), (3), (4), (5), and (6) of the fourth paragraph of subdivision L); or after the provisions of said subdivision L shall have ceased to be operative, to the extent covered by net income (as defined by the accounting rules or practice referred to in said subdivision L).

After dividends shall have been paid or declared, or set apart for payment, on the new common stock at the rate of $3 a share in respect of any year, each share of preferred stock, series A, shall be entitled to share equally with each share of new common stock in any dividends paid or declared or set apart for payment, in respect of such year.

The preferred stock, series A, shall be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year.

The holders of preferred stock, series A, shall not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class.

Holders of preferred stock shall be entitled to one vote per share on all matters, except that in elections of directors, which shall be by cumulative voting, each holder of stock of either class shall be entitled to as many votes per share as the number of directors to be elected.

N. There will be authorized 1,000,000 shares of common stock, without par value, of which 319,441 shares are to be issued in the reorganization as set forth in subdivision P below and 424,382 shares shall be reserved for the conversion of income-mortgage bonds, series A. No new common stock additional to that actually issued in connection with the reorganization, as above [364] stated, shall be issued without the further authorization of this Commission or of such regulatory body or tribunal as may have jurisdiction thereof.

Holders of common stock shall be entitled to one vote per share on all matters except that directors shall be elected by cumulative voting as aforesaid.

So far as permitted by law, any vote or consent by the holders of common stock, authorizing the issue of additional shares of stock of any class or of securities convertible into stock of any class, may waive on such terms and conditions, if any, as may be specified in such vote or consent, the preemptive right of all the holders of shares of common stock to subscribe to such additional shares or securities.

O. The $10,000,000 of new first-mortgage bonds, series A, to be authenticated and issued in the reorganization shall be sold at par and accrued interest

to the Reconstruction Finance Corporation (subject to the approval and authorization of this Commission and the delivery to the Reconstruction Finance Corporation of a legal opinion satisfactory to it as to the validity of the acquisition by the reorganized company of title to the properties of the debtor and the validity of the new first-mortgage bonds, series A, and the new first mortgage). In consideration of such purchase by the Reconstruction Finance Corporation of new first-mortgage bonds, series A, and considering the value of the collateral securing its claim, such claim amounting as of January 1, 1939, to $3,862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by general and refunding bonds of the debtor and other collateral, shall be provided for under the plan in like securities and in like proportions as those given holders of the debtor's first-mortgage bonds.

P. The existing securities of the debtor shall be treated as follows:

1. Existing equipment trusts, Baldwin lease, and Pullman contract, aggregating $2,750,050 shall remain undisturbed and shall be assumed by the reorganized company.

2. Holders of existing first-mortgage bonds shall receive for each $1,000 principal amount thereof, together with $266.66⅔ of [365] interest accrued and unpaid thereon to January 1, 1939, approximately $400 of income-mortgage 4½-percent bonds, series A, (being 40 percent of the principal amount of said existing bonds); $600 of 5-percent preferred

stock, series A (being 60 percent of the principal amount of said bonds); and 4.67 shares of common stock (being common stock taken at the price of $57 a share for 100 percent of said accrued and unpaid interest).

3. The Reconstruction Finance Corporation shall receive in respect of the $10,000,000 of new money provided for in subdivision O (or the surrender of trustees'-certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to January 1, 1939, approximately $10,000,000 of new first-mortgage 4-percent bonds, series A (being 100 percent of said new money); $1,185,200 of income-mortgage 4½-percent bonds, series A (being 40 percent of the principal of said claim); $1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of $57 a share for 100 percent of said accrued and unpaid interest).

4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of $2,455,610, together with $146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries

under the marshaling and distributing plan, 1931), approximately $154,111 of income mortgage 4½-percent bonds, series A; $241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock (being common stock taken at the price of $62 per share). The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value.

5. The A. C. James Company shall receive in respect of its claim in the principal amount of $4,999,800, together with $1,249,950 of interest accrued and unpaid thereon to January 1, 1939, [366] $163,724 of income mortgage 4½-percent bonds, series A; $256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock (being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim).

6. The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the plan in respect of these claims.

7. The capital stock of the debtor is found to be without equity or value, and the stockholders shall not be entitled to participate in the plan.

Q. Claims against the debtor entitled to priority over any mortgage of the debtor, current liabilities and obligations incurred by the trustees of the properties of the debtor during the reorganization proceeding, and expenses of reorganization allowed by the court within the maximum fixed by this Commission shall be paid in cash or assumed by the reorganized company, provided that any amounts so assumed by the reorganized company shall constitute a charge upon the properties of the reorganized company prior in lien to all new securities issued under the plan. When so treated, claims against the debtor entitled to priority over any of its mortgages are found not to be affected by the plan. Obligations under the debtor's equipment-trust certificates, the Baldwin lease, and the Pullman contract are found not to be materially and adversely affected by the plan. The reorganized company shall be deemed to have assumed the executory contracts of the debtor which by their terms do not terminate at or prior to the conclusion of the reorganization proceeding and which shall have been affirmed or shall not have been disaffirmed by the trustees of the properties of the debtor with the approval of the court prior to the confirmation of the plan, and also any executory contracts made by the trustees [367] of the properties with the approval of the court which by their terms do not ter-

minate at or prior to the conclusion of the reorganization proceeding.

R. The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be canceled. Existing mortgages on the debtor's properties shall be released and canceled, and all funds on deposit with the trustees under the debtor's mortgages representing sums paid from time to time to such trustees for the release of properties, sale of scrap, and otherwise, and all collateral pledged under the debtor's mortgages, shall be surrendered to the reorganized company free from liens of the debtor's mortgages, after deductions therefrom of any amounts which the court may find should be deducted under the provisions of such mortgages and consistent with this plan. All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled, except that the Railroad Credit Corporation shall not release or surrender any right or interest in the distributive shares of the debtor or its subsidiaries under the marshaling and distributing plan, 1931, but any proceeds from such distributive shares after the effective date of the plan shall become the property of and be retained by the Railroad Credit Corpo-

ration, but to the extent to which received prior to the issue of the new securities under the plan shall be applied in reduction of the claim of the Railroad Credit Corporation in respect of which such new securities are to be issued at the rates provided in subdivision P. The court by orders of March 11, 1936, and March 20, 1936, authorized the Chase National Bank of the City of New York to pay from funds which had been deposited with it by the debtor all outstanding first-mortgage bond coupons which matured on or prior to September 1, 1933, and had not theretofore been presented for payment. Any such coupons as shall not have been presented for payment up to the time of the consummation of the plan shall be paid in cash by the new company if and when presented by the holders thereof. [368]

The plan shall be carried out under the supervision of a reorganization committee consisting of three persons, all to be approved by the court, who shall be designated, one by the bondholders committee, one by the Reconstruction Finance Corporation, and one by the Railroad Credit Corporation and the A. C. James Company jointly. Should the bondholders committee, or the Reconstruction Finance Corporation, or the Railroad Credit Corporation and the A. C. James Company jointly, fail to designate a representative for membership on the committee within such time as the court shall consider reasonable, the court shall appoint such a representative.

The plan may be carried out either by revesting the properties formerly of the debtor in the debtor company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the plan.

The method of carrying out the plan shall be determined by the reorganization committee in its discretion, and the reorganization committee shall also determine, subject to the approval of the court, the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the reorganization committee necessary or desirable in connection with carrying out the plan.

The reorganization committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The reorganization committee may employ such agents, attorneys, and others as it may deem desirable for the purposes of the plan. The reorganization committee may from time to time delegate to others any power or discretion conferred upon it by the plan; and the members of the reorganization committee shall not be liable for any action taken by them in good faith or by any person employed by the reorganization committee in good faith, ex-

cept for their respective individual malfeasance or wilful neglect.

Should the reorganization committee solicit deposits of securities, or authorization to represent holders of the debtor's existing [369] securities in the reorganization, the terms and conditions upon which such solicitation and representation would be made shall be subject to the prior approval of this Commission.

S.. If deemed desirable and so ordered by the court, the plan, after it has been found fair and equitable and confirmed by the court, may be executed by a sale at not less than a fair upset price to be fixed by the court, of all or any part of the property of the debtor, all on such conditions and in such manner as the court may direct. Upon any such sale the property and assets offered for sale may be purchased for the benefit of the reorganized company by the reorganization committee, and in that event there shall be applied on account of the purchase price the distributive share of the proceeds of such sale of all securities the holders of which shall have assented to the plan, and of the securities, though not assenting to the plan, of all classes which shall have accepted the plan.

In the event of a sale of the properties of the debtor to the reorganization committee, the committee may in its discretion sell all or any portion of the new securities, if any, distributable under the plan to holders of existing securities, if neither

such security holder nor the class to which such security holder belongs shall have accepted the plan, provided that security holders in a class which shall not have accepted the plan, and who themselves shall not have accepted the plan shall have the right, if they shall so notify the committee within a period of 30 days after the confirmation of such sale, to assent to the plan and receive the securities allocated to them under the plan in lieu of their aliquot share of the proceeds of such sale of the properties. The proceeds of any such sale of securities may be used to pay the portion of the purchase price payable in cash on any such sale of the properties.

T. Unless otherwise provided in section 77 or any order or orders of the court in the reorganization proceeding or of this Commission, whenever notice shall be required or permitted to be given under or pursuant to the plan, such notice shall be given by publishing a copy of such notice once in each week on any secular day in each such week for two successive weeks in one newspaper published and of general circulation in the Borough of [370] Manhattan, City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the plan, by

mailing such notice, postage prepaid, to such security holders whose names and addresses appear on the books of the debtor or of the reorganized company, as the case may be, but failure to mail any such notices, or delay in mailing any such notices, shall not invalidate the notice by publication above provided for, which alone shall be sufficient.

U. The board of directors of the reorganized company shall consist of not less than 7 nor more than 11 members, who shall be elected by the holders of the preferred stock and the common stock of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors shall consist of such persons as may be designated by the reorganization committee, with the approval of the court.

V. The construction of the plan by the court shall be final and conclusive. The court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the plan effectively.

W. Acceptance of the plan shall include acceptance of the new bonds, mortgages, stock certificates, and all instruments necessary and appropriate to the carrying out of the plan, other than the orders of the court and this Commission, to the same effect as though the terms of such instruments were set out in full herein.

Notwithstanding any other provisions of this modified order, the reorganized company shall as-

sume the liability for, and shall pay in full in due course, any and all taxes due to the United States from the debtor or the debtor's trustees for any taxable period prior to the date of the confirmation of the plan, whether [371] or not proof thereof has been made in the proceeding and without prejudice by reason of not having made proof thereof.

It is further ordered, That the authorization and approval herein granted by this Commission are upon the condition that the journal entries covering the necessary accounting adjustments under the order will be submitted to this Commission for approval before they are recorded on the books of the reorganized company under the plan of reorganization herein approved;

It is further ordered, That nothing herein contained shall be, or be construed as, a grant of authority for the issue of any securities, assumption of obligations, transfer of any property, sale consolidation, or merger of the debtor's properties, or pooling of traffic, pursuant to either the Bankruptcy Act or the Interstate Commerce Act, except as provided herein, or until further action by this Commission upon confirmation of the plan by the court; and

It is further ordered, That the order herein, dated October 10, 1938, be, and it is hereby, revoked.

By the Commission.

(Seal) W. P. BARTEL,
Secretary.

[Endorsed]: Filed July 29, 1939. [372]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

EXCEPTIONS OF THE RAILROAD CREDIT CORPORATION, INTERVENOR, TO REPORT PROPOSED BY THE BUREAU OF FINANCE AND SUPPORTING BRIEF

Comes now The Railroad Credit Corporation and excepts to the report proposed by the Bureau of Finance in the above entitled proceeding, and assigns the following errors:

1. That the Bureau erred in finding (p. 7) that the sum of $58,566.12 was due from The Railroad Credit Corporation on November 30, 1936. (The date, 1916, in the report, was obviously intended to mean 1936.)

2. That the Bureau erred in failing to find that The Railroad Credit Corporation is entitled by the general law and by special contract to apply income and proceeds from collateral (including distributive shares under the Marshaling and Distributing Plan), to or towards the payment of princi-

pal or interest, or both, of and upon the obligations of the Debtor, in its untrammeled discretion.

3. That the Bureau erred in recommending (p. 50) that the Commission consider, for the purposes of a plan of reorganization, that the equipment covered by leases, conditional sale agreements or equipment trust agreements, is subject to the lien of the First Mortgage in priority to the General Mortgage. [400]

4. That the Bureau, although finding that the equity of the preferred and common stockholders of the Debtor has no value (p. 55), and that claims of several general creditors should be cancelled, nevertheless erred in recommending the issuance of warrants to The Western Railroad Corporation, one of the general creditors and stockholders of the Debtor, enabling it to purchase at par, within sixty days, all or any part of the $10,000,000 of new first mortgage bonds, receiving a bonus of 10 shares of new common stock with every $1,000 bond so purchased.

5. That the Bureau erred in recommending (p. 40) the immediate sale of $10,000,000 of new First Mortgage Bonds, necessitating the payment of interest thereon, although it does not appear that said sum is presently required.

6. That the Bureau erred in failing (p. 54) to accord full recognition to all the collateral held by The Railroad Credit Corporation, in the allocation of new securities.

7. That the Bureau erred in failing to find that important and valuable items of collateral were

assigned to and pledged with The Railroad Credit Corporation by others than the Debtor, and cannot be taken from The Railroad Credit Corporation in this proceeding.

8. That the Bureau erred in proposing that the claim of The Railroad Credit Corporation against the Debtor be discharged.

9. That the Bureau's proposals are unfair, and unjustly discriminatory and prejudicial to the rights and interests of The Railroad Credit Corporation.

10. That the Bureau erred in proposing (p. 60) as the effective date of a plan of reorganization, January 1, 1937, a date already passed. [401]

BRIEF

1. That the Bureau erred in finding (p. 7) that the sum of $58,566.12 was due from The Railroad Credit Corporation on November 30, 1936. (The date, 1916, in the report, was obviously intended to mean 1936.)

The figure given doubtless related to the undistributed book balance of the Debtor in the fund established under the Marshalling and Distributing Plan, 1931; but, as appears from said Plan, said undistributed book balance does not represent an amount due from The Railroad Credit Corporation to the Debtor, The Railroad Credit Corporation's only obligation in this respect being to credit to the account of the Debtor such sums, if any, as The Railroad Credit Corporation may find in its

hands in excess of its requirements in administering said Plan and said fund; moreover, the amount of said undistributed book balance is currently reduced as distributions are made, the undistributed book balance at date hereof being $52,074.17.

2. That the Bureau erred in failing to find that The Railroad Credit Corporation is entitled by the general law and by special contract to apply income and proceeds from collateral (including distributive shares under the Marshalling and Distributing Plan), to or towards the payment of principal or interest, or both, of and upon the obligations of the Debtor in its untrammelled discretion.

See decision of District Court of United States, District of Connecticut, in Re Reorganization of New York, New Haven & Hartford Railroad Company; not yet reported, but printed at pp. 2689-2697, 2829-2830, and 2903-2904 of the record in said proceeding, filed with the Interstate Commerce Commission.

In consequence of applications made since the close of the hearing herein, the obligations of the Debtor have been further reduced, the amount [402] thereof on September 15, 1937, being

Principal	$2,445,609.88
Interest	67,836.33
Total	$2,513,446.21

Note: In view of the reduction of the rediscount rate of the Federal Reserve Bank in the New York District, from 1½% to 1% in August, 1937, that

interest rate, unless sooner changed, will be applied by The Railroad Credit Corporation under the terms of the Marshalling and Distributing Plan, 1931, effective October 1, 1937.

3. That the Bureau erred in recommending (p. 50) that the Commission consider, for the purpose of a plan of reorganization, that the equipment covered by leases, conditional sale agreements or equipment trust agreements, is subject to the lien of The First Mortgage in priority to the General Mortgage.

In support of this exception, The Railroad Credit Corporation refers to the exceptions and supporting brief filed herein by the trustee of the General Mortgage. The Railroad Credit Corporation adopts all said exceptions, and the supporting brief, to the same extent as though set out herein at length.

4. That the Bureau, although finding that the equity of the preferred and common stockholders of the Debtor has no value (p. 55), and that claims of several general creditors should be cancelled, nevertheless erred in recommending the issuance of warrants to The Western Pacific Railroad Corporation, one of the general creditors and stockholders of the Debtor, enabling it to purchase at par, within sixty days, all or any part of the $10,000,000 of new first mortgage bonds, receiving a bonus of 10 shares of new common stock with every $1,000 bond so purchased.

If the value of the new common stock is sufficiently low to make the combined value of a new

$1,000 first mortgage 4% bond and ten shares of
[403]
stock approximate the purchase price of $1,000, there must clearly be an over-issue of stock. It must be assumed, however, that the Bureau has found that there is sufficient property to support fully not only the other stock provided for, but also the $10,000,000 of common stock proposed to be alloted as a bonus with the $10,000,000 of new first mortgage bonds. If such value exists, as a basis for this stock, creditors senior to The Western Pacific Railroad Corporation are entitled to it. In any event, the holder of the warrants for new bonds will secure two dollars in securities for every dollar of investment: this is incongruous, even if lawful, in a reorganized corporation. It can scarcely be claimed that first mortgage 4% bonds, in the amount of only $10,000,000 upon a property which the Bureau proposes to capitalize at more than $90,000,000, and which even through the worst years of the depression, has earned sums available for interest more than sufficient to cover the interest requirements upon such bonds, must be "sweetened" by the addition of stock of an equal liquidating value, or, indeed, by the addition of any stock.

If the estate of the Debtor is insufficient to support this additional $10,000,000 of stock, then, to the extent that such deficiency exists, the stock will be watered. In this connection, it is of interest to note that the Bureau found that if the $10,000,000 of bonus stock is issued, the Debtor's estate is not sufficient to support the issue to The Railroad Credit

Corporation of stock having a par value equal to the amount of The Railroad Credit Corporation's claim, even though that claim is secured inter alia by general mortgage bonds in a principal amount nearly double the amount of the claim. If there is insufficient equity for mortgage bonds, there must of necessity be insufficient equity for general creditors: no general creditor is thus entitled to participate. [404]

It is significant that the Bureau proposes to allot to Reconstruction Finance Corporation common stock having a par value nearly double the amount of the claim: since we must assume that the Bureau would not propose giving to Reconstruction Finance Corporation securities worth more than the amount of the claim, it follows that, in the opinion of the Bureau, the new common stock, though it may be worth less, cannot be worth more than roundly $50 a share. It also follows that The Railroad Credit Corporation is offered stock having, at most, a value of not more than half its claim: and yet the Bureau proposes to give something of value out of the Debtor's estate to The Western Pacific Railroad Corporation, whose position is junior to that of The Railroad Credit Corporation. Such a proposal might stand, on composition principles, if every creditor assented, but if a single creditor dissented, the proposal would necessarily be rejected by the court as being contrary to the requirements of Section 77. The allocation of the bonus stock to the secured note holders would patently be more equitable than the Bureau's proposal.

In either event, the Bureau's proposal would result in an unfair and unsound distribution of securities.

The Bureau's proposal tends not only to discredit other securities of the new company, but to discredit even the new first mortgage bonds themselves. It would be preferable to adjust the interest rate on the new bonds, to the market, or to sell those bonds at a discount. It is possible that satisfactory terms could be made for a loan in the full amount from Reconstruction Finance Corporation, without any increase in the rate of interest.

Even if the proposed issue of bonus stock is legal; it may well be that its issue as "fully paid" would subject the purchaser to an assessment in the event of subsequent financial difficulties. See Brockett v. Winkle Terra Cotta Company, 81 F. (2d) 949 (C. C. A. 8th, 1936); and Spencer v. [405] Anderson, 222 Pac. (Cal.) 355 (1924). The mere possibility of such an assessment would depress the market value not only of the bonus stock, but of all the remaining common stock.

It is obvious that if such an offer as is proposed to be made to The Western Pacific Railroad Corporation is to be made to any general creditor, it should be made on equal terms to all general creditors: certainly there is no basis for offering $20,000,000 par value of securities to a single general creditor having a claim amounting to but a fraction of that sum. It would appear, that such an offer, if made at all, should be made first to prior creditors

whose claims are not satisfied by the proposals of the Bureau.

It should be noted, moreover, that The Railroad Credit Corporation is the holder of $5,494,722 (plus interest), or substantially all, of the claim that is made on the basis of the proposed allocation of warrants to The Western Pacific Railroad Corporation, amounting to $5,747,560, plus interest. If the possession of that claim justifies the proposed offer of warrants, that offer should be extended to The Railroad Credit Corporation rather than to The Western Pacific Railroad Corporation.

The further proposal of the Bureau, that said warrants be offered to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Company, pro rata, in the event and to the extent that they are not taken up by The Western Pacific Railroad Corporation, is wholly illusory: it is obvious that if the warrants have value, the Western Pacific Railroad Corporation will exercise them to the extent, if any, that it is able and willing to do so, and sell the remainder to others. Obviously no part of the warrants will descend to The Railroad Credit Corporation if there is value in them; The Railroad Credit Corporation cannot expect to secure any right to such warrants unless they are entirely worthless. [406]

The proposed allotment of warrants opens the door to full ultimate recovery by The Western Pacific Railroad Corporation: that door is simultaneously closed to The Railroad Credit Corporation,

although the latter has a position senior to the former.

5. That the Bureau erred in recommending (p. 40) the immediate sale of $10,000,000 of new First Mortgage Bonds, necessitating the payment of interest thereon, although it does not appear that said sum is presently required.

It may well be that before all of this sum is required, conditions may be such that first mortgage bonds of the character here proposed, will sell at their face value or even at a premium, without being bolstered by stock. In any event, it would seem unwise to saddle the new corporation with unnecessary interest charges.

6. That the Bureau erred in failing (p. 54) to accord full recognition to all the collateral held by The Railroad Credit Corporation, in the allocation of new securities.

The allocation proposed is based solely on holdings of general mortgage bonds. In addition, The Railroad Credit Corporation also holds (1) pledge of interest accrued upon said general mortgage bonds; (2) assignments of advances to the Debtor by three subsidiaries of the Debtor; (3) assignment of distributive shares of Debtor, and of two subsidiaries of the Debtor, under the Marshalling and Distributing Plan; (4) "negative pledge" of dividends on stock; and (5) equity in collateral pledged with Reconstruction Finance Corporation.

In this respect the Bureau's proposal, if carried

out, would be confiscatory. See comments under Paragraphs 9 and 10, infra. [407]

7. That the Bureau erred in failing to find that important and valuable items of collateral were assigned to and pledged with The Railroad Credit Corporation by others than the Debtor, and cannot be taken from The Railroad Credit Corporation in this proceeding.

The items referred to are as follows:

(a) $2,000,000 principal of Debtor's general and refunding bonds;

(b) Assignment of distributive shares of two subsidiaries of the Debtor, under the Marshalling and Distributing Plan, 1931;

(c) Assignment of certain advances made by The Western Pacific Railroad Corporation to (I) the Debtor, (II) Sacramento Northern Railroad Company, and (III) Standard Realty and Development Company, respectively.

8. That the Bureau erred in proposing that the claim of The Railroad Credit Corporation against the Debtor be discharged.

The Railroad Credit Corporation holds as partial security for its claim against the Debtor, three items of collateral pledged with it by The Western Pacific Railroad Corporation, one item pledged with it by the A. C. James Company, and the distributive shares (under the Marshalling and Distributing Plan, 1931) of two subsidiaries of the Debtor. A pledge of collateral by a third person

is analogous to a guaranty, being in practical effect a guaranty limited to the value of the property pledged. The discharge of the claim of The Railroad Credit Corporation would terminate these several pledges. The right to retain a lien until the debt secured thereby is paid, is a substantive right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution. Security-First National Bank v. Rindge Land & Navigation Co., 85 F. (2d) 557 (C.C.A. 9, 1936). This rule is especially applicable when the pledge is given by third parties. In this respect the situation is closely parallel to that presented in In Re Nine North Church Street 85 F. (2d) 186 (C.C.A. 2nd, 1936). As there [408] intimated, the liquidation of said collateral may be essential to a reorganization of the Debtor. The Railroad Credit Corporation is ready and willing to liquidate said collateral on a proper basis. See also In re Deversey Bldg. Corporation, 85 F. (2d) 456 (C.C.A. 7th, 1936).

Moreover, although The Railroad Credit Corporation has the legal right to sell any collateral pledged with it by third parties, there is doubt whether it could surrender, under any plan of reorganization, any collateral pledged with it by third parties, including, of course, the $2,000,000 principal amount of general mortgage bonds of the Debtor pledged with The Railroad Credit Corporation by the A. C. James Company, unless such third party pledgors assented thereto. Furthermore, while The

Railroad Credit Corporation has the legal right to sell the $2,000,000 principal amount of said bonds pledged with it by the Debtor, and upon which Reconstruction Finance Corporation has a second lien, it is doubtful whether The Railroad Credit Corporation would have the right to surrender said bonds under any plan of reorganization, unless the Reconstruction Finance Corporation had assented thereto. The Reconstruction Finance Corporation would be likewise restricted in its dealings with collateral upon which The Railroad Credit Corporation has a second lien.

9. That the Bureau's proposals are unfair, and unjustly discriminatory and prejudicial to the rights and interests of The Railroad Credit Corporation.

To the extent that the claim of The Railroad Credit Corporation is secured, it is entitled to treatment on a parity with other equally secured creditors, including in that category the holders of first mortgage bonds. See In re New York, New Haven & Hartford Railroad Co., 16 F. Suppl. 504 (D.C., D. of Conn., 1936); also, comment under Paragraph No. 5, above. [409]

The Bureau's proposal:

(a) fails to recognize all of the collateral held by The Railroad Credit Corporation;

(b) allocates to The Railroad Credit Corporation securities having a value of less than half the amount of its claim;

(c) provides for the discharge of the claim of The Railroad Credit Corporation, so as to

deprive The Railroad Credit Corporation of collateral pledged with it by third persons;

(d) allocates valuable rights and interests in property of the Debtor to a general creditor, although the prior claim of The Railroad Credit Corporation has not been fully satisfied;

(e) allocates property to a general creditor based on a claim that had been assigned by that creditor to The Railroad Credit Corporation;

(f) provides for the issuance of stock upon terms that result in the dilution of what value there might otherwise be in the stock assigned to The Railroad Credit Corporation;

(g) recommends the issue of warrants for new first mortgage bonds and stock on a basis that dissipates assets of the Debtor, places an unnecessary interest charge on the Debtor, and discredits all securities issued by the Debtor under the proposed plan of reorganization; and

(h) deprives The Railroad Credit Corporation of income and proceeds of collateral to which it is lawfully entitled pending the consummation of a plan of reorganization. (See Paragraph No. 10, below).

Such treatment is confiscatory and contrary to the provisions of section 77 of the Bankruptcy Act, as well as in violation of the law of the land.

10. That the Bureau erred in proposing (p. 60) as the effective date of a plan of reorganization, January 1, 1937, a date already passed.

The Railroad Credit Corporation since that date has applied, and in duty bound will continue to apply, in accordance with its legal rights, income and proceeds from collateral, including distributive shares of the Debtor under the Marshalling and Distributing Plan. See also comment under Paragraph No. 2. [410]

Wherefore, The Railroad Credit Corporation, because of each and all of the errors herein specified, prays that the report proposed by the Bureau of Finance be so amended as to correct the errors hereinabove specified, in the manner hereinabove set forth.

Dated: Washington, D. C., September 25 1937.

Respectfully submitted,

D. WILLARD, JR.,
General Counsel,
The Railroad Credit Corporation.

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[Endorsed]: Filed Oct. 5, 1939. [411]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

EXCEPTIONS OF RECONSTRUCTION FINANCE CORPORATION TO THE PROPOSED REPORT OF THE BUREAU OF FINANCE.

Reconstruction Finance Corporation (hereinafter called "Reconstruction"), an intervenor in the above-entitled proceeding, hereby makes and presents the following exceptions to the report proposed by the Bureau of Finance:

1. The report errs in failing to give any recognition to the accrued unpaid interest on the General and Refunding Mortgage Bonds (hereinafter called "Refunding Bonds") of the Western Pacific Railroad Company (hereinafter called "the Debtor") held by Reconstruction.

2. The report errs in failing to give any recognition to the substantial additional collateral security held by Reconstruction other than Refunding Bonds.

3. The report errs in failing to give any recognition to the claim which Reconstruction has for the deficiency, if any, on [412] its notes, after a sale or determination of the value of its collateral.

4. The report errs in giving to Western Pacific Railroad Corporation, an unsecured creditor, the

right to subscribe to $10,000,000 principal amount of new First Mortgage Bonds and to receive in addition to said bonds a bonus of $10,000,000 par value of new common stock.

5. The exceptions filed by Irving Trust Company, trustee of the Debtor's General and Refunding Mortgage, are concurred in by Reconstruction, which hereby adopts such exceptions as supplemental and additional exceptions.

6. If the Commission approves the plan proposed by the report, it will be unable to give the approval required by Section 5b(3) of the Reconstruction Finance Corporation Act, as amended.

7. The plan proposed by the report is unfair and inequitable to Reconstruction, fails to afford due recognition to its rights as the holder of an entire class of claims, discriminates unfairly against such class, and fails to conform to the requirements of the law of the land.

I.

The report errs in failing to give any recognition to the accrued unpaid interest on the General and Refunding Mortgage Bonds of the Western Pacific Railroad Company held by Reconstruction.

Since the treatment of Reconstruction in the plan recommended by the Bureau of Finance is based entirely on the total amount of Debtor's Refunding Bonds held by Reconstruction, obviously such [413] treatment should recognize the rights given

by the covenants of the Bonds to the holders of such Bonds to be paid the principal thereof together with interest as specified in the Bonds. This the Bureau has failed to do and has given consideration merely to the principal amount of the Bonds without considering the unpaid interest. This constitutes error, since unpaid interest is as much of a debt as the principal.

That Reconstruction is a pledgee holding Refunding Bonds of the Debtor furnishes no reason why Reconstruction's right to treatment based on a calculation of the unpaid interest accrued on the Bonds should be ignored, since it is the universal rule that a pledgee—until satisfaction of the debt secured by pledged collateral—is entitled not only to the proceeds but the income of the pledged collateral.

In the present case the notes executed by the Debtor to Reconstruction were delivered in the State of New York and the loans evidenced by said notes were made in the State of New York. Furthermore, said notes are payable in the State of New York. In such circumstances, the law of New York is controlling with respect to the parties to the pledge contract, i. e., Reconstruction and the Debtor. See the following cases: Burns Mortgage Co. v. Fried (1934), 292 U. S. 487; Dale v. Pattison (1914), 234 U. S. 399, 404; Taney v. Penn. Nat. Bank (1914), 232 U. S. 174; Hiscock v. Varick [414] Bank (1907), 206 U. S. 28; Cook v. Moffatt (1847), 5

How. (46 U. S.) 295, 307; Lee v. State Bank and Trust Co. (1930), 38 F. (2d) 45, 47.

The right of a pledgee to income or proceeds of pledged collateral, until the satisfaction of the debt for which the collateral is pledged, is well recognized in the State of New York. See the following cases: Brightson v. Claflin (1919), 225 N. Y. 469, 122 N. E. 458; D. S. Stern & Co. Inc. v. Pisitz (1934), 270 N. Y. S. 715; Manufacturers Trust Co. v. Bank of Yorktown (1935), 282 N. Y. S. 507, 509; In re Brewer's Estate (1931); 253 N. Y. S. 213; Ross v. Mabbett Motor Car Co. Inc. (1922), 194 N. Y. S. 200.

While the Debtor was not in default on its notes held by Reconstruction, Reconstruction allowed it to pay to itself the interest as it matured on the $10,750,000 principal amount of Refunding Bonds pledged with Reconstruction. Accordingly, the interest was so paid on said bonds to March 1, 1934. Since that date interest has been accruing at the rate of 5 per cent per annum, none of which has been paid or collected. As of January 1, 1938 (before which date the reorganization of the Debtor cannot be effected) there will be accrued and unpaid on the notes of the Debtor held by Reconstruction $2,150,000 of interest as follows, viz.:

Principal amount of Bonds	Series	Interest from March 1, 1934 to January 1, 1938
$8,750,000	A	$1,750,000
2,000,000	B	400,000
	Total	$2,150,000

This sum, $2,150,0000, when added to the principal amount of the bonds pledged with Reconstruction, $10,750,000, amounts to $12,900,000, which latter amount (with an additional adjustment for such further unpaid interest as shall have accrued on the pledged bonds at the date the plan is actually made effective) should serve as the basis for the issuance of securities to Reconstruction on account of the Refunding Bonds pledged with it.

Under the Bureau's proposal, the accrued unpaid interest on the First Mortgage Bonds is added to the principal amount of said Bonds as a basis for calculating the treatment to be given such bondholders. The Bureau's failure to add such interest in the case of the Refunding Bonds constitutes an inequitable discrimination against Reconstruction and the other pledgees of the Refunding Bonds in favor of the holders of the First Mortgage Bonds.

II.

The report errs in failing to give any recognition to the substantial additional collateral security held by Reconstruction other than Refunding Bonds.

As already referred to, the treatment proposed in the report for Reconstruction's claim is based entirely upon the principal amount of $10,750,000 of Refunding Bonds pledged with Reconstruction. In addition to such principal amount of bonds Reconstruction holds substantial additional collateral security consisting [416] of (1) 150,000 shares, or

one-half, of the outstanding common stock of Denver and Rio Grande Western Railroad Company, represented by voting trust certificates, and (2) a second lien upon $2,000,000 principal amount of Refunding Bonds held in pledge by The Railroad Credit Corporation. Obviously, the report errs in failing to give any recognition to this additional collateral security.

Since the report contemplates the extinction of Reconstruction's claim on its notes and the surrender of the collateral therefor, the acceptance by Reconstruction of the plan proposed in the report would automatically release from pledge the additional items of collateral security (1) and (2) above. The proposed plan is confiscatory to the extent that it fails to give any recognition to such additional collateral security.

The Denver and Rio Grande Western stock, regardless of its intrinsic value, is of considerable value strategically, since through the stock control is exercised over the Denver and Rio Grande Western Railroad Company, an essential link in the transcontinental route consisting of the Western Pacific, the Denver and Rio Grande Western, and the Missouri Pacific systems. The disposition of this stock vitally affects both the Missouri Pacific and Western Pacific interests. See petition and brief dated September 3, 1937, filed by the Missouri Pacific Railroad Company for reconsideration of its petition for leave to intervene. This [417] stock

was pledged with Reconstruction by the Western Pacific Railroad Corporation. Unless the latter corporation releases Reconstruction, this stock will have to be returned by Reconstruction to the Western Pacific Railroad Corporation. For such return Reconstruction, under the proposed plan, will receive no equivalent consideratjon. A fair and equitable plan either would assign to Reconstruction, in consideration of the return of this stock to Western Pacific Railroad Corporation, an equivalent part of the securities which would otherwise be accorded to the Western Pacific Railroad Corporation; or would provide that Reconstruction may sell this stock, in its untrammelled discretion, for such price as it can obtain for the stock. Failure to do so constitutes a discrimination against Reconstruction, in favor of the Western Pacific Railroad Corporation.

A somewhat different situation exists as to the $2,000,000 principal amount of Refunding Bonds on which Reconstruction has a second lien. Should Reconstruction not accept the plan proposed in the report and The Railroad Credit Corporation, on the other hand, do so, The Railroad Credit Corporation, the holder of the senior lien, will be under a legal duty to turn over to Reconstruction the $2,000,000 principal amount of [418] bonds. The Railroad Credit Corporation is likewise under a legal duty to surrender the bonds to Reconstruction (and not to the Debtor) upon satisfaction of its claim by payment out of the proceeds of its other col-

lateral, or otherwise than by the acceptance of new securities under the proposed plan. Reconstruction's right to the bonds, in any of these eventualities, is a valuable property right; and the failure of the report to give any recognition to such right, in the circumstances herein involved, is unjustly discriminatory and prejudicial to the interests of Reconstruction.

III.

The report errs in failing to give any recognition to the claim which Reconstruction has for the deficiency, if any, on its notes, after a sale or determination of the value of its collateral.

It is elementary that to the extent, if any, Reconstruction is not fully secured, Reconstruction is a general creditor for the deficiency. It is likewise elementary that all general creditors must be treated alike.

That these elementary principles are applicable to a Section 77 proceeding, plainly appears from In re New York, New Haven & Hartford Railroad Co., 16 F. Supp. 504 (D.C., D. of Conn., Sept. 16, 1936) where Judge Hincks stated (p. 509):

> "* * * as observed earlier in this memorandum, under the Act only a plan which is free from confiscatory features may be confirmed. To be sure, under the Act the court may approve a plan 'modifying or altering [419] the rights of creditors generally, or of any class of them, secured or unsecured,' etc. But since only an

equitable plan may be approved, the plan must provide that every creditor in the order of his priority shall receive under the plan rights which in equity are the fair equivalent of such of his rights as have been subjected to equitable modification, at least in so far as the assets of the debtor's estate permit. *Any creditor found to be only partially secured is entitled to the equitable equivalent of such security as he has, with a right to share in equality with common creditors for the excess of his claim as allowed above the value of his security as ascertained by equitable considerations.* And the plan must recognize the prior right of common creditors with respect to such assets as remain after equitable treatment has been accorded to secured creditors. Kansas City Ry. v. Central Union Trust Co., 271 U. S. 445. Such is the intent of the Act: * * *" (Italics ours.)

The Bureau's report violates these principles. It fails to find that Reconstruction's claim is fully secured. On the contrary, it does not make any finding whatever as to the extent to which Reconstruction's claim is secured; and in view of the allocation against the claim of new common stock only, we must conclude that the Bureau is of the view that Reconstruction and the other collateral noteholders (who are less well secured than Reconstruction) are all inadequately secured and that such collateral noteholders, including Reconstruc-

tion, have deficiencies on their respective notes. To the extent of such deficiencies, they are, accordingly, general creditors of the Debtor, and must be accorded equal treatment with the Debtor's other general creditors. Yet the report gives a single general creditor, the Western Pacific Rail- [420] road Corporation, the warrant rights hereinafter more fully discussed, without recognizing in any way the claims of the collateral noteholders as general creditors to the extent, if any, of their respective deficiencies.

This treatment is unfair and inequitable. Likewise it fails to afford due recognition to the rights of Reconstruction and discriminates unfairly against it. If the secured creditors are only partially secured and have deficiency claims for the balance—this the Bureau assumes to be clearly so in the case of The Railroad Credit Corporation and the A. C. James Co., since they are given common stock of a less par value than the face amount of their claims—then, if, as the Bureau's plan also assumes, there is not a sufficiency of value to recognize the deficiency claims, there can be no justification for giving anything, under the plan, to The Western Pacific Railroad Corporation. Neither can there be any such justification, if such assumptions are correct, unless and until Reconstruction's claim is satisfied in full. [421]

IV.

The report errs in giving to the Western Pacific Railroad Corporation, an unsecured creditor, the right to subscribe to $10,000,000 principal amount of new First Mortgage Bonds and to receive in addition to said bonds a bonus of $10,000,000 par value of new common stock.

Although the Bureau states that "The Commission should find that the equity of the preferred and common stockholders of the Debtor has no value" (p. 55) and although it recommends that the unsecured, general claim of the Western Realty Company should be cancelled (p. 55), it then proceeds to give to the Western Pacific Railroad Corporation (which holds stock and also an unsecured note of the Debtor), warrants to purchase at any time within sixty days after the reorganization is effected, $10,000,000 of new First Mortgage 4% Bonds which (except for equipment trusts) will be the only fixed interest obligation of the reorganized company and will have an absolute first lien on the Debtor's entire system, valued by this Commission at approximately $145,000,000. In addition, the purchaser of the new First Montgage Bonds of the reorganized company will be entitled to receive as a bonus $10,000,000 aggregate par value of common stock.

This treatment is subject to the following objections for reasons predominately of a business nature:

a. The record does not show any need for the immediate sale, upon reorganization, of $10,000,000 of new First Mortgage [422] Bonds, necessitating the payment of interest thereon from the date of their issuance. The Bureau's recommendation is not supported by any finding of such necessity.

b. The report proposes that the new bonds will be part of a proposed authorized issue of $50,000,000 of such bonds. As mentioned heretofore, such bonds would constitute the only fixed interest obligation of the reorganized company, except for equipment trusts. Whether or not the Bureau had a purpose in making the amount of the authorized issue of new bonds substantially the same as the amount of the outstanding First Mortgage Bonds now in default, does not appear. At any rate, the record fails to disclose any necessity or justification for such a large authorized issue of new bonds. The authorized amount should be cut down to but a fraction of the figure proposed. In addition, the new mortgage should provide restrictions, not proposed in the report, against the issuance of additional bonds when there is insufficient earnings coverage. Otherwise, the Bureau's proposal is but an invitation to the reorganized company to repeat the process, in which the Debtor has indulged, of overloading the property with debt and fixed interest charges—the cause of the present bankruptcy.

c. The Bureau's proposal to issue a bonus of $10,000,000 [423] of stock with the new bonds tends not only to discredit the new bonds themselves, but also all of the other securities issuable under the plan. If the new bonds cannot be sold at their principal amount with a 4% coupon rate, and without any stock bonus, it would be preferable to adjust the interest rate on the new bonds.

Apart from the above, the Bureau's proposal to allot $10,000,000 of new common stock as a bonus with $10,000,000 of new First Mortgage Bonds is subject to other fatal objections. As shown by the record (see Exhibit 2), Reconstruction on July 20, 1935 was willing, provided the approval of the Interstate Commerce Commission was obtained, to accept new securities for its present debt and to put $10,000,000 of new money into the property, as needed, taking therefor either at their face amount $10,000,000 of new First Mortgage Bonds carrying an interest rate of 4 per cent for the first ten years and 4½ per cent thereafter, or a twenty-year or twenty-five-year 4% note secured by bonds of the same issue on a basis of 120 per cent of the amount borrowed. As shown by the Debtor's plan, these bonds were to be part of no less than some $25,000,000 of new First Mortgage Bonds to be issued upon reorganization. With an issue of only $10,000,000 of new First Mortgage Bonds constituting a first lien on properties valued at about

$145,000,000 it is highly probable that the holder of the warrants for the new bonds will be able to [424] make arrangements through private banking channels for a syndicate to take the bonds off his hands at their face amount and resell them to the public at the face amount or better, thus leaving the warrant holder with the bonus of $10,000,000 of new common stock for which he has paid nothing whatsoever. Bearing upon this probability, it should be kept in mind that the Debtor's rehabilitation program instituted during the reorganization period has called for abnormally large expenditures which have reduced substantially the Debtor's net income available for fixed charges. Upon the completion of such program the effect of these expenditures should be just the opposite. The economies which the Debtor should be able to realize from the improvements made should be reflected in substantially better earnings. Likewise, increased traffic may reasonably be expected from the Northern California Extension and the Dotsero Cut-off, both of which were completed during the depression.

It must be assumed that the Bureau *if* of the opinion that there is value to support both the issue of $10,000,000 of new First Mortgage Bonds and $10,000,000 of new common stock. If there is such value, then, as pointed out above, the holder of the warrants will receive under the proposed plan $2.00 worth of new securities for each $1.00 of new money put in the property. Unless and until senior creditors are satisfied, there can be

no justification for singling out one of the general creditors, the Western Pacific Railroad [425] Corporation, and affording it more advantageous treatment than is afforded secured creditors.

On the other hand, if there is not value in the Debtor's estate sufficient to support the $10,000,000 of new common stock, then to the extent of the deficiency in value, there will be a watering of stock, with consequent dilution of the value of the stock to be issued to the First Mortgage bondholders and the collateral noteholders. There is no provision of Section 77 which allows the Commission to authorize an issue of watered stock. In this respect, Section 77 is like Section 77B. Watered stock, issued in a reorganization under either section, will, even if legally issued, be subject to the claims of creditors of the reorganized company. This point was decided by the Circuit Court of Appeals for the Eighth Circuit in Brockett v. Winkle Terra Cotta Company (1936), 81 Fed. (2d) 949, a case involving a Section 77B reorganization. In its decision that court held (p. 959):

> "We have been referred to no case where stock has been permitted to be issued 'without the shadow of right or consideration' and where it 'does not represent actual or substituted value in corporate assets.' It is, of course, urged that the cancellation of the bonded indebtedness constitutes a consideration for the stock issued to the bondholders. This may be true as between the corporation and assenting stock-

holders, but it cannot be held binding upon creditors who deal with the company upon the faith of its capital stock. No new money or its equivalent accrues to the Terra Cotta Company by virtue of the transaction. Not a dollar has been added to the physical assets of the Corporation by this additional stock issue. [426] One who assents to that issue and accepts the certificates stands in the same relationship to the public as that assumed by an original subscribing stockholder. * * *

"And it is the avowed purpose of the plan to seek credit and to borrow money upon the faith of this stock issue. It is not proposed to offer that stock for sale upon the market at its real worth. As stated in the plan, 'it is believed * * that its financial position would justify a line of bank credit sufficient to prepare for, make up, and fill any orders it may be able to obtain.' The witness Davis, on behalf of the debtor-petitioner, says: 'It seems to me this company can handle its credit situation by getting rid of this bond issue and then going to the banks on its individual orders.' By this means, notwithstanding the fact that the terra cotta business is admitted to be at a standstill, two other local companies being out of business or in liquidation, it is hoped 'that the company will be able to endure the loss of business incident to the economic depression for a few more years.'

"We may lay on one side the question of whether the financial responsibility of stock in an uncertain business venture may fairly be substituted for a first mortgage lien against the protest of the lienor. The paramount question here is whether these objecting bondholders may be forced into the position of holders of stock issued for an inadequate consideration, and thereby exposed to possible if not probable financial responsibility and loss. We do not think so. Without impugning the motives of the proponents of the plan, we feel that potentially it may affect injuriously the rights of creditors and of the public generally, and is, therefore, nonfeasible and unfair to these objectors as well. The small value of the physical property involved, and the large percentage of acceptance on the part of the stockholders and bondholders, no doubt operated in the trial court to obscure this issue which, we think, conditions the disposition of this appeal."

For a California decision (under the laws of which the Debtor Railroad is incorporated, see Spencer v. Anderson (1924) [427] 222 Pac. 355, where the Court recognized the liability of the holder of watered stock to creditors, saying in part (p. 357):

"* * * the creditor does not stand in the shoes of the corporation and he is not suing to recover upon a claim of the corporation against the stockholder. He may recover, though the

corporation have no such claim. His action is not upon a debt due from the stockholder to the corporation. It is to recover compensation for a wrong done directly to him by the corporation acting for the stockholder and participated in by the latter. The gist of the creditor's action is that he was induced to extend credit to the corporation by the false representations of the corporation respecting the amount paid in by the stockholder to the corporate capital, and the measure of his recovery is the same as in ordinary actions for damages for deceit, namely, the difference between the amount which has actually been paid in by the stockholder to the corporate capital and the amount which would have been paid in had the representations been true."

If the Commission is of the view that warrants should be issued in the reorganization to any of the parties, they should be offered first to secured creditors whose claims are not satisfied by the Bureau's proposal. The proposed plan would give one of the unsecured creditors, The Western Pacific Railroad Corporation, as a bonus or gift, $10,000,000 par value of new common stock, against $7,188,607 of debt, including interest (Report, p. 24), while the General Mortgage bondholders, who are secured, would receive new common stock for their bonds, on the basis of dollar for dollar. This is essentially unfair. The Bureau's proposal that if The Western Pacific Railroad Corporation does not

within sixty days [428] exercise the warrants, they will then be offered to Reconstruction, The Railroad Credit Corporation, and the A. C. James Company, pro rata, is unrealistic. If the warrants are of any value (and there is justification for belief that they will have substantial value), then they will either be exercised by The Western Pacific Railroad Corporation or sold by it to investment bankers or other purchasers. Obviously, no part of the warrants will accrue to Reconstruction if they have any value. Reconstruction cannot reasonably expect to receive any of the warrants unless at the time the reorganization is effected they are completely valueless.

V.

The exceptions filed by Irving Trust Company, Trustee of the Debtor's General and Refunding Mortgage, are concurred in by Reconstruction, which hereby adopts such exceptions as supplemental and additional exceptions.

Reconstruction adopts all of the exceptions filed by Irving Trust Company, Trustee of the Debtor's General and Refunding Mortgage, and said Trust Company's supporting brief, to the same extent as though set out herein at length.

On the basis of the said exceptions, it is obvious that Reconstruction is entitled to securities of the reorganized company on a substantially more favorable basis than are the holders of the Debtor's First Mortgage Bonds. This is for the reason that, as said Trust Company sets forth, the Refunding

Bonds are secured by a first [429] lien on substantial properties of the Debtor of a value in excess of the amount of Refunding Bonds outstanding; and Reconstruction's claim, in turn, is secured by Refunding Bonds of a principal amount in excess of three times the amount of Reconstruction's claim. Clearly, if the exceptions of said Trust Company are well taken, as we believe them to be, Reconstruction's claim is more than 100% secured.

VI.

If the Commission approves the plan proposed by the report, it will be unable to give the approval required by Section 5b(3) of the Reconstruction Finance Corporation Act, as amended.

It should not be forgotten that both the Commission and the Directors of Reconstruction, found, in 1932 and 1933, at the time that the Reconstruction loans were made, and when the earnings of the Debtor Railroad were much less favorable than they are to-day, that with the collateral security required by the Commission, Reconstruction would be adequately secured. Western Pacific Railroad Company Reconstruction Loans, 180 I.C.C. 645, 184 I.C.C. 699, and 189 I.C.C. 575.

Likewise, it should ont be forgotten that, in addition to any duties imposed upon it by Section 77 of the Bankruptcy Act, a special duty with respect to the claim of Reconstruction in the [430] reorganization is imposed upon the Commission by Section

5b(3)* of the Reconstruction Finance Corporation Act, as amended. Under the latter section, Reconstruction has no power to accept for its present claim new securities, except "with the prior approval of the interstate Commerce Commission." This provision is an integral part of the Reconstruction Finance Corporation Act, as amended, and is a limitation upon the powers of Reconstruction. Obviously, its purpose was to insure, by requiring the prior approval of the Commission, that Reconstruction's claim should receive adequate treatment

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* This section provides as follows:

"(3) In connection with the reorganization under section 77 of the Federal Bankruptcy Act, approved July 1, 1898, as amended, or with receivership proceedings in a court or courts, of any railroad or railway indebted to the Corporation or any railroad or railway the receivers or trustees of which are indebted to the Corporation, the Corporation may, *with the prior approval of the Interstate Commerce Commission*, adjust or compromise its claim against such railroad or railway, or any such receiver or trustee, by accepting, in connection with any such reorganization or receivership proceedings and in exchange for securities or any part thereof then held, new securities which may have such terms as to interest, maturity, and otherwise as may be approved by the Corporation, or part cash and part new securities so approved: Provided, That any such adjustment or compromise shall not be made on less favorable terms than those provided in the reorganization of the railroad or railway for holders of claims of the same class and rank as the claim of the Corporation." (Italics ours). [431]

in a Section 77 proceeding or in an equity receivership. Under the provision, the responsibility is imposed upon both the Commission and Reconstruction to make certain that Reconstruction does receive such adequate treatment.

It is respectfully submitted that if the Commission approves the Bureau's plan, it will not be able to give the approval required by Section 5b(3) of the Reconstruction Finance Corporation Act, as amended.

VII.

The plan proposed by the report is unfair and inequitable to Reconstruction, fails to afford due recognition to its rights as the holder of an entire class of claims, discriminates unfairly against such class, and fails to conform to the requirements of the law of the land.

Neither the Commission nor the Court can approve a plan which does not conform to the requirements of Section 77. Subsection (d) of Section 77 provides that the Commission, if it approves any plan whatsoever, shall approve a plan "that will in its opinion meet with the requirements of subsections (b) and (e)" of Section 77, "and will be compatible with the public interest." Subsection (e) of Section 77 provides in part that "the judge shall approve the plan if satisfied that: (1) it * * * is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding

the participation of the various classes of creditors and stockholders * * *."

These requirements, as we have already shown, are not met [432] by the plan proposed in the Bureau's report. Incidentally, the District Court, in classifying creditors and stockholders, has put Reconstruction in a class by itself, so that the failure of the Bureau's plan to give due recognition to the rights of Reconstruction constitutes a failure to afford due recognition to an entire class of creditors. Likewise, the unfair discrimination of the proposed plan against Reconstruction is an unfair discrimination against an entire class of creditors. Yet, even if the claims of Reconstruction, The Railroad Credit Corporation, and the A. C. James Company, in respect of the Refunding Bonds, were consolidated into a single class, Reconstruction's claim would amount to 56.6 per cent of the class.

It is respectfully submitted that the proposed plan, even if approved by the Commission, could not be approved by the Court. For the reason that if could not be approved by the Court, it should not be approved by the Commission.

Oral argument is requested.

Respectfully submitted.

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[Endorsed]: Filed Oct. 5, 1939. [433]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter
of
The Western Pacific Railroad Company
Reorganization

EXCEPTIONS OF THE DEBTOR TO THE PROPOSED REPORT OF THE BUREAU OF FINANCE AND BRIEF IN SUPPORT OF ITS EXCEPTIONS. [434]

TABLE OF CONTENTS

	Page of Original Printed Document	Page of Printed Record
Exceptions	1	447
Brief	4	449
I. The Report Errs in Failing to Approve a Practicable Plan of Reorganization Reasonably Acceptable to Security Holders as a Composition Under Section 77 of the Bankruptcy Act	4	449
II. The Report Errs in Attempting to Limit Total Capitalization to $91,406,510. by Authorizing in Addition to Existing Obligations to be Assumed in Reorganization not more than $10,000,000. of First Mortgage Bonds, $19,716,040. of 50 Year Income Mortgage 4% Bonds; 295,740-3/5 Shares of Preferred Stock, and 800,682-1/5 Shares of Common Stock	5	450
III. The Report Errs in Construing Section 77 of the Bankruptcy Act as a Mandate or Legislative Declaration that Capitalization shall "not Exceed a Conservative Valuation of the Assets to be Taken Over by the Reorganized Company"	12	458
IV. The Report Errs in Disregarding the Section 19a Value of the System Properties Amounting as of December 31, 1935, to $144,619,851.	13	459
V. The Report Errs in Refusing to Authorize the Issue of Stock Without Par Value and in Treating No Par Value Stock at $100. Per Share in Measuring Capitalization	14	460

	Page of Original Printed Document	Page of Printed Record
VI. The Report Errs in Providing for the Expropriation of the Collateral or the Debtor's Interest in the Property Represented by the Collateral Securing the Debtor's Notes Held by Reconstruction Finance Corporation, The A. C. James Co. and The Railroad Credit Corporation	19	466
VII. The Report Errs in Assuming that the Public Interest Involves Matters Lying Beyond the Field of Transportation and Includes the Amount of Interest Charges Which are not Fixed Obligations to Pay but are Payable Only Out of Available Income; Sound Financing; Financing Through Junior Obligations and Other Phases of Controversial Economics	21	467
VIII. The Report Errs in Proposing a Finding That the Equity of the Preferred and Common Stockholders of the Debtor has no Value	22	469
IX. The Report Errs in Failing to Find That the Debtor's Plan is Fair and Equitable and Otherwise Complies with the Provision of Section 77 and is Compatible With the Public Interest	24	471
Appendix The High Function of the Interstate Commerce Commission is to Approve a Plan of Reorganization Compatible with the Public Interest Designed to Command the Support of the Percentages of Each Class of Creditors and Stockholders Necessary to Make a Binding Composition Under Section 77 of the Bankruptcy Act Which Contemplates the Relief and not the Elimination of the Debtor	31	478

TABLE OF CASES

	Page of Original Printed Document	Page of Printed Record
Acquisition and Operation of Fellsmere Railroad by Trans-Florida Central Railroad Company, 124 I. C. C. 366 (1927)	17	463
Acquisition of Control of Seaboard Air Line Railway, 131 I. C. C. 733 (1927)	17	463
Algers, Winslow & Western Railway Company Securities, 166 I. C. C. 788 (1930)	15	461
Atlanta, Birmingham and Coast Railroad Company v. United States, 296 U. S. 33 (1935)	13	459
Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928)	16	462
Cincinnati, Georgetown Railroad Company Acquisition and Operation, 166 I. C. C. 134 (1930)	15	461
Continental Illinois Bank and Trust Company v. Chicago, Rock Island and Pacific Railway Company, 294 U. S. 649	4, 31	478
Cook Transit Corporation Stock, 202 I. C. C. 465 (1934)	15	461
Cumberland Glass Co. v. DeWitt, 237 U. S. 447; 265 U. S. 269	36	484
Dayton-Goose Creek Railway Company v. U. S., 263 U. S. 456	22	468
Delaware & Northern Railway Company Stock, 162 I. C. C. 187 (1930)	16	462
Denver & Salt Lake Railway Company Control, 170 I. C. C. 4 (1930)	18	464

	Page of Original Printed Document	Page of Printed Record
Denver and Salt Lake Reorganization, 117 I. C. C. 397 (1926); 117 I. C. C. 749 (1927)	17, 19	463, 464

[437]

iv

East Washington Railway Company Acquisition and Stock, 212 I. C. C. 516 (1936). Commissioner Porter dissenting	15	461
Finance Application of Delaware & Hudson Company and Delaware & Hudson Railroad Corporation, 158 I. C. C. 615 (1930)	16	462
Grand Trunk Western Railroad Company Stock, 162 I. C. C. 540 (1930)	16	462
Great Northern Railway Company Securities, 212 I. C. C. 327 (1936)	15	461
In re H. J. Arrington Co., 113 Fed. 498	36	484
Kansas City, Mexico & Orient Reorganization, 145 I. C. C. 339 (1928)	16	462
Kansas City Terminal Railway Company, et al. v. Central Union Trust Company of New York, et al., 271 U. S. 445	33	480
Louisiana & Arkansas Railway Company Stock, 217 I. C. C. 208 (1936)	15	461
Minneapolis, Anoka & Cuyuna Range Railroad Company Stock, 170 I. C. C. 591 (1931)	15	461
Missouri-Kansas Belt Railway & Terminal Company, Proposed Construction, Etc., 207 I. C. C. 175 (1935)	15	461
Nassau Smelting & Refining Works, Ltd. v. Brightwood Bronze Foundry Company, 265 U. S. 269	36	484

	Page of Original Printed Document	Page of Printed Record
New York Central Railroad Company Securities, 221 I. C. C. 269 (1937)	14	460
New York Central Railroad Company Securities, 199 I. C. C. 546 (1934). (Stock changed from $100 par to no par value)	15	461
Ohio & Morenci Railroad Company Stock, 199 I. C. C. 7 (1933)	15	461

[438]

v

In re Realty Associates Securities Corp., 6 Fed. Supp. 549; 295 U. S. 295	36	484
Reorganization and Control of Atlanta, Birmingham & Atlantic Ry. Co., 117 I. C. C. 439 (1926)	17	463
St. Louis & Troy Railroad Company, et al. Acquisition and Construction, 189 I. C. C. 464 (1933)	15	461
San Diego & Arizona Eastern Railway Company Acquisition and Stock, 187 I. C. C. 713 (1932)	15	461
Savannah & Atlanta Railway Company Acquisition and Securities, 166 I. C. C. 119 (1930)	16	462
Savannah & Atlanta Railway Company Acquisition and Securities, 162 I. C. C. 771 (1930)	16	462
Seaboard Air Line Railway Company Readjustment, 158 I. C. C. 182 (1929) modified in 162 I. C. C. 267 (1930)	16	462
Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I. C. C. 423 (1929)	16	462
Securities of Mayo & Cook's Hammock Railroad Company, 154 I. C. C. 622 (1929)	16	462

	Page of Original Printed Document	Page of Printed Record
Sexton v. Lloyd's Bank, Ltd., 219 U. S. 339	23, 27	469, 474
Stock of Castelman River Railroad Company, 158 I. C. C. 149 (1929)	16	462
Stock of Port Angeles Western Railroad, 145 I. C. C. 144 (1928)	16	462
Stock of Santa Fe, San Juan & Northern Railroad, 154 I. C. C. 741 (1929)	16	462
In re Waynesboro Drug Co., 157 Fed. 101	36	484

[439]

EXCEPTIONS.

The Western Pacific Railroad Company, the Debtor herein, hereby excepts to the proposed Report of the Bureau of Finance filed herein on or about August 2, 1937, and respectfully submits the following exceptions to said proposed Report (herein called "the Report"): [440]

I.

The Report errs in failing to approve a practicable Plan of Reorganization reasonably acceptable to security holders as a composition under Section 77 of the Bankruptcy Act (pp. 59, 60).

II.

The Report errs in proposing to limit total capitalization to $91,406,510. (p. 46) by authorizing in addition to existing obligations to be assumed in reorganization not more than $10,000,000. of First Mortgage Bonds (p. 39), $19,716,040. of 50 Year Income Mortgage 4% Bonds (p. 43), 295,740-3/5 shares of Preferred Stock (p. 44), and 300,682-1/5 shares of Common Stock (p. 44).

III.

The Report errs in construing Section 77 of the Bankruptcy Act as a mandate or legislative declaration that capitalization shall "not exceed a conservative valuation of the assets to be taken over by the reorganized Company" (p. 36).

IV.

The Report errs in disregarding the Section 19a

value of the System properties amounting as of December 31, 1935, to $144,619,851. (p. 23).

V.

The Report errs in refusing to authorize the issue of stock without par value and in treating no par value [441] stock at $100. per share in measuring capitalization (p. 36).

VI.

The Report errs in providing for the expropriation of the collateral, or the Debtor's interest in the property represented by the collateral, securing the Debtor's notes held by Reconstruction Finance Corporation, the A. C. James Co. and The Railroad Credit Corporation (p. 54).

VII.

The Report errs in assuming that the public interest involves matters lying beyond the field of transportation and includes the amount of interest charges which are not fixed obligations to pay but are payable only out of available income (p. 37); sound financing (p. 38); financing through junior obligations and other phases of controversial economics (p. 42).

VIII.

The Report errs in proposing a finding that the equity of the preferred and common stockholders of the Debtor has no value (p. 55).

IX.

The Report errs in failing to find that the Debtor's Plan is fair and equitable and otherwise com-

plies with the provisions of Section 77 and is compatible with the public interest (pp. 36, 37). [442]

BRIEF.

I.

The Report Errs in Failing to Approve a Practicable Plan of Reorganization Reasonably Acceptable to Security Holders as a Composition Under Section 77 of the Bankruptcy Act.

From the tenor of the Report it is clear that the Bureau of Finance misconceives the true function of the Interstate Commerce Commission under Section 77, which is to reconcile differences between security holders so as to make practicable a composition under Section 77 and not to rewrite the Debtor's capital structure.

In Continental Illinois Bank and Trust Company v. Chicago, Rock Island & Pacific Railway Company (294 U. S. 648), the United States Supreme Court, referring to the original Section 77, said:

> "As outlined by that section, a plan of reorganization, when confirmed, cannot be distinguished in principle from the composition with creditors authorized by the act of 1867, as amended by the act of 1874." (p. 672)

To this end subsection (d) of Section 77 requires that a Plan of Reorganization shall be set down for hearing unless the Interstate Commerce Commission shall consider it to be "*prima facie impracticable.*"

Obviously the Commission, if it is to make Section 77 a workable statute, if it is to develop a Plan that will bring the property of the Debtor out of the courts and restore it to private operation, ought not itself [443] to report a Plan which, if it were proposed by the Debtor or by a group of creditors, it would be the duty of the Commission to dismiss because impracticable.[1]

II.

The Report Errs in Attempting to Limit Total Capitalization to $91,406,510. By Authorizing in Addition to existing Obligations to Be Assumed in Reorganization Not More Than $10,000,000. of First Mortgage Bonds, $19,716,040. of 50 Year Income Mortgage 4% Bonds, 295,740-3/5 Shares of Preferred Stock, and 300,682-1/5 Shares of Common Stock

Nowhere in the Act do we find any authority or jurisdiction conferred upon the Interstate Commerce Commission to limit *capitalization** and to prescribe the amount and character of the securities which a corporation reorganized thereunder shall be permitted to issue.

The lesser authority—the authority to limit fixed charges—is given *expressly* by subsection (b) but

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[1] A further interpretive discussion of Section 77 appears in the Appendix.

* Italics used in this brief are by counsel for Western Pacific Railroad Company.

must be exercised subject to and in conformity with a prescribed statutory formula. It would, therefore, be contrary to familiar rules of statutory construction to assume that a greater authority—the authority to limit the amount and character of *all* forms of capital securities—is given (a) not expressly but only by implication and (b) to be exercised not according to [444] formula or statutory guide but in the uncharted discretion of the Interstate Commerce Commission.

$10,000,000. principal amount of First Mortgage Bonds.

We agree that it is within the province of the Interstate Commerce Commission to say that the reorganized Company shall not issue more than $10,000,000. of First Mortgage 4% Bonds, either (a) because fixed charges under the formula prescribed in subsection (b) ought not to exceed $400,000. (a conclusion we think would be erroneous) or (b) because a first lien on the rails ought to be reserved exclusively as a credit basis for new money (a position asserted by the A. C. James Co. but which we think is not sustained by the record in this case).

The public interest requires that carriers engaged in interstate commerce be assured of new capital on reasonable terms and in certain cases it may be necessary to reserve an exclusive first lien on the rails to attract new capital.

Such cases are, however, the exception and not

the rule and the present case, we submit, is governed by the rule and not by the exception.

In presenting the Debtor's "earnings experience" the System Income Account for the fourteen years period 1922 to 1935 was introduced, showing average annual income available for interest of $2,165,920.[2] Deferred maintenance of $5,036,778. existing on January 1, 1936, was assumed to have accrued during this period reducing the average to $1,800,000. or more than 1.7 times the fixed charges proposed by the Debtor and [445] more than 4½ times the fixed charges proposed by the Bureau of Finance.[3]

The true earnings are depressed in the Bureau's Report by substituting for the fourteen years period 1922-1935 as the Debtor's "earnings experience" the ten years period 1926-1935, thereby giving greater effect to the low depression period earnings and reducing the average to $1,207,100., assuming (which is *not* the fact) that all deferred maintenance accrued during this ten year period.

The Report then refers to tax burdens under the Social Security Act and the Railroad Retirement Act, which if applied retroactively would have amounted to $537,653. in 1930, $488,633. in 1931, $365,498. in 1932, $331,149. in 1933, and $257,345. in 1934, asserts that similar data is lacking for the full ten years period, but states

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[2] Tr. p. 221.

[3] Tr. pp. 215, 216; Ex. 23.

"it is apparent that such amounts should be considered in determining the debtor's probable future earnings available for interest and dividends."[4]

At a later point, however, the Report states,

"* * * But limitation of the fixed charges of the reorganized company on the basis of such hypothetical adjustments can hardly be justified, since other factors, now unknown, tending to increase net earnings may later affect the situation.[5]

In attempting to limit fixed interest charges to less than $500,000 the Report seems to rest entirely [446] upon the depression years of 1931, 1932 and 1933, and in so doing

(a) it *ignores* the fact that the 1931 deficit is a nonrecurring incident of the rapidly changing operating conditions peculiar to that period and that total Operating Revenues in that year which yielded no profit amounted to $14,852,938, whereas in 1934, with Operating Revenues of only $13,779,237, there was income available for interest of $1,084,243.85;

(b) it *erroneously assumes* that the 1932 income of $252,706. was a deficit, thus understating the reported income by $515,412, and,

(c) it *entirely disregards* the controlling fact that the reported incomes for these years do not

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[4] Report, pp. 19-21.

[5] Report, p. 39.

contain the revenue of the Northern California Extension as a seasoned line and an established route.[6]

We respectfully urge that the Bureau of Finance was not justified in ignoring the estimate of Charles Elsey, President of the Debtor, who testified that in any future depression equally as severe as that of 1931, 1932 and 1933, the earnings from this new line will not fall below $2,961,853. and that in any such future depression the System earnings available for interest would not fall below $1,218,000.[7]

As already pointed out we are working under a composition statute which aims to bring about capital readjustments by agreement of creditors and stockholders in specified percentages. Success or failure easily may depend upon the allotment of a reasonable [447] proportion of fixed interest bearing bonds to our present First Mortgage Bondholders. 30% was the percentage originally agreed upon and we submit that this amount could properly be authorized (a) because an interest charge of $1,027,036. is abundantly justified by the 1931-1934 income *plus* a very conservative estimate of earnings from the Northern California Extension, (b) because reserved Bonds under the First Mortgage after an initial issue requiring not more than $1,027,036. to be paid as the annual fixed charge

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[6] Report, pp. 38-40; Tr. p. 255.

[7] Tr. pp. 162, 163.

would be sound Bonds according to accepted standards and reasonably certain to attract sufficient new capital, and (c) because the primary purpose of Section 77 is to promote and not to prevent the prompt reorganization of rail carriers that are victims of the late depression.

$19,716,040. of 50 Year Income Mortgage 4% Bonds.

We cannot agree that it is within the province of the Interstate Commerce Commission to say that the reorganized Company shall not issue more than $19,716,040. of Income Bonds. Such Bonds are not fixed interest bearing obligations and the public interest is not affected by the amount of Income Bonds which find their way into the capital structure of the reorganized Company but the public interest may be adversely affected if the present holders of our First Mortgage Bonds (many of whom are testamentary trustees or other fiduciaries, institutional investors, banks and insurance companies) are relegated to a stock position which in many jurisdictions they are not permitted to occupy and are required to [448] accept a form of security which they cannot hold and are obliged to sell. *A sound reorganization should include among its features every inducement to the old security holders to continue their investment in the new Company and not in effect merely pave the way for future involuntary liquidation.*

By consulting its own archives the Commission will find that it heretofore certified that it was

compatible with the public interest for the Debtor to issue actually or nominally $49,290,100. of First Mortgage Bonds and $18,999,500 of General and Refunding Mortgage Bonds, a total of $68,289,600. of fixed interest bearing obligations, although it is now asked by the Bureau of Finance to say that only $19,716,040. of this grand total is entitled to preserve its superior character as debt and that $48,573,560. must be converted into stock.

How the Bureau of Finance reached the conclusion that only $19,716,040. of Income Bonds should be issued is not clear but apparently has some relation to a capitalization of the 1936 reported income after deducting fixed interest and the $500,000. capital fund.

As already noted there is nothing in Section 77 authorizing the Interstate Commerce Commission to limit or prescribe the character of the securities of the reorganized company except as expressly authorized in respect of fixed interest bearing obligations but even if such authority may be implied, it is manifestly unfair to holders of our First Mortgage Bonds to use 1936 income as a yardstick in view of the fact that the cycle of earnings is upward in transportation and nearly every other industry and in view of the further admitted fact that the construction of the Northern California Extension, a new and as yet undeveloped [449] property, has revolutionized the Debtor's earning power.[8]

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[8] Tr. pp. 161-163; 255.

We do not overlook the argument that fifty years hence the reorganized company may be embarrassed by the maturity of this issue of Income Bonds. This, however, is not a substantial or practical reason which should be given weight as against the insistence of substantial holders of our First Mortgage Bonds that debt should be preserved as debt and not converted into a lower form of investment.

Income Bonds should be authorized up to the full principal amount of First Mortgage Bonds, $49,290,100. (or such part thereof as is not refunded in new First Mortgage Bonds) and despite the misgivings of the Bureau of Finance, we think that full interest upon these Income Bonds will be earned in 1938.[9]

295,740-3/5 shares of Preferred Stock and
300,682-1/5 shares of Common Stock.

The major vice of the Report is the proposal to wipe out all of the equity and part of the lien investment in the property of the Debtor by refusing to authorize an issue of securities thereagainst. Instead of giving to the Debtor the relief contemplated by Section 77, i.e., a stake in the future

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[9] Note Exhibit 29, Statement No. 2, and monthly income statements subsequent to the last hearing filed under stipulation. Our estimate for 1938 is $2,929,586. The estimate for 1936 was exceeded by $242,546. Figures to date show an even greater improvement over the 1937 estimate. There is no reason whatever to doubt the integrity of the estimate for 1938.

prosperity of the property, the Bureau proposes a death sentence.

In justifying this result the Report states that the [450] debtor's forecasts of earnings are open to doubt but as one critic has well observed, "It might better have said, not subject to determination."

Property rights ought not to be taken away or titles extinguished by mere appraisals of even present values; much less by estimates of future earnings. Such a result runs counter to all of our conceptions of due process of law.

III.

The Report Errs in Construing Section 77 of the Bankruptcy Act as a Mandate or Legislative Declaration that Capitalization Shall "Not Exceed a Conservative Valuation of the Assets to Be Taken Over by the Reorganized Company."

Nowhere in the Act is there any suggestion that the Interstate Commerce Commission should undertake to reduce, limit or otherwise deal with capitalization. To read into the Act as the Bureau of Finance attempts to do in this case a requirement that capitalization "shall not exceed a conservative valuation of the assets to be taken over by the reorganized Company" is to read into the Statute a provision which it does not contain and which is alien to its express and fundamental objectives.

The real intent is to keep alive and conserve potential values by averting a foreclosure or a permanent readjustment of capital on the basis of present day values. The Commission is expressly authorized by [451] the Act to judge the future by the past in limiting fixed charges, but there is no such authorization in respect of junior securities which involve no fixed interest obligations.

Again we observe that appraisals of property values and earning power by a Bureau of the Government, however informed and impartial may be the judgment upon which such appraisals are based, cannot be accepted as a safe substitute for the traditional requirements of due process of law.

IV.

The Report Errs in Disregarding the Section 19a Value of the System Properties Amounting as of December 31, 1935, to $144,619,851.

For reasons above stated the Debtor contends that Section 77 does not authorize the Commission to fix, limit or otherwise deal with *capitalization*.

If, however, the Commission enters this field then we submit that it ought not except for the most cogent reasons and upon a clear and convincing record entirely disregard its own Section 19a valuation.[1]

Here the discrepancy between the capitalization proposed in the Report and the value placed by the Commission under Section 19a as the property in-

[1] Atlanta, Birmingham and Coast Railroad Company v. United States, 296 U. S. 33 (1935).

vestment upon which the carrier is guaranteed a fair return by the Fifth Amendment is so extreme, amount- [452] ing as it does to more than $53,000,000, as to constitute a menace to the general rate structure.

Under-capitalization may be even more serious in its repercussions than over-capitalization, and we are confident that this strategic railway bridging the territory between the Great Salt Lake and the Pacific Ocean, and occupying what is perhaps the last available route through the Sierra Nevada Mountains but also serving a new and undeveloped territory lying to the north, should not be so recapitalized as (a) to liquidate on the basis of present day depressed levels its undeterminable potential values, and (b) to set up in competition with its more prosperous neighbors a reorganized Company, which, because of excessive under-capitalization forced upon it by a governmental authority may do business profitably at less than the cost of the service.

V.

The Report Errs in Refusing to Authorize the Issue of Stock Without Par Value and in Treating No Par Value Stock at $100. Per Share in Measuring Capitalization.

In the following cases the Interstate Commerce Commission has authorized the issue of stock without par value:

New York Central Railroad Company Securities, 221 I. C. C. 269 (1937).

curities, 221 I. C. C. 269 (1937) [453]

Louisiana & Arkansas Railway Company Stock, 217 I. C. C. 208 (1936).

East Washington Railway Company Acquisition and Stock, 212 I. C. C. 516 (1936). Commissioner Porter dissenting.

Great Northern Railway Company Securities, 212 I. C. C. 327 (1936).

Missouri-Kansas Belt Railway & Terminal Company Proposed Construction, Etc., 207 I. C. C. 175 (1935).

Cook Transit Corporation Stock, 202 I. C. C. 465 (1934).

New York Central Railway Company Securities, 199 I. C. C. 546 (1934). (Stock changed from $100. par to no par value).

Ohio & Morenci Railroad Company Stock, 199 I. C. C. 7 (1933).

St. Louis & Troy Railroad Company et al. Acquisition and Construction, 189 I. C. C. 464 (1933).

San Diego & Arizona Eastern Railway Company Acquisition and Stock, 187 I. C. C. 713 (1932).

Minneapolis, Anoka & Cuyuna Range Railroad Company Stock, 170 I. C. C. 591 (1931).

Algers, Winslow & Western Railway Company Securities, 166 I. C. C. 788 (1930).

Cincinnati, Georgetown Railroad Company Acquisition and Operation, 166 I. C. C. 134 (1930). [454]

Savannah & Atlanta Railway Company Acquisition and Securities, 166 I. C. C. 119 (1930).

Delaware & Northern Railway Company Stock, 162 I. C. C. 187 (1930).

Grand Trunk Western Railroad Company Stock, 162 I. C. C. 540 (1930).

Savannah & Atlanta Railway Company Acquisition and Securities, 162 I. C. C. 771 (1930).

Seaboard Air Line Railway Company Readjustment, 158 I. C. C. 182 (1929) modified in 162 I. C. C. 267 (1930).

Stock of Castleman River Railroad Company, 158 I. C. C. 149 (1929).

Finance Application of Delaware & Hudson Company and Delaware & Hudson Railroad Corporation, 158 I. C. C. 615 (1930).

Securities of Mayo & Cook's Hammock Railroad Company, 154 I. C. C. 622 (1929).

Stock of Santa Fe, San Juan & Northern Railroad, 154 I. C. C. 741 (1929).

Securities and Acquisition of Control of Railway Express Agency, Incorporated, 150 I. C. C. 423 (1929).

Kansas City, Mexico & Orient Reorganization, 145 I. C. C. 339 (1928).

Stock of Port Angeles Western Railroad, 145 I. C. C. 144, (1928).

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928). [455]

Acquisition of Control of Seaboard Air Line Railway, 131 I. C. C. 733 (1927).

Acquisition and Operation of Fellsmere Railroad by Trans-Florida Central Railroad Company, 124 I. C. C. 366 (1927).

Reorganization and Control of Atlanta, Birmingham & Atlantic Ry. Co., 117 I. C. C. 439 (1926).

Denver & Salt Lake Reorganization, 117 I. C. C. 397 (1926); 117 I. C. C. 749 (1927).

It is respectfully submitted that the Bureau of Finance is in error in this case (a) in not resorting to stock without par value as a sound and convenient method of keeping alive for the benefit of the junior creditors and stockholders the equity in this virile and resilient property and (b) in assuming that no par value stock if resorted to must be given a substantial value for the purpose of measuring capitalization.

From the foregoing incomplete but impressive list of precedents we select the first and the last as illustrating the usefulness of stock without par value.

The case first cited is that of the New York Central Railroad Company which, with the approval of the Interstate Commerce Commission, changed its $100. par value Common Stock to no par value stock as an integral and indispensable part of a financial operation that saved one of the premier railroads of the United States.

The case last cited is that of Denver and Salt Lake Railroad Company, which was reorganized in 1926 on the basis of an issue of 50,000 shares of Common Stock [456] without par value. With the approval of the Interstate Commerce Commission the Common Stock was set up upon the books at $5,000,000, "arrived at by adjusting book values to the basis of our tentative valuation, plus additions and betterments since the date of valuation". While the Commission expressly disclaimed any responsibility for the then book value of the stock, it is interesting to note that it subsequently authorized the purchase of the no par value stock by the Denver and Rio Grande Western Railroad Company at the price of $150. per share.[2]

It is true that the unfortunate stockholders of the old Railroad Company were foreclosed and were not permitted to participate in the valuable equity that was conserved through the issue of the no par value stock of the new Railway Company but it was just such a case that Congress had in mind when it adopted Section 77 for the express purpose of relieving Debtors from the inequity of final capital adjustments on the basis of subnormal conditions.

There is no sanctity or virtue in stock having a par value or a book value of $100. As already noted the capital stock of the New York Central Railroad Company is without par value. The stock of the

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[2] Denver & Salt Lake Railway Company Control, 170 I. C. C. 4 (1930).

Pennsylvania Railroad Company has always been a $50. par value stock and this is true of most rail carriers organized in Pennsylvania. In other fields stocks vary from no par or nominal ($1.00) par value to $10., $20., $25., $50., $100. and intermediate figures determined by the exigencies of each case.

[457]

Values change from day to day, from week to week and from year to year, and it is impossible to maintain any rational relationship between the property account and the capital stock and why therefore should the Commission try to fix a relation which almost immediately will begin to yield to the force of changing conditions.

The true course and the one plainly indicated by Section 77 is to preserve the positions of all creditors and stockholders and unless the case of the stockholder is hopeless (when he may be taken care of by purchase warrants) stock without par value should be allotted to the equity to give the equity holders a participation in any extraordinary prosperity that may develop in the future. The book value may be placed at $1.00, or as was done in the case of the Denver and Salt Lake Railway Company, may be measured somewhat in relation to the 19a value of the System properties plus additions and betterments to the date of reorganization.[3]

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[3] 117 I. C. C. at page 406.

VI.

The Report Errs in Providing for the Expropriation of the Collateral or the Debtor's Interest in the Property Represented by the Collateral Securing the Debtor's Notes Held by Reconstruction Finance Corporation, the A. C. James Co. and the Railroad Credit Corporation.

Equity abhors a forfeiture.

So it is that properties are not foreclosed and property rights not forfeited without, [458]

(a) a reasonable nisi period within which the debtor may pay, and

(b) an opportunity to bid at a public sale, and

(c) a reasonable period thereafter within which to redeem.

The Report cuts off all of these rights by giving outright the collateral to the pledgees after first converting it into capital stock of the reorganized Company.

Such a procedure was not contemplated by Section 77 which, whatever may be its defects, was mindful of the solicitude of equity for redemption rights and in connection with a sale of property stipulates that it shall be "at not less than a fair upset price".

Here, however, all equity of the junior interests in $18,999,500. of General and Refunding Bonds and other collateral securing the Notes held by Reconstruction Finance Corporation, A. C. James Co. and The Railroad Credit Corporation, is proposed to be wiped out without sale or upset price or right

of redemption. This we submit is contrary to the requirement of Section 77, the usages of equity and the established principles of due process of law.

Whatever Plan is ultimately adopted for the Debtor we submit that the secured Notes should be converted into some form of collateral note issue that will give effect to their present collateral position but will nevertheless afford the Debtor an opportunity to work out the problem over a period of years. The idea of giving Reconstruction Finance Corporation more, and the A. C. James Company less, than the face of their re- [459] spective claims cannot be justified by Section 77 or by the law of the land regarding the participation of creditors—especially since both the A. C. James Co. and The Railroad Credit Corporation have special or cross equities in the collateral held by Reconstruction Finance Corporation.

VII.

The Report Errs in Assuming That the Public Interest Involves Matters Lying Beyond the Field of Transportation and Includes the Amount of Interest Charges Which Are Not Fixed Obligations to Pay But Are Payable Only Out of Available Income; Sound Financing; Financing Through Junior Obligations and Other Phases of Controversial Economics.

Subsection (d) of Section 77 expressly provides that the Interstate Commerce Commission may

> "render a report and order in which it shall approve a Plan which may be different from any Plan which has been proposed."

Literally construed this provision may be deemed to authorize the Commission to write its own Plan for any carrier and give effect to any views it may have on any features even though inherently controversial in their nature.

But when we consider that the objects of the Statute are the relief of debtors and, as pointed out by Mr. Justice Sutherland in his opinion in the Rock Island [460] case, a prompt reorganization of the property and its release from the Courts, the inevitable conclusion is that the Interstate Commerce Commission was expected to adhere somewhat closely to the trail blazed by the Act; that it was to concern itself primarily with the points that touch the public interest.

Of course, a determination of the permissible fixed charge is of prime importance and is to be dealt with by the Commission on the basis of a statutory formula. The only other requirement is that the Plan shall be in the public interest, which gives no new or extraordinary jurisdiction to the Commission but merely reasserts a jurisdiction that it has exercised in the authorization of securities ever since the enactment of the Transportation Act, 1920.[4] Here the public interest has always been understood to lie in the encouragement of an inflow of private capital that will insure an adequate transportation service.[5]

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[4] Transportation Act, 1920, Sec. 20a.

[5] Dayton-Goose Creek Railway Company v. U. S., 263 U. S. 456.

VIII.

The Report Errs in Proposing a Finding That the Equity of the Preferred and Common Stockholders of the Debtor Has No Value.

The Report finds the single sum value of the System properties as of December 31, 1935, to be $144,619,851, on which date the indebtedness of the Company, exclusive of claims for interest, amounted to only $69,071,271. Accrued interest was then less than $6,461,469., so that [461] the total debt ahead of the stock was only $75,450,640.[6] There was, therefore, an equity of more than $69,169,211. represented by the Debtor's stock on the basis of the Commission's own valuation under Section 19a.

Although, as we have already pointed out, the Section 19a valuation may not be a criterion of value except as it fixes the amount upon which the carrier is given a constitutional right to a fair return, it is, nevertheless, made *prima facie* evidence and ought not to be cast aside to permit equities to be taken away on mere estimates and speculative forecasts.

Estimates were submitted by the Debtor which show a 4% on $100,000,000. in 1940.[7] This was part of an estimate for a five year period of which one and one-half years have already elapsed during which elapsed period the actual results have greatly exceeded the estimates. Moreover, these estimates were prepared solely for the purpose of showing that $1,027,031. would be a conservative fixed charge and not for the purpose of placing a limit of $4,000,-

000, on the earning power of the property in 1940 or in any other period. When the estimates were made the Northern California Extension had barely emerged from the construction stage and there was no basis for a true appraisal of its earning power. Subsequent earnings show that the value of the north and south line, which opens up a new channel of trade between the Pacific Northwest and the System lying to the South and the East of the lines of the Debtor, was [462] greatly understated.[5] Should there be any disposition on the part of the Commission to make a finding that extinguishes nearly $70,000,000. of property represented by the Commission's own 19a value; then we ask that this case be set for further hearing to enable the Debtor to meet an issue that it had never conceived it could be called upon to meet in this case—the issue of confiscation.

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[4] The rights of the parties are fixed as of the date of bankruptcy. Sexton v. Lloyd's Bank Ltd., 219 U. S. 339.

[5] Ex. 29, Statement No. 2. See also note 9 on page 11. (supra).

[6] Tr. p. 255.

[redacted]

[redacted]

[redacted]

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME II

Page 471 to 962

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

IX.

The Report Errs in Failing to Find That the Debtor's Plan Is Fair and Equitable and Otherwise Complies With the Provisions of Section 77 and Is Compatible With the Public Interest.

The Commission will recall the classic case of a Czar of all the Russias who indicated the route of a railroad between St. Petersburg and Moscow by a straight line ruled on a map between these ill-fated cities.

The railroad was not built on the Czar's route. Barriers erected by nature may not have been insuperable but there were the vested moral rights of communities long established in territories tributary to the more natural lines of communication.

It is just as impracticable to attempt to reorganize rail carriers by "straight-line" methods and, as we have already pointed out such does not seem to be the underlying scheme and purpose of Section 77.

[463]

The most practicable approach to a reorganization must be along the normal line of least resistance and we shall now undertake briefly to show that the Plan promising the most hope (if not the only hope) of early accomplishment is the Debtor's modified Plan as summarized in the Report but with further modifications to meet certain views of the Bureau of Finance.

We submit, therefore, that the Report errs in failing at least to approve the basic principles of the Debtor's Plan.

It is to be here noted that the Debtor's original Plan was the Plan developed by leading members of the group representing First Mortgage Bondholders and in spite of their subsequent tactical defection we still think that a reorganization closely following the Debtor's Plan will command the support of sufficient First Mortgage Bonds to assure its success.[9]

We shall therefore discuss in detail what we think would be an acceptable capital structure for the reorganized Company.

$2,048,190. Equipment Trust Obligations and Baldwin Lease.

The assumption of these obligations by the reorganized Company is approved by all parties, is recommended by the Report; and no doubt will be acceptable to the Interstate Commerce Commission.

$10,000,000.-$19,858,000. 30 Year First Mortgage 4% Bonds.

The report limits the present issue of First Mortgage Bonds to $10,000,000., the amount required for new money, and makes no allotment of new First [464] Mortgage Bonds to the holders of $49,290,100. of the Debtor's present First Mortgage Bonds. The Debtor proposed that they be allotted 30% of their principal in new First Mortgage Bonds, involving a

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[9] Ex. 2—Outline Plan annexed to minutes of June 27, 1935. The background of the Debtor's Plan is shown at pages 4-9 of its Brief filed below.

fixed charge of only $1,027,036, a reduction of approximately 66⅔%.

We have already stated the reasons why we think such a fixed charge is permissible and if the Commission also finds it permissible then 30% in new First Mortgage Bonds might properly be given the present holders of First Mortgage Bonds as an inducement to accept the composition. Inasmuch, however, as the Committee representing substantial holders of First Mortgage Bonds has itself proposed 20%, we think this ultra conservative allotment may prove a satisfactory compromise and ask that the Plan, as approved and reported by the Commission, provide for $19,858,000. of First Mortgage Bonds, of which $10,000,000. shall be for new money (or retirement of Trustees' Certificates) and $9,858,000. for allotment to holders of $49,290,100. of presently outstanding First Mortgage Bonds.

$49,290,100.-$39,432,100. 50 Year Income Mortgage 4% Bonds.

The Report limits the issue of Income Bonds to $19,716,140. and relegates the present First Mortgage Bondholders to a stock position in respect of approximately 60% of their principal debt. This, as we have already pointed out, is unduly harsh to the First Mortgage Bondholders, is required by no factor of public interest and tends to defeat a composition. Without repeating more of the prior discussion on this subject, we submit that a practicable Plan calls most [465] imperatively for the preserva-

tion of existing senior debt *as debt* and not as a mere equity and that $39,432,100. of Income Bonds should be issued to holders of present First Mortgage Bonds, unless the Commission rejects our proposal to issue them 20% in new First Mortgage Bonds, in which event they should be given $49,290,100. in Income Bonds, upon which they may reasonably expect a *full* return from the effective date of reorganization.

$10,487,707. of 15 Year Collateral Income Notes.

Our more mature consideration of this reorganization in the light of the arguments of counsel and the discussions in the report leads us to the conclusion that a Collateral Note issue is the solution of the problem growing out of the present secured notes—a new issue of 15 Year Income Notes to be secured by $18,999,500. of Prior Lien 4% Preferred Stock. The Collateral Notes should be in three series equally secured by the pledged collateral, Series A to be allotted to Reconstruction Finance Corporation, Series B to Railroad Credit Corporation, and Series C to A. C. James Co., with appropriate preference in the payment of interest to give recognition to their comparative collateral positions. Amortization should be provided on a sound basis.

$9,503,664. of 4% Participating Preferred Stock for accrued interest to date of Reorganization.

There is a serious question whether *any* interest subsequent to the filing of the Petition under Sec-

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[1] Sexton v. Lloyd's Bank, Ltd., supra.

tion 77 is entitled to recognition.' It would be a liberal compromise of this [466] highly litigious issue to offer full interest up to the date of reorganization in a 4% Participating Preferred Stock ($100. par value) consisting of 95,036 64/100ths shares amounting to $9,503,664.

$7,188,607. of 4% Convertible Preferred Stock for unsecured indebtedness.

To avoid any question as to the right of the unsecured creditors to a complete priority over the holders of the Debtor's Stock, the medium of settlement should be a 4% Convertible Preferred Stock ($100. par value) junior to the Participating Preferred Stock issued in adjustment of claims for interest. We therefore propose that such Convertible Preferred Stock be issued at par to The Western Pacific Railroad Corporation and Western Realty Company in settlement of their unsecured indebtedness.

300,000 shares of No Par Value Common Stock.

The revised Plan of the Debtor proposes the issue of 300,000 shares of no par value stock.

We respectfully submit that this number of shares should be issued to The Western Pacific Railroad Corporation as sole holder of the Debtor's capital stock—the entire issue to be taken up upon the books at a valuation of $1.00. If, as is indicated by the Report there is doubt as to its value, it will conform to sound accounting principles to enter the entire issue on the books at a valuation of $1.00. *The public will*

then be advised that the Common Stock is accorded no present day value but represents (a) voting power and, (b) the right to participate in possible future prosperity. [467]

Assuming that the no par value stock is given a book value of $1.00., the foregoing adjustments would provide the reorganized Company with the following simple, sound, financial structure:

Equipment Trust Obligations and Baldwin Locomotive Lease	$ 2,048,190.
First Mortgage 30 Year 4% Bonds	19,858,000.
Income Mortgage 50 Year 4% Bonds	39,432,100.
Collateral Income Notes	10,487,707.
4% Participating Preferred Stock	9,503,664.
4% Convertible Preferred Stock	7,188,607.
Common Stock (Book Value)	1.
Total	$88,518,269.

If, however, there is objection on the part of the Interstate Commerce Commission to a nominal value being placed upon no par value stock, then we suggest (but without waiving our contention that such a policy is wrong in principle and tends to destroy the usefulness of Section 77) that the proposed no par value stock be entered on the books at a substantial value. If this stock is entered at a value of $100. a share, it will bring the total capital up to only $118,518,269., which is an amount upon which a return may be earned in the immediate future but nevertheless is $25,101,582. below the Commission's Section 19a valuation. If it is placed on the books at a valuation of $50.00 a share, which is the present par value of the stocks of The

Pennsylvania Railroad Company and many other railroad companies, the total capitalization will be $103,518,269, or $40,191,582. less than the Commission's Section 19a valuation. If this is done the Plan "will conform to the requirements of the law of the land regarding the participation of various creditors [468] and stockholders", all of whom will be taken care of on a fair and equitable basis and should command sufficient support to make practicable the composition contemplated by Section 77.

Even in the days of ruthless mortgage foreclosures the stockholder was permitted to pay an assessment and stay in the situation. Section77, like the Frazier-Lemke Act, the Home Loan Act, the various State enactments providing for suspension of foreclosure remedies, and a great mass of legislation, Federal and State, which came in the wake of the depression, was all for the protection and relief of the debtor and not for the aid of the creditors and we submit with all deference to the Bureau of Finance that the Commission should recognize this as the true spirit of Section 77.

Oral argument is hereby requested.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
Counsel, the Western Pacific
Railroad Company.
15 Broad Street,
New York City.

Dated: September 27, 1937. [469]

APPENDIX*

The high function of the Interstate Commerce Commission is to approve a plan of reorganization compatible with the public interest designed to command the support of the percentages of each class of creditors and stockholders necessary to make a binding composition under Section 77 of the Bankruptcy Act which contemplates the relief and not the elimination of the debtor.

In Continental Illinois Bank and Trust Company v. Chicago, Rock Island and Pacific Railway Company, 294 U. S. 648, the Supreme Court, referring to the original Section 77, said:

> "As outlined by that Section, a Plan of Reorganization, when confirmed, cannot be distinguished in principle from the composition with creditors authorized by the Act of 1867, as amended by the Act of 1874."

In the body of Section 73 of the Bankruptcy Act Congress declared that it was enacting Section 77 for the "relief of debtors." This unusual expressed declaration of the purpose of the Act was the most

* This Appendix is a Section of the brief now being prepared by Frank C. Nicodemus, Jr. and William V. Hodges, as counsel for The Denver and Rio Grande Western Railroad Company, for filing in Finance Docket No. 11002 on October 1, 1937 and although subject to possible revision is here included in its original form for advance consideration by the Interstate Commerce Commission.

that Congress could do to prevent the defeat of its purpose and the avoidance of its objective in the course of administration through the interpretation and con- [470] struction of any other language that might be found in the Act.

The plight of a railroad debtor under the applicable rules of law and equity as they existed before the enactment of Section 77 was that its creditors could take its property at a present-day depressed market value, determined by judicial sale and strip the Debtor of all value and interest not presently realizable on liquidation. If under Section 77 it is given similar treatment, its "loaf of bread" becomes a stone. It is twice mocked if, while relying upon Section 77, there is added to the creditor threat the political threat that its property is to be confiscated.

The relief which Congress offers the Debtor under Section 77 is predicated on the constitutional right of Congress to provide for *composition* under the bankruptcy power. Unless in its enactment Congress was evincing the lowest of legislative morals, it should not be contended that a law which depends for its life on the fact that it is an assertion of the constitutional power to authorize composition, really provides for the treatment of creditors or debtors in a manner repugnant to the principles of composition.

Long before Section 77 became law, men negotiated railroad reorganizations and sought the aid of

courts of equity to carry out their reorganization plans. Minorities had an effective power of obstruction, because they had in equity remedies which do not exist under composition principles.

Under equity practice much has been said by the courts about what is "fair and equitable" in a re-

[471]

organization plan, which had to be said in the light of rights and remedies there under consideration. Much that has been so said has no application under Section 77, which contemplates the alteration of rights and a modification of remedies (Section 77 (b)).

One approach to the defeat of the declared intent and purpose of Section 77 is to insist on the application to the situation of the parties under that Act of all the language used by the courts in the discussion of what is "fair and equitable," but used with reference to the old rights and remedies.

The Debtor is familiar with the cases that are repeatedly cited on this question, and knows that they have been called to the attention of the Interstate Commerce Commission in many of the pending railroad reorganization cases. The Debtor is also familiar with the fact, not so often adverted to, that in the *Kansas City Terminal Railway* case (271 U. S. 445) the Supreme Court, attached qualifications to the test of "priority for priority," which is at the bottom of the other legalistic tests which are sometimes sought to be used as absolute measures of what is "fair and equitable" in a

corporate reorganization plan. All such tests are subject to qualification by the weight of a multitude of possible circumstances, so many circumstances that no rule for a test is so clear that it bars the way to a full consideration and weighing of all facts which bear upon the present-day value to the creditor of his existing claim and the value to him of what is offered in exchange.

Another road to the defeat in practice of the declared purpose of the Act would be to attempt under it [472] to exercise the power to extinguish anyone's interest in the Debtor's assets through administrative or judicial appraisement except in accordance with the principles of composition. Such a step would raise constitutional questions so serious that no self-respecting citizen would submit without exhausting his right of appeal to the highest authority.

Another course which leads beyond the safe boundaries of administrative and judicial jurisdiction under the Act would be the attempt to force upon any class of creditors or stockholders an adjustment in new securities to which the requisite majority of the interested class could not be expected within reason to give assent.

There are some who seek to locate the extreme boundaries of that jurisdiction beyond the constitutional danger point. It seems to the Debtor that it is much better to try through a practical course to make the Act useful and not jeopardize its usefulness by crowding beyond safe boundaries into areas of dubious power.

Before Section 77, when men representing various interests in a railroad property sought to reorganize and not dismember the property, they met around a table to agree upon a reorganization plan. Their first step was to engage in that field of business discussion and judgment where the real and important problems of give and take were solved. They functioned as reasonable and informed businessmen, each presumably intent on a "fair and equitable" adjustment of interests. Those judgments were far and away the most important steps in the process of arriving at a new [473] plan.

Their test of "fair and equitable," used in that area of discussion, was a business test. If the result of their efforts received the approval of a majority in interest of free and independent security holders, it was the best proof of the fairness of their efforts. Dissenting minorities could defeat those efforts by the application of legalistic tests of "fair and equitable"—quite different tests. Those tests were blocking the needed rehabilitation of railroad properties, and Congress substituted composition tests under bankruptcy powers.

Under the statute, that field of business judgment is now occupied by the Interstate Commerce Commission. If formerly aggressive selfishness tainted the formulations of reorganization plans, it is now eliminated. Furthermore, within the limits of Section 77, the Interstate Commerce Commission can see to it that any reorganization plans at birth conform to the public interest.

As intended by the Act, the Debtor has attempted to cooperate in a composition proposal to be made to all parties in interest under the ægis of Interstate Commerce Commission approval. Until the Interstate Commerce Commission shall have proposed a Plan, the attitude of any class of security holders cannot be assumed. Fractions of various classes of creditors are represented before the Commission, but there is no one present to give an affirmative answer for the requisite majority, or a negative answer for a requisite minority. The Commission can and should do what could and should be done by reasonable and fair-minded men, representing the various interests in the Debtor's property toward evolving a Plan. [474]

The hope of the statute is that, in the first instance, the Commission can do the thing that reasonable men have been continually doing through this depression looking to the readjustment of debtor and creditor relations in all business areas.

If either through insistence on some assumed rights of creditors or because of some view of the public interest it is suggested that the Debtor be stripped, such a suggestion will be contrary to the purpose of the statute. If the existing priorities of interest in the property are not reasonably recognized, it will be contrary to the statute. But such priorities are not sanctified.

The decisions of the Federal Courts under the composition provisions of bankruptcy statutes hold

that an offer to creditors of a consideration equivalent to the present-day liquidating value of the Debtor's assets, leaving to the Debtor the hope of realization out of the unestimateable residue of value, is the proper basis for composition.

Cumberland Glass Co. v. DeWitt, 237 U. S. 447.

Nassau Smelting & Refining Works, Ltd. v. Brightwood Bronze Foundry Company, 265 U. S. 269.

In re Waynesboro Drug Co., 157 Fed. 101.

In re H. J. Arrington Co., 113 Fed. 498.

In re Realty Associates Securities Corp., 6 Fed. Supp. 549; 295 U. S. 295.

In the instant case the Debtor has suggested that creditors receive securities which represent not only any maximum appraisal of the present-day liquidating [475] value of the assets, but also a share in the future expectations of the property, which if realized will then give to the creditors a prior right to all the earnings that they would receive were the present-day securities to stand under a moratorium until that earning power is again reached.

As for the relief which Section 77 promises the Debtor, the Debtor suggests that it receive the common stock representing the residue of those values that cannot be estimated or liquidated today, and which the railroad as a going concern under present management and relationships has a promise of

realizing through the growth and development of the empire served by the Denver and Salt Lake Railroad, the development of business which must inevitably follow from the construction of the Cut-off and from the great expenditures for the betterment of the old lines made prior to the depression and being currently made by the Trustees.

The various classes of creditors and the stockholders of the Debtor, instead of locking horns at the threshold over problems of ultimate right, can, we submit, better serve the interests of all by endeavoring through the mechanics provided in Section 77 to reach a fair composition.

When the Plan goes to the Court it will be tested for conformity to composition principles and constitutional limitations. Unless there is an attempt to ignore composition principles or an attempt to confiscate the interests of some class of security or shareholders in the property, no constitutional objections need be expected.

[Endorsed]: Filed Oct. 5, 1939. [476]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of
The Western Pacific Railroad Company
Reorganization

EXCEPTIONS OF IRVING TRUST COMPANY, AS TRUSTEE, TO PROPOSED REPORT OF BUREAU OF FINANCE; AND BRIEF IN SUPPORT OF SUCH EXCEPTIONS [477]

INDEX

	Page of Original Printed Document	Page of Printed Record
Exceptions	1	491
Brief	3	492
I. The Report errs in recommending that the Commission consider, for the purposes of a Plan of Reorganization, that the equipment covered by leases, conditional sale agreements or equipment trust agreements is subject to the lien of the First Mortgage in priority to the General Mortgage	3	493
II. The Report errs in recommending that the Commission conclude that, in determining the equitability of Plans of Reorganization for the debtor, the lien of the General Mortgage on the Northern California Extension and various branches and spurs in question is subject to the lien of the entire First Mortgage	9	499
III. The Report errs in recommending that the Commission also consider that the property characterized as non-carrier real estate, which was owned by the predecessor of the debtor, is covered by the First Mortgage in priority to the General Mortgage; and errs in not recommending that non-carrier real estate acquired after the date of the First Mortgage be considered by the Commission to be free from the lien thereof	13	504
		[478]
ii		
IV. The Report errs in its conclusion that the creditors with whom are pledged General Mortgage bonds are not entitled to the same treatment as First Mortgage bondholders	15	506

	Page of Original & Printed Document	Page of Printed Record
V. The Report errs in its conclusion that the provision made in the recommended Plan for the participation of one of the unsecured creditors would not discriminate against either the First Mortgage bondholdholders or the General Mortgage bondholders	19	511
VI. The Report errs in not recognizing that the creditors secured by the General Mortgage bonds are entitled to the benefit of the interest accrued on said bonds; and discriminates unfairly against such creditors in that the Report does recognize accrued interest upon the First Mortgage bonds	21	513
VII. The Plan recommended by the Report is unfair and inequitable to the holders of General Mortgage bonds and is contrary to the law of the land and the provisions of Section 77	22	514
VIII. Conclusion	24	517

iii

TABLE OF CASES

	Page of Original Printed Document	Page of Printed Record
American S. S. Co. v. Wickwire Spencer Steel Co., 42 F. (2d) 886, aff'd 49 F. (2d) 766	6	496
Citizens' Savings & Trust Co. v. Cincinnati & Dayton Traction Co., 106 Ohio St. 577	12	503
Cleveland Trust Co. v. Consolidated Gas, E. L. & P. Co., 55 F. (2nd) 211	11	502
Equitable Trust Co. of New York, Trustee v. Wabash R. R. Co. et al., U. S. Dist. Ct., Eastern Dist. of Missouri, In Equity No. 3977	4	494
Guaranty Trust Co. v. N. Y. & Queens Co. Rwy. Co., 253 N. Y. 190	11	502
Hernickell v. Omaha Water Co., 146 App. Div. (N. Y.) 693	6	496
Hodder v. Kentucky & Great Eastern Rwy. Co., 7 Fed. 793	11	502
Horn v. Ross Island Sand & Gravel Co., 88 F. (2d) 64 (C. C. A. 9)	23	516
McKay v. Howard, 6 Ont. 135	6	496
Moulder Holcomb Co. v. Glasgow Cooperage Co., 173 Ky. 519	11	502
New York, New Haven & Hartford R. R. Co., In re., 16 F. Supp. 504	23	516
Northern Pacific Rwy. Co. v. Boyd, 228 U. S. 482	23	515

	Page of Original Printed Document	Page of Printed Record
Security-First Nat. Bank v. Pindge Land & Navigation Co., 85 F. (2d) 557 (C. C. A. 9)	23	515

AUTHORITIES

Pomeroy's Equity Jurisprudence, 4th ed., §167	11	502

EXCEPTIONS

Irving Trust Company, as Trustee under General and Refunding Mortgage of The Western Pacific Railroad Company, dated as of January 1, 1932 (hereinafter termed the General Mortgage), hereby makes and presents the following exceptions to the Report proposed by the Bureau of Finance:

I. The Report errs in recommending (p. 51) that the Commission consider, for the purposes of a plan of reorganization, that the equipment covered by leases, conditional sale agreements or equipment trust agreements is subject to the lien of the First Mortgage in priority to the General Mortgage.

II. The Report errs in recommending (p. 50) that the Commission conclude that, in determining the equitability of plans of reorganization for the debtor, the lien of the General Mortgage on the Northern California extension and various branches and spurs in question is subject to the lien of the entire First Mortgage. [481]

III. The Report errs in recommending (p. 51) that the Commission also consider that the property characterized as non-carrier real estate, which was owned by the predecessor of the debtor, is covered by the First Mortgage in priority to the General Mortgage; and errs in not recommending that non-carrier real estate acquired after the date of the First Mortgage be considered by the Commission to be free from the lien thereof.

IV. The Report errs in its conclusion (p. 52)

that the creditors with whom are pledged General Mortgage bonds are not entitled to the same treatment as First Mortgage bondholders.

V. The Report errs in its conclusion (p. 56) that the provision made in the recommended plan for the participation of one of the unsecured creditors would not discriminate against either the First Mortgage bondholders or the General Mortgage bondholders.

VI. The Report errs in not recognizing that the creditors secured by the General Mortgage bonds are entitled to the benefit of the interest accrued on said bonds; and discriminates unfairly against such creditors in that the Report does recognize (p. 53) accrued interest upon the First Mortgage bonds.

VII. The plan recommended by the Report is unfair and inequitable to the holders of General Mortgage bonds and is contrary to the law of the land and the provisions of Section 77. [482]

BRIEF

With a view to avoiding duplication, the General Mortgage Trustee confines this brief to the questions relating to relative priority of liens between the General Mortgage and the First Mortgage. Other questions which are raised by the Report, and which are of general interest to the security holders, such as the particulars of the securities to be issued, the power of the Commission to reduce the valuation of

the Debtor's property so drastically below the valuations made by the Commission for rate-making purposes, or the propriety of its action in so doing, are left for treatment by the interested parties.

I.

The Report errs in recommending that the Commission consider, for the purposes of a Plan of Reorganization, that the equipment covered by leases, conditional sale agreements or equipment trust agreements is subject to the lien of the First Mortgage in priority to the General Mortgage.

In this respect the Report is most clearly and manifestly in error for the following reasons:

1. The First Mortgage expressly excepts such equipment unless acquired by the use of First Mortgage bonds or cash (First Mortgage, Exhibit 5, pp. 17, 21, 22); and the record shows that no First Mortgage bonds or cash were used in the acquisition of this equipment (see our brief dated January 11, 1937—hereinafter termed our original brief, p. 48). [483]

2. The First Mortgage omits the provision contained in the General Mortgage to the effect that when and as the Railroad Company acquires an equity in such equipment the equity becomes subject to the General Mortgage (see our original brief, pp. 50-51).

3. The Listing Application of December 21, 1931 (Exhibit 112), specifically states that such equip-

ment is not subject to the lien of the First Mortgage (see our original brief, p. 46).

4. The Report is directly contrary to the conclusions reached in the memorandum opinion of Circuit Judge Sanborn in The Equitable Trust Company of New York, Trustee v. The Wabash Railroad Company, et al., U. S. District Court, Eastern District of Missouri, In Equity No. 3977; opinion filed November 7, 1921 (see our original brief, p. 52).

Our argument in respect of this equipment is set forth under Point III of our original brief, the general principles of construction being set forth under the heading "General" at pages 12-24. Specific comment appears to be required, however, in respect of the language in the First Mortgage, with reference to which the Report states as follows (p. 51):

> "The latter paragraph reads as follows:
>
> 'Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby * * *'
>
> If all equipment acquired under equipment trusts was to be entirely free of the lien of the first mortgage, it is not understood why the words [484] 'equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby' were made part of

the last quoted provision. The Commission should consider, for the purposes of a plan of reorganization, that since the equipment in question was acquired for use, and was actually used, on the mortgage *lines*, the debtor's equity in that equipment is subject to the lien of the first mortgage."

The extract above quoted from the Report contains a typographical error in that it omits the language upon which the conclusion of the Report is based. The above-quoted language refers only to equipment "now owned", but the mortgage itself refers also to equipment "hereafter acquired". The correct language of the First Mortgage (Exhibit 5) is as follows (p. 22):

> "Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon and, as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture."

The Report does not quote the specific exception in the granting clauses of equipment acquired under lease, conditional sale or equipment trust (Exhibit

5, p. 22), nor is the exception mentioned in the summary of the First Mortgage contained in the Report (p. 49).

If the last-quoted provision were necessarily inconsistent with the immediately preceding and plain lan- [485] guage (see Exhibit 5, p. 22) specifically excluding such equipment from the mortgage (unless acquired by First Mortgage bonds or cash), the last-quoted provision would have to give way. It is not contained in the granting clauses proper but only in the "Subject, However", provision which follows the descriptions of the property granted. The Report erroneously permits the "Subject, However," clause to override the clear and controlling language of the granting clauses.

American S. S. Co. v. Wickwire Spencer Steel Co., 42 F. (2d) 886, 893-94, aff'd 49 F. (2d) 766;

Hernickell v. Omaha Water Co., 146 App. Div. (N. Y.) 693, 699;

McKay v. Howard, 6 Ont. 135, 137.

However, the language is not inconsistent. It is plain that the "Subject, However", clause with reference to thereafter-acquired equipment refers only to the possibility that equity in equipment, subject to equipment trust or conditional sale agreements, might be acquired by the use of First Mortgage bonds or moneys—in which case it might come under the First Mortgage by virtue of the provisions relating to the use of First Mortgage bonds or cash.

The First Mortgage (Exhibit 5) permits the use of First Mortgage bonds or cash for the acquisition of equipment (Article Second, Section 2, subsection A, clause (b), p. 41).

The documents required to be furnished as a basis for delivery of such bonds or cash are required to state (Exhibit 5, pp. 46-48) among other things whether the property acquired "is, or upon its acquisition will [486] become, subject to any lien or charge (within the meaning of the terms 'lien' and 'charge' as defined in subsection G of this Section 2) * * *; and, if so, such certificate shall briefly describe such liens and charges and state the amount and character of indebtedness secured thereby, the due date thereof, the date of and parties to any indenture securing the same, and other particulars with respect thereto, and that sufficient First Mortgage Bonds or deposited cash remain available for reservation against such liens or charges as provided in subsection E of this Section 2."

Subsection E (pp. 57-58) provides for the reservation of bonds or cash equal to the amount of the "lien" or "charge" to which the acquired property is subject.

Subsection G (p. 60) then provides: "The words 'lien' and 'charge', as used in this Section 2, shall be deemed to include, among other things, deferred instalments of the purchase price of property in every case where title thereto has not then vested in the purchaser or, having so vested, is subject to a vendor's lien or any right of the seller to retake

or enforce a charge upon such property upon default in the payment of such deferred instalments of the purchase price and *also the deferred payments to be made or rentals to be paid under any conditional sale agreement or lease or trust agreement covering equipment.*" (Italics supplied.)

It thus appears that the Report is completely in error in the vital conclusion that the equipment in question is subject to the First Mortgage because the "Subject, However" clause mentions a *particular species* of after-acquired property as covered by the mortgage although subject to equipment trust or conditional sale agreements to which the same shall be subject "*as permitted hereby*". The above quoted provisions from the [487] First Mortgage show that equipment is "permitted" to be subject to such agreements if First Mortgage bonds or cash are reserved in an amount equal to any such "lien" or "charge". The Report completely distorts the meaning of this limited provision in the "Subject, However" clause and permits it to destroy the clearly expressed intent of the mortgage that such after-acquired equipment shall not be covered thereby unless acquired by the use of First Mortgage bonds or cash.

In the present case, if First Mortgage bonds or moneys had been used to acquire the equity in question there would be presented a different question; but since it is clearly shown by the record (see our original brief, p. 48) that no First Mortgage bonds or moneys were used in the acquisition of the

equipment which we are considering, the question is not complicated; and we are left with a case coming indisputably within the specific mortgage provision that equipment acquired by "lease, conditional sale agreement or under any form of equipment trust" shall be "free from the lien hereof" "unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same* * *," (First Mortgage, Exhibit 5, p. 22).

[488]

II.

The Report errs in recommending that the Commission conclude that, in determining the equitability of Plans of Reorganization for the debtor, the lien of the General Mortgage on the Northern California extension and various branches and spurs in question is subject to the lien of the entire First Mortgage.

This recommendation is based upon a construction of the language of the First Mortgage as providing (Report, p. 49) that "the lien of the first mortgage attaches to after-acquired extensions if the purchase, acquisition or construction thereof, or any work thereon, be financed *in any part* with first mortgage bonds or cash deposited under that mortgage". (Italics added.)

Even this principle would not apply to the miscellaneous branches, aggregating some twenty-three miles, which were mentioned at pages 56 and 57 of

our original brief, nor to the certain tracks and spurs discussed in Point V of our original brief.

The Report is also in error in its statements concerning the execution of the General Mortgage, with reference to the lien on the Northern California Extension, and particularly in the statement (Report, p. 50) that "the general and refunding mortgage was not executed and delivered until several months after the completion of the extension." In fact the General Mortgage was executed and delivered on February 29, 1932 (Exhibit 6 p. 188), whereas the Northern California Extension was not completed for full operation until June 1, 1932, or later (Exhibit 56, p. 7), after further expenditures of [489] money obtained by the pledge of General Mortgage bonds (Exhibit 50, pp. 3-4; and see pp. 32-33 of our original brief).

A more far reaching objection to the conclusion which the Report recommends is that the language on which it relies does not support the proposed conclusion which is reached. The Report refers (p. 49) to subdivision marked Third (a) of the granting clause in the First Mortgage (Exhibit 5, p. 17), which covers after-acquired property and extensions if (1) they are "acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder," or if (2) "*on account of* the purchase, acquisition or construction thereof or work thereon, First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited here-

under shall hereafter be paid out under any of the provisions of this indenture."

The alternatives which the last quoted paragraph contemplates are either (1) the use of First Mortgage bonds or cash originally for the acquisition or construction of the property, or (2) their use as reimbursement for the cost of acquisition or construction. The words "on account" are not inserted in a manner to connote payments of only a part of the cost of construction, as the Report infers, or to indicate an intention to confer a complete lien in return for partial advances from First Mortgage funds, but rather serve to distinguish payments in reimbursement from original payments in anticipation of the acquisition or construction of new property.

If the meaning of the language quoted be regarded as open to any doubt, it should be resolved by a reasonable and equitable construction. In order to [490] demonstrate the inequity and practical absurdity of a construction which confers a first lien for the entire First Mortgage if *any* First Mortgage money is used, it is only necessary to suppose that the Railroad Company had acquired the Northern California extension at a cost of $10,000,000 and had financed such acquisition to the extent of $5,000 by means of First Mortgage bonds or cash. No court of equity would ever construe the mortgage so as to give to it a prior lien upon the extension beyond the amount of First Mortgage bonds and cash expended thereon.

The enforcement of a mortgage as against after-acquired property is wholly a matter of equity. (Guaranty Trust Co. v. New York & Queens County Railway Co., 253 N. Y. 190, 199; Hodder v. Kentucky & Great Eastern Railway Co., 7 Fed. 793, 799, aff'd sub nom. Wright v. Kentucky & Great Eastern Railway Co., 117 U. S. 72; Moulder Holcomb Co. v. Glasgow Cooperage Co., 173 Ky. 519, 522; Pomeroy's Equity Jurisprudence, Fourth Edition, Section 167.) Courts of equity apply the rule of strict construction to after-acquired property clauses in a mortgage and will not bring property within their purview unless the language imperatively demands. (See Cleveland Trust Co. v. Consolidated Gas, E. L. & P. Co., 55 F. (2nd) 211, 214, and other cases cited at pages 12-13 of our original brief.)

There can be no dividing line depending upon the amount of the expenditure. If the conclusion in the Report is correct, the same principle would necessarily control, no matter how trivial the expenditure, and how valuable the property, might be.

It is worthy of note also that (as is pointed out in our original brief, at pp. 35-37) it was never represented to the First Mortgage bondholders that their mortgage [491] would constitute an exclusive first lien upon the entire extension.

An equitable result would be reached by recognizing the prior lien of the First Mortgage to the extent of expenditures made from such bonds or cash, but only to such extent. The situation is very similar

in its equities to those which arose in the case of Citizens' Savings & Trust Co. v. Cincinnati & Dayton Traction Co., 106 Ohio St. 577 (referred to in our original brief, at pp. 43-44). In that case it might have been held that the mortgage which was the earliest in date attached to the new power plant and that inasmuch as such mortgage was the earliest in date, it became the prior lien upon the entire new plant. Such a result, however, would have been inequitable, and the court worked out a manifestly fair and proper result by allowing to the earliest mortgage only its pro-rata lien. Similarly, in the present case, while no one would suggest that the First Mortgage lien should be cut down below the amount of expenditures, it would be equally inequitable to conclude that the entire First Mortgage lien attaches to this $10,000,000 extension by virtue of the expenditure of less than $5,000,000 thereupon. The only way by which the First Mortgage language in question can be so construed as to avoid gross unfairness is to construe it as meaning that the First Mortgage is the prior lien upon after-acquired property to the extent only of the First Mortgage bonds and cash used thereon.

Our arguments with respect to these properties are more fully set forth under Points II, IV, and V of our original brief. In the interest of economy of space, we refrain from repeating them here. [492]

III

The Report errs in recommending that the Commission also consider that the property characterized as non-carrier real estate, which was owned by the predecessor of the debtor, is covered by the First Mortgage in priority to the General Mortgage; and errs in not recommending that non-carrier real estate acquired after the date of the First Mortgage be considered by the Commission to be free from the lien thereof.

In Point VI of our original brief, we urged to the Commission that specific property not subject to the lien of the First Mortgage included, among other things, (1) non-carrier property owned at the date of the First Mortgage (brief pp. 62, 63) and (2) subsequent additions to non-carrier property (brief pp. 63-69).

The Report mentions only the non-carrier property originally owned and recommends (p. 51), with respect to this, that the Commission conclude that such property is subject to the lien of the First Mortgage. This recommendation is stated to be based on the language of the First Mortgage, which the Report construes as not limited to railway property by the description of the First Mortgage bonds in the 1916 reorganization plan pursuant to which they were issued. That plan described the bonds as being secured by the "*existing railway properties*" (Rec. 584). Such a plan constituted a contract with the stockholders of the new Company

as well as with the new bondholders (see our original brief, pp. 67-68), entitling them to consider that non-railway property would not be subject to the new First Mortgage. [493]

This Trustee, however, did not cite the 1916 plan solely for its contractual effect in limiting the lien of the First Mortgage, but as confirming the principle of legal interpretation that non-carrier real estate is not included in the security for a railroad mortgage unless specifically described, even though owned at the time the mortgage was created (see our original brief, pp. 65-69).

After-acquired non-carrier real estate is clearly free from the First Mortgage.

No argument in the Report, or in the Brief of the First Mortgage Trustees dated January 9, 1937, undertakes to justify extending the lien of the First Mortgage to after-acquired non-carrier property which was not financed by First Mortgage bonds or funds.

An analysis of Exhibit 114, and of Point VI of our original brief shows that the real estate owned prior to 1916 and now claimed by the First Mortgage Trustees amounted to $2,165,615.48, book value; and that subsequently acquired non-carrier real estate, not financed under the First Mortgage, has a present book value of $1,262,308.32. This represents a substantial item which must be recognized as free from the First Mortgage even if the proposed Report be sound in respect of non-carrier property

owned prior to 1916. No language in the First Mortgage will permit even a plausible argument that this property is covered by it. The existence of this substantial amount of real property not subject to the First Mortgage is particularly important in its bearing on the statement on page 52 of the proposed Report that the First Mortgage "should be considered as having a first lien on practically all the assets of the [494] debtor". That statement is in error even if the specific recommendations of the Report already discussed herein were sound.

IV

The Report errs in its conclusion that the creditors with whom are pledged General Mortgage bonds are not entitled to the same treatment as First Mortgage bondholders.

Under the plan recommended in the proposed Report (p. 53), the existing First Mortgage bondholders would receive all of the new income bonds, all of the new preferred stock and (as satisfaction of unpaid interest) approximately twenty-seven per cent. of the new common stock. The holders of General Mortgage bonds would receive only common stock, representing about forty per cent. of the total amount of common stock proposed to be issued.

Such completely subordinate treatment of the General Mortgage bondholders cannot be justified unless it be literally true (as the Report states, at p. 52) that the First Mortgage bondholders have "a first lien upon practically all of the assets of the

debtor." If there be *any* assets which are available to the General Mortgage bondholders in priority to the First Mortgage bondholders, the former must be given securities equal in priority to those received by the latter, to the extent of the assets on which the General Mortgage is a prior lien. These creditors, in fact, are as fully secured as are the holders of the First Mortgage bonds.

A plan which accords a completely subordinate position to creditors who hold a prior lien on even a sub- [495] stantial amount of assets does not, as required by Section 77(e), afford "due recognition to the rights of each class of creditors and stockholders."

Moreover, if the First Mortgage were to be foreclosed, the burden would be upon the First Mortgage Trustees to show what assets were subject to its lien, applying a strict construction of the after-acquired property clause, and excluding from the foreclosure sale all assets which were not subject to its lien. The Commission, in any proposed reorganization plan, cannot deny to the General Mortgage bondholders the rights of priority which they would have to be granted in a foreclosure of the First Mortgage.

Our original brief listed, at pages 9 and 10, assets free from the First Mortgage, and available to the General Mortgage bondholders, worth more than $19,800,000. This is more than the total amount of outstanding General Mortgage bonds ($18,999,500),

and over fifty per cent. more than the total amount of debt secured by such bonds, including interest (approximately $11,770,582 as of January 1, 1937).

The proposed Report would eliminate, from the list of property available to the General Mortgage bondholders, the equity in rolling stock subject to lease or equipment trust agreement, the Northern California extension, and the real estate owned prior to 1916. These items, with the addition of the Deep Creek Railroad Company note and the Standard Realty & Development Company note as to which the General Mortgage lien is disputed, amount to approximately $14,075,000, leaving approximately $6,000,000 of property free from the lien of the First Mortgage, made up as follows: [496]

Cash in the hands of Trustee under General Mortgage	$ 82,369.59
Interest on Tidewater Southern note paid to Railroad Company after default under General Mortgage	50,827.88
Additional interest accrued on Tidewater Southern note to December 31, 1936	33,885.25
Note of Tidewater Southern Railway Company due March 1, 1945	508,278.61
Stock of Tidewater Southern Railway Company (based on net assets at Interstate Commerce Commission values)	1,567,108.84
Bonds of Central California Traction Company	270,000.00
Non-carrier real estate after-acquired and not financed with First Mortgage funds (book value)	1,262,308.32
Cash on hand at date of institution of reorganization proceedings (adjusted by elimination of Tidewater Southern interest paid after default under General Mortgage)	810,331.39

Stock of Central California Traction Company (at book value to Western Pacific)	393,367.10
Alameda Belt Line stock (at book value to Western Pacific)	465,300.00
Industrial tracks, spurs, etc., representing investment by Western Pacific of	239,663.04
Miscellaneous property acquired from free funds (at book value)	101,409.33
Various branches, 23.33 miles in length, not financed under First Mortgage	not valued
Total	$5,784,849.37

It cannot be stated with any fairness that even the list of assets set forth above, which indisputably are security alone for the General Mortgage creditors (either as the holders of the General Mortgage lien or as the bulk of the unsecured creditors), are not sub- [497] stantial, in relation to the amount of debt secured by the General Mortgage. It should be emphasized, moreover, that the above reduced list is set forth only to show the situation if the recommendations in the proposed Report (which are clearly erroneous) were to be accepted.

The Report does not show the real value of most of the above-listed assets. For instance, while reciting (p. 18) the gross freight revenue of Tidewater Southern Railway Company, it omits to state that this important feeder, contributing traffic from which Southern Pacific Railroad derives approximately $500,000 per year (Exhibit 27, statement No. 4; p. 2), earns a net income itself (after interest on the note held by the General Mortgage Trustee), of approximately $75,000 per year (Exhibit 29, state-

ment Nos. 3-7, 28). No mention is made, among the analysis of subsidiaries (pp. 17-19), of the Central California Traction Company, although it is considered especially valuable as a feeder (Exhibit 82, p. 18; Rec. p. 164). The $465,300 of stock of Alameda Belt Line pledged under the General Mortgage (see Exhibit 103) is not even mentioned in the Report's list of pledged collateral (p. 7). No consideration is given to the non-carrier real estate; nor to the free cash, amounting to over $800,000, on hand when the reorganization proceeding was instituted, although this also is clearly free from the lien of the First Mortgage.

The various items listed above are discussed in more detail in our original brief.

Therefore, and even if (which is far from the case) the recommendations of the proposed Report, to which we except, should be accepted as correct, it is clear (from the amount of assets on which the General Mortgage is a prior lien as well as the smaller amount of [498] assets which are free both from the First Mortgage and the General Mortgage) that the creditors secured by General Mortgage bonds are entitled at least to upwards of forty per cent. of their debt in securities of the same type offered to the First Mortgage bondholders and should be treated, to such extent, as on a parity with the First Mortgage bondholders, rather than being completely subordinated to them. The failure of the Report to recognize this principle, as well as its fail-

are to find that the General Mortgage bondholders are fully secured, vitiate the entire Report.

V

The Report errs in its conclusion that the provision made in the recommended Plan for the participation of one of the unsecured creditors would not discriminate against either the First Mortgage bondholders or the General Mortgage bondholders.

The plan recommended in the proposed Report allocates $10,000,000 par value of common stock to be issued as a bonus to the purchasers of the $10,000,000 principal amount of new First Mortgage 4% bonds proposed to be issued. The first right to subscribe to such bonds, and to obtain such common stock bonus, is given to an unsecured creditor, which is also the principal stockholder. The result of the plan, if such unsecured creditor exercises its option, will be that it will receive practically the same amount of common stock which the General Mortgage bondholders receive. The plan of distribution of stock among the General Mortgage bondholders, as recommended in the proposed Report, would result [499] in certain of them receiving less than the face amount of their claims. Thus, while secured creditors are reduced to common stockholders with stock of par value less than the amount of their claims, one of the unsecured creditors would end up with stock of the same class, in an amount sub-

stantially equal to the total received by the General Mortgage creditors. Such a dilution of the securities offered to the creditors secured by General Mortgage bonds cannot be justified.

This Trustee has no information concerning the necessity for offering a $1,000 bonus of common stock for every new $1,000 bond. It doubts, however, that any stock bonus is necessary. At any rate, the determination of the amount of stock promised to be given should be based on the minimum necessary to provide a market, rather than on any theory (which the Report, at p. 54, apparently follows) that such bonus stock will recognize the claims of one of the unsecured creditors.

The pretense at recognition of the value of General Mortgage bonds is illusory. The securities which the holders would receive under the recommended plan are not only of much lower grade, but of less nominal value than the General Mortgage bonds which they replace. So long as this is true, and the holders of General Mortgage bonds are not paid in full at least the face value of their bonds, plus interest, it is improper to dilute their securities by handing out stock to one unsecured creditor.

Even if the value of new securities issued to the General Mortgage bondholders equalled the amount of their bonds, with accrued interest, a fair plan would still have to recognize their rights as general creditors for the amount by which any of their debts exceeded [500] the value of the new securities.

The total disregard of the portion of their debts which the recommended plan leaves unpaid, while offering them even less than the face amount of the bonds held as collateral to their debts, is indefensible.

The creditors secured by General Mortgage bonds now have a claim on the debtor's income and assets prior to any claim of the unsecured creditors. This priority of rank is a substantial right, which the reorganization plan cannot properly take away from them. Even a modified plan which would give to the creditors secured by General Mortgage bonds securities of a value equal to the bonds which they hold, must also provide, in order to be fair and equitable, that any stock offered to the unsecured creditor, as a bonus or otherwise be stock of a class inferior, as to dividend and liquidation rights, to the stock or other securities given in exchange for General Mortgage bonds. However, as has been stated, the General Mortgage bondholders are so fully secured that they should be given the same treatment as the First Mortgage bondholders.

VI

The Report errs in not recognizing that the creditors secured by the General Mortgage bonds are entitled to the benefit of the interest accrued on said bonds; and discriminates unfairly against such creditors in that the Report does recognize accrued interest upon the First Mortgage bonds.

The Report gives no recognition to the fact that

the General Mortgage bonds bear interest to which the pledgees are entitled after default. (See our original [501] brief, pp. 71-72.) The Report does recognize accrued interest upon the First Mortgage bonds, and recommends the issuance of common stock to them for the entire amount of the unpaid interest (pp. 52-53). This constitutes an unfair discrimination against the holders of the General Mortgage bonds.

VII

The Plan recommended by the Report is unfair and inequitable to the holders of General Mortgage bonds and is contrary to the law of the land and the provisions of Section 77.

Some of the requirements of a reorganization plan are that it must (1) be "fair and equitable", (2) afford "due recognition to the rights of each class of creditors and stockholders", (3) "not discriminate unfairly in favor of any class of creditors or stockholders", and (4) "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" (Sec. 77(c)).

A plan is not fair and equitable if it does not afford due recognition to the rights of each class of creditors or if it discriminates unfairly in favor of any class of creditors or stockholders.

What has already been said above shows that the plan recommended in the proposed Report does not

afford due recognition to the rights of General Mortgage bondholders, and in fact takes no account of the substantial assets on which they have the prior lien.

What has been set forth in Point V shows also that the plan recommended in the proposed Report would discriminate unfairly in favor of one of the unsecured [502] creditors, and in effect place it on a parity with, or even on a higher plane than, the creditors secured by General Mortgage bonds.

A plan which has these effects does not "conform to the requirements of the law of the land."

The "law of the land" must have been meant by Congress to include the doctrine of the Boyd case (Northern Pacific Railway Company v. Boyd, 228 U. S. 482), that neither unsecured creditors nor stockholders can be given any participation in a reorganization until the prior rights of all senior creditors have been recognized. This principle is too well known to require elaboration. Recent cases which have applied the rule include Security-First National Bank v. Rindge Land & Navigation Co., 85 F. (2d) 557 (CCA 9), disapproving a plan of reorganization which proposed a payment to bondholders of 40¢ on the dollar in full satisfaction, where the Court stated:

> "The right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution" (p. 561);

and Horn v. Ross Island Sand & Gravel Co., 88 F. (2d) 64 (CCA 9).

The requirements of a fair reorganization plan were clearly set forth in the opinion of In re New York, New Haven & Hartford Railroad Company, 16 F. Supp. 504, 509, where the Court said:

> "To be sure, under the act the court may approve a plan 'modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured,' etc. 11 U. S. C. A. §205 (b).
>
> [503]
>
> But since only an equitable plan may be approved, the plan must provide that every creditor in the order of his priority shall receive under the plan rights which in equity are the fair equivalent of such of his rights as have been subjected to equitable modification, at least in so far as the assets of the debtor's estate permit. Any creditor found to be only partially secured is entitled to the equitable equivalent of such security as he has, with a right to share in equality with common creditors for the excess of his claim as allowed above the value of his security as ascertained by equitable considerations."

The plan recommended does not meet the principles set forth in the foregoing opinion nor the requirements of the Act.

VIII.

CONCLUSION.

The recommendations of the Report with respect to the lien of the First Mortgage on equipment covered by leases, conditional sale agreements or equipment agreements, on the Northern California extension and various branches and spurs, and on non-carrier real estate, should be rejected. The Commission should find that these items are free from the First Mortgage, subject only to the lien thereof on the Northern California extension to the amount, and the amount only, of First Mortgage bonds or cash used in the acquisition or construction thereof.

The Commission should then allocate to the creditors secured by General Mortgage bonds their proper prorata of the same securities as shall be given to the holders of First Mortgage bonds. We have refrained [504] from discussing the details of the proposed capitalization and the nature of the securities which should be issued to the holders of the First Mortgage bonds and the General Mortgage bonds, because we believe that if the Commission shall find, as it should find, that the General Mortgage bonds are fully secured, further opportunity should be afforded for discussing, in the light of such finding, the treatment to be accorded to the General Mortgage bondholders.

Provision should also be made to prevent any possible dilution of the securities allotted to General Mortgage bondholders by securities offered to junior interests. This Trustee does not intend, by

anything which has been stated herein, to take sides as between the three creditors secured by General Mortgage bonds or even to discuss the comparative treatment which these creditors should receive.

Oral argument is requested.

Dated, New York, September 24, 1937.

Respectfully submitted,

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ern Pacific Railroad Company,
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[Endorsed]: Filed Oct. 5, 1939. [505]

Before The
Interstate Commerce Commission
Finance Docket No. 10913

IN THE MATTER OF

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

EXCEPTIONS OF A. C. JAMES CO., A SECURED CREDITOR, TO PROPOSED REPORT OF BUREAU OF FINANCE, AND BRIEF IN SUPPORT OF SUCH EXCEPTIONS. [506]

TABLE OF CONTENTS

	Page of Original Printed Document	Page of Printed Record
Exceptions	1–3	523–525
Brief:		
General Statement	3–4	525–526
Point I—Drastic Devaluation under Bureau Proposal	4–10	526–533
Point II—Discriminatory Allotment of Securities as between A. C. James Co. and other Secured Creditors	10–28	533–554
Point III—Objections to Proposed Capital Fund	28–33	554–560
Point IV—Objections to Proposed Sinking Fund for Income Bonds	33–36	560–564
Point V—Proposed Complete Priority for Lien of First Mortgage	36–37	564–565
Point VI—Status of Claim of A. C. James Co. as to Claims of General Creditors	38	565–566
Point VII—Proposed Finding of Commission as to Value of Equity	39	566–567
Point VIII—Failure to Provide for Claim of Western Realty Company	39–40	567–568
Point IX—Erroneous Basis of Allocation of Conditional Rights Among Secured Creditors	40	568
Point X—General Objections to Proposed Plan	41	568
Suggested Modifications in Proposed Plan of Bureau of Finance	42–43	569–570
Capital Structure Resulting from Modification Suggested	44	572
Conclusion	44–45	572–573

TABLE OF CASES

	Page of Original Printed Document	Page of Printed Record
Baxter v. Washburn, 8 Lea (Tenn.) 1	18	542
Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648	9, 10, 16	532, 539
Dutch Woodcraft Shops, In Re, 14 Fed. Supp. 467	7	529
Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co., et al., 228 Fed. 516	18	543
First National Bank of Cincinnati v. Flershem, 290 U. S. 504	7	529
First Nat. Bank of Ottawa v. Kay Bee Co., et al., 366 Ill. 202, 7 N. E. (2d) 860	19, 20, 21	543-545
Hitner, et al. v. Diamond State Steel Co., 176 Fed. 384	19	543
Jessup, et al. v. City Bank of Racine, et al., 14 Wis. 331	18	542
Kelly et al. v. Wellsburg, Etc., Co., 74 W. Va. 130, 81 S. E. 712	18	542
Merrill v. National Bank of Jacksonville, 173 U. S. 131	24	550
Morgan v. Missouri Pacific Railroad Company, 85 Fed. (2d) 351	11, 12	533
Murphy v. Murphy, 74 Conn. 198	19	543
Nelson v. Hubbard, 96 Ala. 238	18	542

	Page of Original Printed Document	Page of Printed Record
Newport & Cincinnati Bridge Co. v. Douglass, Trustee, 12 Bush (Ky.) 673	18	542
Peacock v. Phillips, et al., 247 Ill. 467, 93 N. E. 415	18	542
Simmons v. Taylor, et al., 23 Fed. 849	17, 18	541

[508]

EXCEPTIONS

A. C. James Co., a secured creditor of the Western Pacific Railroad Company in the principal amount of $4,999,800, representing cash advances made to the carrier in 1931 and 1932 for the construction of the Northern California Extension, hereby excepts to the Report proposed herein by the Bureau of Finance, in the following respects:

1. The Report errs in its recommendation (Report, p. 46) that the capitalization of the reorganized company should be limited to $91,406,510, principal or par value, of securities to be issued.

2. The Report errs in failing to give adequate weight, in its recommendations for the capitalization of the reorganized company, to the valuation of the properties of the company by the Interstate Commerce Commission; [509] under Section 19(a) of the Interstate Commerce Act, of $144,619,851 (Report, p. 23).

3. The Report errs in recommending that the "allotment of the common stock to the secured creditors" (Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co.) "be made on the basis of the collateral held rather than on the amount of the claims" (Report, p. 54).

4. The Report errs in its recommendation that a capital fund be created out of available net income remaining after payment of fixed interest (Report, p. 41).

5. The Report errs in recommending that a sinking fund of one-half of one per cent be created and maintained for the retirement of proposed income bonds (Report, p. 42).

6. The Report errs in its recommendation that First Mortgage bondholders "should be considered as having a first lien upon practically all of the assets of the debtor" (Report, p. 52).

7. The Report errs in recommending that valuable rights be allotted to the Western Pacific Railroad Corporation (Report, p. 54) although it proposes to allot to A. C. James Co., on a claim amounting with interest to $5,749,770, only $2,643,320 par value of new common stock, or less than fifty per cent of the total amount of the claim.

8. The Report errs in recommending (Report, p. 55) that the Commission find that the equity of the preferred and common stockholder of the debtor is of no value.

9. The Report errs in failing to make provision for the claim of the Western Realty Company.

[510]

10. The Report errs in recommending (Report, p. 55) that any conditional rights under subscription warrants be allotted to the secured creditors in proportion to collateral held by them rather than in proportion to their actual advances.

11. The plan recommended is unfair and inequitable for its unjust discrimination against the A. C. James Co., is contrary to the law of the land and to the provisions of Section 77, and should be

modified in accordance with the recommendations hereinafter made.

BRIEF

General Statement

In certain respects the plan recommended by the Bureau of Finance for the reorganization of The Western Pacific Railroad Company is sound and forward looking. It fails, however, in vital respects, to take into account the actualities of the situation and disregards the intent of Section 77 of the Bankruptcy Act. The adoption of the proposed Report, without the modifications hereinafter indicated, will destroy existing possibility of a prompt reorganization of this carrier, consistent with the rights of interested parties and in accord with public interest.

The Western Pacific Railroad Company is, of all the more important carriers now in reorganization under Section 77, the one with the simplest capital structure, and the one most favorably situated to obtain the necessary consents of security holders. It is respectfully submitted that if sound principles are applied to the problem, The Western Pacific Railroad Company can be reorganized under Section 77, wisely and without further delay. [511]

In the following pages, we outline briefly the considerations which support the various exceptions stated above, and indicate those changes in the plan proposed by the Bureau of Finance which, if made, will render that plan an equitable and sound solution of the relations between the various classes

of security owners interested in the Western Pacific property.

Point I.

1. The Report errs in its recommendation (Report, p. 46) that the capitalization of the reorganized company should be limited to $91,406,510, principal or par value, of securities to be issued.

2. The Report errs in failing to give adequate weight, in its recommendations for the capitalization of the reorganized company, to the valuation of the properties of the company by the Interstate Commerce Commission, under Section 19(a) of the Interstate Commerce Act, of $144,619,851 (Report, p. 23).

The basic weakness of the plan suggested in the Report of the Bureau of Finance flows from the drastic and unnecessary limitation on capitalization which is suggested; namely, that the securities of the reorganized company shall not exceed an aggregate of $91,406,510, including $2,048,190 of assumed equipment trust obligations and $10,000,000 of First Mortgage 4% Bonds, used for new money rather than to provide for existing creditors.

This proposed devaluation is surprising when one notes the statement in the Report that the company being reorganized held assets of a book value of $171,- [512] 096,992.80, as of November 30, 1936 (Report, p. 6). These assets are now set off in the balance sheet of the company against capital liabilities, exclusive of accrued and unpaid interest, of $145,276,379.26 (Report, p. 8).

Even more surprising is the suggested limitation in the light of the valuation of these assets as made by the Interstate Commerce Commission under Section 19(a) of the Interstate Commerce Act, adjusted to December 31, 1935, amounting to $144,619,851 (Report, p. 23). Note also that this valuation figure is brought down only to December 31, 1935, and therefore does not include any increase in capital accounts due to the investment of new money under the current Improvement Program.

The suggested limitation on capitalization cannot be justified by any specific limitation within the four corners of Section 77. Subsection (b) (4) is the only definite limitation of capitalization in Section 77, and this limitation is solely as to securities which set up *fixed* charges. Under this provision of the Act, a plan to be approved by the Commission should contemplate that "there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof."

In the plan recommended by the Bureau of Finance the fixed charges are to be no more than the interest on equipment trusts amounting to $86,473 (Report, p. 39), and the interest at 4% on such part of $10,000,000 of First Mortgage Bonds, as may be issued for new money, which interest will not exceed $400,000 per annum. Since the demonstrated adjusted net earnings available for interest even for 1936 amounted to $1,766,632 (Report, p. 21), the provisions of Subsection (b) (4) of Section 77 are fully complied with. [513]

It is fair to ask this question:

> "Why does the Bureau of Finance recommend such a radical limitation upon capitalization against the protests of all interested parties?"

When one reviews the Report in an endeavor to find an answer to this question, one does not find it squarely answered. The nearest approach to an answer is found on page 44 of the Report. There, after discussing the three plans submitted in this proceeding (one by the debtor company, one by a committee representing a group of institutions holding First Mortgage Bonds, and one by the A. C. James Co.), the Report makes the following statement:

> "The debtor's assets consisting of real and personal property have been described, and its investment in such property has been stated. While these data alone would seem to support the total capitalization proposed in each of the three plans. Yet when considered in connection with its record of earnings, it appears that the total capitalization of the reorganized company should be less than that proposed in any of the plans *if any material return in the future on the reorganized company's capital stock is to be expected.*" (Italics ours.)

Certainly nothing in Section 77 of the Bankruptcy Act requires or authorizes a restriction upon capitalization to assure common stock dividends.

Apparently upon this tenuous basis the Bureau of Finance proposes to give to the A. C. James Co. only $2,643,320 par value of common stock in liquidation of its secured claim, which arises from the actual advance of $4,999,800 in cash during the years 1931 and 1932, to enable the debtor company to build its Northern [514] California Extension. This Northern California Extension is necessarily recognized to be, and has clearly demonstrated that it will continue to be, a highly important source of the earning power of the debtor company.

There is nothing clearer in our law than that in any reorganization proceeding creditors are entitled to insist that *fair values, and not forced sale values,* shall be used in determining the capitalization of the reorganized company and the securities to be given each class of creditors. A United States District Court in Michigan correctly stated the principle (In Re Dutch Woodcraft Shops, 14 Fed. Supp. 467, November 19, 1935) in the following language:

> "Confirmation of the plan to revest the stockholders with title to the property of debtor would be justified only upon clear proof of fairness to creditors Here the appraisal evidently was made on the basis of values which would be realized at a forced sale. Creditors may not be thus dealt with. In determination of the value of their claims, they are entitled to have recognized not only present [illegible]dation values but also the prospective [illegible]es of debtor's assets as a going concern.'
>
> See also First National Bank of Cincinnati v. Flershem, 290 U. S. 504.

If Section 77 is deemed impliedly to empower the Commission to so cut down capitalizations (in addition to the express power as to fixed charges), the Report of the Bureau of Finance does not point out the source of such power.

And conceding that a plan, to be in the public interest, "must provide a capital structure * * * which [515] will give it a reasonable opportunity to function efficiently and continuously as a going concern" (Report, p. 36), it is not clear how the drastic and unnecessary scaling down of real values suggested in the Report is justified.

Nor is it enough to say that "the capitalization should not exceed a conservative valuation of the assets to be taken over by the reorganized company", for the question is, what is a conservative valuation? All the evidence in the record supports the Commission's lump sum valuation under Section 19(a) far better than it does the Bureau's theoretical devaluation to approximately ninety-one million dollars (and note that ten million dollars of this represents new money).

The Commission has dual powers and responsibilities. Its long existing powers over rates, and its responsibility to the public that reasonable rate structures be maintained, are necessarily ever present in the thinking of the Commission as to railroad problems. Yet elementary principles of due process of law and eminent domain should render the Commission alert to avoid any unreasonable and

confiscatory exercise of its powers over capitalization in reorganizations under Section 77 of the Bankruptcy Act.

Can the Bureau equitably sustain its recommended plan by any reference to "probable earning power"? When creditors are ready and willing to protect the carrier from future difficulties by accepting long term *income obligations*, no possible consideration of public policy requires the Commission to squeeze out of the picture honest debts, heretofore created under the supervision of the Commission, on the ground that unless this is done the *stockholders* of the reorganized company *may not* receive "any material return". [516]

In this case the record shows clearly that the probable earnings of the reorganized company justify a far greater capitalization than the Bureau of Finance here proposes.

Certainly the Commission ought not, as the Bureau of Finance would have it do, indulge in vague speculations as to whether an issue of income bonds maturing fifty years from now may then be refunded (if not previously converted into stock), or form a judgment as to whether, over the years, the holders of the proposed stock in the reorganized carrier will receive a "material return."

Even though the Report of the Bureau of Finance established a sound *theoretical* basis for its proposed drastic devaluation—and this it clearly does not do—nevertheless, the Commission ought not to approve such proposed devaluation. The Com-

mission has always had the difficult task of subjecting theories to the test of practical application. The problem of the Commission in this proceeding is to give to Section 77 of the Bankruptcy Act a practical application. No *theory* which defeats the legislative intent expressed in Section 77 should be adopted by the Commission for application in this proceeding, even though it may seem to present advantages from other points of view.

The test to be applied by the Commission in this proceeding has been well expressed by the Supreme Court in Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648, 676, as follows:

> "* * * But a proceeding under §77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of [517] that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile."

If a plan embodying the drastic devaluation proposed by the Bureau of Finance were to be adopted by the Commission, (a) the purpose and intent of Congress that Section 77 of the Bankruptcy Act should provide machinery for the speedy reorganization of carriers which came into difficulties during the recent depression would be defeated; (b) the security owners interested in such carriers

would be thrown back to the prior practices of mortgage foreclosure and equity receivership, and (c) there would be substituted for the reorganization by negotiation contemplated by Section 77, reorganization by litigation, with all its attendant ills.

Point II.

3. The Report errs in recommending that the "allotment of the common stock to the secured creditors" (Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co.) "be made on the basis of the collateral held rather than on the amount of the claims" (Report, p. 54).

A second vital defect in the proposed plan of the Bureau of Finance is one which especially discriminates against the A. C. James Co. as a secured creditor. This defect in the proposed plan flows directly from the recommended drastic devaluation of the assets of the carrier, which prevents the Bureau assigning obligations to the secured creditors in exchange for their existing claims. The Bureau of Finance suggests a plan which would deal with three secured creditors, all of whose [518] claims clearly belong in the same class*, under the doctrine of Morgan v. Missouri Pacific Railroad Company (U. S. Circuit Court of Appeals, 8th Cir-

* The order of August 20, 1935, of the U. S. District Court in California, putting these claims, each in a separate class, was not upon notice to such creditors and was tentative and provisional, as to the propriety of such a classification.

cuit), 85 Fed. (2d) 351, by giving them common stock.

The Bureau has recommended that common stock can be provided for the Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., consistently with the public interest as prescribed in Section 77 of the Bankruptcy Act, in the total amount, par value, of $11,853,454.

The Bureau points out that this amount just equals "the total of the claims of the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company" (Report, p. 53).

It is further recommended that "the allotment of the common stock to these secured creditors be made on the basis of the collateral held rather than on the amount of the claims" (Report, p. 54).

The opinion of the Bureau setting forth the recommended allotment is as follows (Report, p. 54):

> "While, as stated, the par value of the stock available for distribution equals the principal and unpaid interest on the secured creditors' notes, the collateral pledged by the debtor as security for the notes is of varying amounts. For instance, the total of the Reconstruction Finance Corporation's claim is $3,507,310 although it holds as pledgee 56.6 percent of the debtor's general mortgage bonds. The total claim of the Railroad Credit Corporation amounts to $2,596,374 and 21.1 percent of the general mortgage bonds are pledged thereunder.

"The total of the A. C. James [519] Company's claim amounts to $5,749,770 and only 22.3 percent of the general mortgage bonds are pledged thereunder. Under these circumstances it is recommended that the allotment of the common stock to these secured creditors be made on the basis of the collateral held rather than on the amount of the claims. Such allotment would result in the Reconstruction Finance Corporation receiving $6,709,055 par value, the Railroad Credit Corporation $2,501,079 par value, and the A. C. James Company $2,643,320 par value of new common stock."

In short, the Bureau finds that common stock in the proposed reorganized company may be made available in an amount, par value, sufficient to pay in full the total loans of these creditors and interest thereon, but it is recommended that Reconstruction Finance Corporation, *with a claim of $3,507,310 shall receive $6,709,055* in stock in discharge of its debt; that The Railroad Credit Corporation, *with a claim of $2,596,374, shall receive $2,501,079* in discharge of its debt; and that A. C. James Co., *with a claim of $5,749,770, shall receive $2,643,320* in discharge of its debt.

A. C. James Co. excepts to this proposed allotment on the grounds that it ignores and repudiates the established equitable rights of the parties and that it is unfair and unduly discriminatory in favor of Reconstruction Finance Corporation and The Railroad Credit Corporation, at the expense of A.

C. James Co. contrary to the intent and purpose of Section 77 of the Bankruptcy Act.

A. C. James Co. maintains that the proposed common stock or any other securities in a reorganized company should be allotted to these three creditors pro rata according to the present value of their respective claims against the debtor. [520]

If an amount of common stock of par value equal to the "total of the claims" of these three creditors can lawfully be made available for them under Section 77:

(1) Why should the allotment of their respective shares of that stock be made "on the basis of the collateral held rather than on the amount of the claims"?

(2) If this amount of common stock can lawfully be made available to liquidate and discharge the "total of the claims" of these three creditors, as the proposed plan contemplates, why should it not be allotted *as a payment and discharge of each of their claims, rather than as a substitute for, or liquidation of, their respective holdings of collateral?*

Analysis of Reasons in Support of Recommended Allotment.

The Report does not undertake to answer the foregoing questions, nor to sustain the basis of the proposed allotment, other than as reference is made to the fact that "the collateral pledged by the debtor as security for the notes is of varying amounts" (Report, p. 54).

Apparently the Bureau has accepted the general thesis set forth by the Institutional Bondholders' Committee in its brief, dated January 9, 1937. The Committee's thesis is stated as follows:

> "RFC, RCC, and ACJ are the holders of promissory notes of the Debtor for which there is pledged as the principal security in each case General and Refunding Mortgage Bonds of the Debtor. This collateral is held as between the three parties in entirely different ratios (Ex. 9). [521] The legal question is, whether their rights in the property of the Debtor are to be measured by the amount of the notes which they hold, or by the amounts of General and Refunding Mortgage Bonds held as collateral. It is clear that the latter is the true test, subject only to the limitation that no one of the claimants may realize a present value in excess of the total amount due on its claim for principal and accrued interest." (p. 64).

No authorities involving proceedings under or outside the Bankruptcy Act are cited in support of this "true test."

It is further set forth in the foregoing brief that:

> "The pledge of the Debtor's mortgage obligations to secure a promissory note of course creates but one 'debt' viz. the note. But the effect of the pledge is to vest in the holder of the note an interest in the mortgage securing

the pledged obligations equal to that proportion of the whole value of the mortgaged property which the amount of pledged mortgaged [sic] obligations bears to the total amount of obligations outstanding under the mortgage. Obviously, if a debtor has outstanding two notes each for $10,000, one secured by $10,000 of the debtor's mortgage bonds and the other secured by $90,000 of the debtor's mortgage bonds, both out of a total issue of $100,000 of such bonds, the security of the second noteholder in the debtor's assets is nine times that of the first note holder. This is subject to the limitation that in realization upon his interest in the mortgage the second noteholder must not receive more than the amount due on the note itself.

"Thus in equity proceedings it has become settled law that noteholders in the position of RFC, RCC and ACJ in this case are entitled upon the sale of the Debtor's property to realize [522] directly upon the pledged securities without having first reduced them to possession and to receive distribution on the basis of face value of their collateral." (pp. 65-66)

Five cases (p. 66) are cited at the conclusion of this last paragraph. We fail to find how they support the "true test."

It will be observed that the foregoing statements nowhere particularize *how or when*, under existing law, the right of these pledgee-creditors *to realize*

upon their collateral mortgage bonds according to their respective holdings of those bonds, is reconciled with "the limitation that in the realization" no one *"may realize a present value in excess of the total amount due on its claim for principal and accrued interest."*

Such particularization, when made according to established rules of equity, will show that, on the facts of this case at least, these pledgee-creditors should share in the proposed common stock according to the present value of their respective claims, and not according to their respective bond holdings. (By the term "present value" of a claim is meant the amount of the principal loan, plus interest accrued thereon, pursuant to the terms of the loan agreement to the date of confirmation of the plan by the judge without compounding interest.)

The Equitable Rights of the Three Pledgee-Creditors

It seems unquestionable that, in proceedings under Section 77 of the Bankruptcy Act, established rules of equity fixing the relative rights of the parties in interest should be accorded full credit. This is true because courts of bankruptcy "are essentially courts of equity, and their proceedings inherently proceedings in equity," [523] Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648, 675 (1934) (proceedings under Section 77 of the Bankruptcy Act), and because the Act conditions the judge's jurisdiction to approve any plan of reorganization upon

his being satisfied that it is "*fair and equitable*" (Section 77 (e) (1)).

Stated as a *broad generalization*, it may be conceded as an elementary rule of equity that where two or more creditors are secured by pledge of unequal amounts of bonds which in turn are secured by the same mortgage, and the bonds are of equal priority under the mortgage, the pledgees may, as between themselves, share in the net proceeds of the foreclosure sale according to the face value of their bonds. *But this rule of equity is of consequence as a rule of distribution only if and when a deficiency in the mortgage security has been realized so that all of the pledgee-creditors holding the mortgage bonds will not be paid therefrom their principal and interest in full.*

We emphasize this particularization of the foregoing elementary equity rule of distribution because the record of these proceedings nowhere discloses, nor has it been contended, that the mortgage security is or has been inadequate to pay in full the present value of the claims of the three pledgee-creditors. This same particularization likewise reconciles the alleged "true test" set out in the brief of the Bondholders' Committee (quoted *supra*) with the limitation that no one of the claimants shall receive more than the principal of his claim with interest.

There appears to be no dissent in the authorities that the debtor's General and Refunding Mortgage could not be foreclosed for a greater sum than the ag- [524] gregate present value of the pledgees'

claims (aggregate principal with interest thereon pursuant to the respective loan agreements to date of the foreclosure decree). This was decided by Brewer, J., in the notable case of Simmons v. Taylor, et al. (Circuit Court, S. D. Iowa, C. D. 1885), 23 Fed. 849, 857, as follows:

> "One further question requires notice. Obviously most, if not all, of the bonds secured by this second mortgage were issued as collateral security for certain debts of the mortgagor. *Should such bonds today be treated as valid obligations for their face and interest, or as binding only to the extent of the debts secured thereby? I think the latter.* Take the bonds held by the Lackawanna Iron Company, for instance. They were given as a collateral security only, and the present holder took them under such circumstances as to charge him with notice. *Instead of being a debt for their face, all that the present property should be held liable for is the amount of the debt due to the iron company secured by these bonds.* So in respect to others.
>
> "The order therefore should be that the matters be referred to the master of this court, to state—*First*, which of those bonds secured by this second mortgage were issued simply as collateral security for debts of the mortgagor; *second, the present value of the debts secured thereby*, and *third*, if any of those bonds have been transferred from the holders of such debts,

under what circumstances, and for what consideration they passed to the present holders. *Upon the coming in of such report of the master, and finding of the amount which is properly secured by this second mortgage, a decree will be entered directing the sale of the mortgaged property within 60 days to pay such amount.*" (Italics ours.) [525]

As we have stated, this ruling appears to have the unanimous approval of the authorities.

Accord:

Newport & Cincinnati Bridge Co. v. Douglass, trustee, 12 Bush (Ky.) 673, 720 (1877) (Foreclosure proceedings with receivership in aid. "Some of the bonds issued under the later mortgages are in pledge to certain of the company's creditors. These bonds should be paid to the extent necessary to satisfy the debts for which they are held as collateral security, and no more.").

Jessup, et al. v. City Bank of Racine, et al., 14 Wis. 331, 340 (1861) (Foreclosure proceedings).

Baxter v. Washburn, 8 Lea (Tenn.) 1, 17 (1881) (Foreclosure proceedings).

Nelson v. Hubbard, 96 Ala. 238, 254 (1891-1892) (Foreclosure and statutory proceedings for dissolution and liquidation of mortgagor corporation).

Peacock v. Phillips, et al., 247 Ill. 467, 93 N. E. 415 (1910) (Foreclosure proceedings).

Kelly et al. v. Wellsburg, Etc., Co., 74 W. Va. 130, 140, 81 S. E. 712 (1914) (Foreclosure proceedings).

See, also, Equitable Trust Co. of New York v. Great Shoshone & Twin Falls Water Power Co., et al. (D. Ct. D. Idaho, S. D. 1915), 228 Fed. 516.

It necessarily follows from the foregoing authorities that parties entitled to redeem the mortgaged property may do so by paying no more than the present value of the debt owed to pledgees like Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co. Simmons v. Taylor, et al., supra.

It may also be pointed out in passing, that there is substantial authority holding that while a pledgee of mortgage bonds may sue at law upon the collateral [526] bonds (rather than upon his principal note) as the personal obligation of the debtor-mortgagor, judgment will be allowed only in sufficient amount to pay the debt and interest due thereon. Murphy v. Murphy, 74 Conn. 198 (1901). And, of course, in insolvency proceedings, the pledgee may prove and have allowed against the debtor's *general estate* his principal-debt only and not his collateral bonds. Hitner, et al. v. Diamond State Steel Co. (Circuit Court, D. Delaware, 1910), 176 Fed. 384.

The rule of distribution *in case of a deficiency* was neatly and precisely applied in the recent case of First Nat. Bank of Ottawa v. Kay Bee Co., et al., 366 Ill. 202, 7 N. E. (2d) 869 (1937).

The case came before the Supreme Court of Illinois upon appeal from a judgment affirming a decree of foreclosure. The mortgagor corporation had executed a deed of trust mortgage to the plaintiff

to secure $50,000, which was represented by two bonds, each in the principal sum of $25,000 of equal priority, and bearing interest at the rate of 6%. One bond was pledged with the Ottawa bank as collateral security for loans which totaled at foreclosure $24,000 (not including unpaid interest). The other bond was pledged with the Morrison Bank as collateral security for loans which totaled at foreclosure $16,500 (not including interest). To quote the Court (pp. 860, 861):

> "* * * On March 20, 1936, a decree of foreclosure was entered by the circuit court of Whiteside County. The decree found there was due the Ottawa bank, $24,956.20, for which it held as collateral security bond No. 1, and due the Morrison Bank, $17,117.25 for which it held as collateral security bond No. 2. The mortgaged premises were directed to be sold to satisfy the indebtedness. The decree further provided that *if the sum* [527] *should be insufficient to pay the several amounts due* the respective banks, then the master should distribute the fund in the proportion that the sum due each bank bore to the total amount due both banks." (Italics ours.)

The Morrison Bank appealed from the provision of the decree relating to distribution in event of a deficiency; taking the position that, in event of deficiency, the proceeds of the foreclosure sale "should be prorated between the banks on the basis of the proportion which the bond held by each bore to the total amount of the bonds issued."

The Supreme Court reversed the lower court, and held (p. 861):

> "* * * The rule applicable is, that the two banks, as the holders of the several bonds pledged to them respectively as surety for the primary indebtedness of each, should share in the funds derived from the sale of the mortgaged property, until the primary indebtedness is satisfied, on the basis of the bond held, and not on the factor of the aggregate debt owing the banks."

The court set forth the rationale of its ruling as follows (p. 861):

> "The purpose of a pledge is to give the creditor additional security out of which payment of the primary debt may be made. In the case at bar the bonds, secured by the trust deed stood on the same plane. When they were pledged, each bank, *for the purpose of further protection to its primary debt*, owned one-half of the security furnished by the trust deed. By the sale of the property under the foreclosure of the trust deed, the funds derived are substituted for the real estate. By the conversion of the property into money through sale under the foreclosure, the security [528] afforded by the bonds pledged to the respective banks, did not shift so that the funds should be distributed on the basis of the debt due each bank bore to the total of the primary debts due

the two banks. So to hold would, in practical effect, give the bond held by the creditor to whom there was due the larger debt, a preference over the creditor to whom the lesser amount was due. The application of a different rule would result in a variable and shifting factor in the value and extent of the security granted the creditor to whom had been pledged a portion of a series of corporate bonds, the value varying in accordance with the amount of primary indebtedness held by other creditors holding like hypothecated bonds as collateral security therefor." (Italics ours.)

We do not challenge the foregoing decision nor the authorities which are in accord. We emphasize only that the decision expressly concerned a decree involving the distribution of the proceeds of a foreclosure sale, *if, and when, a deficiency were realized.*

Relying upon the foregoing authorities, we reiterate that it *is the established equity law of the land that the allotment of common stock to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co. should be according to the present value of their respective claims, unless and until it is shown that there is a deficiency in the value of the mortgage security. Only in case of such deficiency might they realize upon the security according to the face value of their collateral bond holdings. Absent such deficiency the pledgees' relative interests in the mortgage security exist ac-*

cording to the present value of their respective claims.

The record in this case makes no pretense at showing, nor has it been contended, that the security back of the [529] debtor's General and Refunding Mortgage Bonds has been, or is, insufficient to pay in full the present value of the debts owed to Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Co.

It is conceded that the General and Refunding Mortgage is secured by all of the assets of the debtor's system except cash and current assets derived from free funds; that it covers assets of substantial value which are not subject to the First Mortgage; and that the extent and scope of the First Mortgage as a lien prior to the General and Refunding Mortgage are challenged by the Trustee of the latter mortgage.

In order not to engage at this point in the challenge of the scope and extent of the lien of the First Mortgage as made by the Trustee of the General and Refunding Mortgage, we will assume its priority and restate our point, set forth in the last preceding paragraph, *supra*, as follows: Nothing in the record of these proceedings shows, nor has it been contended, that the property of the debtor subject to its two mortgages is, or would be, insufficient upon foreclosure or other judicial sale, to liquidate and pay in full the present value of the genuine debt secured by the respective mortgages;

The First Mortgage indebtedness, with interest thereon to January 1, 1937, has been reported as	$57,504,866
The debt secured by the General and Refunding Mortgage (notes held by Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., with interest thereon to January 1, 1937), has been reported as	11,853,454
Total	$69,358,320.

[530]

The Bureau has set forth in the Report (pp. 22-23) that the debtor's system was valued as of December 31, 1935, for rate making purposes, in the total amount of $144,619,851.00.

Book value of road and equipment investments alone was reported in the Trustee's balance sheet of November 30, 1936, at $139,371,768.08 (Report, p. 6).

The Bureau has further found that even on its drastic basis of proposed reorganization, the assets and probable earnings warrant a capitalization of $91,406,510 (including the $10,000,000 "new money" for expenditures under the Rehabilitation Program). (Report, p. 46.)

Note further that the issue of all the outstanding First Mortgage Bonds of the carrier, and all of the General and Refunding Mortgage Bonds held by the secured creditors, was approved by the Commission, and that the last such order of approval, which brought the authorized General and Refunding Mortgage Bonds to a total of $18,000,000 was

made February 25, 1933. In other words, that order, which confirmed the existing debt structure of the carrier, was made approximately at the end of the recent depression, and since that time we have had five years of recovery.

In view of these considerations, and in view of the absence of any judicial sale in these proceedings, we submit that it is beyond challenge that the security behind the carrier's General and Refunding Mortgage is and has been sufficient to liquidate and pay in full the total claims due Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co. And, to repeat, this conclusion is derived without relying upon the challenge by the Trustee of the General and Refunding Mortgage of the scope and extent of the First Mortgage as a prior lien. [531]

Further Equitable Rights Which Are Unlawfully Denied by the Recommended Plan

The recommended allotment also ignores and repudiates the rights of subrogation and exoneration of A. C. James Co. to have The Railroad Credit Corporation reimburse itself under its junior lien on the excess collateral held by Reconstruction Finance Corporation, and restore the $2,000,000 of bonds which A. C. James Co. loaned to The Railroad Credit Corporation, thereby obviating the deficiency of collateral bonds held by A. C. James Co. It is also apparent that the right of A. C. James Co. to the restitution of its $2,000,000 bonds loaned to The Railroad Credit Corporation is further sup-

ported by the equitable rule of marshalling which requires that a creditor holding two securities shall, when it can be done without prejudice to him, exhaust one of his security funds in aid of another creditor who has a claim on only one of the security funds. Merrill v. National Bank of Jacksonville, 173 U. S. 131, 140 (1899). This is especially important in this case because of the excess collateral held by the Reconstruction Finance Corporation for its secured loan.

The Proposed Common Stock Is Not a Mere Substitute or Exchange for the Existing Collateral Security

As we have pointed out before, the Bureau utters no explanation in support of its recommended allotment of the common stock in the reorganized company.

We have also pointed out how the proposed allotment ignores and repudiates the existing equitable rights of the parties as established by courts of equity, including the rights of subrogation, exoneration and marshalling of A. C. James Co. [532]

Speculation upon a possible support for the allotment has prompted the thought that possibly it was predicated upon the hypothesis that the new stock will be distributed as *a substitute and exchange for the collateral security which the pledgee-creditors now hold* and that, therefore, they should be awarded proportional ownership in the substitute according to their holdings in the original collateral rather than according to their claims as creditors.

This would be extraordinary principle indeed.

Any such rule would necessarily rest upon an assumption that these creditors were entitled to trace their collateral bond holdings into the new stock without any regard for the principles of equity or law under which the collateral bonds were held for purposes of security only; that they were subject to redemption; that they were subject to rules at law and in equity precluding the creditors from collecting more than the amounts due them respectively; and subject to the equitable rights of The Railroad Credit Corporation as a junior lienor of the collateral bonds held by Reconstruction Finance Corporation, and subject to the equities of subrogation, exoneration and marshalling inhering in A. C. James Co. with respect to the security.

Nothing in Section 77, nor elsewhere in the Bankruptcy Act, authorizes a plan of reorganization *to reclassify and transform creditors* holding collateral security into *co-owners* of a substitute for their collateral security and then require them to share their ownership in the substitute according to the ratio of their prior collateral security holdings.

Traditional it is that Section 77 was amended into the Bankruptcy Act as a debtor relief measure to provide ways and means of scaling down and extending [533] the time of payment of debts of railroad corporations. The Bureau recommends in its Report that, under Section 77, the capitalization of the reorganized company should be scaled down and altered so that the fixed charges of the company

shall be adequately covered by the probable earnings available therefor, and the plan as a whole shall be compatible with the public interest (Report, p. 36).

To comply with the intent and purpose of Section 77 it is unquestionable that the new common stock must have been proposed for the three pledgee-creditors as a *payment and discharge of their present claims as creditors.* This is further manifest from the provisions of Section 77 concerning the function and effect of a plan of reorganization. If the plan is confirmed by the judge, Subsection (f) of Section 77 provides that "the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, * * * *and all creditors* secured or unsecured * * *. Upon confirmation of the plan * * * property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, *shall be free and clear of all claims* of the debtor, its stockholders and *creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan* * * *." Everyone realizes that the proposed common stock is not made available as a continuing or substitute *security* for any debt which will continue to be owed to these creditors; its one and sole function under [534] the

plan would be to pay and discharge their several claims. It should be allotted accordingly.

There is no authority in Section 77, nor elsewhere, whereby the proposed common stock provided for the three pledgee-creditors shall be allowed to serve a *series of functions*, namely, first, as a substitution and exchange for the creditors' present collateral holdings and, second, as a payment and discharge of their claims. *But if there were authority under Section 77 to treat the proposed stock as a substitute and exchange for the original security, rules of fairness and equity are yet to be conceived which would sustain the recommended allotment. As has been pointed out, there is no deficiency in the original security held by these pledgee-creditors.* No principle of law or equity justifies *assuming* one for purposes of alloting the "substitute collateral." Such assumption would be no more warranted in law or equity than is the allotment. Finally, there is, of course, no principle of fairness or equity to support any suggestion that the proposal to give this common stock to these creditors of itself establishes any deficiency in the original security held by them.

These same considerations would apply with the same force against the proposed allotment, if the common stock were conceived as being offered in "payment" or "liquidation" of the creditors' *original collateral holdings* rather than as a substitution or exchange therefor. Under the principles of law and equity set forth above, the relative rights of these creditors are derived through their claims

against the debtor and according to their present value. Absent a deficiency in their original security, there is no equity or law to justify the creation of new and discriminatory rights in what may be offered as a "payment" or "liquidation" of that security. [535].

Any plan which does not recognize the advances made by the three junior creditors as equal in equity, all having been made during the depression years to preserve the existence of the carrier would be inequitable and discriminatory as to the A. C. James Co. If there is a distinction as between these junior creditors, arising from the application of the funds advanced, it is in favor of the A. C. James Co., since its advances were used for the construction of the Northern California extension, now an important element in the earning power of the carrier property, while the advances of the Reconstruction Finance Corporation and The Railroad Credit Corporation largely went into the pockets of the First Mortgage bondholders, either by paying them unearned interest, or by paying current tax charges prior in lien to the First Mortgage Bonds.

Point III

4. The Report errs in its recommendation that a capital fund be created out of available net income remaining after payment of fixed interest (Report, p. 41).

In addition to the difficulties of fair apportionment of interest between the different classes of creditors which flow from the drastic limitation on

capitalization recommended by the Bureau of Finance, the Report adds additional difficulties by recommending a deduction up to $500,000 a year from the effective income of the carrier to provide for future capital additions.

The language of the Report (pp. 40-41) in which this recommendation is made is as follows: [536]

> "Since new first mortgage bonds would not be issued in principal amount to exceed 75 percent of future capital expenditures, the balance of such expenditures must be financed through the issue of junior securities or from earnings. Under both the debtor's plan and the bondholders' plan funds for such expenditures would be secured from the hereinbefore described capital fund contemplated by their plans. *While the A. C. James Company opposes the creation of such a fund, as well as a sinking fund for the redemption of bonds, it does not contend such funds are not in accordance with the principles of sound financing, but that the Revenue Act of 1936 places too great a penalty on the retention of earnings for such purposes.* It is essential, however, that the reorganized company should not be embarrassed in securing funds for future capital expenditures. * * * It is recommended, therefore, that the plan approved by the Commission provide for the creation of a capital fund out of available net income remaining after payment of fixed interest. To avoid too heavy a sacrifice by present security

holders, payments into the fund should not exceed $500,000 in any one year, nor, in any event, the sum needed to raise the totals of the fund to $1,000,000 at any time, and payment into the fund should be dependent upon earnings and noncumulative." (Italics ours.)

In the above statement, the fact that the debtor's plan and the bondholders' plan each provided for a capital fund should be read with the qualification that each of these plans, as the record in this proceeding clearly indicates, was prepared in the interest of the institutional holders of First Mortgage Bonds and by the same draftsman. The rights of other creditors of the carrier were not given fair consideration in providing such a [537] drain upon the earnings of the company with a priority over the interests of all other creditors.

As to the intimation that the A. C. James Co. conceded that a capital fund from current earnings was in accordance with the principles of sound financing and only barred by the present Federal Revenue Act limitations, it is obvious that the position of this creditor was not clearly understood by the Bureau of Finance.

A. C. James Co. opposed and opposes, for basic reasons, the creation of such a capital fund from current earnings. It maintains that a deduction of $500,000 a year from the current earnings of the reorganized carrier immediately after fixed charges is unnecessary, violates modern principles of sound

corporate financing, imposes upon the carrier an unreasonable tax burden under the Federal Revenue Act, and is prejudicial to the equitable rights of all existing creditors of the carrier.

Is the current deduction of $500,000 a year for capital expenditures necessary, as is intimated by the language of the Report set out above? In so far as capital expenditures represent replacements, the moneys are provided from income by reason of the operation of the depreciation deductions prescribed by the Interstate Commerce Commission. To say that any further moneys are required *to replace* capital assets which must be retired for obsolescence or otherwise is to suggest that depreciation provisions of the Uniform System of Accounting prescribed by the Interstate Commerce Commission are inadequate and unsound.

Consider next new additions of fixed capital.

We submit that it is a far more wholesome situation for a carrier to be compelled to come before the Commission and ask for authority for the issue of the nec- [538] essary capital securities, whether bonds or stock, than for the carrier to be left free to plow back into the property moneys obtained from the shippers. Investment in such additions is not warranted until after earnings have covered operating expenses and a fair return on the existing capital.

If a sound capital structure is constituted, there is no reason why the necessary funds for any proper extension, approved by the Interstate Commerce

Commission, cannot be obtained through properly balanced senior and junior financing. It is a reasonable limitation that 25% of such capital funds should be derived from sources other than First Mortgage Bonds. *It is, however, an unreasonable requirement that 25% of such future capital expenditures should be derived from funds withheld from those creditors of the carrier who advanced money for its prior capital expenditures.* So long as capital additions to the property of the carrier are obtained through the issue of new capital securities, the Interstate Commerce Commission retains full control of such additions. If, on the other hand, the Commission should attempt to force a compulsory investment of money, which ought to go to the existing creditors of the carrier on account of their prior investment, that would seem to be clearly confiscatory action by the Commission, and as such, unreasonable.

Nor is it true that such deductions from current income for capital expenditures (or for sinking funds on bond issues, hereinafter discussed) are recognized as being in accordance with the principles of sound corporate financing. Even before the Federal Revenue Acts included a legislative declaration condemning the policy of retaining undistributed current earnings, through reinvestment or otherwise, it had become apparent that [539] provisions in corporate mortgages for deductions from current income for capital purposes or for the retirement of bonds did far more harm than good.

We cannot but recognize that the Interstate Commerce Commission has forcibly urged upon Congress that the existing provisions of the Revenue Act which penalize the retention of current earnings by corporations, including railroad, should not have application to the railroads of the country. The Commission, however, must recognize as a practical matter that its representations to Congress have had no effect, and that the Federal Revenue Act does still penalize such retention of capital funds. A compulsory redemption ought, therefore, to be imposed upon a carrier, only upon a clear showing of necessity.

Take the situation we are here considering: Suppose the reorganized carrier were to earn only the interest on its equipment trusts, $86,473 (Report, p. 39), and the interest on ten million dollars of First Mortgage Bonds of $400,000, plus $500,000 which it was compelled to plow back into the property under the suggested capital fund provisions of the Bureau of Finance. Actually, it would not be able to plow back $500,000, because in retaining such moneys, it would impose upon itself a liability to pay $161,202.80 in Federal income taxes on such retained income.

If the somewhat unduly pessimistic view of the Bureau of Finance as to future earnings of this carrier should prove to have any basis, the unreasonableness of a provision for $500,000 per year

deduction from income for new capital expenditures becomes obvious. *Why should the management of the carrier be allowed or required to spend $500,000 a year from current income* [540] *for future capital additions, while the creditors of the carrier, who have furnished the money to build the present property, stand aside and wait upon such additional investment for any return upon their moneys?* Why should the principal claims of existing creditors be scaled down in deference to such inequitable charge upon future earnings? Obviously, the proposed charge could be justified only if it were shown to be essential to the preservation of the property as a going concern. If the depreciation reserve policies promulgated by the Interstate Commerce Commission are sound, as the Bureau should assume they are, there can be no necessity for $500,000 per annum of additional capital expenditures to preserve the property.

Any plan which contemplates a deduction from the earnings of the reorganized carrier, after fixed charges, for the purpose of capital investment, is unsound and inequitable.

Point IV

5. The Report errs in recommending that a sinking fund of one-half of one per cent be created and maintained for the retirement of proposed income bonds (Report, p. 42).

In the Report of the Bureau of Finance, after a discussion of the proposed $500,000 per year capital fund, it is stated (Report, pp. 41-42):

"* * * It also is believed to be desirable that provision be made at least for the retirement of the income bonds. * * *

"* * * It is recommended, therefore, that provision should be made in the plan approved by [541] the Commission for the creation and maintenance of a sinking fund of one-half of 1 percent to be used for the retirement of income bonds hereafter recommended out of available net income remaining after the payment of fixed charges, payment into the capital fund, and interest on income bonds."

In discussing this recommendation of the Bureau of Finance, we will point out at the outset that we are not here concerned with a proposed sinking fund for an issue of bonds which will be sold to the public and which, in the judgment of the Bureau of Finance, should contain provisions assuring retirement within the period of the issue. The proposed sinking fund applies only to income bonds proposed to be issued to existing creditors of the carrier. The money of these creditors is now frozen into the carrier property. None of these creditors is asking that it be permitted to withdraw it. What everyone is trying to do in this proceeding is to assure the creditors of the carrier that their relative claims will be recognized on a fair basis, consistent with the continuance of the carrier as a going concern, and that future income will be fairly apportioned among them. The Commission, therefore, may well omit a sinking fund from these income bonds

without abandoning the position which it has taken in the past as to the desirability of sinking funds in connection with the issue of new capital obligations.

We reiterate, moreover, that, owing to unfortunate experiences with the operation of sinking funds on corporate obligations during the depression years, and a realization of the heavy burden imposed upon such moneys retained from income to retire capital obligations through the operation of the Federal Revenue Acts, the [542] use of sinking funds is being largely abandoned in connection with the issue of corporate obligations, except where such obligations are supported by wasting assets, as in the case of mining companies, oil companies, and similar operations.

Take one instance from the electrical industry, which is in some respects closely comparable to the railroad industry: In the years 1935, 1936 and 1937, one group of gas and electric companies in Greater New York issued capital obligations in the aggregate principal amount of $235,000,000. These issues were approved by the Public Service Commission of the State of New York, registered with the Securities and Exchange Commission, and sold to the general public by banking houses. The issuing companies, the amount of each issue, and the maturity of each issue were as follows:

Name of issuer	Amount of issue	Date of maturity
Consolidated Edison Company of New York, Inc.	35,000,000	Apr. 1, 1946
Consolidated Edison Company of New York, Inc.	35,000,000	Apr. 1, 1956
The New York Edison Company, Inc.	55,000,000	Oct. 1, 1965
The New York Edison Company, Inc.	30,000,000	Apr. 1, 1966
Brooklyn Edison Company, Inc.	55,000,000	May 15, 1966
New York and Queens Electric Light and Power Company	25,000,000	Nov. 1, 1965

In no one of the indentures supporting the above issues was there any provision for a sinking fund for the retirement of these obligations before maturity.

If the income bonds which the Bureau of Finance proposes shall be issued for a part of the existing debt [543] owed First Mortgage bondholders of this carrier were to be ten year bonds or twenty year bonds, some provision for retirement might fairly be considered. Here, however, the proposed income bonds are fifty year bonds. Not for a half century will the carrier face the problem of refunding the obligation. If it be thought that we ought now to plan for that refunding, quite obviously it can better be done by including a conversion privilege which at some time in the fifty years is likely to make it advantageous to exchange such income bonds for preferred or common stock without fixed maturity, rather than by a compulsory deduction from current income which penalizes the company

in additional Federal income taxes, and unnecessarily and inequitably penalizes existing creditors of the carrier with like effect as the proposed capital fund considered in Point III above.

It would appear that in the existing situation, the creation of a sinking fund from current income to retire the income bonds is unnecessary and prejudicial, and should not be incorporated in a plan approved by the Commission.

Point V

6. The Report errs in its recommendation that First Mortgage bondholders "should be considered as having a first lien upon practically all of the assets of the debtor" (Report, p. 52).

This recommendation in the Report is clearly contrary to the facts which appear on the face of the Report itself. Leaving out of account the persuasive showing made by the Trustee of the General and Refunding [544] Mortgage Bonds as to substantial items of physical property upon which that mortgage is asserted to be a lien, at least *pari passu* with the First Mortgage, it is undisputed that the General and Refunding Mortgage is a prior lien on property of substantial value. Moreover, the First Mortgage cannot, on any possible theory, be regarded as any lien on current assets, stated on page 7 of the Report, to amount to $7,653,809.28, including $3,290,601.55 in cash.

During the hearings before the Bureau of Finance, the position of the A. C. James Co., as a

secured creditor of the carrier, was stated to be one of unwillingness to concede that the First Mortgage bondholders had, as their counsel asserted broadly but failed to prove, a first lien upon practically all of the assets of the debtor, but as willing to concede, as a part of a fair plan of reorganization (and in the plan submitted on behalf of the A. C. James Co., it was so provided) that there should be a definite subordination of other creditors to the First Mortgage bondholders, even as to assets upon which the other creditors may now have (through holding General and Refunding Mortgage Bonds as collateral) a first lien, as an offset to certain necessary concessions on the part of the First Mortgage bondholders. This continues to be the position of this creditor. [545]

Point VI

7. The Report errs in recommending that valuable rights be alloted to the Western Pacific Railroad Corporation (Report, p. 54) although it proposes to allot to A. C. James Co., on a claim amounting with interest to $5,749,770, only $2,643,320 par value of new common stock, or less than fifty per cent of the total amount of the claim.

It is perhaps sufficient to state in connection with this exception that if the A. C. James Co. were to be given for a claim of $5,749,770, only $2,643,320 par value of new common stock, it would clearly be

a general creditor for upwards of $3,000,000, and entitled, as such, to share in any distribution to general creditors of the carrier in any sort of proceeding.

Nor can there be any doubt in the minds of anyone familiar with this situation and with the existing situation as to general interest rates, that the right which it is proposed to give to the Western Pacific Railroad Corporation as a general creditor, to buy 4% First Mortgage Bonds at their face value, with the issue presently limited to $10,000,000, and secured by a first lien upon a property fairly valued at approximately fifteen times that amount, with a bonus of $1,000 of common stock for each $1,000 bond, is a valuable right. On no possible theory can such a right be allocated to the Western Pacific Railroad Corporation while the claim of the A. C. James Co. remains unsatisfied to the extent of more than one-half its amount. [546]

Point VII.

8. The Report errs in recommending. (Report, p. 55) that the Commission find that the equity of the preferred and common stockholder of the debtor is of no value.

The factors involved in this exception have been sufficiently discussed in Point I above. It seems unnecessary to do more than to repeat here that an attempt on the part of the Bureau of Finance to solve the problem of reorganization proceeding un-

der Section 77 by asking the Commission to squeeze out in such a proceeding about one-half of the value which it heretofore found the carrier to have for rate-making purposes, in order to eliminate the preferred and common stockholders, is unsound and confiscatory beyond justification in law or equity.

Point VIII.

9. The Report errs in failing to make provision for the claim of the Western Realty Company.

Some reference has been made above to various instances of the sweeping way in which the Bureau of Finance proposes to brush aside vested equitable and legal rights without any showing of public right or interest. Its treatment of the claim of the Western Realty Company is a further example. The Western Realty Company is a creditor of the carrier in the principal amount of $50,000, which debt ranks on a parity with the debt owed to the Western Pacific Railroad Cor- [547] poration. The Bureau of Finance proposes to give the Western Pacific Railroad Corporation valuable rights in exchange for its claim, but gives nothing to the Western Realty Company, unless paragraph 10 on page 60 of the Report applies, and the debt to the Western Realty Company is to be paid by the reorganized company, as an obligation of the debtor not specifically provided for. As a matter of fact, whether or not the record discloses it, the stock of Western Realty Company has been pledged to one of the

creditors of Western Pacific Railroad Corporation, and its rights cannot be so completely ignored.

Point IX.

10. The Report errs in recommending (Report, p. 55) that any conditional rights under subscription warrants be allotted to the secured creditors in proportion to collateral held by them rather than in proportion to their actual advances.

There has heretofore been a sufficient discussion of the principle here involved, under Point II. above. Obviously, any conditional rights under subscription warrants which were allotted to the secured creditors could not properly be allotted in proportion to the collateral held by them, but must be allotted instead according to the present value of their claims upon confirmation of the plan by the judge. [548]

Point X.

11. The plan recommended is unfair and inequitable for its unjust discrimination against the A. C. James Co., is contrary to the law of the land and to the provisions of Section 77, and should be modified in accordance with the recommendations hereinafter made.

It is possible that other creditors of this carrier will protest broadly against the suggestion of the Bureau of Finance that the Interstate Commerce

Commission should itself propose a plan which differs so radically from the plans submitted by interested parties. In any such broad protest A. C. James Co. will not join. This creditor conceives it to be the right and duty of the Commission under Section 77 so to proceed; *provided the plan so proposed is fair and equitable,* and is motivated by a desire to find a sound ground upon which the minds of the interested parties may meet, rather than by a desire to effect unnecessary and drastic changes in the capital structure of the carrier, for reasons not related to the solution of its present difficulties.

This creditor believes, moreover, that if the plan proposed by the Bureau of Finance were to be modified in the respects indicated below and approved by the Commission, it would be likely to receive the necessary approval of at least two-thirds of each class of creditors.

The changes indicated, however, are, in the opinion of this creditor, the minimum changes necessary to secure a practical, fair and equitable plan and to make possible a speedy reorganization of this carrier under the provisions of Section 77. [549]

Proposed Amendments to Bureau of Finance Plan.

For the reasons set out above, it is respectfully urged that the Interstate Commerce Commission modify the plan proposed by the Bureau of Finance, in the respects specified below:

1. By increasing the issue of Fifty Year Income Mortgage 4% Bonds from the proposed principal

amount of $19,716,040 to $49,290,100; that is, to an amount sufficient to refund the entire principal amount of the outstanding First Mortgage Bonds of the carrier.

2. By authorizing an issue of $10,445,018 of Sixty Year 4% Convertible Income Debentures to refund the principal amounts owed Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., convertible into preferred stock on the basis of fifteen shares of such preferred stock for each $1,000 Convertible Income Debentures.

3. By reducing the amount of the proposed Non-Cumulative 5% Preferred Stock from $29,574,060 par value, to $25,290,729, of which $9,623,202 would be immediately issued to fund the interest claims of the existing First Mortgage bondholders and of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., and $15,667,527 reserved in the treasury of the reorganized company to meet the expected conversion of the Convertible Debentures given to the secured creditors for the principal of their debt. (Here, as elsewhere in this brief, the amounts of interest stated in the Report as of December 31, 1936, are used.)

[550]

4. By eliminating from the proposed plan of the Bureau of Finance any provision for deductions from current income for capital expenditures or for a sinking fund on the income bonds.

If the above-suggested modifications in the plan proposed by the Bureau of Finance were to be adopted by the Commission, the reorganized company would issue (a) $10,000,000 (or such part thereof as might be necessary to secure the new money required for the Rehabilitation Program) of its new Thirty Year Mortgage 4% Bonds; (b) $49,290,100 principal amount of Fifty Year Income Mortgage 4% Bonds to the First Mortgage bondholders for the principal of their debt; (c) $10,445,018 in Sixty Year 4% Convertible Income Debentures to Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., to represent the principal of their claims, allocated so as to refund their respective principal claims in full; (d) $9,623,202 par value of Non-Cumulative 5% preferred Stock (or so much thereof as may be necessary) for the unpaid interest which has accumulated on the First Mortgage Bonds and on the claims of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co.; (e) $5,807,650 of Common Stock to the Western Pacific Railroad Corporation and to the Western Realty Company, in satisfaction of their claims (principal only), for unsecured advances; (f) $10,000,000 of the Common Stock as a pro rata bonus with such new First Mortgage Bonds as are issued; (g) the balance of the Common Stock to be allocated to the Western Pacific Railroad Corporation in recognition of the inter-

est which it has as sole stockholder in the carrier.

[551]

After these steps were taken, the capital structure of the new company (prior to any conversion of income debentures) would appear as follows:

Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract	$ 2,048,190
New Thirty Year First Mortgage 4% Bonds	10,000,000
Fifty Year Income Mortgage 4% Bonds	49,299,100
Sixty Year 4% Convertible Income Debentures	10,445,018
5% Non-Cumulative Preferred Stock	9,623,202
Common Stock	30,068,220
Total	$111,474,730

Against the above capital obligations which would be outstanding, there would be assets valued by the Interstate Commerce Commission under Section 19(a) of the Interstate Commerce Act, at $145,000,000 as of December 31, 1935, and this prior to any increase in such assets which may result from the application of the proposed $10,000,000 of new money invested under the Rehabilitation Program.

In Conclusion, A. C. James Co. respectfully urges upon the Interstate Commerce Commission that it modify the plan proposed by the Bureau of Finance so as to make possible a prompt and equitable readjustment of the capital structure of this carrier as a demonstration of the effectiveness of the machinery provided by Congress to that end, in the provisions of Section 77 of [552] the Bankruptcy Act. And A. C. James Co. respectfully asks that it

be granted an oral hearing before the Commission on the matters herein discussed.

Respectfully submitted,

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[Endorsed]: Filed Oct. 5, 1939. [553]

Before the
Interstate Commerce Commission.
Finance Docket No. 10913.

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION.

EXCEPTIONS OF CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916, TO PROPOSED REPORT OF BUREAU OF FINANCE, AND BRIEF IN SUPPORT OF SUCH EXCEPTIONS. [554]

INDEX

	Page of Original Printed Document	Page of Printed Record
Exceptions	1	575
Brief	3	576
1. Introductory Statement	3	576
II. The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in its Treatment of Unpaid Interest on Said Bonds. (Exceptions 1 and 2.)	5	578
III. The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in its Provision for Non-Cumulative Interest on the New Income Mortgage Bonds. (Exception 3.)	6	580
IV. The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in its Provisions Relating to the Issue of New First Mortgage Bonds. (Exceptions 4, 5 and 6.)	8	582
(a) As Regards the Failure to Offer the First Mortgage Bondholders New First Mortgage Bonds for at Least a Portion of their Claims	10	583
(b) As Regards the Offer to the Sole Stockholder and to the Junior Secured Creditors of Preferential Rights to Purchase New First Mortgage Bonds on Unduly Favorable Terms	11	584
V. To the Extent that the Plan Fails to Give Effect to the Principle of First Mortgage Priority, It Fails to Meet the Requirements of Section 77 of the Bankruptcy Act. (Exceptions 7 and 8.)	14	587
VI. Conclusion	15	588

EXCEPTIONS.

1. The Report errs in recommending (pages 53 and 59) that new common stock be allotted on a dollar for dollar basis to the holders of existing First Mortgage Bonds in respect of the unpaid interest on said bonds and in not recommending the allotment in respect of such interest of securities ranking prior to the securities allotted to the junior secured creditors.

2. The Report errs in recommending (pages 53-54 and page 60) that the junior secured creditors be allotted securities ranking equally with the securities allotted in respect of the unpaid interest on the existing First Mortgage Bonds.

3. The Report errs in recommending (pages 41 and [556] 43) that interest on the new income mortgage bonds should be non-cumulative, payable only out of available net income determined on the basis of six months' income periods ending June 30 and December 31 in each year.

4. The Report errs in not recommending the allotment of new first mortgage bonds to the holders of existing First Mortgage Bonds in respect of at least a portion of their claims.

5. The Report errs in recommending (pages 52 and 59) that a bonus of 10 shares of new common stock be given to the purchaser of each $1,000 principal amount of new first mortgage bonds and in recommending (pages 54, 55 and 60) that The Western Pacific Railroad Corporation and the

junior secured creditors be given preferential rights to purchase such bonds at par and to receive such bonus in common stock.

6. The Report errs in its conclusion (page 56) that "The provision for the participation of the unsecured creditor would not discriminate against * * * the first mortgage bondholders * * * because such unsecured creditor must contribute $1,000 in cash for each new $1,000 bond and 10 shares of new common stock received."

7. The Report errs in its conclusion (page 56) that, if the new securities are allocated as recommended in the Report, "it would result in preserving the priority [557] of the first mortgage bondholders as to the principal amount of their bonds over all other existing creditors and stockholders in so far as new securities are available."

8. The Report errs in recommending (page 61) "that the Commission find that the plan as recommended herein will meet with the requirements of subsections (b) and (e) of section 77 of the Bankruptcy Act, and will be compatible with the public interest."

BRIEF.

I.

Introductory Statement.

Section 77 of the Bankruptcy Act requires, among other things, that any plan approved by the Commission pursuant to subsection (d) of that section shall be "fair and equitable," shall afford

"due recognition to the rights of each class of creditors and stockholders," shall "not discriminate unfairly in favor of any class of creditors or stockholders," and shall "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders" (subsection (e) of Section 77).

The Report states (pages 46-47) with reference to the provisions of subsection (e): [558]

> "The language comprising those provisions has long had a settled meaning in equity reorganizations. Briefly stated it is to the effect that no plan of reorganization will be fair and equitable if it attempts to secure the rights and interests of stockholders at the expense of the prior rights of secured or unsecured creditors. Subsection (e) specifically commands that the rights of each class of creditors and stockholders be accorded due consideration."

The First Mortgage Trustees, in the brief heretofore filed on their behalf in this proceeding, contended that substantially all of the Debtor's property, except certain cash and securities therein specified, is subject to the lien of the First Mortgage as a first lien, and they asked that the Commission, in approving a plan for the Debtor pursuant to subsection (d) of Section 77, take this contention as its premise or starting point.

The findings of the Report (pages 48-52) sustain in every respect this contention of the First Mort-

gage Trustees and reach the conclusion (page 52) that

> "While due recognition must be accorded to the rights of the creditors with whom are pledged general mortgage bonds, those creditors are not entitled to the same treatment as first mortgage bond holders, who should be considered as having a first lien upon practically all of the assets of the debtor. It follows that holders of the debtor's first mortgage bonds should receive securities of a higher rank than other creditors, at least to the extent that existing conditions will permit."

The First Mortgage Trustees believe, however, that the plan recommended by the Report (hereinafter referred [559] to as the "Plan") departs in several important respects from the principle of First Mortgage priority above stated and that, to the extent that it does so depart, the Plan does not conform to the requirements of Section 77.

II.

The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in Its Treatment of Unpaid Interest on Said Bonds.

(Exceptions 1 and 2.)

The Plan provides that the holders of existing First Mortgage Bonds (hereinafter sometimes referred to as the "First Mortgage Bondholders")

shall receive, in respect of their unpaid interest, new common stock of a par value equal to the amount of such interest. The Plan further provides that the junior secured creditors (Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company) shall receive new common stock of an aggregate par value equal to the aggregate amount of their claims for principal and unpaid interest, such stock to be distributed among the individual creditors proportionately to the General and Refunding Mortgage Bonds held by them as collateral rather than proportionately to the amount of their claims.

Clearly, these provisions of the Plan discriminate unfairly against the First Mortgage Bondholders and in favor of the junior secured creditors and depart from the principle [560] of First Mortgage priority upon which the Plan is predicated.

The right of the First Mortgage Bondholders to priority in respect of their unpaid interest is not questioned by the Report; on the contrary, the Report states (page 53) that "the rights represented by unpaid interest should be recognized with the principal of the debt." Nevertheless, the Plan accords to them, in respect of their unpaid interest, neither a qualitative nor a quantitative preference. They are offered, on a dollar for dollar basis, securities of the same rank as the securities offered to the junior secured creditors.

The First Mortgage Trustees believe that the First Mortgage Bondholders should receive, in re-

spect of their accrued interest, securities of a higher rank—at least preferred stock—than those offered to the junior secured creditors.

III.

The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in Its Provision for Non-Cumulative Interest on the New Income Mortgage Bonds.

(Exception 3.)

The Plan provides that the new income mortgage bonds, to be allotted to the First Mortgage Bondholders in respect of [561] 40% of their claim for principal, shall bear interest at the rate of 4% per annum, payable semi-annually only out of available net income determined on the basis of six months' income periods ending June 30 and December 31 in each year and further provides that such interest shall be "cumulative only as against such available net income for the income period in respect of which such interest is payable" (page 43).

The discriminatory nature of these provisions becomes apparent when it is considered that the earnings of the Debtor are seasonal, being consistently much lower during the first six months of the year than in the last six months. As a result of the non-cumulative feature, "the cards are stacked" against the First Mortgage Bondholders. Except in unusually prosperous years, their chances of receiving more than a 2% annual return on their new income

mortgage bonds are slight, although the earnings on an annual basis may be more than sufficient for the payment of full 4% interest.

Furthermore, as indicated in the Report (page 22), the earnings of the Debtor fluctuate widely from year to year. Even if interest on the new income mortgage bonds were made cumulative against available net income for each annual period, the First Mortgage Bondholders would bear the full brunt of low earnings in a "lean" year without having an opportunity [562] to share in the excess earnings of a succeeding prosperous year.

So drastic a limitation upon the right of the First Mortgage Bondholders to share in the income of the Debtor discriminates unfairly against them and in favor of the junior creditors who are to receive new common stock under the Plan, and in this respect the Plan fails to afford due recognition to the rights of the First Mortgage Bondholders in respect of such income.

The First Mortgage Trustees believe that the Commission should eliminate the discrimination resulting from seasonal earnings by making interest on the new income mortgage bonds cumulative at least against available net income for each annual period. They further believe that the Commission should eliminate the discrimination resulting from fluctuations of earnings from year to year by making such interest cumulative against available net income for a reasonably longer period—not less than three years.

IV.

The Plan Discriminates Unfairly Against the Holders of Existing First Mortgage Bonds in Its Provisions Relating to the Issue of New First Mortgage Bonds.

(Exceptions 4, 5 and 6.)

An outstanding feature of the Plan is a drastic scaling down both of debt structure and of fixed and contingent [563] charges. The issue of new first mortgage bonds for the purposes of the Plan is limited to $10,000,000 principal amount, all of which are to be sold to provide new money. No new first mortgage bonds are allotted to the First Mortgage Bondholders, who are to receive securities subordinate in every respect to the new first mortgage bonds.

The Plan provides that the $10,000,000 principal amount of new first mortgage bonds shall be sold at par, with a bonus of 10 shares of new common stock for every $1,000 principal amount of bonds purchased, and it offers preferential rights to purchase the bonds on these terms to The Western Pacific Railroad Corporation (an unsecured creditor and the sole stockholder of the Debtor), to the junior secured creditors, and to the First Mortgage Bondholders, in the order named.

The First Mortgage Trustees believe that these provisions of the Plan involve an unfair discrimination against the First Mortgage Bondholders in two respects, viz.:

(a) in failing to offer them new first mortgage bonds for at least a portion of their claims, and [564]

(b) in offering to the sole stockholder and to the junior secured creditors preferential rights to purchase new first mortgage bonds on unduly favorable terms.

(a) As Regards the Failure to Offer the First Mortgage Bondholders New First Mortgage Bonds for at Least a Portion of Their Claims.

The First Mortgage Trustees believe that any plan approved by the Commission should preserve the first lien position of the First Mortgage Bondholders to the greatest extent consistent with the requirement that (to use the language of the Report) "the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern" (page 36). Any plan which unnecessarily sacrifices their first lien position is not "fair and equitable" as regards the First Mortgage Bondholders.

The First Mortgage Trustees believe that the first lien position of the First Mortgage Bondholders can be preserved as to at least a portion of their claims without creating a capital structure inconsistent with the requirement above stated. For example, the issue to the First Mortgage Bondholders

of a reasonable amount of new first [565] mortgage bonds (in lieu of a like amount of new income mortgage bonds allotted to them in the Plan) would not involve any increase in either the total debt structure or the total charges—fixed and contingent—contemplated by the Plan, and the First Mortgage Trustees believe that it would not involve an undue increase in the fixed charges.

The extent to which the first lien position of the First Mortgage Bondholders can be preserved is governed, of course, by the further requirement that adequate provision should be made for obtaining new capital without exceeding the limits of a sound debt structure. The Plan limits the total authorized issue of new first mortgage bonds to $50,000,000 principal amount. With only $10,000,000 principal amount immediately required to be issued for new money, the First Mortgage Trustees believe that reasonable provision can be made for issuing new first mortgage bonds to the First Mortgage Bondholders and still leave an ample margin to meet the requirements of future capital financing.

(b) As Regards the Offer to the Sole Stockholder and to the Junior Secured Creditors of Preferential Rights to Purchase New First Mortgage Bonds on Unduly Favorable Terms.

As now contemplated by the Plan, the $10,000,000 principal amount of new first mortgage bonds to be [566] presently issued for new money will be the sole first lien on property having a value (see pages 22-23 of the Report) well over $100,000,000;

they will be issued to finance capital expenditures of a corresponding amount under a rehabilitation program calculated to put the property in excellent physical condition and to effect substantial operating economies, and they will carry a 4% fixed interest charge which, according to the findings in the Report, will have an adequate coverage of earnings. Considering these factors, it seems reasonable to believe that these bonds can be sold at not less than par without any stock bonus. Nevertheless, the Plan offers to the purchasers a bonus of new common stock aggregating 100,000 shares (out of a total authorized issue of 300,682-1/5 shares) and having an aggregate par value of $10,000,000. Moreover, the Plan offers preferential rights to purchase these bonds at par, with this stock bonus, first to the sole stockholder of the Debtor and next to the junior secured creditors.

If, as the First Mortgage Trustees believe, the $10,000,000 principal amount of new first mortgage bonds can be sold at par without any stock bonus, these provisions of the Plan discriminate unfairly against the First Mortgage Bondholders and in favor [567] of the sole stockholder and the junior secured creditors. Their effect is to permit the sole stockholder or the junior secured creditors to acquire a first lien position on the property (to the entire exclusion of the First Mortgage Bondholders), and in addition a large share of the equity, by paying no more (and possibly less) than the market value of the new first mortgage bonds. If the bonds

are purchased by The Western Pacific Railroad Corporation, the result will be a donation of new common stock to a stockholder (who is also one of the unsecured creditors) whose equity, according to the findings of the Report (page 55), has no value; if the bonds are purchased by the junior secured creditors, the gratuitous increase in their allotments of new common stock will accentuate the discrimination in their favor which is discussed under Point II of this brief.

The conclusion in the Report (page 56) that "The provision for the participation of the unsecured creditor would not discriminate against * * * the first mortgage bondholders * * * because such unsecured creditor must contribute $1,000 in cash for each new $1,000 bond and 10 shares of new common stock received" can be accurate only if the value of the bonds and stock received does not exceed the amount of cash contributed. [568]

The First Mortgage Trustees believe that the Commission should give effect to the principle of First Mortgage priority as regards the issue of new first mortgage bonds, (a) by providing for the issue of new first mortgage bonds to the First Mortgage Bondholders in respect of at least a portion of their claims, and (b) by eliminating stock bonuses in connection with the sale of the $10,000,000 principal amount of new first mortgage bonds to be sold to provide new money, except to the extent that such stock bonuses may, in the judgment of the

Commission, be required to insure the salability of the bonds at par.

V.

To the Extent That the Plan Fails to Give Effect to the Principle of First Mortgage Priority, It Fails to Meet the Requirements of Section 77 of the Bankruptcy Act.

(Exceptions 7 and 8.)

The foregoing discussion has indicated certain respects in which the Plan departs from the principle of First Mortgage priority upon which it is predicated. In these respects the First Mortgage Trustees believe the Plan fails to meet the requirements of Section 77 of the Bankruptcy Act, in that

[569]

(a) it is not fair and equitable as regards the First Mortgage Bondholders,

(b) it does not afford due recognition to the rights of the First Mortgage Bondholders,

(c) it discriminates unfairly against the First Mortgage Bondholders and in favor of junior creditors and stockholders, and

(d) it does not conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

The First Mortgage Trustees also believe that in these respects the Plan is not compatible with the public interest.

VI.

Conclusion.

The First Mortgage Trustees ask that the Commission, in approving a plan for the Debtor pursuant to subsection (d) of Section 77 of the Bankruptcy Act, give full effect to the principle of First Mortgage [570] priority which the Report adopts as its premise or starting point.

Respectfully submitted,

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(Here follows certificate of service.)

[Endorsed]: Filed Oct. 5, 1939. [572]

Before the
Interstate Commerce Commission
Finance Docket No. 10913
In the Matter
of
THE WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION

Brief on Behalf of
Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee Representing a Group of Not Exceeding Twenty-five Bona Fide Holders of the First Mortgage Bonds of The Western Pacific Railroad Company

In Support of
Exceptions (Hereto Annexed) to Proposed Report of the Bureau of Finance. [573]

TABLE OF CONTENTS

	Page of Original Printed Document	Page of Printed Record
I. Introductory Statement	1	596
A. Scope of this Brief	1	596
B. Present Capital Structure	2	597
C. Objective of the Reorganization	4	598
D. Summary of the Bondholders' Plan and the Bureau Plan	5	600
II. Both the total capitalization and the character of the new securities proposed by the Bondholders' Plan provide a sound capital structure, compatible with the public interest, and permit due recognition of the rights of each class of securityholders, while both the total capitalization and the character of the new securities proposed by the Bureau Plan are so drastically restricted as to impair railroad credit in a manner not compatible with the public interest, and as to prevent due recognition of the rights of the respective classes of securities	6	603
A. The Statutory Requirements	6	603
B. The total capitalization contemplated by the Bondholders' Plan is not excessive; that contemplated by the Bureau Plan is unduly low	8	605
C. The aggregate of First Mortgage Bonds and fixed charges contemplated by the Bondholders' Plan are well within all statutory requirements; those proposed by the Bureau Plan are unduly low	10	608

	Page of Original Printed Document	Page of Printed Record
1. The Debtor's "Earnings Experience"	10	608
2. "Probable Prospective Earnings"	21	623
ii		[574]
3. No reduction of the fixed charges contemplated by the Bondholders' Plan is necessary to effect the sale in the reorganization of $10,000,000 First Mortgage 4% Bonds at par	24	626
D. The total interest charges, both fixed and contingent, contemplated by the Bondholders' Plan are conservative and compatible with the public interest, in the light of both "earnings experience" and "probable prospective earnings"	27	629
E. The Income Mortgage Bonds proposed by the Bureau Plan are not of a character either compatible with the public interest or permitting due recognition of the priority of the present First Mortgage Bondholders	28	631
1. Interest rate	28	631
2. Their non-cumulative character	28	631
3. Authorized amount	31	634
F. The rights of the Preferred Stock contemplated by the Bondholders' Plan provide fairer treatment of the present bondholders than the rights of the Preferred Stock contemplated by the Bureau Plan, and are compatible with the public interest	32	635

	Page of Original Printed Document	Page of Printed Record
G. The amount of Preferred Stock contemplated by the Bureau Plan is insufficient to permit due recognition of the prior rights of the present bondholders	34	638
H. The shares of Common Stock to be issued in the reorganization should be without par value as contemplated by the Bondholders' Plan rather than of the par value of $100 each as provided by the Bureau Plan	36	640
I. Contingency Reserve Fund; Capital Fund; and Sinking Fund	38	642

[575]

iii

III. The Bondholders' Plan "affords due recognition to the rights of each class of creditors and stockholders" and "does not discriminate unfairly in favor of any class"; while the Bureau Plan in several respects fails to "afford due recognition" to such rights and in several respects does "discriminate unfairly in favor of" junior creditors and the Western Pacific Corporation, the sole stockholder, and against the present First Mortgage Bondholders	39	644
A. The terms upon which the Bureau Plan proposes to raise new money unfairly discriminate in favor of Western Pacific Corporation (perhaps RCC) and against the First Mortgage Bondholders	41	646

	Page of Original Printed Document	Page of Printed Record
B. The Bureau Plan unfairly discriminates in favor of RFC, RCC and ACJ, and also in favor of Western Pacific Corporation, and against the First Mortgage Bondholders by alloting to these junior interests new Common Stock at a higher rate per $100 of claim than is allotted to the bondholders for their prior claim for interest	47	653
C. The limitations imposed by the Bureau Plan upon total First Mortgage Bonds, total Preferred Stock, rates of annual return on Income Bonds and Preferred Stock, and accumulation of Income Bond interest, taken together, impose such sacrifices upon the present First Mortgage Bondholders, all of which ultimately redound to the benefit of the new Common Stock, as to constitute an unfair discrimination against the First Mortgage Bondholders and in favor of RFC, RCC, ACJ and the Western Pacific Corporation as the principal recipients of the new Common Stock	50	657
		[576]
iv		
D. The Bureau Plan discriminates unfairly against the present bondholders in favor of junior interests in granting to each share of Common Stock equal voting power with each share of Preferred Stock in the election of directors	50	658

	Page of Original Printed Document	Page of Printed Record
E. The Bureau Plan unfairly discriminates against the First Mortgage Bondholders in providing that the reorganization shall be effected, and the details of its carrying out determined, by a committee controlled by junior interests	51	658
IV. Any Plan which the Commission may approve should contain a provision, permitted by subsection (b)(5) of Section 77, for the protection of dissenting classes of the Debtor's securityholders by "the sale of all * * * the property of the Debtor * * * at not less than a fair upset price" and "the distribution of * * * the proceeds derived from the sale thereof, among those having an interest therein"	53	661
V. Summary of modifications in the Bondholders' Plan acceptable to the Bondholders' Committee	57	666
VI. In view of the great importance of the principles involved in this proceeding, not only with respect to the investment of institutional bondholders in the Western Pacific, but also with respect to railroad reorganizations generally, oral argument before the full Commission is requested by the Bondholders' Committee	60	669
Exceptions of Bondholders' Committee to Proposed Report of the Bureau of Finance	i	669

v

TABLE OF CASES

	Page of Original Printed Document	Page of Printed Record
Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648	54	663
Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 30	4	599
In re Tennessee Publishing Co., 81 F. (2d) 463	54	663
Kansas City Terminal Ry. Co. v. Central Union Trust Co., 271 U. S. 445	40	645
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555	54	663

TABLE OF AUTHORITIES CITED

Moulton and Associates, The American Transportation Problem	43	649

I.

Introductory Statement.

A. Scope of this brief.

Western Pacific Railroad Company (hereinafter called the Debtor) filed its petition under Section 77 of the Federal Bankruptcy Act on August 5, 1935.

The Debtor on February 8, 1936, filed its plan of reorganization, hereinafter called the Debtor's Plan.

Two additional plans have been submitted, a plan prepared by the Bondholders' Committee (hereinafter called the Bondholders' Plan) and a plan prepared on behalf of A. C. James Co. (hereinafter called the James Plan). [580]

The proposed Report of the Bureau of Finance rejects all three of these plans and recommends a wholly new plan (hereinafter called the Bureau Plan).

It is the firm belief of the Bondholders' Committee that the Bondholders' Plan, as originally filed, but in any event with the modifications hereinafter indicated, both (1) is compatible with the public interest and (2) affords due recognition to the rights of each class of security-holders.

It is the equally firm belief of the Bondholders' Committee that the Bureau Plan neither (1) is compatible with the public interest nor (2) affords due recognition of the rights of each class of security-holders.

This brief will discuss only the issues between the Bondholders' Plan and the Bureau Plan. The Bond-

holders' Committee and its counsel therefore rely upon, and request the Commission carefully to examine, their earlier brief of January 9, 1937, in respect of the issues between the Bondholders' Plan on the one hand and the Debtor's Plan and the James Plan on the other hand, particularly since on many of them the proposed report of the Bureau of Finance is supported by, and entirely in accord with, the arguments advanced in that brief.

B. Present Capital Structure.

The Debtor was organized in 1916 to acquire in reorganization the properties of its predecessor. In the 1916 reorganization all bonds (aggregating $75,000,000) and all other debt of the predecessor were wiped out, as debt, and the Debtor's presently outstanding stock was issued in lieu thereof. $20,000,000 principal amount of the Debtor's First Mortgage Bonds were issued in the 1916 reorganization for new money. Commencing in 1921, additional First Mortgage Bonds have been issued for [581] capital expenditures, all with the approval of the Commission under Section 20a of the Transportation Act. Junior General and Refunding Mortgage Bonds have also been issued, with the approval of the Commission, for capital expenditures, and in turn pledged to secure notes for loans by Reconstruction Finance Corporation, hereinafter called RFC; The Railroad Credit Corporation, hereinafter called RCC; and A. C. James Co., hereinafter called ACJ. In addition, the Debtor has certain unsecured

unfunded obligations to its sole stockholder, Western Pacific Railroad Corporation, hereinafter called the Western Pacific Corporation, and to the latter's subsidiary, Western Realty Company (Ex. 105).

As a result, the capital structure of the Debtor as of January 1, 1937, was:

Equipment obligations	$ 2,408,190
First Mortgage 5% Bonds	49,290,100
Accrued Interest	8,214,766
RFC Note	2,963,000
Accrued Interest	426,753
Secured by pledge of $10,750,000 General and Refunding Bonds.	
RCC Note	2,482,148
Accrued interest	114,156
Secured by pledge of $4,000,000 General and Refunding Bonds.	
James Note	4,999,800
Accrued interest	749,870
Secured by pledge of $4,249,500 General and Refunding Bonds.	
Unsecured obligations to Western Pacific Corporation (including $56,667 to its subsidiary, Western Realty Company) including interest	7,245,274
Preferred Stock	28,300,000
Common Stock	47,500,000

[582]

C. Objective of the Reorganization.

The objective of the reorganization is to create a sound capital structure, which will restore the credit of the property and enable it to perform its public function, and which at the same time, through the character and basis of exchange of the new securities, will provide for the distribution of

income of the reorganized company in accordance with the relative priorities of the various classes of the Debtor's securities.

A prospective debtor's credit lies in the state of mind of his prospective creditors. Railroad credit must therefore depend upon the state of mind of the prospective investors in railroad bonds. The Bondholders' Committee is acting for a substantial number of life insurance companies and other institutions which in the past have been among the principal investors not only in the securities of the Debtor but in the securities of other American railroads.

This case is the first involving a major railroad in reorganization to come before the Commission under Section 77. The action of the Commission in respect of the treatment of First Mortgage Bonds heretofore issued under the Commission's aegis for very recent capital expenditures will have a decisive effect, not merely upon the credit of the Debtor and other railroads in reorganization, but upon the credit of all American railroads.

The Commission should, and it is believed will, approach the problem involved in this proceeding in the spirit expressed by the Commission's own decision in the O'Fallon case as follows (Excess Income of St. Louis & O'Fallon Ry. Co., 124 I. C. C. 3, 30):

> "The end in view, as we have stated, is the maintenance of an adequate national railway transpor- [583] tation system. Such a system,

so long as it is privately owned, obviously cannot be provided and maintained without a continuous inflow of capital. Obviously, also, such an inflow of capital can only be assured by treatment of capital already invested which will invite and encourage further investment."

D. Summary of the Bondholders' Plan and the Bureau Plan.

That the commission may have in this brief a summary comparison of the Bondholders' Plan and the Bureau Plan, the following table is presented showing the capitalizations, charges and distribution of new securities under the two plans: [584]

1 2 3 2 2 5 2 5
7 4 0 7 5 0
4 2 6 7 5 3
5 2 0 5 3 7
1 1 4 1 5 6
1 2 4 9 9 5 0
7 4 9 8 7 0
7 1 8 8 6 0 7
1 0 0 0 0 0 0
5 6 6 6 7

3 3 4 6 9 8 1 5

	NEW FIRST MORTGAGE BONDS		NEW INCOME MORTGAGE BONDS		NEW PREFERRED STOCK		NEW COMMON STOCK	
	~~Bondholders'~~ Plan 4%	~~Bureau~~ Plan 4%	~~Bondholders'~~ Plan 5% Cumulative against 3 years income	~~Bureau~~ Plan 4% Non-cumulative on ~~cumulative~~ rests	~~Bondholders'~~ Plan 6% Non-cumulative on annual basis	~~Bureau~~ Plan 5% Non-cumulative on annual basis	Bondholders' Plan No Par Value Shares	Bureau Plan $100 Par Value Shares
Equipment Trusts[1]								
Old First Mortgage Bonds								
Principal	$ 9,858,020 (20%)		~~$19,716,040 (40%)~~	$49,290,100 (100%) ~~$19,716,040 (40%)~~	$19,716,040 (40%)	~~$39,574,060 (80%)~~		
Interest					8,214,766 (100%)	$ 8,214,766 (100%)		
R. F. C. Note				2,963,600 (100%)			107,500 (317%)[2]	
R. C. C. Note				2,482,148 (100%)			40,000 (105%)	
A. C. J. Note						$ 4,999,500 (100%)	42,495 (74%)	
Western Pacific R. R. Corp.							339,995[3] (Warrants)	
For New Money	10,000,000	10,000,000					Not less than 150,000 nor more than 300,000	
Total	19,858,020	10,000,000	19,716,040	~~19,716,040~~ 54,735,248	27,930,806	~~39,574,060~~ 13,214,566	No less than 339,995 shares nor more than 489,995 shares	
Fixed Interest Charges	794,320	400,000		2,169,410 ~~788,640~~		660,728. ~~1,478,703~~		
Contingent Interest Charges			985,802					
Preferred Dividends					1,675,848			

1 $2,048,190 undisturbed both plans. Annual charges thereon amount to $86,473.

2 No par value shares are taken at $100 each in computing these percentages.

3 150,000 shares were covered by warrants for stock allotted to new money; 189,995 shares are allotted to RFC, RCC and ACJ and the warrant price is such as to pay off the RFC Note, RCC Note and ACJ Note.

4 Both plans give the opportunity to provide the new money first to Western Pacific Corporation, then to RFC, RCC and ACJ as a group, and then to the First Mortgage bondholders. The Bureau Plan, however, makes no distinction in the terms offered to the diverse classes of the Debtor's security holders, and in order to make the successive offerings equivalent to an underwriting and insure the raising of the new money, the Bondholders' Plan makes the second and third offerings progressively more favorable to the respective offerees.

II.

Both the total capitalization and the character of the new securities proposed by the Bondholders' Plan provide a sound capital structure, compatible with the public interest, and permit due recognition of the rights of each class of securityholders, while both the total capitalization and the character of the new securities proposed by the Bureau Plan are so drastically restricted as to impair railroad credit in a manner not compatible with the public interest, and as to prevent due recognition of the rights of the respective classes of securities. (See Exceptions 1 to 25.)

A. The Statutory Requirements.

Section 77 requires that a railroad reorganization plan shall be "compatible with the public interest." It also requires that it shall be "fair and equitable," that it shall "afford due recognition to the rights of each class of creditors and stockholders," that it shall "not discriminate unfairly in favor of any class of creditors or stockholders," and that it shall "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

As the Bureau's proposed Report points out (p. 36), Section 77 provides no standards by which the public interest shall be determined, with the sole exception that it requires that a plan shall "provide for fixed charges * * * in such amount that, after

due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there [585] shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof."

The Bondholders' Committee concedes, indeed asserts, that, notwithstanding this lack of specification of standards, the new capitalization must be "sound" and that the Commission should not approve a capitalization which does not bear a reasonable relationship to *all* the relevant factors and "give reasonable opportunity to function efficiently and continuously as a going concern." It asserts, however, that any determination by the Commission which takes regard only of past earnings and those which can be expected in the *immediate* future, and which disregards the other relevant factors is itself not compatible with the public interest.

It is just as important "in the public interest" that a railroad property shall not be grossly undercapitalized in a reorganization proceeding as it is important that it shall not be over-capitalized. It is just as important "in the public interest" that the new securities to be issued by the reorganized company shall not be so restricted in their rights, either as to principal or as to income, as to make it appear that the Commission has no confidence in American railroads, as it is important that the character of the securities shall not be such as to impose a hopeless debt burden or give to equity

securities such impossibility of future return that they will be mere tokens for stock market speculation.

Section 77 was not intended to abrogate as to railroad reorganizations the Biblical injunction to be temperate in all things.

Neither the railroad industry as a whole nor the Western Pacific in particular is obsolete. The railroads generally, and Western Pacific itself, will have need of future capital. The public policy of the United States is [586] that that capital shall be furnished by private investors. But private investors cannot be expected to furnish that capital if the Commission is to impose standards of capitalization in reorganization to which not even the soundest of the American railroads today conform, and which indicate to prospective investors that the cycle from a First Mortgage bond issued with the approval of the Commission, and sold at a price approved by the Commission, to stock under a reorganization plan prepared by the Commission itself is a matter of approximately two decades.

B. The total capitalization contemplated by the Bondholders' Plan is not excessive; that contemplated by the Bureau Plan is unduly low. (See Exceptions 1 to 5.)

The total capitalization proposed by the Bondholders' Plan is less than that proposed either by the Debtor's Plan or by the James Plan. It contemplates securities having a par value of $69,-

553,056, plus 339,995 shares of Capital Stock without par value.*

In contrast to this, the Bureau Plan limits the capitalization to $91,406,510, in securities all of par value.

Were the character of the new securities which the Bureau Plan offers for the present First Mortgage Bonds, and the terms of that offer, such as to recognize the priority of those Bonds as against other creditors, the bondholders would not be directly aggrieved by this drastic reduction in total capitalization, since the amount is large enough to meet all the bondholders' prior claims. However, as will hereinafter be pointed out, the Bureau Plan uses this small permitted capitalization as a justification, first, for refus- [587] ing to permit the creation of priority securities, even preferred stock, adequate in amount to recognize the bondholders' priorities, and second, for unduly limiting the amount of permissible fixed and contingent interest obligations in the guise of maintaining a conservative debt ratio.

The Bondholders' Committee's further interest in the imposition of this low total capitalization lies

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*A possible additional maximum of 150,000 shares of Common Stock without par value is provided for issue in connection with the underwriting of the $10,000,000 of new money, but, as pointed out in the January, 1937, brief on behalf of the Bondholders' Committee, it is not believed that the issue of this additional 150,000 shares will prove to be necessary.

in the fact already pointed out that if the Commission is to have such a pessimistic attitude toward railroad properties, private investors cannot be expected to look with favor upon railroad securities.

As of December 31, 1935, the investment in the properties of the Debtor's system less accrued depreciation aggregated $146,940,649, and the Commission's valuation for rate making purposes of those properties aggregated $144,619,851 (Exs. 11, 29, 30, 59). Approximately $3,700,000 expended in connection with the Debtor's rehabilitation program will represent an addition to both these items (Ex. 38).

This means that the Bondholders' Plan contemplates that the aggregate new securities having par value shall represent but 46% of such investment and but 47% of the Commission's valuation, and that even if the no par value Common Stock be treated as having a capital value of $100 per share, the total capitalization will aggregate but 69% of such investment and but 70% of the Commission's valuation.

In finding that this seemingly conservative total capitalization proposed by the Bondholders' Plan is not compatible with the public interest, and proposing that total capitalization, all with par value, shall be limited to but 61% of investment less depreciation and but 62% of the Commission's valuation, [588] the proposed Report has imposed standards which, if applied to other American railroads, would demonstrate that even those capital struc-

tures generally regarded as the most sound violate the standards of public interest. Approval of the suggested standards by the Commission will constitute such a shock to railroad credit as to render doubtful the ability of any railroad hereafter to sell any securities on a favorable basis, particularly if issued for more than 50% of future additions and betterments.

C. The aggregate of First Mortgage Bonds and fixed charges contemplated by the Bondholders' Plan are well within all statutory requirements; those proposed by the Bureau Plan are unduly low. (See Exceptions 6 to 12.)

The institutional investors represented by the Bondholders' Committee regard it as important that the Commission adopt standards of reorganization which will permit them to retain their investments in the railroad field as well as to invest some of their funds in that field in the future. They are therefore interested in having as large a part of their present investment remain a First Mortgage fixed charge as sound principles will permit, and they are alarmed at the pessimism with respect to the future of American railroads indicated by the relationship of fixed charges to past and present earnings which the Bureau Plan requires to constitute the "adequate coverage" required by Section 77.

1. The Debtor's "earnings experience."

The consolidated net income of the Debtor's system available for interest on funded debt for the

years 1926-1930 was reported as follows (Ex. 29, S. 9): [589]

1926	$4,759,282
1927	2,647,494
1928	2,964,371
1929	2,529,846
1930	1,552,487

Such income for the depression years and for 1936 as reported, as adjusted by the Bureau, and as adjusted as required by "relevant facts" hereinafter discussed, was as follows (Ex. 29, S. 8, 9; Ex. 39; Report pp. 21, 39):

	As Reported	As Adjusted by Bureau	Adjusted in Light of "Relevant Facts"
1931	186,708 Deficit	850,000 Deficit	460,350
1932	252,706	400,000 Deficit	489,075
1933	674,007	None	1,175,628
1934	1,084,244	500,000	1,418,527
1935	805,589	250,000	1,495,803
1936	181,102	1,766,682	1,902,033
Average 1931-1935	525,967	100,000 Deficit	1,007,876

The difference between the 1936 earnings as stated by the Bureau, and those here asserted, represents solely the failure of the Bureau to add back $135,401 representing amortization of bond discount charged against reported earnings. This apparently was an oversight as the proposed Report recognizes the propriety of such an adjustment (pp. 20, 39).

While the proposed Report does not state exactly how its adjusted earnings for the years 1931-1935, inclusive, were arrived at, its discussion indicates that they were computed as follows: [590]

	1931	1932	1933	1934	1935
Reported Earnings (Ex. 29, S. 9)	$186,708 Def	$252,706	$674,007	$1,084,244	$805,589
Add:					
Amortization Bond Discount (Report, P. 20, 39)	140,000	140,000	140,000	140,000	140,000
	46,708 Def	392,706	814,007	1,224,244	945,589
Deduct:					
Social Security & Retirement Taxes (Report, P. 20)	488,633	365,498	331,149	257,345	275,000
Deficiency in Normal Maintenance	314,659	427,208	482,858	466,899	420,589
	804,392	792,706	814,007	724,244	695,589
Adjusted earnings (Rep., P. 39)	850,000 Def	400,000 Def	None	500,000	250,000

Adjusted earnings (Rep., P. 39)	850,000 Def	409,000 Def	None	500,000	250,000

For reasons hereinafter explained, it is submitted that the Bureau's adjustment is erroneous and that a true picture of the "earnings experience" of the Debtor can be arrived at only by the following adjustments:

	1931	1932	1933	1934	1935
Reported Earnings (Ex. 29, S. 9)	$186,708 Def	$252,706	$ 674,007	$1,084,244	$ 805,589
Add:					
Amortization of Bond Discount (Ex. 29, S. 23, 28)	124,323	130,599	134,462	134,500	135,517
Rehabilitation Expenditures (Ex. 29, S. 8, 9)	122,735				436,036
RR. Retirement Taxes (Exs. 58, 59)				97,683	51,593
Northern California Extension (Ex. 39)	400,000	400,000	400,000	400,000	400,000
Total	460,350	783,306	1,208,469	1,716,427	1,282,735
Deduct:					
Credit RR Retirement Taxes					149,267
Deficiency in Normal Maintenance (Based on 33% maintenance ratio)		294,231	32,841	297,900	183,665
Adjusted Earnings	460,350	489,075	1,175,628	1,418,527	1,495,803

Considering first the necessary additions to reported income:

The Bureau computation adds back to reported earnings for amortization of bond discounts a flat $140,000 for each of the years concerned (Report, pp. 20, 39). While this is the approximate amount, the immediately foregoing table sets forth the exact amount. [591]

The Bureau computation fails to add anything back during these years for rehabilitation expenditures, although it concedes the propriety of such an adjustment (R. p. 21), and makes an adjustment on that score of the 1936 reported earnings. With reference to this item for 1935, the proposed Report states (p. 21) that "no substantial amount of expenditures was made on account of the rehabilitation program in 1935."

The fact (Ex. 29, S. 8) is that the rehabilitation expenditures in 1935 (equipment and 100 miles of heavy rail) were $436,036. The record likewise indicates that in 1931 the amount of expenditures made in an effort to overcome existing deferred maintenance amounted to $122,735 (Ex. 29, S. 9; Ex. 34; Report, p. 19). The foregoing amounts, therefore, on the principles established by the proposed Report, should have been added back, and are so added in the immediately foregoing table.

While the Bureau computation dealt, on the side of deductions, with the item of Social Security and Railroad Retirement taxes, and the exact method of its computation is difficult to determine from the

Report, proper accounting would seem to require adding back to reported earnings for 1934 and 1935 the amounts charged for those taxes in those years, and deducting from 1935 reported earnings the amount credited on the books of the Debtor in that year. Accordingly, this adjustment has been made in the foregoing computation.

The Bureau's analysis of "earnings experience" also overlooks the fact that during a part of the period analyzed, the Northern California Extension, a substantial revenue producer, was not even in operation. That line commenced operation November 10, 1931, and it was not until some time thereafter that the Debtor began to [592] realize substantial additions to its revenues arising from that Extension. Indeed, the Report recognizes (p. 20) that the earning power of the Extension is not reasonably reflected in the earnings reported for 1932 and 1933, but its computation makes no allowance for that fact.

Since, therefore, the reported past earnings of the Debtor represent the "earnings experience" of only a part of the property to be embraced in the system of the Debtor as reorganized, a fair picture of such "earnings experience" must include an adjustment by adding to reported earnings an amount reasonably to be expected from the Northern California Extension after that line has been in use sufficiently long to have become a fully seasoned and developed route.

In referring to the earning capacity of the Northern California Extension, Mr. Elsey, President of the Debtor, said in part (Ex. 39):

> "In order to make a true and accurate estimate of the earning power of the Western Pacific Railroad Company, restated retroactively for the period 1930 to 1934, inclusive, it would be necessary in the judgment of the undersigned to increase in each of said years the income available for the payment of fixed charges by an amount not less than $500,000, which would represent the difference between the net income actually received from the Northern California Extension during the years referred to and the net income which can reasonably be expected from this line during a similar period after the line has been in use long enough to have become a fully seasoned and developed route."

It is clear from Mr. Elsey's statement that the same would hold true for the year 1935, his comments having been confined to the years 1930 to 1934 because his Exhibit 39 [593] deals with certain phases of the Report of the Commission's Bureau of Accounts which was filed as a part of the record on August 6, 1936. That Report covers the years 1930-1934. It will be noted that in Mr. Elsey's judgment earnings available for fixed charges should be increased by not less than $500,000 per year. However, in order to be conservative, that amount has been reduced 20%, or to $400,000, in the computation above suggested.

Considering next the necessary deductions from reported income:

In making its computation, the Bureau adjusted the past earnings downward to take into account the expense of recently enacted legislation such as the Social Security tax and the tax under the Railroad Retirement Act. Assuming that any such deduction would be justifiable, the Bureau's adjustment seems to have used the rates provided for in the 1935 Act (p. 20). Those rates are substantially higher than those for the next ten years as required by the 1937 Act. It appears, too, that in computing the Social Security tax the maximum rate has been used for each of the years instead of the sliding scale of rates provided for in the Act. Accordingly, even were some such deduction proper, the deductions made by the Bureau are approximately some $75,000 to $150,000 per annum too large.

But it is submitted that no such deduction should have been made.

These items, of course, must be taken into account with respect to *future* earnings, but it presents a wholly erroneous picture of "earnings experience" to attempt to apply them to past earnings for years in which they were not in effect without taking into account any credits which may be expected in the future to offset them for the years in which they will be in effect. To make such a deduction, without making the offsetting credits, as does the Bureau, [594] necessarily assumes that increased costs,

therefore make improper the deduction of those taxes from past earnings to determine "earnings experience." Among these factors are: the continued increase in earnings which has resulted from the opening of the Dotsero Cutoff, the probability of increased business resulting from the proposed entry of the Burlington into the reorganization of the Denver & Rio Grande, the Debtor's principal connection on the East, and the reduction in transportation costs and maintenance expenditures due to the rehabilitation program.

The Bureau's adjustment also made deduction from reported earnings to reflect the admitted deficiencies in the normal maintenance in the depression years (Rep., pp. 38, 39). That this factor requires an adjustment is conceded, but it is believed that the manner of its computation by the Bureau was erroneous. [596]

The Report is silent as to the amounts of such adjustment and the manner in which such amounts were determined. However, by working from the known to the unknown, it is readily determined that the Bureau deducted for maintenance, in 1931, $314,659, in 1932, $427,208, in 1933, $482,858, and in 1934, $466,899. Since the Report is silent upon the amount of the adjustment for Social Security and Railroad Retirement taxes in 1935, we have been unable to determine accurately the amount of the deduction made by the Bureau either for such taxes or for deficiency in maintenance. The sum of the two deductions is ascertainable, the amount thereof being

$695,589. Assuming $275,000 to be the deduction for the Social Security and Railroad Retirement taxes (a wholly reasonable assumption) the amount of deduction in respect of maintenance would be $420,589.

A simple mathematical calculation reveals that the ratio of the Bureau's normal maintenance to operating revenues in each of the depression years closely approximated 36%. In only one year prior to 1936 has the System's maintenance ratio equalled or exceeded 36%. In 1929 such ratio was 36.677%. In that year the Debtor and its subsidiaries, Sacramento Northern and Tidewater Southern, were in the midst of a vast rehabilitation program. Maintenance expenditures in 1929 aggregated $6,828,740, of which $1,305,681 were in connection with the program (Ex. 29, S. 9). This rehabilitation program was started in 1927 and continued through 1930 with a slight carry-over in 1931 (Ex. 29, S. 9). The average maintenance ratio of the System during the 1927 to 1930 period was 35.6%. It seems quite clear, therefore, that the Bureau's figures for normal maintenance, which represent a maintenance ratio of 36%, are decidedly too high and that the deductions made by the Bureau for the defi- [597] ciency in normal maintenance were excessive. This is particularly true when due consideration is given to the effect of System expenditures of $10,105,138 made for rehabilitation in the years 1927 to 1931, inclusive, of which $6,087,193 were charged to capital accounts (Ex. 29, S. 21, 24, 27).

resulting from such legislation, could not in the past have been offset, and cannot in the future be offset, by increased revenues, resulting from increased rates or otherwise. In so assuming, it plainly erred.

It can hardly be doubted that neither Congress nor the Commission would have imposed these burdens on the railroads during the depression years or that both Congress and the Commission contemplate that the cost of these additional burdens shall in some manner be compensated by increased revenues. It therefore produces a wholly unfair picture of the "earnings experience" to deduct from reported earnings the theoretical costs of these items without taking into account on the side of gross revenues the probable compensating factors.

That increased costs resulting from Federal and State legislation and from wage increases may have to be compensated by an increase in rates has been publicly recognized by at least one member of the Commission. Speaking on September 1, 1937, at Salt Lake City at the 49th annual meeting of the National Association of Railroad and Utilities Commissioners, Commissioner Lee, as quoted by the press, said:

> "We must make the best of the situation in which we find ourselves. We are tied up with the railroads and they must earn enough to pay their expenses and something additional.
>
> "We in the West, are very much interested in our freight rates, and it is necessary that

they be made as low as reasonably possible. However, the fact must not be overlooked that a great part of the expenses of the railroads is a matter over which they have but little, if any, control.

"Congress imposes expenses upon them and so do the states. It is not my function or purpose to [595] offer any criticism of our national or state authorities in the enactment of legislation which results in increasing the expenses of the railroads. It is to be expected that there would be disagreement as to the advisability of such measures. I do not propose to go into that. But I am interested in the level of railroad rates which our producers have to bear, and I am interested in carrying out the mandate of Congress that this country be afforded adequate and efficient railroad transportation service.

"The point I want to make is that the railroads will include in the rates which they impose every dollar they are required to spend. If increases in their operating expenses are made necessary, we must expect that such increased expenses will be reflected in the rates we will have to pay."

Quite apart from any possible increase in rates, there are other factors which in the future will tend to offset the application of the Social Security tax and the Railroad Retirement Act tax and which

The record shows that, after the completion of the rehabilitation program in 1938, and on the basis of estimated earnings for 1939 and 1940, a normal maintenance ratio will approximate 30% (Ex. 29, S. 2). Witness Engelbright testified that a maintenance ratio of 33% would more than take care of normal maintenance (R. 236).

A conservative adjustment for the item of subnormal maintenance would, therefore, seem to be effected by a computation on the basis of a normal 33% ratio. This basis has been used in the adjustment above suggested, resulting in deductions of $294,231 in 1932, $32,841 in 1933, $297,900 in 1934, and $183,665 in 1935. No deductions were required in 1931, expenditures in that year for maintenance, exclusive of rehabilitation, having amounted to $5,052,625, and the maintenance ratio in respect thereof having been 34.02%.

Accordingly, in determining whether there is "adequate coverage" for the proposed fixed charges of the Debtor as reorganized, the "earnings experience" of the Debtor should be taken as indicated by the figure set forth in the last column on page 11, rather than by the figures taken by the proposed Report.

Both the Bondholders' Plan and the Bureau Plan contemplate that $2,048,190 of equipment obligations outstanding as of January 1, 1937, and involving fixed charges of $86,473, shall remain undisturbed. [598]

The Bondholders' Plan contemplates that in addition there shall be issued in the reorganization $10,000,000 of First Mortgage 4% Bonds to provide the necessary new money and $9,858,020 First Mortgage 4% Bonds to provide 20% of the principal amount of the present First Mortgage debt. The Bondholders' Plan therefore contemplates total fixed charges of $880,793.

It will be noted that these fixed charges were more than three times covered by the average earnings of the years 1926 to 1930, inclusive, that they were materially more than covered by the average earnings as properly adjusted for the years 1931 to 1935, inclusive, and, that after making such adjustments, they were covered with a margin of 61% in 1934, of 70% in 1935, and of more than 115% in 1936.

Certainly these fixed charges contemplated by the Bondholders' Plan have the "adequate coverage" based on "earnings experience" which Section 77 requires.

The Bureau Plan, on the other hand, permits, in addition to the equipment obligations, the issue in the reorganization, of but $10,000,000 First Mortgage 4% Bonds to provide new money, thus permitting fixed charges limited to the low amount of $486,473.

This means that the Bureau Plan requires for compliance with the test of "adequate coverage" based on "earnings experience," average earnings for the years 1926 to 1930, inclusive, of 5.94 times

the proposed fixed charges, average earnings, as adjusted, for the years 1931 to 1935, inclusive, of 2.07 times, average earnings, as adjusted, for the years 1934 to 1936, inclusive, of 3.30 times, and earnings for the year 1936 of 3.91 times.

Certainly the imposition of any such limitation upon permissible fixed charges goes far beyond the requirements of "adequate coverage" based on "earnings experience." [599]

Again, the application of any such standard generally would indicate that a substantial number of railroads generally regarded as conservatively capitalized, and as having a conservative ratio of debt to stock, are in need of reorganization.

For example, the fixed charges of the Pennsylvania were covered by average earnings for the years 1934 to 1936, inclusive, only 1.34 times, those of the Santa Fe only 1.68 times, and those of the Burlington only 1.40 times.

Again, the fixed charges of the Pennsylvania were covered by earnings for the year 1936 only 1.49 times, those of the Santa Fe only 1.77 times, those of the Burlington only 1.54 times and those of the Union Pacific only 2.51 times.

Thus the example of these eminently sound roads supports the "adequacy" and conservatism of the "coverage," based on "earnings experience," of the fixed charges proposed by the Bondholders' Plan and demonstrates the extreme reduction of fixed charges contemplated by the Bureau Plan.

Not only is there no necessity, from the standpoint of earnings experience, that the First Mortgage obligations and fixed charges should have the large coverage which the Bureau Plan requires, but in the light of the experience of the last two years, it may well be doubted whether the Bondholders' Plan itself did not reduce the proposed fixed charges materially below those required by the rule of "adequate coverage".

2. "Probable prospective earnings".

When the problem of the permissible amount of fixed charge obligations is approached from the standpoint of "probable prospective earnings", whether for the imme- [600] diate future or for the long term future, the unfairness of the proposals of the Bureau Plan becomes increasingly apparent, and the blow of those proposals to railroad credit increasingly aggravated.

The consolidated income available for interest as estimated in the forecast last filed by the Debtor in this proceeding was as follows (Ex. 38):

1936	$1,521,386
1937	2,180,586
1938	2,738,886
1939	3,365,836
1940	3,769,836

These figures are lower than those used in the proposed Report (p. 21) which are those from Statement 2 of Exhibit 29, an Exhibit revised by Exhibit 38, from which the above figures were taken.

The proposed Report gives little credence to these estimates, characterizing them as resting "upon uncertainties" (p. 16) and as "unduly optimistic" (p. 22). Of course, all estimates for the future must involve some uncertainties. It was because the Bondholders' Committee believed that the estimates of the officers of the Debtor might be "unduly optimistic" that the Bondholders' Plan contemplated the very low amount of fixed charges which it does.

However, whereas in June, 1936, the officers of the Debtor estimated that the 1936 system earnings available for interest would aggregate $1,521,386 and that those for 1937 would aggregate $2,180,586, the earnings actually realized in 1936 (after the adjustments conceded by the proposed Report to be proper, pp. 20, 21, 39) aggregated $1,902,033, or 25% in excess of the Debtor's estimate, while those for 1937, based on actual experience to Sep-
[601] tember 1, 1937, are now expected to aggregate $2,600,000, or 20% in excess of the Debtor's estimate.

It would therefore seem that not only the proposed Report, but even the Bondholders' Committee, were unduly pessimistic and that the proposed Report is unjustified in characterizing the estimates as "unduly optimistic".

The fixed charges contemplated by the Bondholders' Plan clearly have "adequate coverage * * * after due consideration of the probable prospective earnings". They are covered by the now probable

1937 earnings with a margin of 194% and by the average estimated earnings for the years 1937 to 1940, inclusive, by a margin of 254%.

The Bureau Plan, however, requires that fixed charges shall be limited to an amount which will be covered by the now probable 1937 earnings with a margin of 434% and by the estimated earnings for the years 1937 to 1940, inclusive, with a margin of 541%. Again the standard of "adequate coverage * * * after due consideration of the probable prospective earnings," imposed by the Bureau Plan goes far beyond that prescribed by Section 77 and is such as to shock the confidence of the investor in the future of railroad securities.

But again, the proposed Report seeks to justify its pessimistic attitude toward future earnings coverage by suggesting adjustments for various items of expense such as taxes under the recent Federal legislation and probable wage increases, without giving any recognition to probable offsetting factors such as the hope of recapture of substantial amounts of traffic from motor trucks, increased rates which the Commission must necessarily authorize to meet rising costs and the possibility that the growth of California territory served by the Debtor's system, including recently constructed branches, and the revenue producing possibilities of the Dotsero Cut-[602] off and the Northern California Extension may have been under-estimated rather than over-estimated. The actual experience of the last two years (1936 and 1937) would seem to indicate this latter factor to be a probability.

3. No reduction of the fixed charges contemplated by the Bondholders' Plan is necessary to effect the sale in the reorganization of $10,000,000 First Mortgage 4% Bonds at par.

The Bureau Plan, as already indicated, limits the new First Mortgage Bonds to those to be sold to provide the $10,000,000 of necessary new money, and then accentuates its hopelessness as to the investment character of railroad bonds by adding (p. 52), "To facilitate the sale of the bonds at par, it is recommended that the plan provide that 10 shares of the new Common Stock be given to the purchaser of each $1,000 principal amount of the new bonds." This Common Stock bonus constitutes approximately one-third of the entire equity in the Debtor's property as reorganized, subject only to prior securities aggregating $61,338,290 in principal amount and to $2,753,818 in total prior charges, most of the latter having also (unnecessarily, as will hereinafter be pointed out) been made non-cumulative.

There is not the slightest evidence in the record to support either the inference that the First Mortgage Bonds contemplated by the Bondholders' Plan would not be saleable at par or that any such bonus would be necessary to support the sale at par of such a First Mortgage bond as that contemplated by the Bureau Plan.

The fixed charges under the Bondholders' Plan constitute but 46% of the actually realized available income [603] for 1936 and but 34% of that now

estimated for 1937. Its First Mortgage Bonds will constitute a first lien at the rate of but $8,665 per mile of the Debtor's system and of but $12,450 per mile of main line first track.

The Bureau Plan limits the First Mortgage Bonds to but $4,365 per system mile and $6,270 per mile of main line first track, with fixed charges of but 25% of available income for 1936 and 18% of that now estimated for 1937.

That, but for the injury to railroad credit which would result from the imposition of the standards contemplated by the Bureau Plan, bonds of the character proposed by the Bureau Plan would not only not require the exaggerated Common Stock bonus proposed by the Bureau Plan to enable them to bring par, but would actually command a premium without any such bonus, is evidenced by the record of recent sales on the New York Stock Exchange of comparable bonds.

The following bonds, which are outstanding in amounts in excess of $10,000,000, and which, although because they have been outstanding for substantial periods of time and have become qualified as legal investments for savings banks, are otherwise comparable for the present purpose, are but a few instances of bonds recently selling on an interest yield basis of 4% or less. They had as to 1936 income the following earnings coverage and are outstanding at the following rates per mile of road covered by their lien. [604]

4% Bonds	Last sale, week ending Sept. 23	Outstanding and pledged including prior liens per mile of road ①	Times interest earned on issue in 1936 ①	Times fixed charges earned in 1936 ①
Atchison, Topeka & Santa Fe Railway Company				1.77
Transcontinental Short Line, First, 1958	$112½	20,268	2.49	
General, 1995	110	21,848	2.49	
Atlantic Coast Line Railroad Company				1.29
First Consolidated, 1952	100½	15,915	3.27	
Baltimore & Ohio Railroad Company				1.14
First, 1948	98	94,110	3.18	
Chicago, Burlington & Quincy R. R. Company				1.54
Illinois Division, First, 1949	109¾	52,059	4.6	
General, 1958	110	21,909	2.49	
Northern Pacific Railway Company				1.13
Prior Lien and Land Grant, 1997	102½	19,486	3.69	
Southern Pacific Railroad Company				1.23
First Ref., 1955	103⅜	55,425	1.49	
Central Pacific First Ref., 1949	107⅛	73,905	1.95	
Union Pacific Railroad Company				2.51
First Lien and Refunding, 2008	105¾	55,197	2.95	
3¾% Bonds				
Pennsylvania Railroad Company				1.49
General, Ser. "C", 1970	98⅛	164,291	3.22	
3½% Bonds				
New York Central Railroad Company				1.16
Lake Shore & Mich. So. Ry., First, 1997	101½	50,384	4.81	

①Source: Poor's Railroad Service.
②Source: Moody's Railroad Service.

The Bondholders' Committee believes that the foregoing facts establish the conservatism of the provisions of the Bondholders' Plan with respect to First Mortgage Bonds and fixed charges and that the Commission should approve those provisions of the Bondholders' Plan without modification.

It should also be pointed out in this connection that the Bondholders' Plan itself provides for the adjustment of the coupon rate upon the $10,000,000 of First Mortgage Bonds to be sold to provide the new money, in the light of money conditions at the time of the sale and that it also provides, as will be more specifically discussed later in this brief (infra, pp. 44-45), insurance of the raising of the new money by a sliding scale of offers to the Debtor's [605] securityholders in inverse order of their priority, and by provisions for underwriting.

D. The total interest charges, both fixed and contingent, contemplated by the Bondholders' Plan are conservative and compatible with the public interest, in the light of both "earnings experience" and "probable prospective earnings". (See Exceptions 13 to 14.)

The Bondholders' Plan contemplates Income Mortgage 5% Bonds, with contingent interest of $985,802, which, when added to the fixed charges, results in total fixed and contingent interest charges of $1,866,595.

The Bureau Plan contemplates Income Mortgage 4% Bonds, with contingent interest of $788,642 and

a total interest charge, fixed and contingent, of only $1,275,115.

The total charges contemplated by the Bondholders' Plan were thus actually realized in 1936 and will, it is now estimated, be exceeded in 1937 by 39%. The coverage provided by the estimated earnings for the years 1938, 1939 and 1940 will range from a margin of 47% to a margin of 102%, so that within a very few years the indicated coverage by "probable prospective earnings" will be a ratio in excess of the 50% margin required by the laws of the State of New York to qualify bonds as savings bank investments.

The Bureau Plan permits contingent interest charges only to an amount which, with fixed interest charges, was more than covered in both 1934 and 1935, was covered with the savings bank margin of more than 50% in 1936, and it is estimated will be earned twice over in 1937.

The general imposition in reorganization proceedings of such standards would in many cases not only require complete elimination of capital stocks and substantial elimination of junior bonds recently issued with Com- [606] mission approval, but would require the substantially complete conversion into stock of many senior liens heretofore regarded as prime investments. Such a drastic conversion of debt into stock would constitute an added blow to railroad credit generally, which it is submitted is not "compatible with the public interest."

E. The Income Mortgage Bonds proposed by the Bureau Plan are not of a character either compatible with the public interest or permitting due recognition of the priority of the present First Mortgage Bondholders. (See Exceptions 15 to 18.)

1. Interest rate.

Although the present First Mortgage Bonds bear interest at 5% per annum and the Bondholders' Plan contemplates that the Income Mortgage Bonds shall bear 5% interest, the Bureau Plan reduces the rate to but nominally 4%. If the bondholders are to be required to surrender their fixed charge return which is prior to that of all other classes of securityholders, they should not be required to make the additional sacrifice of accepting a 25% reduction in the nominal rate of their contingent return when, as already demonstrated, neither "earnings experience" nor "probable prospective earnings" indicate any necessity for such a reduction.

The Commission should therefore approve the coupon rate of 5% upon the Income Mortgage Bonds to be issued in the reorganization.

2. Their non-cumulative character.

One provision with respect to the Income Bonds made in the Bureau Plan works such an injustice upon the In- [607] come bondholders that it must have been an oversight on the part of the Bureau. The Bureau Plan (pp. 41, 43) provides that the interest on the Income Bonds shall be determined and be payable for each six months income period ending June 30 and December 31 and that such

interest shall be "cumulative only against such available net income for the income period in respect of which such interest is payable." That this makes the Income Bonds wholly noncumulative on the basis of six months rests is indicated by the title of "Non-cumulative Income Mortgage 4% Bonds" given on page 46 of the Report. This provision would make the nominal 4% rate actually but a 2% rate, for the income of the Debtor is seasonal, being realized almost wholly in the last six months of the year (R. 290). The income for the periods ending June 30 and December 31 for each year since 1927, adjusted only to eliminate amortization of bond discount in each year and to eliminate expenditures of rehabilitation program in 1936 and 1937 was as follows:

	Jan.-June	July-Dec.	Calendar Year
1927	562,140	2,221,117	2,783,257
1928	19,155	3,052,136	3,071,291
1929	627,732	2,015,374	2,643,106
1930	918,305 def.	2,588,372	1,670,067
1931	904,451 def.	841,168	63,283 def.
1932	813,830 def.	1,196,438	382,608
1933	437,703 def.	1,245,476	807,773
1934	234,756	983,254	1,218,010
1935	192,483 def.	1,133,474	940,991
1936	225,664 def.	2,127,697	1,902,033
1937	213,381		

It is obvious, therefore, particularly when account is taken of the fact that, under both the Bondholders' Plan and the Bureau Plan, income can be taken for the Capital [608] Fund before it is applied to the payment of interest on the Income Bonds, that the holders of Income Bonds could,

even in the best years, receive for the first six months interest period little, if any, return. Accordingly the bonds would really be 2% bonds. This means, of course, that they could never attain a market value in excess of 50% of their par value, if that, and that the Bureau Plan, through this provision, in effect permanently confiscates, for the benefit of junior securities of the Debtor, one-half of the 40% of principal allotted in Income Bonds, or 20% of the total principal of the First Mortgage Bondholders' present claim.

But "due recognition" of the present bondholders' rights requires a further right of accumulation of interest on the new Income Bonds.

The proposed Report states (p. 22) that the Debtor's volume of traffic, and therefore, of course, its earnings, "is subject to wide fluctuations." It was to take care of these fluctuations that the Bondholders' Plan provided that the interest on the Income Mortgage Bonds shall be cumulative for the limited period of three years.

As more fully pointed out in the January, 1937, brief of the Bondholders' Committee, the Bondholders' Committee recognized the dangers which lie in making contingent interest fully cumulative and therefore recognized, in the preparation of the Bondholders' Plan, that the amount of contingent interest contemplated by that Plan was such as to make it unwise that that interest be fully cumulative. But unless income bond interest, however it may be limited in annual amount, is made cumula-

tive for the limited period of three years as provided in the Bondholders' Plan, the loss due to the fluctuation in earnings which the proposed Report points out, falls upon the [609] present First Mortgage Bondholders. Interest lost in one year as a result of the non-cumulative provision would be gone forever. Though low earnings might be more than offset in subsequent periods of high earnings, the benefit of those high earnings could not recoup the losses of the Income Mortgage Bondholders but would enure progressively downward to the lower classes of the Debtor's securities, ultimately redounding to the sole benefit of the Common Stock. This is unfair to the Income Bonds and, particularly when coupled with the suggested 4% nominal coupon rate, would prevent the Income Bonds' ever selling at par. As hereinafter pointed out (infra, pp. 39-41, 50-53), this violates the "law of the land" as to "due recognition" of the rights of the present bondholders as enunciated by many decisions of the United States Supreme Court and expressly recognized in the proposed Report.

The Bondholders' Committee therefore urges that the Commission adopt the provision of the Bondholders' Plan that interest on the Income Bonds shall be cumulative for some limited period and that any period less than three years would be unfair to the Income bondholders.

3. Authorized amount.

The proposed Report seems to indicate (p. 40 and p. 42) the belief of the Bureau that the Income

Mortgage Bonds should be available for future financing.

While the Bondholders' Plan did not so provide, the Bondholders' Committee would have no objection to modifying the Bondholders' Plan by opening the Income Mortgage for future financing under conservative restrictions; indeed, the Bondholders' Committee thinks this a wise suggestion. [610]

F. The rights of the Preferred Stock contemplated by the Bondholders' Plan provide fairer treatment of the present bondholders than the rights of the Preferred Stock contemplated by the Bureau Plan, and are compatible with the public interest. (See Exceptions 19 to 22.)

The rights of the new Preferred Stock are defined in substantially the same manner in the Bondholders' Plan and in the Bureau Plan except that (1) the dividend rate provided in the Bondholders' Plan is 6% while that provided in the Bureau Plan is 5%, (2) the Sinking Fund is taken out of available net income after Preferred dividends under the Bondholders' Plan while it is taken out of available net income before Preferred dividends under the Bureau Plan, and (3) under the Bondholders' Plan Preferred Stock is given the right, until its earning power has been established, to elect a majority of the Board of Directors, whereas under the Bureau Plan the voting power of each share of Preferred Stock is wholly pari passu with that of each share of Common Stock.

The Bondholders' Committee believes that the bondholders are entitled to a 6% dividend on the Preferred Stock in any year in which the earnings suffice to pay that dividend. The Bureau's own analysis of the situation indicates the Bureau's belief that there will often be years in which dividends on this stock will not be earned. Since the dividend is non-cumulative except to the extent that it is earned, dividends not earned in any year are lost forever. To compensate for the failure to pay dividends in years of low earnings, the Bondholders' Committee urges that the Commission should permit the payment of a 6% dividend in years of high earnings. [611]

While it is true that the Preferred dividends under the Bondholders' Plan will exhaust the consolidated available net income estimated for the immediate future, there is no reason of public policy preventing the payment of substantially all the income possible in the immediate future to the present First Mortgage Bondholders in those years in which such income is realized. The bondholders today have a claim ahead of all other securityholders for fixed interest every year at the rate of 5% upon their bonds. For several years they cannot hope to receive anything like that return. To provide that in years of prosperity the deficits of the lean years shall be partly compensated by the payment of the additional rate of 1% on that part of their present investment which is to be commuted into Preferred

Stock seems not only not violative of the public interest, but demanded by all reasons of equity.

The Bondholders' Committee also believes that it is unfair to the bondholders to pay off the Income Bonds issued to them by depriving them of any current return on that part of their present investment which is commuted into Preferred Stock. Accordingly, it believes that the placing of the Sinking Fund ahead of the Preferred Stock dividend as provided in the Bureau Plan rather than behind it as provided in the Bondholders' Plan does not "accord due recognition" to the rights of the bondholders.

The Bondholders' Committee also believes that in view of the fact that the Preferred Stock represents the prior and major interest in the property, the right to elect a majority of the Board of Directors should be vested in the Preferred Stock until its earning power has been established. In view of the facts that the Common Stock and Preferred Stock are so nearly equal in number of shares and that the Preferred Stock will be held by widely scattered holders while large blocks of the Common Stock, con- [612] stituting a large majority thereof, will be held by RFC, RCC, ACJ and Western Pacific Corporation, the Bureau Plan will result in practical control of the Board being vested in those having the most remote and least valuable interest in the property. For reasons which were fully argued in its January, 1937 brief (pp. 27-31), the Bondholders' Committee believes that

the public interest, as well as due recognition of the prior rights of the respective securityholders, requires the adoption of the provision of the Bondholders' Plan with respect to the Preferred Stock voting power.

However, if after its fair consideration of the problem, the Commission shall disagree with the Bondholders' Committee and shall support the position of the Bureau Plan in respect of these three differences in the rights of the Preferred Stock, the Bondholders' Committee does not believe that modification of the Bondholders' Plan upon these points alone would make it unacceptable.

G. The amount of Preferred Stock contemplated by the Bureau Plan is insufficient to permit due recognition of the prior rights of the present bondholders. (See Exceptions 19 and 23.)

The amount of Preferred Stock to be issued under the Bondholders' Plan is $27,930,800, while the amount contemplated by the Bureau Plan is $29,574,060. This difference is due to the fact that the Bondholders' Plan allots Preferred Stock for 40% of the principal of the present bondholders' claims and for all the interest to the effective date of the Plan, while the Bureau Plan allots Preferred Stock for 60% of the principal of the claims and Common Stock for the interest. [613]

For the reasons argued in full in the January, 1937, brief of the Bondholders' Committee (pp. 67-80) and set forth in the proposed Report itself (p. 52), the law of the land requires "that holders

of the Debtor's First Mortgage Bonds should receive securities of a higher rank than the other creditors, at least to the extent that existing conditions will permit."

The proposed Report, however, expresses the view that the total stock contemplated by the very limited capitalization permitted by the Bureau Plan should be divided substantially equally between Preferred and Common Stock. The result is that not enough Preferred Stock is permitted to provide for the present bondholders' interest.

This claim for interest, as the proposed Report correctly finds (p. 53), is entitled to the same priority over the claims of other creditors of the Debtor as the principal of the debt, and the quotation from the proposed Report above set forth recognizes the right of the bondholders to receive priority securities for that interest, "at least to the extent that existing conditions will permit."

The Bondholders' Committee submits that there is no necessity for an equal division of the stock capitalization between Preferred and Common and that even if the limited capitalization contemplated by the Bureau Plan is adhered to, the division of the stock should provide a sufficient amount of Preferred Stock to permit the recognition of the bondholders' claim for interest in priority securities. This can do no possible harm to the capital structure in view of the fact already pointed out that dividends not earned on the Preferred Stock do not accumulate and therefore can never constitute a

burden to the Debtor as reorganized or in any way adversely affect its credit. There are no "existing conditions" which do not permit such recognition of the bondholders' rights. [614]

H. The shares of Common Stock to be issued in the reorganization should be without par value as contemplated by the Bondholders' Plan rather than of the par value of $100 each as provided by the Bureau Plan. (See Exceptions 19 and 24.)

There are wide differences of opinion not only between the Bondholders' Committee and the Bureau but also between the Bondholders' Committee and other creditors and the Western Pacific Corporation, the sole stockholder of the Debtor, as to the aggregate amount at which the properties of the Debtor should be capitalized in reorganization. It would therefore seem advisable to assign no par value to whatever number of shares of Common Stock may be issued in the reorganization to represent the residual value of the property after deducting the par value securities down through the Preferred Stock, rather than to attempt to place an exact dollar mark on the aliquot part of the residue represented by each share.

Quite apart, however, from avoiding unnecessary conflicts of opinion, the use of $100 par value shares for the Common Stock in the present situation will prevent any reasonable probability that the Common Stock can ever be used as a financing medium.

The Common Stock under both the Bondholders' Plan and the Bureau Plan is to bear $3.00 a share

dividends after the Preferred dividends and thereafter is to participate with the Preferred Stock on a share-for-share basis. It will require earnings much greater than are now visible for a stock with these dividend rights to attain a market value equal to the par value of $100 which the Bureau Plan assigns. Under the laws of California, where the Debtor is organized, shares of a railroad corporation can- [615] not be sold at less than their par value. The Bondholders' Committee submits that not only is it compatible with the public interest, but that public interest requires, that the Commission should facilitate, rather than obstruct, the use of Common Stock to provide future financing even though the market may require it to be sold at a price below $100 per share. This the Commission can do by the very simply expedient of permitting the shares to be without par value.

If the Commission adopts the view of the Bondholders' Committee that sound capitalization permits the creation of sufficient Preferred Stock to cover all of the bondholders' claims, including that for interest, thus obviating the necessity of the use of Common Stock for any part of the bondholders' claims, the Bondholders' Committee does not have any substantial interest in the number of shares into which the common capital is divided. If, however, the Commission does not adopt that view, then problems as to distribution of the common capital, which are hereinafter discussed (infra, pp. 47-50), may make advisable an increase in the number of

shares into which the common capital shall be divided. Such an increase, of course, can be made without getting into the question of total dollar valuation if, as suggested, the shares are without par value.

Furthermore, if the Commission, while approving the general framework of the Bondholders' Plan, should feel that the number of shares of Common Stock provided for by the Bondholders' Plan is too large, then, of course, the Bondholders' Plan may easily be modified by reducing proportionately all the allotments of Common Stock which it contemplates. Here again elimination of a par value for the Common Stock will eliminate ground for objection to the ultimate Plan. [616]

I. Contingency Reserve Fund; Capital Fund; and Sinking Fund. (See Exception 25.)

The Bondholders' Plan contemplates a Contingency Reserve Fund, to be maintained at $500,000, as an emergency fund to take care of lean periods and prevent defaults due to rapidly falling earnings. The Bureau Plan provides for no such fund. The Bondholders' Committee does not feel that such a fund is indispensable.

Both the Bondholders' Plan and the Bureau Plan provide for a Capital Fund to come out of income after fixed charges. The Bondholders' Plan, however, contemplates that the Capital Fund shall be on the basis of annual rests with permissible use of $500,000 in respect of each year to and including 1940, $1,000,000 in respect of the years 1940 to

1945, both inclusive, and thereafter at the rate of 3% of consolidated gross revenues. The Bureau Plan, on the other hand, provides a flat Capital Fund to be maintained at $1,000,000, with an appropriation of not more than $500,000 in any year.

The Bondholders' Committee believes that the Capital Fund suggested in the Bondholders' Plan is better adapted to the needs of the property than the Capital Fund proposed by the Bureau Plan, particularly in the event of dollar inflation, resulting in rapidly increasing costs, which will have to be offset by increased revenues. The fixing of the Capital Fund at a flat dollar amount under such circumstances might result in an inadequate Fund, whereas the situation would automatically be taken care of under the provision that the Capital Fund shall be a percentage of gross. However, the Bondholders' Committee does not believe this to be a vital point of difference.

The Bondholders' Plan contemplates a Sinking Fund which shall come out of available net income after payment of Preferred dividends, while the Bureau Plan pro- [617] vides that it shall be taken before Preferred dividends. On the other hand, the Sinking Fund provided by the Bondholders' Plan is twice as large as that provided by the Bureau Plan. While again the Bondholders' Committee believes that its proposal is preferable, it does not believe that the suggested change in position of the Fund would constitute an obstruction to consummating a reorganization, assuming that such change

in position were compensated by a reduction in the amount of the Fund as proposed by the Bureau Plan.

III.

The Bondholders' Plan "affords due recognition to the rights of each class of creditors and stockholders" and "does not discriminate unfairly in favor of any class"; while the Bureau Plan in several respects fails to "afford due recognition" to such rights and in several respects does "discriminate unfairly in favor of" junior creditors and the Western Pacific Corporation, the sole stockholder, and against the present First Mortgage Bondholders. (See Exceptions 6 to 9, 15 to 17, 19 to 22, 26 to 28.)

The proposed Report correctly finds, and the Bureau Plan is correctly predicated upon the conclusion, that the First Mortgage is a first lien upon substantially all the valuable assets of the Debtor. The proposed Report also correctly recognizes that the well-established decisions of the Supreme Court and the lower Federal courts with respect to reorganizations in equity govern the relative treatment of different classes of securityholders in a railroad reorganization under Section 77, and that [618] accordingly the "holders of the Debtor's First Mortgage bonds should receive securities of a higher rank than other creditors, at least to the extent that existing conditions will permit" (p. 52).

The proposed Report, however, fails to recognize the equally well-established rule of law that "to the extent that existing conditions" do not "permit" prior creditors to receive a *qualitative* preference in new securities (i.e., securities ranking in priority as to assets and income over those allotted junior interests) the prior creditors' position must be recognized by a *quantitative* preference (i.e., by giving them securities of the same rank as those given junior interests, but greater in amount per unit of claim or upon more favorable terms). Kansas City Terminal Ry. v. Central Union Trust Co., 271 U. S. 445.

Furthermore, while the proposed Report expressly recognizes the fundamental rule of priority, the Bureau Plan gives it but formal observance. Observance must be in substance and not merely in form. The prior securities allotted to the prior creditors must give to the prior creditors a reasonable opportunity to recoup their investment in priority to the recoupment of the junior investment. The rule would not be complied with, for example, by allotting to prior creditors (here the First Mortgage Bondholders), to use an extreme illustration, non-cumulative contingent interest and dividend securities bearing 2% current return.

The Bondholders' Committee, in the preparation of the Bondholders' Plan, made an earnest and sincere attempt, after thorough consideration, to work out a Plan which would give fair substantive recognition to the rights of each class of creditors and

stockholders of the Debtor, and which would not discriminate unfairly in favor of any class, even the First Mortgage Bonds. The affirmative [619] arguments in support of the Bondholders' Plan in that respect will be found at pages 81 to 92, inclusive, of the January, 1937, brief of the Bondholders' Committee. Those arguments seem to go wholly unanswered in the proposed Report, the Bureau apparently treating them as irrelevant in view of the fact that its conception of the future earning power of the Debtor resulted in the reduction of capitalization and the restriction of security rights already discussed.

The failure of the Bureau Plan to comply with the requirements of Section 77 with respect to the recognition of the rights of the relative classes of securityholders arises very largely out of this unnecessarily drastic view of the permissible capital structure. However, were such a view well founded, the resultant damage to existing securityholders should fall in much less degree on First Mortgage Bondholders, and in much greater degree upon junior securityholders, than is provided by the Bureau Plan.

A. The terms upon which the Bureau Plan proposes to raise new money unfairly discriminate in favor of Western Pacific Corporation (perhaps RCC) and against the First Mortgage Bondholders. (See Exception 26.)

As already pointed out, the Bureau Plan denies to the present First Mortgage Bondholders any par-

ticipation in fixed charges or in the new First Mortgage in order to permit the creation of new First Mortgage Bonds so limited in amount in relationship to both assets and earnings of the Debtor that the bonds themselves are clearly worth more than par, and then for the wholly unfounded reason of insuring their sale at par, couples with the $10,000,000 of such new First Mortgage Bonds 100,000 shares of new Common Stock (representing one-third of the entire common capital) and offers this "package" to [620] the Western Pacific Corporation at a price lower than the worth of the bonds alone.

The Bureau Plan purports to allot the offer to the Western Pacific Corporation, not in its capacity as a stockholder, but in its capacity as an unsecured creditor, for $7,188,607. The proposed Report then adds the further statement (p. 56) "The provision for the participation by the unsecured creditor would not discriminate either against the First Mortgage Bonds or the other secured creditors because such unsecured creditor must contribute $1,000 in cash for each $1,000 bond and 10 shares of new Common Stock received."

It is a strange conception that the payment of $1,000 for a bond worth more than $1,000 *plus* a share in the equity both potentially and actually presently valuable is any *contribution* at all. The result is that the creditor lowest in rank, which is also the sole stockholder of the Debtor, upon buying bonds worth more than the price paid, receives

Common Stock for its claim at the rate of $139 for each $100 of its claim—while the Bureau Plan at the same time proposes that the bondholders shall receive Common Stock for their concededly prior interest at the rate of $100 in Common Stock for each $100 interest and purports to allot to the junior secured creditors (RFC, RCC and ACJ) Common Stock in the aggregate at the rate of $100 for each $100 of such junior claims.

This is on its face an unfair discrimination in favor of the Western Pacific Corporation.

The problem is, however, complicated by the fact that the claim in respect of which the Bureau Plan purports to permit this Western Pacific Corporation subscription to new money has been assigned to RCC as collateral for the RCC note (Ex. 9). If, therefore, the subscription right constitutes an additional participation of RCC in the [621] reorganized Debtor, it constitutes a discrimination in favor of RCC and against the bondholders.

In Appendix C to the January, 1937, brief of the Bondholders' Committee, there was set forth a detailed study of the new securities which had been issued to provide new money in every major railroad reorganization from 1894 to 1936. That study evidenced the fact that in no previous reorganization has new money been given such favorable terms as are proposed by the Bureau Plan, whether the new money was furnished by stockholders or by junior creditors. Yet many of those reorganizations have been severely criticized by responsible learned

authorities on reorganization probelms as unduly favorable to the junior interests which were given the subscription rights there involved. See Moulton and Associates, The American Transportation Problem (1933), pp. 336-348.

The only justification for permitting junior interests to participate in such a reorganization as is here involved is that they may afford a market which will take securities at a higher price than they could otherwise be sold in the hope of preserving existing investments. The bonds offered to provide new money, if offered to the junior interests, whether in their capacity as stockholders or junior creditors must therefore be securities which are at least not worth substantially more than the price at which they are offered. It is in the difference between the lower market value of the new money securities and the higher price paid that justification can be found for permitting junior interests to retain a position in the reorganized property when drastic sacrifices of the character here tendered in the Bondholders' Plan are accepted by the bondholders.

There is in the record no evidence to support the implication of the proposed Report that the First Mortgage Bonds which it proposes require any bonus to effect their [622] sale at par. Whatever evidence there is in the record on this subject is to the contrary. The First Mortgage Bonds proposed for new money under the Bondholders' Plan are part of substantially twice as large an issue as is

contemplated by the Bureau and therefore, as already pointed out, have substantially less, although still "adequate", coverage by "earnings experience" and "probable prospective earnings." Yet counsel for the Bondholders' Committee stated both orally and in the January, 1937, brief that it was the belief of the Bondholders' Committee that those bonds were saleable at substantially par.

The Commission has an ample fund of practical knowledge of this sort of problem to know, without more evidence, that the bonds proposed by the Bureau Plan are in fact worth more than par and do not require any such bonus. The Bureau Plan therefore creates a substantial gift to the Western Pacific Corporation (or its assignee) at the expense of the First Mortgage Bondholders in violation of "the law of the land."

The Bondholders' Committee believes that this problem should be dealt with as provided in the Bondholders' Plan, which gives to the Western Pacific Corporation an opportunity to preserve an interest in the equity, but upon terms which do not grossly discriminate in favor of the Western Pacific Corporation and against the First Mortgage Bondholders.

In this connection, it should be pointed out that the successive offerings of the new money "package" to the junior creditors and then to the First Mortgage Bondholders, provided for in the Bureau Plan, is wholly illusory and ineffective. These successive offerings, under the Bureau Plan, are upon

exactly the same terms as the offering to the Western Pacific Corporation. The [623] purpose of such successive offerings is to insure the provision of the new money if it is not provided upon the prior offerings. The only possible reason for the failure of a prior offering would be that the securities offered were not worth the offering price. It is therefore a futile gesture to make an offering of the already rejected securities, upon no better terms, to the senior interests.

This latter problem was taken care of in the Bondholders' Plan by providing an original offering to the Western Pacific Corporation upon terms which were believed would make the "package" worth approximately the offering price, but improving the terms to each successive offeree. Under such an arrangement, if the market did not justify the Western Pacific Corporation in accepting the offering, then the better terms of the offering to RFC, RCC and ACJ would, it was believed, make the offering attractive to those offerees. If, however, market conditions were so adverse as to make that offering not attractive, then the terms were improved in order to make it attractive to the First Mortgage Bondholders. To safeguard against the possible contingency that not even this offer would be adequate to induce the First Mortgage Bondholders to provide the new money, the Bondholders' Plan provided for an underwriting, subject to the approval of the Commission and the Court, and also permitted adjustment of the rate upon the new

First Mortgage Bonds to be offered, in the light of market conditions existing at the time of the actual offer. These provisions the Bondholders' Committee believes are wise and fair and should be adopted by the Commission. However, their elimination would not be fatal to acceptance of the Plan.

The terms upon which the Bureau Plan proposes to offer the new money First Mortgage Bonds and bonus [624] Common Stock contain another unfair discrimination which, although it involves only a small amount and does not directly affect the bondholders, should be remedied by the Commission in order to obviate the vulnerability of the ultimate Plan to justifiable attack. The Bureau Plan provides that the new money "package" shall be offered to the Western Pacific Corporation as an unsecured creditor, and then adds (p. 55) "The claim of the Western Realty Company should be canceled." The unsecured claim of the Western Realty Company ranks pari passu with that of the Western Pacific Corporation. The Western Realty Company is therefore entitled to participate ratably with the Western Pacific Corporation in accordance with the amounts of their respective claims. While the Western Realty Company stock is wholly owned by the Western Pacific Corporation, counsel is advised that it has been pledged to Curtis Southwestern Corporation. This provision of the Bureau Plan, therefore, is a violation of Section 77 as against Western Realty Company and the pledgee of its stock. This defect, of course, is purely formal and not substan-

tive, and can be remedied by providing that any offering to unsecured creditors shall be proportionately to the Western Pacific Corporation and to the Western Realty Company. While the January, 1937, brief of the Bondholders' Committee indicated that it was the intent of the Bondholders' Plan that the offering to the Western Pacific Corporation covered, and should be allocated to, the unsecured claims of both the Western Pacific Corporation and the Western Realty Company, the Bondholders' Plan is itself not sufficiently clear on this point and should be modified to obviate the risk here pointed out. [625]

B. The Bureau Plan unfairly discriminates in favor of RFC, RCC and ACJ, and also in favor of Western Pacific Corporation, and against the First Mortgage Bondholders by allotting to these junior interests new Common Stock at a higher rate per $100 of claim than is allotted to the bondholders for their prior claim for interest. (See Exception 27.)

The proposed Report correctly finds that the bondholders' position, including their claims for interest, is entirely prior to the position of all the junior creditors, secured and unsecured (pp. 46-49, 52-53). As already pointed out, this priority should be maintained in the reorganization through a *qualitative* preference of the new securities allotted to the bondholders in respect of their interest. This claim, therefore, should be recognized in new Preferred Stock.

If, as the bondholders believe is not at all the case, the situation does not so permit, but requires that the bondholders shall accept Common Stock for the part of their claim represented by interest, then "the law of the land" requires a *quantitative* preference, viz. that the Common Stock so allotted shall be at a rate per $100 of the interest claim greater than the rate per $100 of claim at which Common Stock is allotted to junior creditors. No amount of multiplication of collateral junior to the First Mortgage Bonds can result in raising the junior RFC Note, RCC Note and ACJ Note or the unsecured claims of the Western Pacific Corporation to a position, as to each $100 of the claims, of equality with, or priority to, the bondholders' prior claim for interest.

Yet the Bureau Plan, while giving to the bondholders new Common Stock at the rate of $100 par value for each $100 of the claim for interest, gives to the RFC Note new [626] Common Stock at the rate of $198 for each $100 of that claim as of January 1, 1937, and to the RCC Note new Common Stock at the rate of $96 for each $100 of its claim, exclusive of anything which it may get as assignee of the Western Pacific Corporation's unsecured claim, and if the rights of RCC as such assignee are included, Common Stock at the rate of $481 for each $100 of the claim represented by the RCC Note. It also gives to Western Pacific Corporation as an unsecured creditor $139 new Common Stock for each $100 of its unsecured claim.

If the Commission will allot Preferred Stock for the bondholders' interest, then the Bondholders' Committee has no interest in the question as to how much stock is allotted to the junior creditors within the limits of the Bondholders' Plan or as to the distribution of that stock among those creditors, except its interest that the Plan shall be valid, and, therefore, not subject on its face to rejection by the Court.

If, however, Common Stock is to be issued for the bondholders' interest, then no Plan can comply with "the law of the land" which does not give to the bondholders for their interest Common Stock on more favorable terms per $100 of claim than are given to any class of junior creditors. The most favorably situated junior creditor is RFC. If, therefore, RFC is to receive approximately 2 shares of new Common Stock for each $100 of its claim, the First Mortgage Bondholders must be given more than 2 shares of Common Stock for each $100 of their claim for interest. On the other hand, if the bondholders are to be required to accept 1 share of new Common Stock, for each $100 of their interest claim, then RFC must be allotted something less than 1 share, of new Common Stock for each $100 of its claim. [627]

And since RFC, RCC and ACJ must, as the proposed Report correctly finds, participate as among themselves in proportion to their collateral, the participations allotted to RCC and ACJ in respect of their Notes must be proportionately less than the

participation allotted to RFC. Again, let the Bondholders' Committee repeat that if the bondholders are removed from this discrimination by the issue of Preferred Stock for their interest claims, they have no interest in any discrimination as between the junior creditors provided the junior creditors agree among themselves so that no one of them can make the discrimination the basis for an attack on the Plan.

The relationships between RFC, RCC and ACJ are extremely complicated, as pointed out in the January, 1937, brief of the Bondholders' Committee (pp. 7, 85-87). It was to meet those complications in a manner which would not give any one of those parties the basis for an attack upon the Plan that the Bondholders' Plan provided the device of escrow certificates, which exactly recognize the relative rights of those three parties inter se as well as the ultimate right of redemption of the Western Pacific Corporation. Those provisions have been criticized as unduly complicated by counsel for some of the junior creditors concerned. Counsel for the Bondholders' Committee recognize the complicated character of the provisions, but point out that (in the absence of agreement among the junior creditors) that complication is necessitated by the very complication of the relationships. The Bondholders' Committee would be glad indeed to have the provisions for escrow certificates eliminated if any way can be found for such elimination, without simultaneously opening up a well-founded basis for at-

tack on the Plan by the very counsel who utter the criticism. [628]

C. The limitations imposed by the Bureau Plan upon total First Mortgage Bonds, total Preferred Stock, rates of annual return on Income Bonds and Preferred Stock, and accumulation of Income Bond interest, taken together, impose such sacrifices upon the present First Mortgage Bondholders, all of which ultimately redound to the benefit of the new Common Stock, as to constitute an unfair discrimination against the First Mortgage Bondholders and in favor of RFC, RCC, ACJ and the Western Pacific Corporation as the principal recipients of the new Common Stock.

Each of these limitations and its result has already been separately discussed in the discussion of the proposed capital structure. Each one is serious, but taken in the aggregate, their cumulative effect is to destroy any possibility that the bondholders will ever recoup their investment, while at the same time creating and granting to junior interests new Common Stock which, not suffering in lean years but profiting in prosperous years, will have substantial value.

The participating feature of the New Preferred Stock is important if the bondholders are adequately to be compensated for these sacrifices which the Bureau plan imposes upon them. However, in the light of the Bureau's views of future earnings the possibility of such participating feature ever

becoming effective is so remote as not adequately to compensate the bondholders for such sacrifices.

D. The Bureau Plan discriminates unfairly against the present bondholders in favor of junior interests in granting to each share of Common Stock equal voting power with each share of Preferred Stock in the election of directors. (See Exception 22.)

This discrimination has already been adequately discussed (supra, pp. 32-34.) [629]

E. The Bureau Plan unfairly discriminates against the First Mortgage Bondholders in providing that the reorganization shall be effected, and the details of its carrying out determined, by a committee controlled by junior interests. (See Exceptions 28 and 31.)

As pointed out in the January, 1937, brief of the Bondholders' Committee (p. 91), and as recognized by the proposed Report (p. 58), it is impractical and would be unduly confusing to prescribe in the reorganization plan all the details of the reorganization. Accordingly, many of those details must be left to some representatives of the securityholders.

On the other hand, fair dealing with the securityholders requires that as many as possible of the important substantive points involved in the reorganization should be worked out and specified in the Plan. Recent Federal legislation, and recent regulations and reports issued by the Securities and Exchange Commission, have been concerned with in-

suring full disclosure to prospective purchasers of securities of the rights which those securities will have. The Bondholders' Plan accordingly endeavored to work out, in much greater detail than either the Debtor's Plan or the James Plan, specific definitions of the rights of the proposed new securities. The Bureau Plan seems lacking in specification on important substantive points. To obviate any justifiable basis for such a criticism of the ultimate Plan, the Bondholders' Committee urges that before the Commission publicly announces the Plan which it will approve, it give to all the interested parties an opportunity to confer with its representatives and work out the provisions of the ultimate Plan in sufficient detail to make to the securityholders an adequate disclosure of what they are voting upon. Legal [630] and financial documents, which are necessarily somewhat complicated, cannot well be drafted in formal public hearings.

But even when the ultimate Plan is worked out with reasonable specification, many details will remain for determination in the course of the consummation of the reorganization. This determination the Bondholders' Plan committed to the Bondholders' Committee itself in view of the paramount interest of the bondholders in the property. The Bureau Plan, however, commits the determination of these questions to a committee of three, one nominated by the Bondholders' Committee, one by RFC, RCC and ACJ as a group, and one by the Western Pacific Corporation.

The proposed Report finds that the Western Pacific Corporation's holdings of Preferred and Common Stock of the Debtor have no value and are entitled to no participation. The Western Pacific Corporation's claim as an unsecured creditor has been pledged to RCC. The anomalous result is thus produced that one of the three members of this reorganization committee will be the nominee of a party which will have no interest whatsoever in the reorganized property. If, as may be claimed by RCC, this right of nomination attaches to the unsecured claim which the RCC holds as pledgee, the equally anomalous result will follow that two of the three members of the proposed committee will represent a group of junior creditors, to whom, under the provisions of the Bureau Plan itself, there is allotted only a minority of the voting stock of the reorganized Debtor.

The members of the Bondholders' Committee have no personal desire to perform the work of a reorganization committee, and they have no objection to representation on the reorganization committee of the junior creditors, or even of the Western Pacific Corporation, if it provides [631] the new money on proper terms. The Bondholders' Committee cannot, however, recommend to the bondholders acceptance of any Plan on which representatives of the First Mortgage Bondholders, chosen as the Commission may determine, shall have less than a majority of the membership.

IV.

Any Plan which the Commission may approve should contain a provision, permitted by subsection (b) (5) of Section 77, for the protection of dissenting classes of the Debtor's securityholders by "the sale of all * * * the property of the Debtor * * * at not less than a fair up-set price" and "the distribution of * * * the proceeds derived from the sale thereof, among those having an interest therein." (See Exceptions 29 and 30.)

The Bondholders' Plan contained provisions (1) requiring the consent of two-thirds of the bondholders as a condition precedent to the confirmation of the Plan, and (2) requiring as to any other class of securityholders as to which less than the statutory two-thirds assents, the sale of the property of the Debtor at a fair up-set price, the use of all assenting securities in the purchase of such property, and the distribution of the proceeds of such sale to the dissenting securityholders of the dissenting classes in accordance with their interests therein.

The proposed Report rejects, and the Bureau Plan omits, both provisions.

For the reasons set forth in the January, 1937, brief of the Bondholders' Committee, it is believed that the first of these provisions is wise, that its inclusion will facilitate [632] rather than obstruct a reorganization, and that any attempt to exercise the coercive power purported to be granted by Sec-

tion 77 can only result in long litigation and indefinite delay in the reorganization. Counsel for the Bondholders' Committee have advised that in their opinion this coercive provision is unconstitutional as against dissenting members of a dissenting class, unless that class is otherwise protected as hereinafter suggested. The Bondholders' Committee, however, does not, at this time, press further its point as to the first of the omitted provisions.

However, the Bondholders' Committee believes that unless the second of the suggested provisions is included in any Plan which the Commission may approve and, the first provision having been omitted, the second provision is also extended to cover the bondholders as a possible dissenting class, the practical situation in the Western Pacific case will make impossible any reorganization without interminable litigation, if not entirely prevent reorganization.

It also believes that if the Commission takes the construction of Section 77 which the proposed Report has taken, the most severe condemnation of the critics of Section 77 as to its unworkability will have been confirmed by the Commission.

The provision purporting to give the Commission and the Court the power to force a Plan upon a class of creditors, particularly mortgage bondholders, which as a class has dissented from the reorganization, would seem to be clearly unconstitutional under the decisions of the United States

Supreme Court. Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555. See also: In re Tennessee Publishing Co., 81 F. (2d) 463; Continental [633] Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co., 294 U. S. 648.

Even if the Commission does not agree with this conclusion, it would seem wise that the Commission should not adopt a construction of Section 77 which raises a doubt as to the constitutionality of the procedure attempted to be taken in the reorganization.

Furthermore, the compulsory provision itself does not permit the exercise of the power of coercion purported to be granted unless the Court finds that such rejection (i. e., by the dissenting class) "is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relative facts". The rejection of a Plan by more than one-third of the bonds (and the Bureau Plan in anything like its present form would be so rejected) is strong prima facie evidence that the Plan is not fair or equitable and that the rejection is reasonably justified. This fact alone would seem to make advisable in the public interest the inclusion of a constitutional method of fixing the rights of the dissenting members of a class which, as a class, dissents by failing to give the statutory two-thirds assent.

The proposed Report rejects the argument of counsel for the Bondholders' Committee that sub-

section (b) (5) expressly authorizes the inclusion of the suggested provision providing for the protection of the dissenting members of a dissenting class through a sale at a fair up-set price. The only argument contained in the proposed Report for its conclusion is that Section 77 contemplates "that reorganization shall be accomplished through confirmation of a Plan, or that the proceedings should be dismissed." To the fact stated in that argument comsel for the Boudholders' Committee do not at all dissent. Of [634] course the Plan must be confirmed. But when it is confirmed (under the coercive provision of Section 77 if any class dissents), one of the provisions of the confirmed Plan should be the suggested and expressly authorized "means for the execution of the Plan", viz., "the sale of all * * * the property of the Debtor * * * at not less than a fair upset price", for the protection of the dissenting class. If, at such sale, the property is purchased by assenting classes, the reorganization will proceed with the issue of securities contemplated by the Confirmed Plan. If, on the other hand at such sale, the property is purchased by a dissenting class, the assenters will, under this provision of the Confirmed Plan, receive their proportionate part of the proceeds of sale. The dissenters in the latter case will own the property and will have to recapitalize it in accordance with Section 20(a) of the Transportation Act. Thus, as to non-assenting members of non-assenting classes, the unconstitutional features of the coercive provision will

have been obviated by providing for them a conventional and clearly constitutional means of realizing the value of their interest in the Debtor's property. Failure to include this provision will destroy the validity of any plan; its inclusion will save the Plan.

An examination of the legislative history of the 1935 amendments to Section 77 will show that this provision of sub-section (b) (5) was inserted for the express purpose of dealing with the constitutional question raised by the inclusion of the coercive provision and for the purpose of enabling those who desire to have a reorganization which will vest marketable title in the reorganized property and validate the securities which may be issued in the reorganization, to have a means of so doing by a judicial sale of the sort here suggested. What "sale of all the property of the Debtor * * * at not less than a fair up-set price" [635] could there possibly be, under a confirmed Plan, other than a sale of the sort contemplated by this provision of the Bondholders' Plan?

Any other construction of sub-section (b) (5) will leave subsection (b) (5) wholly without meaning, and it is a fundamental rule of construction that even as between two apparently conflicting provisions of any Act, effect must be given to both to the extent that such effect can be given. Even if sub-section (b) (5) and the provisions respecting confirmation of a Plan have any apparent conflict (which it is submitted they do not have), effect can

be given to each of the provisions by taking the construction urged by the Bondholders' Committee.

V.

Summary of modifications in the Bondholders' Plan acceptable to the Bondholders' Committee.

Throughout this brief various suggestions have been made as to modifications which might be made of the Bondholders' Plan to meet criticisms which are made, or to be implied, from the proposed Report. It may clarify the Commission's dealing with the problem if those modifications are summarized.

That the Bondholders' Committee indicates these possible modifications is not to be taken as any indication either that the Bondholders' Committee believes that they are wise, or even justified, or that the Bondholders' Committee believes that with them the acceptance of the Plan by the bondholders will not be materially more difficult to obtain.

If the Commission after weighing all the arguments in its judicial capacity decides that the following modifica- [636] tions of the Bondholders' Plan are necessary, the Bondholders' Committee is desirous of cooperating to facilitate the reorganization and, accordingly, would recommend the acceptance of the plan with such modifications:

1. Open the Income Mortgage to provide for future financing through Income Bonds.

2. Reduce the dividend rate upon the Preferred Stock from 6% to 5%.

3. Eliminate the provision giving the Preferred Stock power to elect a majority of the Board of Directors.

4. Reduce the number of shares of Common Stock to such number as the Commission may require, provided that the distribution of such shares shall remain in the proportions provided in the Bondholders' Plan.

5. Eliminate the Contingency Reserve Fund.

6. Make the Sinking Fund payable out of available net income before Preferred dividends, but, as provided in the Bureau Plan, reduce it to an annual ½ of 1% Fund instead of a 1% Fund.

7. Change the provision for the Capital Fund to the provision contained in the Bureau Plan.

8. Clarify the provision respecting the offering of new securities to provide new money by providing that it shall be made to the unsecured creditors (i. e., the Western Pacific Corporation or its assignee, and the Western Realty Company) proportionately to the amounts of their respective claims.

9. Eliminate the provision for successive offerings of the new money First Mortgage Bonds and [637] bonus Common Stock successively to the junior secured creditors and the First Mortgage Bondholders, upon progressively more favorable terms to the offeree, and

also the provision for ultimate underwriting; and substitute a provision that the exact terms of the offering as to both the interest rate to be borne by the new money First Mortgage Bonds and the amount of Common Stock to be included as a bonus shall be determined by the reorganization committee with the approval of the Commission and the Court at the time the offering is to be made, and shall be such that the "package" will be worth approximately the par of the First Mortgage Bonds.

10. Eliminate the provision for escrow certificates, so that RFC, RCC and ACJ will directly receive Common Stock. This modification, however, is unwise unless all these creditors agree upon the distribution of the new Common Stock as among themselves.

11. Provide that the reorganization committee shall be constituted of such number of members, not more than 5, as the Commission may determine, but a majority of whom shall be elected by the bondholders in any manner which the Commission may prescribe.

12. Eliminate the provision requiring the consent of two-thirds of the bondholders to the confirmation of the Plan, but extend the provision for protecting a dissenting class through a judicial sale at a fair up-set price to include the bondholders as a class. [638]

VI.

In view of the great importance of the principles involved in this proceeding, not only with respect to the investment of institutional bondholders in the Western Pacific, but also with respect to railroad reorganizations generally, oral argument before the full Commission is requested by the Bondholders' Committee.

Respectfully submitted,

CRAVATH, DE GERSDORFF,
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ROBERT T. SWAINE,
LITTLETON GROOM,
Of Counsel. [639]

EXCEPTIONS OF BONDHOLDERS' COMMITTEE TO PROPOSED REPORT OF THE BUREAU OF FINANCE.

The Bondholders' Committee hereby makes and presents the following exceptions to the Report proposed herein by the Bureau of Finance:

1. The Report errs in its recommendation (p. 38) that the Commission should not approve the debt structure proposed in the Bondholders' Plan as compatible with sound financing and the public interest.

2. The Report errs in not recommending that the Bondholders' Plan, including the debt structure provided for therein, be approved by the Commission as complying with all the requirements of Section 77 and as being compatible with the public interest.

3. The Report errs in recommending (pp. 59-61) a Plan of Reorganization for the Debtor providing for a total capitalization and for new securities of a character not compatible with the public interest and not permitting due recognition of the rights of each class of securityholders.

4. The Report errs in its recommendation (pp. 44, 46) that the capitalization of the reorganized company should be limited to $91,406,510 par value of securities.

5. The Report errs in not recommending approval by the Commission of the capitalization of the reorganized company contemplated by the Bondholders' Plan.

6. The Report errs in its recommendation (pp. 39-40) that fixed interest-bearing bonds issued in the reorganization be limited in aggregate principal amount of $10,000,000 "and that no other fixed interest obligations be permitted". [640]

7. The Report errs in failing to recommend that new First Mortgage Bonds be allotted to the present First Mortgage Bondholders for a portion of their claim.

8. The Report errs in its conclusion (p. 39) that no fixed charges in excess of $500,000 should be authorized or approved.

9. The Report errs in not recommending approval by the Commission of the aggregate fixed charges contemplated by the Bondholders' Plan.

10. The Report errs in its analysis (pp. 19-22) of the Debtor's "earnings experience" and of the "probable prospective earnings" of the reorganized company.

11. The Report errs in its essential conclusion that the First Mortgage Bonds contemplated by the Bondholders' Plan, together with the shares of stock included therewith, would not be salable at par of the bonds.

12. The Report errs in its recommendation (p. 52) that "10 shares of new common stock be given to the purchaser of each $1,000 principal amount of new bonds", proposed in the Bureau Plan in order "to facilitate the sale of the bonds at par".

13. The Report errs in its recommendation (pp. 42-43) that the total of fixed and contingent interest charges plus sinking fund requirements and the capital fund of the reorganized company should not be more than the earnings of the Debtor available for interest in 1936.

14. The Report errs in not recommending that, in view of the Debtor's earnings experience and probable prospective earnings, the total fixed and contingent interest charges contemplated by the

Bondholders' Plan be approved as compatible with the public interest. [641]

15. The Report errs in recommending (pp. 43, 59) the issuance to present First Mortgage Bondholders of new Income Mortgage Bonds which are not of a character compatible with the public interest or permitting due recognition of the priority rights of the present First Mortgage Bondholders.

16. The Report errs in recommending (p. 43) that the annual interest rate on the Income Mortgage Bonds shall be 4%, and in failing to recommend approval by the Commission of a rate of 5% as contemplated in the Bondholders' Plan.

17. The Report errs in recommending (pp. 41, 43) that interest on the new Income Mortgage Bonds shall be noncumulative determined on semi-annual rests ending June 30 and December 31 in each year.

18. The Report errs in not recommending that interest on the Income Mortgage Bonds shall be cumulative as against three years income, as provided in the Bondholders' Plan.

19. The Report errs in its conclusion (p. 44) that the maximum amount of new Preferred and new Common Stock to be issued in the reorganization may not exceed 295,740 3/5ths shares and 300,682 1/5th shares, respectively, of a value of $100 each.

20. The Report errs in not recommending that the amounts and character of the Preferred Stock and Common Stock contemplated by the Bond-

holders' Plan be approved by the Commission as compatible with the public interest.

21. The Report errs in recommending (pp. 44-45) Preferred Stock bearing a dividend rate of 5% and in failing [642] to recommend approval by the Commission of a rate of 6% as contemplated in the Bondholders' Plan.

22. The Report errs in recommending (p. 46) that each share of Preferred Stock have equal voting power with each share of Common Stock and in failing to recommend that the Preferred Stock be given the right to elect a majority of the Board of Directors of the reorganized company as contemplated in the Bondholders' Plan.

23. The Report errs in its recommendation (p. 53) that the unpaid interest on present First Mortgage Bonds be commuted into new Common Stock and in failing to recommend that such interest be commuted into Preferred Stock as contemplated in the Bondholders' Plan.

24. The Report errs in recommending (p. 44) that the new Common Stock should be of a par value of $100 each and in failing to recommend that such stock should be without par value as contemplated by the Bondholders' Plan.

25. The Report errs in its recommendations (pp. 40-42) respecting (1) Contingency Reserve Fund; (2) Capital Fund; and (3) Sinking Fund, and in failing to recommend the approval by the Commission of the provisions of the Bondholders' Plan respecting such funds.

26. The Report errs in recommending a Plan which provides for the raising of new money on terms discriminating unfairly in favor of The Western Pacific Railroad Corporation and against the present First Mortgage Bondholders.

27. The Report errs in recommending a Plan which discriminates unfairly in favor of the junior creditors and against the First Mortgage Bondholders by allotting [643] to the junior creditors new Common Stock at a higher rate per $100 of claim than that allotted to the present First Mortgage Bondholders for their prior claim for interest.

28. The Report errs in its recommendation (p. 59) as to the constitution of the Reorganization Managers and in failing to recommend approval by the Commission of the provisions respecting Reorganization Managers contained in the Bondholders' Plan.

29. The Report errs in its conclusion (p. 57) that the provision of the Bondholders' Plan requiring its acceptance by or on behalf of the holders of at least two-thirds in principal amount of the First Mortgage Bonds of the Debtor is not in accordance with the provisions of Section 77, and in failing to recommend that such provision be approved by the Commission.

30. The Report errs in its conclusion (p. 58) that the provision of the Bondholders' Plan providing for the sale of the property of the Debtor in case of failure to obtain necessary assents is not in accordance with the provisions of Section 77 and

in failing to recommend that such provision be approved by the Commission as being not only in accordance with the provisions of Section 77, but expressly permitted and contemplated by subsection (b)(5) of Section 77.

31. The Report errs in recommending a Plan which fails to set forth many important substantive points with sufficient detail to enable security-holders to know on what they are voting.

[Endorsed]: Filed Oct. 5, 1939. [644]

Before the Interstate Commerce Commission
Finance Docket No. 10913.

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY, Debtor.

THE RAILROAD CREDIT CORPORATION, Intervening Petitioner.

PETITION FOR MODIFICATION

To the Interstate Commerce Commission:

The Railroad Credit Corporation (hereinafter referred to as the R.C.C.), an intervenor in the above entitled proceeding, respectfully petitions the Interstate Commerce Commission under the provisions of Subsection (d) of Section 77 of the Federal Bankruptcy Act as amended, to modify its Report and Order herein dated October 10, 1938, as set out in Paragraph A of this petition, or alternatively as suggested in Paragraph B hereof, and in support of said petition represents:

A

That the Report and Order herein of the Interstate Commerce Commission, dated October 10, 1938, err in material respects, both in fact and in law, and do not conform to the requirements of Section 77 of the Federal Bankruptcy Act as amended, and should be modified, as hereinafter set forth:

1. Paragraph A of said Order directs that the effective date of the plan reported in said Order (hereinafter referred to as the I.C.C. Plan) shall be July 1, 1938.

The employment of an arbitrary effective date earlier than the actual date of reorganization would result in the payment of interest upon interest that [646] has accrued during the pendency of the Section 77 proceeding, in a case where, as in the Western Pacific, new bonds are to be issued in satisfaction of existing bonded indebtedness. While it is doubtless proper to fix an arbitrary cut-off date for the purpose of determining relative amounts of claims as of such date, an arbitrary effective date can not be so employed as to affect substantive rights. Even an approved and confirmed plan can not act upon substantive rights retroactively. No plan has yet been approved or confirmed herein. It is possible that no plan ever will be approved and confirmed in this proceeding. Pending the final adoption and consummation of a plan, or other disposition of this proceeding, the R.C.C., in pursuance of a substantive right, has applied,

and it has a duty to apply in future, income and proceeds of collateral to or towards the payment of the principal of or interest upon the debt secured, in accordance with the principles twice declared by District Courts of the United States in proceedings under Section 77 of the Federal Bankruptcy Act as amended, to which proceedings the R.C.C. was a party and in which its rights, as herein discussed, were in issue (New Haven Reorganization, printed record p. 2903; St. L. S. W. Reorganization, printed record p. 3533). The rights of the R.C.C. in this respect are not dependent upon the action of any court but exist by virtue of the general law of pledges and the guarantees of the Fifth Amendment to the Constitution. (See also The Railroad Credit Corporation v. Hawkins, 80 F. (2d) 818; cert. den. 298 U. S. 667). The R.C.C. has a positive duty to apply such income and proceeds as aforesaid; such funds, when so applied, become the property of the R.C.C. subject to the terms and provisions of the Marshalling and Distributing Plan, 1931, and are distributed by the R.C.C. from time to time in accordance with said terms and provisions. The R.C.C. cannot be required to suspend the performance of its duties under said Marshalling and Distributing Plan, 1931, on the chance [647] (uncertain of fulfillment) that any particular plan will ultimately become effective. The alternative, under the I.C.C. Plan, would seem to be an order directing the R.C.C., upon the actual effective date, which may be years hence if it does occur, to return funds which

it has received as income or proceeds, applied on the debt secured, and distributed to the participating carriers under said Marshalling and Distributing Plan, 1931. Manifestly such an order, if issued, would not be sustained on appeal. It is significant that the loans made by the R.C.C. to the Debtor, and upon which the R.C.C.'s claim herein is based, were made prior to the enactment of said Section 77.

The I.C.C. Plan should either omit all references to an arbitrary effective date, or include the provision hereinafter proposed under subparagraph 7.

2. Paragraph C of said Order directs that the capitalization shall be an aggregate sum of $93,726,517 (treating no-par-value common stock at $100 per share).

The Report states (sheets 40-41), "It will be observed that, insofar as the capitalization of a reorganized company is concerned, Section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor; and the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization should not exceed a *conservative appraisal* of the assets to be taken over by the re-

organized company, and that proposed charges, whether fixed or contingent, be within the probable earning power." (Italics supplied). [648]

Again, at sheets 50-52, the Commission's Report says, "It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans" (viz. $74,270,738, exclusive of no par stock, to $124,259,367, inclusive of such stock taken at $100 per share).

Mr. Commissioner Miller in a partly dissenting opinion said (sheet 72), after quoting the sentence last above quoted, "With this conclusion I can not agree but am strongly of the view that the capitalization should be generally on the basis of original cost less depreciation amounting to something over $120,000,000, which is about the same as is proposed in two of the three plans referred to in the above quotation. The no-par-value common stock may have little or no market value when the company is reorganized, but the issuance in the neighborhood of $30,000,000 more than the majority authorize would give the present stockholders a chance to participate in the future profits of the reorganized company."

There is no practical or legal necessity for taking the no-par-value stock at $100 per share in computing capitalization—to do so is only to run up the *apparent* capitalization. It would be more accurate to treat it in this instance as having a merely nominal value, which would leave the capitalization at its real level under the I.C.C. Plan, of roundly $63,000,000.

It may generally be in the public interest (though the point is not without doubt, because of the strong arguments contra) that capitalization should be based on a "conservative appraisal" and kept "within strict limits"; but even if this be true, in this instance, these tests should not be so applied as to [649] destroy property rights. The Supreme Court said in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555 (1935), "* * * * * the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." Assets of the Debtor may not be diverted or withheld from those entitled to them, whether creditors or stockholders.

The R.C.C. holds in pledge, among other items of collateral, certain bonds of the Debtor. Although as

this Commission pointed out in its report (sheet 56), with respect to the status of these bonds, "final adjudication of this and similar questions must be made by the Court," this Commission has nevertheless determined the question adversely to the R.C.C. and treated those bonds as being virtually worthless. Admittedly a legal question, it would seem that it should have been referred to the court for determination and alternative treatments proposed subject to subsequent judicial determination. The limited record before the Commission establishes some value in those bonds. The I.C.C. Plan also treats as worthless the claim of the Western Pacific Railroad Corporation, which the R.C.C. holds in pledge. If the capitalization were not so restricted it would be possible to provide for this claim as well as for the secured note holders. Capitalization in a reorganization should be *fair:* there is no warrant for making it either conservative or excessive. If it is less than *fair,* it diverts assets of the Debtor from creditors who are entitled to them. This is the sort of thing condemned by the Supreme Court. [650]

The I.C.C. Plan should provide for adequate capitalization to permit participation by all parties entitled to share in the capital assets of the Debtor; and in the distribution of said capital assets through the allocation of new securities ("share in the consideration to be distributed in reorganization"; "and equitable share in the debtor's assets": Kuehner v. Irving Trust Co., 299 U. S. 445, 1937) due recognition be given (or suitable provision be made

for such recognition contingent upon subsequent judicial determination of the issues) to the prior lien of the General and Refunding Mortgage, to the extent that such lien exists, and that recognition be given to other items of collateral pledged by the Debtor.

3. Paragraph I (2) directs the establishment of a capital fund amounting to $1,000,000, by annual instalments of not to exceed $500,000.

However desirable generally, a capital fund in this instance is unnecessary and deprives junior creditors of earnings to which they are entitled. It is not clear that it is even desirable in the case of this debtor: since the proposal for a capital fund was first made, ten millions have been spent improving the property of the Debtor: no such fund, sterlizing a substantial part of the assets of the Debtor, should now be required.

Other persuasive arguments against such a fund are stated or referred to in the separate opinions herein of Mr. Commissioner Eastman (concurred in by Mr. Commissioner Aitchison), and of Mr. Commissioner Miller.

The I.C.C. Plan should restrict the capital fund to $500,000, with instalments of not exceeding $250,000, or eliminate it entirely.

4. Paragraph J (3) provides for the treatment of the secured notes of the R.C.C., R.F.C., and A. C. James Company.

For principal and interest (computed only to July 1, 1938), these [651] creditors are offered.

159,462 shares of no-par common stock (out of a total authorized issue of 500,000 shares, with 313,703 shares being issued at date of reorganization) divided between them on the basis of their respective holdings of the Debtor's General and Refunding bonds. No account is taken of other collateral. The value of this stock, as it is set up in the I.C.C. Plan, is best indicated by noting that although the Commission computes future earnings at about $500,000 per annum, it has nevertheless set up charges ahead of dividends on the common stock such that it will be necessary to have earnings available for interest and dividends, in the sum of $4,318,035 before even 3% can be paid on the common stock. This is a wholly unwarranted diversion of income (comparable to the diversion of capital assets, above discussed) from the General and Refunding Mortgage bonds to the First Mortgage bonds. Here again it would seem that if a proper allocation cannot be made without a judicial determination of the relative priorities, either the question should be referred to the Court and allocation held up until a decision is rendered, or the allocation should be so made that it can be adjusted to such ultimate judicial determination. The parties did not make a full presentation of their case upon this issue in the hearings before this Commission because it could not be settled here. It is unfair for the Commission to pre-judge the issue upon an incomplete record, and to act upon its protem finding as though it were final.

The additional offer of "warrants" to purchase new first mortgage bonds adds nothing. This provision, more fully treated in subsection 6 (infra), appears to be made to avoid possible technical objections.

The I.C.C. Plan should contain an alternative provision based on the assumed establishment of a prior lien as claimed by the Trustee of the General and Refunding Mortgage, or leave the matter open until after determination of the respective liens by the Court; and it should also give due recognition to other collateral pledged by the Debtor. A more equitable division of income [652] should be evolved.

5. Paragraph J (4) dismisses the claims of the Western Pacific Railroad Corporation as being without value.

The lack of value is due to the unwarranted diversion of capital assets and income, as above stated.

The I.C.C. Plan, modified as hereinabove proposed, in subparagraph 2, would necessarily make adequate provision for these claims.

6. Paragraph K deals with warrants to purchase new first mortgage bonds at their face value.

That it was not seriously contemplated that these warrants would be exercised by the R.C.C., R.F.C. and A. C. James Company is apparent from the fact that subsequent provision is made for the possible exercise of such warrants by the present first mortgage bondholders in case the first three creditors do not act, and failing in that, for a loan from the R.F.C. secured by new first mortgage bonds.

The marketability of the new first mortgage bonds is hardly enhanced by the provisions for using them as collateral in the event that no one is willing to buy them.

The warrants will have no value unless the terms upon which the bonds are to be issued are such as to make them worth more than their face amount, within the period of 45 days after date of reorganization. It is apparent from the certificate of incorporation of the R.C.C. that the R.C.C. could not exercise the warrants allocated to it. Whether or not it could sell such warrants within 45 days of the actual effective date of the plan, which, if it does occur, will be at an indefinite date in the future, is at this time a matter of pure speculation. It may truly be said of the warrants that they are thus made tokens for speculation in reorganization. If the new first mortgage bonds will be worth [653] more than their face amount at date of reorganization, a creditor's right of participation in the "profit" should not be dependent upon its corporate power to exercise warrants for purchase, or upon its ability to sell such warrants in a 45 day period. It would be unfair and inequitable to compel a creditor, especially a creditor dealing with trust funds, to embark upon such a speculation, even to the extent of assenting to a plan that involved its acceptance of such warrants, unless its claim against the Debtor were otherwise fully provided for. Neither is it fair or equitable to offer to creditors

terms which may be accepted by some but cannot be accepted by others.

This does not seem to be either a sound basis or method for the issue of new securities, however good they may be; neither does it seem to be a fair method, from the standpoint of other creditors.

The proposal for the issue of such warrants should be eliminated from the I.C.C. Plan, and other provision made for the creditors affected thereby.

7. Paragraph N provides, first, for the release and cancellation of existing mortgages, and for the surrender to the reorganized company of "all funds on deposit with the debtor's mortgage trustees," and of "all collateral pledged under the mortgage," free from existing liens; also of all collateral pledged by the debtor with the R.C.C., R.F.C. and A. C. James Company. (A further provision respecting the R.C.C. will be discussed below.)

It is clear that "the right to retain a lien until the debt secured thereby is paid is a substantive property right which may not be taken from the creditor consistently with the Fifth and Fourteenth Amendments to the Constitution" (Security-First National Bank v. Ridge Land & Navigation Company, 85 F. (2d) 557, C.C.A. 9, 1936). There can be no obligation upon the trustee under the General and Refunding Mortgage to surrender cash, deposited securities and other collateral, or to release the lien of that mortgage, until the bonds [654] thereunder have been satisfied, to the extent at least

that the mortgage assets will permit. Similarly there can be no duty upon the R.C.C. to release its pledge unless and until pledge assets have been devoted to the satisfaction of its claim.

The I.C.C. Plan should be limited in accordance with the foregoing.

Paragraph N then proceeds to require the R.C.C. to release and surrender to the new company, the distributive shares of the Debtor under the Marshalling and Distributing Plan, 1931, "from and after the effective date of the plan," that is to say, the arbitrary date of July 1, 1938, and further provides that "any proceeds from such shares applied by The Railroad Credit Corporation to the payment of principal and/or interest of and upon the obligations of the debtor after the effective date of the plan, unless such application shall have been made by authority of the Court of competent jurisdiction, shall be turned over to the reorganized company."

In the absence of a voluntary acquiescence by the R.C.C., which has not been given, these provisions are completely unwarranted and cannot be supported in Court. The rights of the R.C.C. do not rest upon a court order and the R.C.C. cannot be required to seek a court order as a condition precedent to the exercise of its rights.

It may be noted in this connection that the claim of the R.C.C., as classified by the reorganization court, constitutes an entire class of claims. Where the statutory majority of an affected class dissent from a plan, the court may confirm the plan only

if it finds, inter alia, that the plan provides fair and equitable treatment for the rights and interests of those rejecting it and that their rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts. [655].

Not only is the R.C.C. entitled as pledgee to receive and apply the distributive shares of the Debtor, but under the terms of the Marshalling and Distributing Plan, 1931, to which both the R.C.C. and the Debtor are parties, the R.C.C. has the right and is in duty bound not to pay distributive shares in cash to participating carriers that have borrowed from and are indebted to the R.C.C., but instead to credit such shares upon such indebtedness. In view of the origin and purpose of the R.C.C., and the benefits derived from it by the Debtor and the First Mortgage bondholders of the Debtor, it would be most unfair and inequitable, even if it were lawful, as it is not, to require the R.C.C. to subject its rights to the provisions of Paragraph N.

Unless the arbitrary effective date is eliminated, as hereinabove proposed in subsection 1, the I.C.C. Plan should be modified by inserting therein the following provision which is contained in the order of this Commission (by Division 4) in Chicago Great Western Railroad Company Reorganization, F.D. No. 10772, decided August 4, 1938: "Nothing in the foregoing and other provisions herein with respect to The Railroad Credit Corporation is intended to

limit or in any manner affect the right of that Corporation to apply, in its discretion, the income on and proceeds of the collateral held by it, to or towards the payment of the principal, or interest, or both, of or upon its claim against the Debtor prior to the consummation of the reorganization."

8. Paragraph O declares that the approval and confirmation of the plan shall in no wise disturb or alter the right and interest of the R.F.C. and the R.C.C. in collateral pledged with them by parties other than the debtor.

Obviously the R.C.C. will not accept out of hand a plan which does not adequately provide for its claim, especially when acceptance would cut off the security of collateral pledged with it by third parties. Whether such security [656] is cut off or not is dependent upon established principles of law which cannot be altered by any provision in an order of this Commission.

The I.C.C. Plan treats the $4,000,000 principal amount of Debtor's General and Refunding Mortgage bonds held in pledge by the R.C.C. as though they were pledged with it by the Debtor: the record shows that $2,000,000 principal amount of said bonds were pledged with the R.C.C. by the A. C. James Co. Obviously the R.C.C. cannot surrender said bonds without the consent of the A. C. James Co. Under the terms of Paragraph O, the R.C.C. would not be required to surrender them. Paragraph N would not apply though presumably it

was intended to. The R.C.C. has previously suggested a simple method of meeting this difficulty, viz., the proposal of plan equivalents for General and Refunding bonds. If all parties assent to the I.C.C. Plan these mechanical details, which affect substantive rights, can be readily worked out; otherwise they will prove stumbling blocks.

The I.C.C. Plan should recognize and make provision for this situation by the method herein proposed.

B

That as a result of extensive negotiations between the representatives of the Debtor, the First Mortgage Institutional Bondholders Committee, Reconstruction Finance Corporation, A. C. James Company, and The Railroad Credit Corporation, on November 30, 1938, a compromise plan of reorganization for the Debtor was tentatively agreed upon by all the conferees except one, who indicated that while his client might not assent to said plan, it might not oppose it. A copy of said compromise plan in outline is attached hereto, marked Exhibit A. Although said compromise plan does not give effect to the legal rights of The Railroad Credit Corporation and does give preferential treatment to the First Mortgage bondholders and the R.F.C., in the opinion of your Petitioner, [657] nevertheless The Railroad Credit Corporation tentatively assented to said plan as a compromise, in the hope and expectation that a speedy termination of the Western

Pacific Railroad Company reorganization might this be brought about, avoiding further delay, litigation, and expense. Said compromise plan now appears to have been abandoned, at least for the present. A compromise plan will avoid the many complexities that have arisen in this proceeding, but such a plan, to become effective, must be accepted by all parties in interest. It will be noted that the capitalization after reorganization under the compromise plan will be $94,647,981, if the non-par common stock is set up on the basis of issue.

Your Petitioner believes that said compromise plan would still be acceptable, as a compromise, to all the parties that tentatively assented thereto, and that further negotiation, or minor modification by this Commission, would result in acceptance thereof by all parties in interest.

Wherefore, The Railroad Credit Corporation prays that the Order of the Commission herein, dated October 10, 1938, and the Report accompanying said Order, be modified in the several respects hereinabove set forth in paragraph A, and in such other respects as may be necessary to give effect thereto, and as may be approved by this Commission; or, alternatively, and preferably, that said Order and Report be so modified as to give effect to the aforesaid compromise plan hereinabove referred to in paragraph B, and attached hereto as Exhibit A, with such amplification and such further

modification thereof, if any, as may be agreed to by the parties in interest, and approved by this Commission.

Respectfully submitted,

THE RAILROAD CREDIT CORPORATION,
Intervening Petitioner.
By D. WILLARD, JR.
Vice President and General Counsel.

Washington, D. C.,
December 9, 1938. [658]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 9th day of December, 1938.

D. WILLARD, JR.,
Vice President and General Counsel,
The Railroad Credit Corporation.
Office and P. O. Address:
228 Transportation Building,
17th and H Streets, N. W.,
Washington, D. C. [659]

EXHIBIT A TO PETITION OF THE RAILROAD CREDIT CORP.

PROPOSED CAPITALIZATION

Effective Date January 1, 1939

Title of Issue	Presently Issued	Interest or Dividends
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract	$ 2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due 1989	10,000,000	400,000
Total Annual Fixed Charges		494,202
Capital Fund		200,000
Income Mortgage 4% Bonds, Series A, due 2014	20,901,240	836,050
Total Funded Debt	33,651,290	
Total Annual Charges (fixed and contingent) and Capital Fund		1,630,252
Income Mortgage Sinking Fund		104,506
Participating 5% Preferred Stock (par value $100)	33,797,670	1,689,835
Participating 4% Preferred Stock (par value $100)	14,190,318	567,613
Total Annual Charges, Capital Fund, Sinking Fund and Preferred Dividend Requirements		3,992,206
Common Stock (without par value)	343,730 shs.	
Capitalization (Common at $100 per share)	$115,850,711	
Preferred Stock Begins Participating After		5,023,397

TREATMENT OF EXISTING SECURITIES

1. In Respect of each $1,000 of Principal

	Income Mortgage Bonds	5% Preferred Stock	Common Stock	Rate Per Share of Common
First Mortgage Bonds	400	600		
R. F. C.	400	600		
R. C. C.	—	1000		
A. C. J.	—	—	30 shs.	$33.33
W. P. RR. Corp.	—	—	20 shs.	$50.00

2. In Respect of each $100 of Interest

	Income Mortgage Bonds	4% Preferred Stock	Common Stock	Rate Per Share of Common
First Mortgage Bonds	—	$100		
R. F. C.	—	100		
R. C. C.	—	100		
A. C. J.	—	—	3 shs.	$33.33
W. P. RR. Corp.	—	—	2 shs.	$50.00

Total Funded Debt	33,651,290	
Total Annual Charges (fixed and contingent) and Capital Fund		1,630,252
Income Mortgage Sinking Fund		104,506
Participating 5% Preferred Stock (par value $100)	33,797,670	1,689,835
Participating 4% Preferred Stock (par value $100)	14,190,318	567,613
Total Annual Charges, Capital Fund, Sinking Fund and Preferred Dividend Requirements		3,992,206
Common Stock (without par value)	343,730 shs.	
Capitalization (Common at $100 per share)	$115,850,711	
Preferred Stock Begins Participating After		5,023,397

TREATMENT OF EXISTING SECURITIES

1. In Respect of each $1,000 of Principal

	Income Mortgage Bonds	5% Preferred Stock	Common Stock	Rate Per Share of Common
First Mortgage Bonds	400	600		
R. F. C.	400	600		
R. C. C.	—	1000		
A. C. J.	—	—	30 shs.	$33.33
W. P. RR. Corp.	—	—	20 shs.	$50.00

2. In Respect of each $100 of Interest

	Income Mortgage Bonds	4% Preferred Stock	Common Stock	Rate Per Share of Common
First Mortgage Bonds	—	$100		
R. F. C.	—	100		
R. C. C.	—	100		
A. C. J.	—	—	3 shs.	$33.33
W. P. RR. Corp.	—	—	2 shs.	$50.00

3. Distribution of Stock

	5% Preferred	4% Preferred	Common
First Mortgage Bonds	$29,574,060	$13,143,945	
R. F. C.	1,778,000	899,870	
R. C. C.	2,445,610	146,503	
A. C. J.			187,536
W. P. RR. Corp.			156,194
Total	$33,797,670	$14,190,318	343,730

[Endorsed]: Filed Oct. 5, 1939. [660]

Before the Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

PETITION FOR MODIFICATION OF THE COMMISSION'S REPORT AND ORDER OF OCTOBER 10, 1938, ON BEHALF OF RECONSTRUCTION FINANCE CORPORATION [661]

Petition for Modification

Comes now Reconstruction Finance Corporation (hereinafter called Reconstruction), an intervener in the above-entitled proceeding, and respectfully petitions the Interstate Commerce Commission (hereinafter called the Commission) to modify its Report and Order herein, of October 10, 1938, and in support of said petition respectfully shows:

I.

Contemporaneously herewith the Committee (hereinafter called the Committee) representing certain institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter called the Debtor), acting under a group agreement dated as of September 1, 1936, and consisting of Frederick H. Ecker, Chairman, John W. Stedman, and Reeve Schley, are petitioning the Commission for a modification of said Report and Order. The modifications proposed by the Committee

are set forth in the [662] Committee's Modified Plan, which it is annexing to its petition.

II.

The provisions affecting Reconstruction in said modified plan meet with the approval of Reconstruction.

III.

Reconstruction has the following objection, among others, to the plan approved by the Commission in its report and order herein dated October 10, 1938:

> Pursuant to the approval of the Commission granted in its report and certificate of November 10, 1938, in Finance Docket No. 12213, Reconstruction, as of December 1, 1938, loaned to the Debtor's Trustees the sum of $9,902,921.95, taking in evidence of such loan, by way of discount from face value such as to make the yield on the Trustee's Certificates next hereinafter mentioned from the date thereof to the date of maturity 4 per cent, Certificates of the Debtor's Trustees in the aggregate principal amount of $10,000,000, dated December 1, 1938, maturing December 1, 1939, and bearing interest by their terms at the rate of 3 per cent per annum, payable semi-annually. [663]
>
> As appears from the foregoing, the $10,000,000 of Trustees' Certificates have been acquired by Reconstruction since the date of the Commission's report and order herein of October

10, 1938, approving a plan. The Commission's approval of the acquisition by Reconstruction of said $10,000,000 of Trustees' Certificates was also granted, on November 10, 1938, in Finance Docket No. 12213, subsequent to the Commission's report and order herein of October 10, 1938, approving a plan.

As required by the terms of the Commission's report and certificate in Finance Docket No. 12213, said $10,000,000 of Trustees' Certificates "rank as expenses of the administration by the court of the property of the Western Pacific" and as such "constitute, equally with other expenses of administration, a direct charge and lien on all property held by the applicants as such Trustees".

These Certificates, therefore, are secured by a lien prior to any of the Debtor's mortgages. They constitute an obligation of the Trustees and "expenses of administration".

Under the Commission's plan (page 2 of order of October 10, 1938), $10,000,000 of new First Mortgage Bonds [664] are to be sold to provide the money to pay off these Trustees' Certificates or are to be pledged "with such additional amount of such bonds as may be necessary to be pledged under a $10,000,000 short-term note" as security for a loan of $10,000,000 to be obtained for the same purpose. The new First Mortgage Bonds in question are

to bear interest at the rate of 4 per cent but the Commission's plan provides "that interest accruing for a period not exceeding five years from the effective date of the reorganization, or any portion thereof, on such bonds shall accumulate and payment thereof shall be made only at such times as earnings are available therefor". In other words, the interest on such bonds, although cumulative if unpaid, is not to become a fixed charge until five years from the effective date of the reorganization.

In the opinion of Reconstruction the provisions of the Commission's plan above referred to do not constitute a feasible method of refinancing the $10,000,000 of Trustees' Certificates which Reconstruction now holds.

Reconstruction respectfully submits that any approved reorganization plan should provide a feasible method of refinancing the $10,000,000 of Trustees' Certificates which [665] Reconstruction now holds. The Commission's plan proposes (pages 1 and 2 of the order) that the new First Mortgage Bonds provided for therein shall have a maturity of fifty years and be part of an authorized issue of bonds limited to $50,000,000. If Reconstruction should take, either in evidence of a loan or as collateral for a loan made to pay off said $10,000,000 of Trustees' Certificates which it now holds, the new First Mortgage Bonds provided for in the Commission's plan, Reconstruction's present security would be subject to dilution and impairment.

Paragraphs (d) and (e) of Section 77 of the Bankruptcy Act apparently require the liquidation in cash of Trustees' obligations. A reading of those paragraphs clearly indicates that the term "creditors" as used throughout refers to creditors of the debtor and not to creditors of the debtor's trustees. This is made even clearer by a provision in paragraph (e) to the effect that the court shall approve the plan (previously approved by the Commission) if satisfied, among other things, that "the plan provides for the payment of all costs of administration". This certainly includes Trustees' Certificates of indebtedness authorized by the court, and in the instant case, the Certificates by their [666] terms are "expenses of administration" by the court.

In setting forth the above objection to the Commission's plan, Reconstruction is not to be deemed as waiving other objections thereto which it may wish to urge, upon a rehearing herein before the Commission, or in the Court.

IV.

It is respectfully submitted that the modifications of the Commission's plan suggested by the Committee offer Reconstruction better treatment of its claim of $2,963,000 (on which there will be interest accrued and unpaid as of January 1, 1938, amounting to $899,870), representing loans made by Reconstruction pursuant to the prior approval of the

Commission granted in the Commission's reports and certificates of February 24, 1932 in Finance Docket No. 9151, and of June 23, 1932 and February 25, 1933 in Finance Docket No. 9448, than does the Commission's plan. Under the modifications proposed by the Committee Reconstruction will receive the following:

$1,185,200 income mortgage 4½% bonds (being 40% of the principal of its claim);

$1,777,000 5% preferred stock, Series A (being 60% of the principal of its claim); and

[667]

13,498 shares of common stock (being common stock at the price of 66-⅔ per share or 100% of its accrued and unpaid interest).

Under the Commission's plan Reconstruction will receive 90,255½ shares of common stock.

V.

In consideration of the effectuation of a plan providing for the treatment of said claim as proposed in the Committee's modifications, Reconstruction is willing, subject to the approval of the Commission, not to insist on its rights under Section 77 of the Bankruptcy Act that the $10,000,000 of Trustees' Certificates which it holds be paid in cash, but instead, subject likewise to the Commission's approval, to take in exchange for said $10,000,000 of Trustees' Certificates, $10,000,000 of new First Mortgage Bonds bearing fixed interest at the rate

of 4 per cent per annum, maturing in 25 years and having the other terms, provisions and conditions set forth in the Committee's modified plan. Reconstruction respectfully submits that, as a matter of fairness and equity, it is entitled to at least as good treatment, in respect of its claim of $2,963,000 and accrued interest, as is offered in the Committee's modified plan, if it takes, for the $10,000,000 of Trustee's Certificates which it holds, new securities instead of cash. [668]

Wherefore, Reconstruction prays that the Commission's Report and Order herein, of October 10, 1938, be modified by the approval of the Committee's modified plan; and that if such modified plan be not approved, the Commission's plan, nevertheless, be modified, to make adequate provision to meet the objection thereto set forth above and such other objections thereto as Reconstruction may urge, at a rehearing which, in such event, the Commission is asked to grant in these proceedings; and that the Commission enter such further order or orders in the premises as to it may seem just and reasonable.

Dated: Washington, D. C., December 9, 1938.

RECONSTRUCTION FINANCE CORPORATION,
By C. M. CLAY
Assistant General Counsel.

Of Counsel:
CLAUDE S. HAMILTON, JR.,
General Counsel.

[Endorsed]: Filed Oct. 5, 1939. [669]

Before The
Interstate Commerce Commission
Finance Docket No. 10913
In the Matter of
The Western Pacific Railroad Company Reorganization

PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY UNDER SUBSECTION (d) OF SECTION 77 OF THE BANKRUPTCY ACT FOR A MODIFICATION OF REPORT AND ORDER OF THE COMMISSION AND FOR A FURTHER HEARING

This Petition of The Western Pacific Railroad Company, herein sometimes called the Debtor, respectfully shows to the Interstate Commerce Commission:

First: That the Plan of Reorganization of The Western Pacific Railroad Company approved by the Interstate Commerce Commission in its Report and Order dated October 10, 1938, is unjust, inequitable, fails to afford due recognition to the rights of stockholders, discriminates unfairly in favor of certain creditors and fails to conform to the requirements of the law of the land re- [671] garding the participation of the various classes of creditors and stockholders in the particulars hereinafter specified, among others not specified in the interest of brevity.

Second: The basic injustice (we use the language of the Statute without implication of disrespect to the

Commission) lies in the proposal of the Commission (we believe without statutory authority) to limit the capitalization of the reorganized Company to $93,726,517, including 313,703 shares of no par value stock valued for purposes of the Plan (we believe unnecessarily and arbitrarily) at $100 per share, thereby *transferring* to senior interests (who do not seek such transfer) all equity in the property which measured by the constitutional right of presently invested capital to earn a fair return exceeds $45,863,938—the excess being the difference between the Commission's valuation under 19a stated as of December 31, 1935, at $139,600,455, and that part of the proceeds of sale of $10,000,000 principal amount of Trustees' Certificates expended for capital improvements, the greater part of which expenditures were made subsequent to that date.

Third: In the preparation of its case for presentation to the Commission the Debtor estimated earnings available for interest of the property for the years 1936-1940, as follows:

1936	$1,521,386
1937	2,180,586
1938	2,738,886
1939	3,365,836
1940	3,769,836

[672]

That these were estimates of minimum prospective earning power and were designed to show (and were offered for no other purpose) that an annual

fixed charge of $1,027,036 was ultra conservative. That the properties of the Debtor have been placed in condition for exceptionally economical and efficient operation at a cost of $10,000,000, thereby substantially completing an earlier program of $18,000,000; that new and highly promising channels of trade have been opened up (including the Northern California Extension and the Dotsero Cut-Off) which have vastly improved the potential earning power of the property and rendered obsolete earnings studies and estimates based upon predepression traffic. That if the Commission asserts the power under Section 77 of limiting capitalization on the basis of its own estimate of prospective earnings (a power we earnestly insist the Commission does not have and may not exercise) then in equity and good conscience it should permit the case to be reopened to receive evidence as to probable maximum earning power and not treat as a ceiling the conservative estimate of minimum earning power offered by the Debtor on the totally different issue of a safe fixed charge.

Fourth: A strikingly inequitable feature of the Plan approved by the Commission (unjustifiable under any accepted legal principle) is in the use of no par value stock of the reorganized Company as an elastic currency for adjusting creditor claims—$77.25 in paying the accumulated interest on First Mortgage Bonds, $40.00 in paying the principal and interest of the claim of Reconstruction Finance Corporation, $76.70 in paying the principal and

interest of the claim of The Railroad Credit Corpora- [673] tion, and $172.25 in discharging the claim of A. C. James Company. Much has been said by pseudo economists in favor of an elastic currency, but none has yet ventured to suggest that the same currency be given four different values in settling four different debts at the same time and place.

Fifth: The Plan fails to give any recognition to the rights of the Debtor's unsecured creditors and stockholders, although the valuation placed by the Commission upon the Common Stock of the reorganized Company in fixing capitalization at $93,726,517 demonstrates mathematically the existence of a substantial equity even upon a valuation of only $93,726,517—a valuation which we are confident would be held confiscatory by the Court.

Sixth: That under the Plan approved by the Commission, provision is made (a) for an annual capital fund of $500,000 and a sinking fund of $197,160, a total of $697,160. This amount capitalized at 4% would provide an additional capitalization of $17,429,000, which belongs and should be credited to the equity and which if represented by new Common Stock (valued at $100. a share) alone provides sufficient additional Common Stock to discharge $7,809,639 of non-negotiable debt to The Western Pacific Railroad Corporation and Western Realty Company and permits an allotment of nearly $10,000,000. of new stock to the present stockholding interests of the Debtor. This adjustment may be made

without departure from the principles underlying the Commission's Report and Order.

Seventh: That unless the Commission will modify the proposed Plan so as to give substantial recognition to the true value of the rehabilitated Western Pacific [674] railroad the inevitable alternative is long litigation which ought to be avoided in the interest of the railroad industry and those unfortunate creditors and stockholders who believed that capital invested in the property would be given a square deal. That various modifications of the Commission's Plan have been discussed by counsel representing all creditor interests (except the very large amount of First Mortgage Bonds not represented by the Stedman-Schley-Haggerty Committee) and while no accord was reached in these discussions it is, nevertheless, the judgment of the Debtor that if the Commission or Division 4 will meet all parties in a conference and will in such conference undertake to mediate and reconcile the differences between the parties, a Plan ought readily be evolved which would be acceptable to reasonable men and could be promptly carried into effect without litigation and without further discredit to Section 77 of the Bankruptcy Act.

Wherefore, the petitioning Debtor, The Western Pacific Railroad Company, respectfully prays for an order modifying the Plan so as to give due recognition to the rights of the Debtor's unsecured creditors and stockholders through the authorization of additional capital stock out of a total capitaliza-

tion of not less than $120,000,000. or, in the alternative, reopening this proceeding for further testimony and argument.

Respectfully submitted,
FRANK C. NICODEMUS, JR.,
Counsel
The Western Pacific Railroad Company
40 Wall Street
New York City [675]

State of New York,
County of New York,—ss.:

Michael J. Curry, being duly sworn, deposes and says: That he is Vice President of the above named petitioner, The Western Pacific Railroad Company; that he has read the foregoing petition and knows the contents thereof and verily believes it to be true in all respects.

MICHAEL J. CURRY.

Subscribed and sworn to before me this 8th day of December, 1938.

[Seal] (Signed) HOWARD A. FISCHER
Notary Public, Kings, Co. No. 123, Reg. No. 230
Cert. filed in N. Y. Co. No. 306, Reg. No. 0-F-187
Commission expires March 30, 1940

[Endorsed]: Filed Oct. 5, 1939. [676]

Before the
Interstate Commerce Commission
Finance Docket No. 10,913

In the Matter of
WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

PETITION OF IRVING TRUST COMPANY, AS TRUSTEE UNDER GENERAL MORTGAGE, FOR MODIFICATION OF COMMISSION'S REPORT DATED OCTOBER 10, 1938; AND BRIEF IN SUPPORT THEREOF [677]

PETITION OF IRVING TRUST COMPANY, AS TRUSTEE UNDER GENERAL MORTGAGE, FOR MODIFICATION OF COMMISSION'S REPORT DATED OCTOBER 10, 1938

The petition of Irving Trust Company respectfully shows, on information and belief:

Your petitioner is a New York corporation, and is Successor Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, dated January 1, 1932, under which there are outstanding $18,999,500 principal amount of bonds.

This petition relates only to the failure of the plan proposed by the Commission to give any recognition to the valuable collateral held by the General Mortgage Trustee which is admittedly free

from the lien of the First Mortgage. By that plan, the First Mortgage bondholders receive income-mortgage bonds and preferred stock for the full amount of their bonds, plus common stock for their accrued interest, while the creditors secured by General Mortgage bonds receive only common stock, in proportion to their holdings of bonds. This petition is concerned with the primary [678] question of priority between creditors, rather than with such matters as total capitalization, and terms of new securities, on which the creditors themselves will make their position known.

We do not in this petition ask modification of the report concerning the priority of lien on the Northern California extension, on the debtor's equity in rolling stock subject to leases, conditional sales agreements, or equipment trust agreements, or on non-carrier real estate. Although we disagree with the Commission's ruling that such items are subject to the entire First Mortgage as a first lien, we consider that review of these questions may best be had in the Court, in view of the statement in the Report (Sheet 56) that the Commission's determination of these questions is purely preliminary, and that final adjudication must be made by the Court.

Substantial property remains subject to the General Mortgage as a first lien, however, even if the items just mentioned be eliminated. The existence of *any* property subject to the General Mortgage and not to the First Mortgage, would make it improper to allot only common stock to the holders of

General Mortgage bonds, and to require at the same time, as the Commission's plan does (Report, Sheets 69-70), that all collateral now pledged under the mortgages be surrendered to the reorganized company free from lien.

When the properties on which the General Mortgage is *admittedly* a first lien are as substantial in relation to the debt secured as are those described below, it is manifest error not to provide for giving to the holders of General Mortgage bonds a proportionate share of securities equal in lien to any allotted to First Mortgage bondholders. The General Mortgage Trustee considers [679] that the Commission, in failing to make such provision, committed an inadvertent error, which it will itself desire to correct.

The Commission rightly states in its Report (Sheet 59) that (with certain exceptions here immaterial):

> *"there is no contention that the cash and collateral held by the trustee under the general and refunding mortgage are not free from the lien of the first mortgage".*

The Commission further recognized (Sheet 59) that "due recognition must be accorded to the rights of the creditors with whom are pledged general-mortgage bonds".

It is submitted that the Commission failed to give such "due recognition" to the holders of General Mortgage bonds, and that it overlooked the impor-

tance in relation to the amount of General Mortgage bonds and the debts secured thereby of the collateral on which the General Mortgage is a first lien; otherwise it could not have stated as it did (Sheet 60) that the First Mortgage bondholders should be considered as having a first lien "upon practically all the assets of the debtor" and should —without any qualification or exception—"receive securities of a higher rank than those allocated to other creditors".

The value of collateral admittedly free from the lien of the First Mortgage is substantial in relation to the debt secured by General Mortgage bonds.

The total principal amount of debts secured by General Mortgage bonds is approximately $10,500,000 (Exhibit 9). [680]

Collateral to the General Mortgage undisputedly free from the First Mortgage amounts at the very least to over $3,000,000—even after eliminating, among other things, the Northern California extension, equipment and non-carrier real estate, on which the Commission has given a preliminary decision contrary to the General Mortgage contentions, and the Deep Creek and Standard Realty & Development notes, on which the lien of the General Mortgage is disputed. With the inclusion of cash which is free from any mortgage the total which must be considered in determining what constitutes due recognition for the General Mortgage bondholders is over $4,000,000. This amount is made up as follows:

Cash in hands of General Mortgage Trustee (including all sums received to date)		$ 223,732
Note of Tidewater Southern Railway Company (Exhibit 126)		508,278
Stock of Tidewater Southern Railway Company, at I. C. C. valuation of assets (Exhibit 103; 82, p. 16; and 29, Statement No. 16, p. 4)		1,567,109
Central California Traction Company securities at book value to Western Pacific (Exhibit 103; and 82, p. 16):		
Bonds	$270,000.	
Preferred stock	264,715.	
Common stock	128,651.	663,366
Alameda Belt Line stock at book value to Western Pacific (Exhibit 103)		465,300
Total		3,427,785
To this may also be added the cash on hand at the institution of the reorganization proceedings, free from both mortgages (Rec. p. 586, adjusted to eliminate Tidewater Southern interest payments subsequently turned over to General Mortgage Trustee), amounting to		810,331
Total, including free cash		$4,238,116

[681]

Nor do the above totals include (1) various important pieces of real estate listed in the item of miscellaneous physical property at page 9 of our brief dated January 11, 1937 which were acquired subsequent to the 1915 reorganization, and are not governed by the same reasoning (assuming, which we do not admit, that the reasoning is valid) used by the Commission at Sheet 59 of its Report in holding the First Mortgage a lien upon non-carrier real estate owned before 1915; (2) industrial tracks

and spurs in respect of which no First Mortgage money was expended; (3) miscellaneous other property acquired from free funds (Rec. pp. 585, 690); nor (4) the twenty-three miles of branches or jointly owned tracks listed at pages 56 to 57 of our January 11, 1937 brief in respect of which no First Mortgage money was used. The figures above may therefore be regarded as stating the General Mortgage rights quite conservatively.

The amounts listed above are real values, and not mere book figures. The value of the cash is clear beyond question. And no one can say of any of the three roads whose securities are listed above (Tidewater Southern, Central California Traction and Alameda Belt Line) that economically its original construction was an ill-advised undertaking. (Cf. Report, Sheet 41.)

The Tidewater Southern is an important feeder to the Western Pacific (Rec. p. 109; Ex. 82, p. 16); described by Mr. Swaine as one of its "important" subsidiaries (Rec. p. 136). It contributes freight yielding a steady revenue averaging over $500,000 per year to Western Pacific (Exhibit 82, pp. 16-17; and Exhibit 27, Statement No. 4, p. 2). Its note, which regularly earns and pays the specified 5% interest, is surely worth face value. [682] The valuation of its stock is not based primarily upon book value, but is rested on this Commission's valuation of the property. This valuation is confirmed by the earnings record of the Company (Ex. 29, Statement No. 28). Its conservative character is

shown by the fact that the value shown by the Tidewater Southern books is nearly 50% higher than the figure listed above (Exhibit 82, p. 16).

The Central California Traction Company is likewise a line of strategic importance, in which Western Pacific could not well afford to lose its one-third share. As stated in Western Pacific's application to the R. F. C., it "has a special value to the applicant as a feeder and would be of value to any corporation which might succeed to the properties of the applicant" (Exhibit 82, p. 17; Rec. p. 165). It serves a rich fruit-producing area, originating much interstate and transcontinental traffic (Ex. 195, p. 32). It contributed freight yielding a revenue during the depression years of over $200,000 per year to the Western Pacific System (Rec. p. 165). The Central California Traction bonds continue to pay the stipulated 5% interest, the Reorganization Trustees considering it important not to permit any default thereon. If these bonds and stock, constituting part of the General Mortgage collateral, were liquidated on foreclosure by sale to Atchison and Southern Pacific, which own the other two-thirds of the line, the consequent loss of freight revenues to Western Pacific might be even more serious than the valuation given above indicates.

Alameda Belt Line is both a feeder and terminal line, owned jointly with The Atchison, Topeka & Santa Fe Railway, serving important docks and industries in Alameda (Ex. 29, Statement No. 33). Its ownership [683] is important to maintain the

debtor's equality with the Atchison in access to and traffic from Alameda.

It is fair to consider also the cash on hand at the time the proceedings were instituted as having a bearing on the rights of the General Mortgage bondholders. Although such cash is not subject to any mortgage (Pintsch Compressing Co. v. Buffalo Gas Co., 280 Fed. 830, 838—C.C.A. 2nd), it is by the same token available for creditors who are not secured; and to the extent that the First Mortgage is held by the Commission to be protected by a prior lien on the debtor's property and the General Mortgage is relegated to a subordinate position, this cash should in any equitable distribution of property be availed of to satisfy the general creditor or deficiency-judgment claim of the General Mortgage bondholders. The First Mortgage bondholders have no such general creditor position, since the Commission has found that the value of the property on which their mortgage is a lien is as great as the amount of their bonds.

The only argument made by the First Mortgage trustees (Brief dated January 9, 1937, p. 68) for not giving consideration to this free cash was that it had been used *subsequent* to the institution of these proceedings for maintenance and rehabilitation of the road. However, such application of funds against which the General Mortgage bondholders had a right prior to that of the First Mortgage bondholders cannot change the situation as it existed at the date of instituting the reorganization

proceedings, nor compel the Commission to disregard such cash in determining the rights of the General Mortgage bondholders. [684]

The earnings of the collateral admittedly subject to the General Mortgage are substantial in relation to the debt secured thereby.

The value of the securities on which the General Mortgage is admitted to be the first lien is supported also by their earnings.

Tidewater Southern in addition to paying 5% interest on its note, or approximately $25,400 per year, earns a substantial net income (Exhibit 29, Statement No. 28). Such income averaged approximately $47,000 from 1930 to 1935 inclusive, and was over $75,000 in the latter years. It has failed to meet interest charges in full in only three years between 1922 and 1935. (*Ibid.*) Its estimated income from 1936 to 1940, after note interest, averages over $75,000 per year (Ex. 29, Statements Nos. 3-7), which we believe will be borne out by the facts, since the estimates in the case of this road are based only upon existing traffic, and not upon any anticipated increases therein (Ex. 29, Statements Nos. 3 to 7). Some further indication of the earning power of Tidewater Southern is shown by the fact that it extinguished, in 1935, its entire bonded debt* (Ex. 29, Statement No. 1, Note 8), repaying to Western

*The note, its only remaining obligation, represents expenditures for additions and betterments to the line (Rec. p. 217).

Pacific a total of $129,921 during the years 1934 and 1935, and being left with cash on hand, on December 31, 1935, amounting to $153,192 (Ex. 29, Statement No. 13), against total current liabilities of $82,290 (Ex. 30). Income from Tidewater Southern represented more than 11% of the net income of the Western Pacific System as forecast for 1936 (Ex. 29, Statement No. 3). [685]

The Central California Traction bonds continue to pay their interest amounting to $13,500 per year.

The above figures indicate minimum earnings for this portion of the General Mortgage collateral of approximately $114,000 per year, without considering the amount which the other items of General Mortgage collateral (pp. 4-5, supra) contribute to the total Western Pacific earnings (as to which see, for instance, Exhibits 113, 115, 116). These latter items should contribute a considerable further sum.

In relation to the amount of General Mortgage debt, the earnings of the General Mortgage collateral are substantial, and may not be disregarded. No plan can be fair which requires the creditors secured by General Mortgage bonds to release their lien on collateral which earns such a substantial amount of money per annum, in exchange for nothing but common stock, which will produce no return unless system earnings return to the 1926 level (Report, Sheets 19, 55). [686]

Wherefore, it is respectfully requested that the Commission, pursuant to Section 77(d) of the Bankruptcy Act, modify its proposed plan of re-

organization so as to provide for the issuance to the General Mortgage bondholders of securities on a par with those awarded to First Mortgage bondholders, to the extent of the value of collateral on which the General Mortgage is admittedly a first lien.

Dated: New York, December 9, 1938.

IRVING TRUST COMPANY,
as Trustee,
By FREDERICK G. HERBST,
Vice President.

H. C. McCOLLOM,
ORRIN G. JUDD,
Attorneys for Trustee,
Office and Post Office Address,
One Wall Street,
Borough of Manhattan,
City of New York. [687]

State of New York,
County of New York—ss.

Frederick G. Herbst, being duly sworn, deposes and says that he is a Vice President of Irving Trust Company, the petitioner in the above entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FREDERICK G. HERBST.

Sworn to before me this 9th day of December, 1938.

GEO. R. HENRY

Notary Public, Kings County No. 431 Register's No. 9132

Cert. filed N. Y. Co. No. 299, Reg. No. 9H250.

Commission expires March 30, 1939. [688]

Before the
Interstate Commerce Commission
Finance Docket No. 10,913

In the Matter of the
Western Pacific Railroad Company Reorganization

BRIEF IN SUPPORT OF FOREGOING PETITION

The facts supporting the General Mortgage Trustee's limited request for modification of the Commission's report are fully set forth in the foregoing petition, and will not be repeated here. It is sufficient for the present purpose to set forth briefly the legal considerations which require that recognition be given to the substantial actual value, and earnings, of the property admittedly free from the lien of the First Mortgage, and that securities of a rank equal to those given the First Mortgage bondholders be accordingly awarded to the General Mortgage bondholders.

A plan is not fair and equitable which denies recognition to the admittedly prior lien of the General Mortgage upon substantial property.

The statute (Sec. 77(d)) commands the Commission, in approving a plan, to determine that the plan will [689] meet the requirements of sub-section (e) of Section 77. That sub-section states among other things that the plan must be one which "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders". (Sec. 77(e)(1)).

The requirement of a release of the substantial collateral which is subject only to the General Mortgage, while giving the creditors secured by the General Mortgage bonds nothing but common stock, preceded by new first mortgage bonds, new income bonds and new preferred stock, does not afford due recognition to their rights, but on the contrary discriminates unfairly in favor of the First Mortgage creditors.

If the General Mortgage and First Mortgage were foreclosed, the creditors secured by the General Mortgage would inevitably obtain (1) the items listed above (excluding free cash), and would also be entitled to (2) the debtor's equity of redemption in the property subject to the First Mortgage and (3) a deficiency judgment for any excess due on

their bonds, thus giving them rights as general creditors against the free cash above mentioned, and any other unmortgaged assets. The common stock allotted to the General Mortgage bondholders represents merely the equity in the Western Pacific property over and above the amount of the present First Mortgage. In other words, it constitutes recognition of only one of the three rights above mentioned of the General Mortgage bondholders, namely, the equity of redemption in the property subject to the [690] First Mortgage. Nothing is given in exchange for the first lien on other property, or in exchange for the general creditor position against the free cash.

Citation is hardly necessary to bulwark the statutory requirement of due recognition to the rights of each class of creditors. The statement in the Radford case (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 580) is nevertheless pertinent that the "right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage". This right cannot be taken away even under the bankruptcy power without some fair compensatory equivalent in recognition.

As was stated in In re Chicago & N. W. Ry. Co., 18 F. Supp. 932, 936 (N. D. Ill.):

> "Even a plan of reorganization should not be permitted to change the *relative* rights, interests and preferences of the persons interested in the estate of the debtor." (Italics ours.)

Principles similar to those on which we here rely were applied in an equity receivership case, in Guaranty Trust Co. v. Missouri Pacific Railway Co. (238 Fed. 812, E.D. Mo.). In a plan of reorganization of the Missouri Pacific railroad therein proposed, holders of so-called Series A bonds were found to be entitled to (1) a first lien upon property of a Missouri Pacific subsidiary, and (2) a general creditor position against Missouri Pacific as guarantor of the subsidiary's bonds. Under the plan, they were given a choice either on the one hand of retaining their mortgage security and losing their creditor rights, or on the other hand of abandoning their mortgage and being treated on a par [691] with general creditors of Missouri Pacific for the face amount of their bonds. The situation is similar to that in the present case, where the General Mortgage bondholders are required to give up their mortgage on properties where they have the first lien, and be treated only as second mortgagees. The court there held that the treatment proposed was unfair, and that the holders of Series A bonds should be entitled both to the benefit of their mortgage position, and also to their general creditor position for the deficiency, without being forced to surrender their mortgage position as a condition of recognition of their junior rights. The court stated (p. 819):

> "* * * the plan is so framed that, if they insist upon their mortgage security, they lose their rights as creditors under the contract. In

other words, the tender of preferred stock would not in that case be open to them for any part of their demands. On the other hand, if they accept the offer of preferred stock, they must abandon their mortgage. In that case they would get no more than a general creditor with no security whatever. These bondholders became creditors of the Missouri Pacific Company by virtue of its contract, irrespective of the Kansas City Northwestern mortgage, and, as such, their rights were equal to those of all general creditors, and superior to those of the stockholders. It does not seem equitable that, to maintain that parity and priority, they should be required to abandon their morfgage. Other general creditors, to whom preferred stock is offered, have nothing and give up nothing of security, but their proper relation to the old stockholders is fairly recognized.

The situation reduces itself to this: Whether those conducting the plan of reorganization decide [692] to include the Kansas City Northwestern Railroad in the new system or to exclude it, consideration should be given to the mortgage securing the series A bonds, and after the application of the value or proceeds of the mortgaged property determined by agreement or by foreclosure and sale the deficiency should have equitable recognition in the plan as a general debt."

To the same effect, see Note, 35 Col. L. Rev. 391, 394.

To put the matter another way, the General Mortgage Trustee here has both a senior position, on a par with the First Mortgage, and a junior position, behind the First Mortgage. The Commission has held that the senior position of the General Mortgage does not apply to as much property as the General Mortgage Trustee contended, but no one disputes that it does have a senior position, on a par with the First Mortgage, in respect of certain property. The fact that this property may be small in comparison with the property on which the First Mortgage has a senior position, does not justify disregarding it altogether, and giving the General Mortgage only a junior position, especially where the property on which it has a senior position is substantial in relation to the debts secured by the General Mortgage.

As respects the free cash, as well as the General Mortgage collateral free from the First Mortgage, there is also good authority that such free assets justify giving junior creditors some share in the prior lien bonds given on reorganization to senior encumbrances. (In re Barclay Park Corp., 90 F. (2d) 595, 597—C.C.A. 2nd.) In that case the court held that a plan was fair which, because of substantial assets free from the [693] first mortgage, subordinated the claims of the first mortgage bondholders to the extent of 25% of the principal to 25% of the claims of general creditors, and sub-

ordinated the first mortgage bondholders' claim for interest arrears to the entire principal of the general creditors' claims.

In order to be fair and equitable even on the legal basis which the Commission has adopted as respects disputed liens, the plan should give to General Mortgage bondholders a proportion of their claims in new income-mortgage bonds* according to the proportion (approximately 40%) which the value of collateral on which the General Mortgage is a first lien (plus a fair proportion, at least, of the free cash) bears to the total amount of the general mortgage claims. The Trustee takes no position respecting the division as between the three creditors holding General Mortgage bonds of the new income-mortgage bonds or other securities which would be thus allocated. Nor does it in any way acquiesce in the preliminary determination of the Commission with respect to priority of lien on the Northern California extension, the equipment, or the non-carrier real estate mentioned above.

CONCLUSION

The report of this honorable Commission dated October 10, 1938 and the plan of reorganization thereby approved should be modified so as to give to the holders [694] of General Mortgage bonds a

*Or the highest rank of such other securities as may be allotted to First Mortgage bondholders under any modified plan of reorganization.

fair proportion of their claims in new securities of the same type given to the First Mortgage bondholders under such plan.

Dated, December 9, 1938.

Respectfully submitted,
H. C. McCOLLOM,
ORRIN G. JUDD,
Attorneys for Irving Trust Company, as Trustee under General and Refunding Mortgage of Western Pacific Railroad Company.

[Endorsed]: Filed Oct. 5, 1939. [695]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

In the Matter of
The Western Pacific Railroad Company,
Debtor.

PETITION OF A. C. JAMES CO., FOR MODIFICATION OF THE PROPOSED PLAN OF REORGANIZATION OF THE DEBTOR COMPANY, PROMULGATED BY THE COMMISSION BY ITS ORDER OF OCTOBER 10, 1938, AND FOR A REHEARING

The petition of A. C. James Co., a secured creditor, respectfully shows as follows:

I. Your petitioner is a corporation organized and existing under, and by virtue of, the laws of the State of Delaware, with its registered office in the State of Delaware at No. 900 Market Street, Wilmington, Delaware.

II. Your petitioner is a creditor of the debtor company in the principal amount of $4,999,800, together with unpaid accrued interest thereon at the rate of 5 per cent per annum from January 1, 1934, which unpaid interest to June 30, 1938 amounted to $1,124,955, or an aggregate debt on the date specified of $6,124,755. [697]

The consideration for said indebtedness was money loaned and advanced to the debtor company, now evidenced by three promissory notes of the debtor company, the principal amount, date, and date of Maturity of which are respectively as follows:

	Principal Amount	Date	Maturity
(1)	$4,504,000	March 28, 1932	March 28, 1935
(2)	347,000	March 28, 1932	March 28, 1935
(3)	148,800	May 31, 1932	May 31, 1935

The promissory note for $4,504,000, appearing at (1) above, was issued by the debtor company pursuant to authority granted by the Interstate Commerce Commission, in exchange for the Five Per Cent. Gold Debentures of the debtor company in like amount, issued under the Indenture dated as of July 1, 1930, made by and between the debtor company and the Chase National Bank of the City of New York, as Trustee. The debentures so ex-

changed evidenced cash advances, in like amount, which were made from time to time during the years 1931 and 1932, as follows:

February 27, 1931	$1,000,000
March 26, 1931	200,000
April 20, 1931	400,000
May 25, 1931	530,000
June 20, 1931	995,000
August 25, 1931	309,000
October 20, 1931	600,000
November 25, 1931	120,000
January 29, 1932	350,000
Total	$4,504,000

The promissory notes appearing at (2) and (3) above, were issued by the debtor company against cash advances in like amount on the dates stated.

[698]

The notes now held by your petitioner are secured as follows:

By $6,249,500 principal amount of the debtor's General and Refunding Mortgage Bonds, issued under an Indenture dated as of January 1, 1932, executed by the debtor company to The Chase National Bank of the City of New York, as Trustee, which General and Refunding Mortgage Bonds were deposited with and are now held by your petitioner; except that $2,000,000 principal amount of said General and Refunding Mortgage Bonds, at the request of the debtor company, were delivered by your petitioner to The Railroad Credit Corporation, to be held by said The Railroad Credit Cor-

poration as additional collateral against advances made to the debtor company by said The Railroad Credit Corporation; your petitioner retaining all its rights as lienor in and to said $2,000,000 principal amount of the debtor company's General and Refunding Mortgage Bonds, subject only to the prior rights which have accrued to The Railroad Credit Corporation as first lienor from the acts of the parties set forth.

The advances made by your petitioner to the debtor company were all made in 1931 and 1932, and were, in their entirety, applied to the costs of constructing the Northern California extension of the debtor company, which was built under the lien of the First Mortgage of the debtor company, and is an important source, present and prospective, of earnings to the debtor company.

A proof of claim was duly filed by your petitioner in the proceedings for reorganization of the debtor company, now pending in the District Court of the [699] United States for the Northern District of California, Southern Division (No. 26591-S).

By an order, entered August 20, 1935, by the District Court of the United States for the Northern District of California, Southern Division, in the proceeding for the reorganization of the debtor company (No. 26591-S), the above described claim of your petitioner was classified as a separate and distinct class for the purposes of Section 77 of the Bankruptcy Act, as amended.

III. On or about February 7th, 1936, the debtor company filed with the Commission a proposed Plan

of Reorganization. Hearings on the debtor company plan were initiated on March 23, 1936 and continued from time to time until December 9, 1936. In the course of these proceedings two additional plans were filed by parties to the proceeding, one of such plans having been submitted on behalf of your petitioner. On or about August 1, 1937, a proposed Report of the Bureau of Finance of the Commission was submitted to the parties to the proceeding. All parties, including your petitioner, filed exceptions thereto. On November 17, 1937, a hearing was held on these exceptions before the full Commission. On October 10, 1938, the Report and Order of the Commission, upon which a rehearing is now asked by your attorney, was handed down. This Report and Order of October 10, 1938, promulgates a Plan of Reorganization for the debtor company, which Plan differs in substantial respects from any of the plans theretofore submitted by parties to this proceeding.

IV. Your petitioner is advised and believes, and therefore alleges on information and belief, that the proposed Plan of Reorganization, as promulgated by [700] this Commission by its Report and Order of October 10, 1938, contains provisions which (a) are substantially prejudicial to its interests as a creditor and would, if put into effect, confiscate its property and deprive it of the protection assured to it, as a creditor, under the law of the land, (b) are incompatible with the public interest, and (c) are not authorized by Section 77 of the Federal Bank-

ruptcy Act, as amended, in the following respects and for the following reasons, among others:

A. The Plan promulgated by the Commission in its Report and Order of October 10, 1938, is objected to by substantially all classes of creditors.

Section 77 of the Bankruptcy Act was intended by Congress to expedite voluntary reorganizations of railroads. The Commission knows, or could readily learn by inquiry, that no single class of creditor or stockholder approves or accepts the plan which it has promulgated. Yet this plan, if certified by the Commission to the Court, will, under the provisions of Section 77 of the Bankruptcy Act, be submitted in due course to the creditors for acceptance or rejection.

We have here the extraordinary situation of the Commission, after almost eleven months of deliberation, promulgating a plan for ultimate submission to the creditors, for approval under the mechanics of Section 77, which plan is known at the outset to be objectionable to all, or substantially all, classes of creditors.

The Commission may fully understand the views of the interested creditors, but may construe the 1935 amendments to Section 77, and especially subsection (e), as amended, as contemplating the making effective of a plan of reorganization of a railroad property which [701] is not acceptable to any of the creditors or to the stockholders. Subsection (e), as amended, contains an express proviso, as follows:

"Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts: and that the plan conforms, * * *."

It may well be doubted whether Congress intended the quoted language as giving to the Commission and the Court the legal power to impose a plan of reorganization by coercion of all interested parties.

However, even though such were the legislative intent (and even though such intent could constitutionally be made effective), your petitioner respectfully submits that the Commission has completely failed to make the essential finding of fact upon which any such action by the Court could be taken.

The language quoted above from subsection (e) of Section 77 is immediately followed by that paragraph which provides the basis upon which the Commission shall find a value for the property being reorganized, to effect the purposes of the section.

The necessary implication is that there can be no coercion of entire classes of creditors, except on the basis of a finding by the Commission of the valua-

tion of the property against which their claims are asserted. Any other construction of subsection (e) would fly in the face of common sense and put substantial property [702] rights at the mercy of the current economic theories of an administrative body, without any effective protection through judicial review. How can the Commission or the Court decide what is "fair and equitable treatment" of admitted claims of creditors except upon the basis of a valuation of the property in which such creditors have an interest?

If the Commission does contemplate that the plan promulgated in its Report and Order of October 10, 1938 will be rejected by all classes of creditors, or, for that matter, by any one class of creditors, and subsequently be made effective by action of the Court under subsection (e) of Section 77, loss of time and additional expense to the parties in this proceeding will necessarily result if the Commission fails to incorporate in its report, at the time of certification of a plan to the Court, a finding as to valuation of the property in which the various classes of creditors claim an interest. This question of valuation is discussed below in other connections.

B. Your petitioner is prejudiced by the improper preferences proposed by the Commission for the benefit of Reconstruction Finance Corporation and The Railroad Credit Corporation.

Your petitioner advanced to the debtor company during 1931 and 1932 (during the depression) a total of $4,999,800. The advances were in cash and

enabled the debtor company to complete the Northern California Extension, now a factor of admitted importance in the earning power of the Company. Your petitioner was given, under Commission authorization, General and Refunding Mortgage bonds of the debtor company as [703] collateral, to the extent of 125% of principal amount of its advances.

At about the same time, functioning under Section 5 of the Reconstruction Finance Corporation Act, the Commission exacted from the debtor company, $10,750,000 face amount of such General and Refunding Mortgage bonds, as *part* collateral for advances of the Reconstruction Finance Corporation, which advances now stand at $2,963,000 principal amount. In other words, disregarding other substantial collateral, the Reconstruction Finance Corporation holds General and Refunding Mortgage bonds of the debtor, as collateral, to the extent of about 363% of the principal amount of its advances, as compared with the 125% furnished to your petitioner.

Carrying forward this solicitude for a coordinate agency of the Federal government, the Plan promulgated in the Report and Order of the Commission of October 10, 1938, gives to the Reconstruction Finance Corporation $9,025,550 in common stock (using the $100 per share value assigned by the Commission in its Report to this non-par value common stock) for its debt, principal and interest, of $3,612,181, while $3,556,000 of such common stock

is given to your petitioner, for its debt, principal and interest, of $6,124,755.

In addition, the Reconstruction Finance Corporation is to be permitted, under the terms of the Commission Report and Order, to retain the collateral for its claim which was furnished it by others than the debtor company. How this can be done against a protest of the party furnishing this other collateral is not made clear, but it does indicate the extraordinary solicitude of the Commission for the interests of the Reconstruction Finance Corporation. [704]

Your petitioner recognizes the special equities which affect the claim of the Reconstruction Finance Corporation. Public moneys were advanced through the Reconstruction Finance Corporation to the debtor company during the depression in an endeavor to save it from default on its fixed debt obligations. The moneys so advanced were used almost entirely to pay interest to the First Mortgage bondholders or to discharge taxes which were liens prior to the claims of the First Mortgage bondholders. The equities arising from the facts mentioned should be recognized in a reorganization (as should similar special equities affecting the claims of the Railroad Credit Corporation and your petitioner), but at the expense of all creditors of the debtor company, including First Mortgage bondholders, and not solely at the expense of your petitioner.

The legal aspects of the theory upon which the Commission seeks to justify its preferential treatment of the Reconstruction Finance Corporation claim as against the similar claim of this petitioner are discussed in Point II of the brief filed by this petitioner with the Commission on September 27, 1937.

Stated simply, the situation is this: The General and Refunding Mortgage bonds which are held by the Reconstruction Finance Corporation and your petitioner in widely varying ratios were never "issued" bonds. They were authorized by the Commission solely for use as collateral. The mere fact that the Commission required more pieces of paper to be issued to the Reconstruction Finance Corporation than to the petitioner, on loans made almost concurrently and for equally meritorious purposes, cannot multiply the debt claim of the Reconstruction Finance Corporation at the expense of [705] your petitioner. If debt claims could successfully be increased by the multiplication of pieces of paper taken from a necessitous debtor, the entire basis upon which the activities of loan companies in this country are conducted would be changed.

Even though the General and Refunding Mortgage bonds held by the three secured creditors were to be regarded as true collateral furnished by the debtor company (which it clearly is not) greater distributions to one creditor than to another could be justified only upon a showing that the value of the property of the debtor company in which its

creditors claim an interest is less than the total amount of the secured creditors claims.

Not only does the Report of the Commission fail to find that the value of the property of the debtor company is less than the total amount of the secured creditors' claims, but it expressly authorizes (Report, p. 60) $80,660,400 of securities for distribution to the First Mortgage bondholders and secured creditors, whose aggregate claims, principal and interest, on June 30, 1938, amounted to only $73,522,463.

Clearly, using approved capitalization as a yardstick, there is enough to discharge the debt claims of the three secured creditors (Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Co.), and hence no legal ground for a preference between them based on the relative amount of General and Refunding Mortgage bonds held by them.

It should be noted, however, that the Report of the Commission, at page 62, states that since it proposes to distribute only 159,462 shares of the non-par-value stock to the three secured creditors, "it would be inequitable to distribute such stock in the proportion that each claim bears to the total amount of such stock." [706]

The Commission's premise for such statement is, "Having found that 159,462 shares of common stock available for distribution are inadequate in value to satisfy the aggregate claims of the parties, * * *."

But the only value assigned by the Commission to this common stock is the value of $100 per share (Report, p. 60). So you have $15,946,200 of common stock to allot among three creditors whose aggregate claims, principal and interest, amount, as of June 30, 1938, to $12,317,842. Obviously there is no inadequacy.

Your petitioner respectfully submits that no plan of reorganization is equitable or legally sustainable which gives the Reconstruction Finance Corporation in common stock two and one-half times the amount of its actual debt, while giving to your petitioner only a little more than half the amount of its actual debt.

The theory upon which the Commission seeks to sustain preferential treatment of the Reconstruction Finance Corporation as against your petitioner leads it to give a like preferential treatment as against your petitioner to The Railroad Credit Corporation. To this preferential treatment your petitioner likewise objects, and on like grounds.

C. The Plan promulgated in the Commission's Report and Order of October 10, 1938, is invalid in that it fails to recognize the claims of the general creditors.

The debtor company has two general creditors. On June 30, 1938, the date used in the Report and Order of October 10, 1938, the debtor company owed to The Western Pacific Railroad Corporation for advances on open account the principal sum of $5,766,309, and for interest to that date the sum of $1,

843,061. The debtor [707] company also owed the Western Realty Company on the date, for like advances, the sum of $50,000 principal amount, and $10,417 of interest. No provision is made in the Plan promulgated by the Commission for these claims of general creditors.

In the Commission's Order there appears an express finding that these claims are without value (Par. 10, Order). There is nothing in the record before the Commission which supports such a finding. The valuation of the property of the debtor company, made by the Commission under Section 19a, amounts, with additions at cost to June 30, 1938, to approximately $145,000,000. As suggested by Commissioner Miller in his dissenting opinion, if all reasonable deductions for depreciation were applied, the net valuation would amount to at least $120,000,000. The aggregate of principal and interest as of June 30, 1938, of the secured claims, coming ahead of these general creditors (including equipment trusts and trustees' certificates), was only $85,488,580, leaving an excess of about $35,000,000, if weight is to be given the Section 19a valuation.

It should further be noted that it is rare indeed that a finding can be made that the claim of a general creditor against a corporation is completely without value, when the debtor company has $5,481,640.99 in current assets (Report and Order, p. 9).

Nor can the Commission sustain its finding of no

value for the interests of the general creditors by reference to the capitalization which the Commission is prepared to approve for the reorganized company. In its Report (p. 60) it expressly authorizes $80,660,400 of securities of the reorganized company for distribution among the creditors (other than holders of equipment [708] trusts and trustees' certificates). The aggregate claims of the First Mortgage bondholders and the secured creditors (such claims having priority as to the bulk of the assets of the debtor company) amount, as of June 30, 1938, to only $73,522,463. This leaves a clear excess for the general creditors of $7,137,937.

The cancellation of the interests of the general creditors in the property can be justified, if at all, only upon a finding both as to the value of that part of the property of the debtor company which is subject to liens, and as to the value of that part of the property of the debtor company which is clearly free from any lien. These findings the Commission has not made.

D. The plan promulgated by the Commission is invalid in failing to recognize any value for the stockholders in the property.

As stated under point C above, the 19a valuation, with additions to cost to June 30, 1938, amounted to upwards of $145,000,000. Deducting accrued depreciation, there would be a clear residue of more than $120,000,000. The debts of the debtor company, as of the same date, aggregate, principal and interest, $93,158,367. On the basis of the 19a valua-

tion there is an excess of approximately $27,000,000 for the equity.

However, the Commission is careful in its Report to designate the Section 19a valuation as a valuation "for rate purposes" and, by implication, to suggest that, for the purpose of Section 77 of the Bankruptcy Act, a valuation may be based purely on earning capacity.

There are several factors which should be noted in this connection. [709]

In the first place, subdivision (a) of Section 77 of the Bankruptcy Act, in stating the basis upon which valuations should be made, does not permit them to be grounded solely on earning power, but definitely requires conformance to the law of the land in valuation cases. A valuation made purely on an earnings basis would not, we are advised, furnish a proper and lawful basis upon which to legally terminate the interest of the stockholders in the debtor company.

In the second place, the record before the Commission shows, and the Report of the Commission recognizes, that the earnings record of the debtor company for the past ten years has been influenced by factors which make it difficult to gauge future earnings on the basis of the earnings of the immediate past. Some of these factors were: (a) the expenditure of approximately $18,000,000 during the period in question on the physical rehabilitation of the property of the debtor company; (b) the construction during that period of the Northern

California Extension, an addition which has greatly changed the traffic relationships of the debtor company and, admittedly, largely increased its future earning power; and (c) the construction of the Dotsero Cut-Off and the resultant increase of through traffic which will be routed to it from its principal eastern connection.

In the third place, it should be noted that the Commission has completely failed in its Report to make any valuation or appraisal for the property of the debtor company (other than its reference to the Section 19a valuation) either on the basis of earnings or any other basis. It has, to be sure, asserted a willingness to approve a capital structure not to exceed an aggregate amount of $93,726,517, but of this total $31,370,300 is [710] represented by the arbitrary allocation of a value of $100 a share to the no par value stock which is to be authorized. Your petitioner is advised that no par value stock has the essential and inherent characteristic of representing merely a fractional interest in property, and there is no more reason (except on the basis of a valuation of the property represented by such fractional shares) to allocate a value of $100 a share to proposed no par value stock than $200 a share, or $25, or $10.

Accepting, for the present purpose, the total value assigned by the Commission to the securities it proposes to authorize ($93,726,517), as reflecting its view as to an appropriate valuation of the property for the purposes of Section 77 of the Bankruptcy

Act, it is difficult to see how, on the record before the Commission, a reviewing court could sustain such valuation.

Not only is there a complete disregard of its Section 19a valuation, but the Commission, in its Report, is quite explicit as to how it arrives at the limitations it puts on the capitalized value of the property of the debtor company. The Report (page 40) states that Section 77 of the Bankruptcy Act provides that an approved plan shall be "compatible with the public interest". It states that "the public interest is not defined"; but interprets the phrase to require, among other things, "that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company and that proposed charges, whether fixed or contingent, be within its probable earning power."

On this basis the Commission proceeds to state, on page 41, quite a different proposition to the effect that consideration should be given to investment in the prop- [711] erty of the debtor company "only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future".

Without making any appraisal of the assets of the debtor company, however, the Commission then moves forward to the premise that it ought not to authorize a capital structure for a reorganized company which includes capital stock on which dividends are not reasonably likely to be paid. At page 51 of the Commission's Report, it states:

> "The capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation."

There would seem to be an obvious missing middle in the above logical sequence. The doctrine that property rights should be taken away if one cannot foresee an immediate material return is the more extraordinary in this day and age when money in the bank and even short term government bonds are often held or purchased on a zero or even minus interest basis. On the same theory you could take away from the owners probably a quarter to a third of the improved real estate property in the City of New York without (in theory) violating due process of law.

Why should the Commission's theory, that a "material return" is to be assured or expected on the capital stock of the reorganized company, take the place of the "conservative appraisal of the assets to be taken over by the reorganized company", to which the Commission refers on page 40 of its Report? [712]

And why, above all, should the substantial rights of the stockholders in the property be disregarded, and in effect confiscated, on the basis of a mere theory of capitalization? Section 77 of the Bankruptcy Act may carry some ambiguities, but it cer-

tainly was not a condemnation statute. The phrase that shares of stock should not become "mere tokens for stock market speculation" was an impressive phrase, as first used by Senator Wheeler, and has a real significance, but it is hardly an adequate substitute for an appraisal, or an adequate basis for the appropriation of the property rights of the stockholders of the debtor company.

Your petitioner urges that any plan of reorganization certified by the Commission to the Court should recognize the interest of the stockholders of the debtor company, even though such recognition be given through the issue of no par value common stock, on which the Commission may not be able to say with confidence that dividends will be paid in the next five, ten, or twenty years.

E. Other objections to the Plan promulgated by the Commission.

In addition to the substantial features of the proposed plan of the Commission to which your petitioner objects, there are other less basic, but equally objectionable, features of the proposed plan.

For instance, the Commission Plan provides for $10,000,000 of first mortgage bonds, protected by a first lien upon all the assets of the company, and yet provides that these bonds should be income bonds for the first five years. [713]

It may fairly be assumed that all parties to the proceeding are prepared to accept a drastic limitation by the Commission, under the mandate of Section 77 of the Bankruptcy Act, upon the fixed

charges of the reorganized company so as to bring such charges well within the scope of its earning power. It is probable that no one party to this proceeding would reject a plan solely because it forced all existing creditors to accept income obligations for the entire existing debt. If, however, the property cannot, as a matter of sound financing, sustain a fixed charge of $400,000 a year upon the $10,000,000 of new money used to rehabilitate the property during the past three years, the Commission might well dismiss the proceeding under Section 77 and invite a proposal for the discontinuance of service to the public and a liquidation of the property of the debtor company.

The result of any such requirement in the plan is to make it quite impracticable to market the proposed 4% income bonds to the public during the first five years of their existence. In effect, it makes the Reconstruction Finance Corporation the only possible purchaser of such bonds and cannot but be detrimental to the credit of the reorganized company.

So too, objection might properly be made to the provisions for the selection of a Reorganization Committee and to other incidental features of the Commission Plan.

F. Practical Considerations.

If the plan of reorganization, in its present form, as set forth in the Report and Order of the Commission of October 10, 1938 is certified by the Commission to the [714] Court, it is at least doubtful

whether the reorganization of the debtor company under Section 77 will be expedited.

Under the unnecessarily drastic treatment of the interests of the creditors and of the stockholders it may be assumed: (a) that the secured creditors will necessarily ask the Court for a determination on the question of conflict of lien between the First Mortgage and the General and Refunding Mortgage, (b) that your petitioner will ask the Court for a determination of the value of the property of the debtor company (or a remission to the Commission for such valuation in the first instance) as a basis for asserting that the rights of general creditors are to be dealt with on the basis of actual debt, represented by the relative amounts of money advanced to the debtor company, and not on the basis of the number of pieces of paper issued by the debtor company to them, ostensibly as collateral, (c) that The Western Pacific Railroad Corporation as a general creditor and the Western Realty Company as a general creditor will ask the Court for a determination of value of the property of the debtor company as a basis for their assertion of a right to be recognized as creditors of the debtor company in any plan of reorganization, and (d) that The Western Pacific Railroad Corporation as owner of all the stock of the debtor company will ask the Court for a valuation of the property with a view to recognition of its interests.

If the Plan in its present form were to be certified to the Court and immediately submitted to the parties to the proceeding for a vote as to acceptance,

it may safely be assumed that substantially all the creditors will vote to reject the Plan. [715]

If, therefore, it is the desire of the Commission to expedite the reorganization of the debtor company, some other or different course should be followed.

If the Commission is prepared to assert, in all proceedings under Section 77 of the Bankruptcy Act, that the interests of creditors must be determined solely on the basis of the prospective earning power of the property of the debtor company, then the case of The Western Pacific Railroad Company constitutes a poor test case. It would be far better for the Commission to reject the various plans submitted to it by the debtor and creditors in this proceeding, and to postpone the approval of a plan of reorganization for the debtor company until it shall have had an opportunity to demonstrate what its real earning power is under normal conditions.

Only during the summer of 1938 did the rehabilitation program of the debtor company, which has involved the expenditure of approximately $16,000,000 in the last three years, reach its completion. This rehabilitation program had an obvious and substantial effect on the apparent earning power of the debtor company, both because it involved charging directly to operating expenses more than half the moneys so spent, and, also, because of the disruption of normal traffic and resultant increase of transportation expenses.

Furthermore, the Northern California Extension is only now in a position to demonstrate its full contribution to earnings of the debtor company, as

it has taken a considerable time for the flow of traffic to become firmly established.

If, however, the Commission is prepared to recognize that theories of capitalization ought not to be solely [716] determinative of the property rights of the creditors and is prepared to deal with the problem of the reorganization of the debtor company on a realistic basis, your petitioner believes that a plan of reorganization can be evolved which will meet with the acceptance of the necessary proportion of all parties at interest. While it is believed that the working out of such a plan acceptable to the parties would be clearly facilitated if the Commission were able, through suitable designees, to proceed by means of informal conferences with the parties at interest, it seems possible that an appropriate plan could be evolved by the parties themselves if freed from the limitations imposed by the somewhat drastic theories of capitalization which have heretofore been urged by the Commission.

In the event a further attempt is made to evolve, in the proceeding before the Commission, a plan acceptable to parties, your petitioner suggests that the Commission invite or require a full representation before it of the various parties at interest. In the proceedings thus far held there has been no formal representation before the Commission of the general creditors or the stockholders. Moreover, the First Mortgage bondholders have been represented only by a committee of Institutional Bondholders, and not by a public committee approved by the Commission under subsection (p) of Section 77

of the Bankruptcy Act. The importance of this is that, while the insurance companies may well hold approximately one-third of the outstanding First Mortgage bonds, their interests are in certain respects quite different from the interests of individual holders of First Mortgage bonds. For instance, the various plans submitted by the Institutional Bondholders Com- [717] mittee in this proceeding, show on their face that considerable importance is attached to holding in that Committee effective control of the reorganization, and of the reorganized company which may emerge from such reorganization. A committee acting for all the First Mortgage bondholders, qualified by the Commission under subsection (p) of Section 77 of the Bankruptcy Act, might well take a quite different point of view upon this question. Likewise, the extent and the manner of funding unearned interest, in connection with the reorganization, has quite a different aspect for the insurance company bondholder than for the individual bondholder, because of the different methods of income tax accounting applicable. In these and other respects, the Institutional Bondholders Committee is not an entirely adequate spokesman for the First Mortgage bondholders.

G. Reservation of right to file specific objections to any modified plan.

Your petitioner, having in mind that such plan as may finally be approved by the Commission and certified to the Court may differ in substantial re-

spects from the Plan of Reorganization, as set forth in the Report and Order of October 10, 1938, necessarily reserves the right to file with the Court specific objections to such plan as may be certified to the Court by the Commission, even though such objections might have been urged to the Plan of October 10, 1938, and are not.

Wherefore, your petitioner prays the Commission, in the alternative, that it either modify the Plan set forth in the Report and Order of October 10, 1938 in the [718] respects indicated above, or reopen the matter for a reasonable period in order that a plan acceptable to the interested parties may be evolved. Your petitioner further prays that in the event the Commission grants an oral argument upon this, or other petitions for rehearing on the Report and Order of October 10, 1938, that your petitioner be granted the right to be heard in person or by counsel at that time. And for such other and further relief as may seem to this Commission just and proper.

Dated: December 8, 1938.

A. C. JAMES CO.,
By WILLIAM W. CARMAN,
Vice-President.

ROBERT E. COULSON,
Attorney for Petitioner,
Office and P. O. Address,
40 Wall Street,
New York, N. Y. [719]

State of New York,
County of New York,—ss.

William W. Carman, being duly sworn, deposes and says that he is the Vice President of A. C. James Co. and as such is fully authorized to make this affidavit and that the foregoing statement of facts is true except as to those matters therein stated to be upon information and belief and as to those matters he believes it to be true.

WILLIAM W. CARMAN.

Subscribed and sworn to before me this 8th day of December, 1938.

[Seal] JOHN K. BIRCH.

Notary Public, Kings County, Kings County Clerk's No. 40, Kings County Register's No. 160, Certificate filed in New York County, New York County Clerk's No. 146, New York County Register's No. 0B125.

Commission expires March 30, 1940. [720]

Certificate of Service

I hereby certify that on December (8), 1938, I served the foregoing document on all parties of record by mailing a true copy thereof to each of said parties.

ROBERT E. COULSON

[Endorsed]: Filed Oct. 5, 1939. [721]

Before the
Interstate Commerce Commission

Finance Docket No. 10913

In the Matter of
The Western Pacific Railroad Company
Reorganization.

PETITION FOR MODIFICATION OF THE COMMISSION'S REPORT AND ORDER DATED OCTOBER 10, 1938 ON BEHALF OF FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, AS AN INSTITUTIONAL BONDHOLDER'S COMMITTEE

Come now Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing a group of institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter referred to as the Committee, the Railroad Company being hereinafter referred to as the Debtor), intervenors in the above-entitled proceeding, and respectfully petition the Commission to modify its Report and Order entered herein under date of October 10, 1938, as hereinafter set forth, and to grant a rehearing herein, and in support of said petition respectfully show:

I.

The Plan of Reorganization approved by the Report and Order entered herein under date of October 10, 1938 (received by the parties hereto Oc-

tober 18, 1938), which Plan is hereinafter called the Commission's Plan, is, as to several of its details, unacceptable to the Committee and, in the opinion of the Committee, will be unacceptable to a substantial majority of the holders of the Debtor's exist- [723] ing First Mortgage Bonds. The reasons for the objections of the Committee to the Commission's Plan are hereinafter in Article III set forth. The Committee is advised that the Commission's Plan is also unacceptable to each of the other classes of creditors and stockholders of the Debtor. Accordingly, in the opinion of the Committee and its counsel, any effort to consummate the Commission's Plan in the form embodied in said Report and Order will result in vigorous opposition from all classes of creditors and stockholders and will indefinitely delay the reorganization of the Debtor. On the other hand, most of the details of the Commission's Plan as to which the Committee has objection seem to affect only private rights of the parties and not the public interest, and as to such objections it would seem that they can be obviated without in any wise adversely affecting any matter of public interest. In so far as such objections go to questions in which there is a public interest, in the opinion of the Committee and its counsel, the modifications of the Commission's Plan required to obviate such objections are themselves all in the public interest.

II.

In the hope that the parties of record herein could and would agree upon a plan for the reorganization of the Debtor which might reasonably be expected to obtain the approval of the Commission and to be acceptable to all classes of creditors and stockholders of the Debtor, the Committee and its counsel, after October 18, 1938, entered into negotiations with the representatives of all such classes of creditors and stockholders.

Said negotiations failed to result in such an agreement primarily, in the opinion of the Committee and its counsel, because recognition of the rights of junior creditors and stockholders in a manner satisfactory to them would necessitate an aggregate capitalization larger than [724] that which said Report of the Commission indicated was likely to be approved by the Commission, and also would require, if the claims of the present bondholders were also to be given recognition in a manner satisfactory to them, the creation of a larger amount of Preferred Stock than said Report indicated the Commission was likely to approve. Should the Commission be willing so to increase the amount of Preferred Stock to be issued in the reorganization as to permit allocation of Preferred Stock for the claim of the existing First Mortgage Bondholders for interest, and at the same time slightly increase the number of shares of new Common Stock, without par value, to be issued, and also make the modifications as to the character of the

new securities hereinafter suggested, it is believed that unanimous agreement between the parties of record might still be effected.

Lacking such unanimous agreement, however, the Committee has developed modifications of the Commission's Plan which, while conforming substantially to the general capital structure provided for by the Commission's Plan, obviate the objections of the Committee to that Plan. These modifications of the Commission's Plan have been embodied in a complete plan, a copy of which is hereto annexed as Exhibit A (hereinafter called the Committee's Modified Plan) which, the Committee is advised, has the approval of Reconstruction Finance Corporation (hereinafter called RFC). The Committee believes that its Modified Plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;" and can, as a practical matter, be consummated without undue delay. [725]

III.

The objections of the Committee to the Commission's Plan, and the manner in which those objections are obviated by the Committee's Modified Plan, are as follows:

1. The Commission's Plan violates the rule laid down by the United States Supreme Court in Northern Pacific R. Co. v. Boyd, 228 U. S. 482, and cases following that case (hereinafter called the Boyd case rule), by allotting to creditors junior to the Debtor's existing First Mortgage Bondholders (hereinafter referred to as the junior creditors) new securities which give the junior creditors participation in the reorganized property in priority to full recognition of the existing priorities of the Debtor's existing First Mortgage Bonds.

The claim of the existing First Mortgage Bonds as of July 1, 1938, aggregated $61,204,621, all of which, as correctly found by the Commission's Report and Order, is secured by a lien upon substantially all the Debtor's property prior to the lien of any other of the Debtor's creditors. By the terms of the existing First Mortgage that claim bears fixed interest at the rate of 5% per annum, or $3,060,231 per annum.

The Commission's Plan requires the following diminution of the present First Mortgage Bondholders' existing rights to annual income and to assets:

(a) Upon no part of their claim are the existing First Mortgage Bondholders hereafter to receive fixed interest;

(b) in respect of that part of their claim representing 40% of the principal amount of the existing First Mortgage Bonds, the holders of said Bonds are to receive an annual rate of return of 4%, or 20% less than that to which

they are presently lawfully entitled; such rate is to be contingent upon [726] income; and to the extent that deficiencies of income exceed three years' interest at the reduced rate, the bondholders are wholly deprived even of the reduced rate of return;

(c) as to that part of their claim representing 60% of the principal of the existing First Mortgage Bonds, the holders of said Bonds are to be transferred from a creditor position to that of Preferred Stockholders. While their annual rate of return remains unchanged at 5%, such return is to be dependent wholly upon annual income and to the extent of any income deficiency in any year, is lost forever. Moreover, dividends on the Preferred Stock (though cumulative if earned) need not be paid unless the Board of Directors of the New Company deems it advisable so to do; and

(d) as to that part of their claim representing the accrued and unpaid interest on their bonds, the holders of the existing First Mortgage Bonds are not only to be transferred from a position of creditor to the position of stockholder, but the priority of that portion of their claim against the assets of the Debtor is to be taken away by the allotment of Common Stock in which, as will hereafter be pointed out, junior creditors are given allotments on a basis more favorable than the allotment made to the holders of existing First Mortgage Bonds.

The Commission's Plan provides no compensating factors (such as conversion or participating rights) to compensate the holders of existing First Mortgage Bonds for the drastic diminution of their rights, both as to income and as to principal, imposed upon them by the foregoing provisions of the Commission's Plan. In other words, the existing First Mortgage Bondholders are required, without being compensated therefor, to make large [727] sacrifices in the new securities which they receive, which sacrifices redound to the benefit of the junior creditors.

The Committee's Modified Plan obviates the foregoing objections of the Committee in the following manner:

(a) The interest rate upon the Income Bonds is made 4½%, thus reducing the minimum sacrifice of annual income on this part of the bondholders' claim from 20% of their present annual return to 10% of that return; and to compensate both for that sacrifice and for the contingent character of the interest and the three year limitation upon its cumulative character, the Income Bonds are made convertible into Common Stock of the New Company at the rate of 20 shares of Common Stock for each $1,000 bond;

(b) while the annual rate of dividends upon the Preferred Stock provided for in the Commission's Plan has not been changed, the Committee's Modified Plan, in order to compensate for the fact that the new Preferred Stock is

wholly non-cumulative except if earned, provides that, after dividends shall have been paid or declared or set apart for payment on the new Common Stock at the rate of $3 per share in respect of any year, each share of new Preferred Stock shall be entitled to share equally with each share of new Common Stock in any dividends paid or declared or set apart for payment in respect of such year; and

(c) the Committee's Modified Plan provides for an allocation of Common Stock whereby no junior creditor shall receive Common Stock for its claim upon a basis (i. e., at a price) more favorable than the basis (i. e., the price) at which Common Stock is allotted to holders of existing First Mortgage Bonds in respect of that part of their prior claim for which new Common Stock is allotted. The ob- [728] jection of the Committee with respect to the allocation of Common Stock under the Commission's Plan and the method of obviating that objection under the Committee's Modified Plan is further explained in the next succeeding paragraph 2 of this Article III.

2. The Commission's Plan erroneously treats General and Refunding Mortgage Bonds of the Debtor pledged to secure the notes to RFC, Railroad Credit Corporation (hereinafter called RCC), and A. C. James Company (hereinafter called

ACJ), as if such Bonds constituted a debt of the Debtor, and, as debt, were entitled to participation in the reorganization. In fact said Bonds have never been issued, have never become obligations of the Debtor, and constitute in law and in equity, not debt, but solely a method of dividing among the holders of the real debts (the notes, with interest, held by RFC, RCC and ACJ), for which said Bonds are pledged as collateral, whatever security may remain in the value of the Debtor's property after full payment of the existing First Mortgage Bonds, both principal and interest.

That security, as correctly found by the Commission, is junior to the First Mortgage. Hence no amount of multiplication of evidences of the security can lift the debt which it secures to a position entitling that debt to better treatment than is accorded any part of the debt represented by the First Mortgage Bonds.

The Commission's plan allots 3.13 shares of new Common Stock to that part of the existing First Mortgage Bondholders' claim representing the accrued and unpaid interest to July 1, 1938, amounting to $241.72 per $1,000 First Mortgage Bond. This makes the price at which new Common Stock is so allotted $77.25 per share.

The Commission's Plan allots 90,255½ shares of new Common Stock to the RFC claim, a debt aggregating to July 1, 1938, for both principal and interest, $3,612,181, [729] and no more. This makes the price at which new Common Stock is so al-

lotted $40 per share, or a price to a creditor junior to the First Mortgage Bonds of but 51.8% of the price at which the stock is allotted to the senior First Mortgage Bonds.

The Commission's Plan allots 33,646½ shares of new Common Stock to the RCC claim, a debt aggregating to July 1, 1938, for both principal and interest, $2,580,906, and no more, and which, because fewer General and Refunding Mortgage Bonds are pledged per $1,000 of the claim than are pledged to secure the RFC note, is entitled to still less favorable treatment than the RFC note. The price at which new Common Stock is thus allotted to RCC is $76.70 per share, again less than the price at which the stock is allotted to the senior First Mortgage Bonds.

The practical result of the allocation of the new securities by the Commission's Plan is that, when income distributable upon the new securities shall in any year have provided in full for the interest upon the RFC's present junior claim, the income so distributed to holders of existing First Mortgage Bonds will have recouped them to the extent of but 81% of the annual income to which they are presently lawfully entitled for that year.

Furthermore, when under such allocation the income distributable to the new securities held by existing First Mortgage Bondholders in any year fully recoups such Bondholders for the annual income to which they are presently lawfully entitled,

the income received upon the new securities allotted to the RFC claim will aggregate 2-1/7 times the annual interest to which the junior RFC claim is presently lawfully entitled.

The Committee's Modified Plan obviates these objections, as to RFC, by granting to RFC, in consideration of its provision of new money as hereinafter in Paragraph 8 of this Article III provided, treatment pari passu with holders of existing First Mortgage Bonds, and as to RCC, by allotting new Common Stock to holders of existing First [730] Mortgage Bonds, in respect of their claim, at the price of $66-2/3 per share and to RCC, in respect of its claim, at the price of $70 per share.

The provision of the Commission's Plan that Common Stock must be allocated as between RCC and ACJ in proportion to the amounts of General and Refunding Mortgage Bonds held by them respectively as collateral is, in the opinion of the Committee and its counsel, correct, and such proportionate allocation as between said two creditors is adhered to in the Committee's Modified Plan.

It will be noted that under the Committee's Modified Plan the changed treatment of the RFC claim results in the RCC claim and the ACJ claim receiving more shares of new Common Stock than are allotted to them under the Commission's Plan.

3. The Commission's Plan provides no definite and practical method of raising the necessary $10,000,000 of new money and further violates the rule

of the Boyd case by giving to RFC, a junior creditor, the privilege of providing the new money upon terms which will presumably be more favorable than those afforded to the senior First Mortgage Bonds.

The Commission's Plan provides for the issue against $10,000,000 of new money of $10,000,000 First Mortgage 4% Bonds maturing in fifty years with interest contingent on income, but fully cumulative, for five years and thereafter fixed. Such bonds probably are not marketable at their principal amount and accrued interest under the conditions affecting railroad credit today. The Commission's Plan provides for an offer of the Bonds at that price to the junior creditors and existing First Mortgage Bondholders, but in neither case are such creditors required so to purchase their proportion of the New Bonds as a condition of their participation in the reorganization. As a practical matter, therefore, the rejection of such offer is certain and its rejection will not in any wise, under the Commission's Plan, diminish the participation of the rejecting creditor in the new securities issuable under that Plan. [731]

The alternative method for furnishing the new money provided by the Commission's Plan is that RFC shall make a loan, the terms of which as to interest rate, maturity, and security, are left wholly undisclosed. Presumably, the terms are to be more favorable than those offered by the Commission's Plan to the senior First Mortgage Bondholders.

This creates a further violation of the rule of the Boyd case, through its unjust discrimination against a senior creditor in favor of a junior creditor.

This objection is obviated by the Committee's Modified Plan (along with the objection referred to in paragraph 2 above in so far as it affects the discrimination in favor of RFC) by providing that RFC, in consideration of its furnishing the new money by purchasing at their principal amount and accrued interest $10,000,000 4% First Mortgage Bonds having a maturity of 25 years and bearing fixed interest, shall receive, in respect of its present claim, treatment on the same basis as that received by holders of existing First Mortgage Bonds.

Under the conditions affecting railroad credit prevailing prior to January 1, 1938, the purchase upon such terms of said new First Mortgage Bonds would not, in the opinion of the Committee and its counsel, have afforded adequate consideration to support, as against holders of existing First Mortgage Bonds and other creditors of the Debtor, the treatment of the existing RFC note as thus contemplated. Under the conditions affecting railroad credit now prevailing, however, the purchase of said Bonds at said price will, in the opinion of the Committee and its counsel, furnish adequate consideration to support, as against both existing First Mortgage Bonds and existing junior creditors, such treatment of the RFC claim.

4. The Commission's Plan provides for a mandatory Capital Fund. In the opinion of the Committee and its counsel, this constitutes an undue restriction upon management and an undue prejudice to all holders of the new securities other than the new First Mortgage Bonds. The [732] Committee's Modified Plan therefore provides that appropriations to the Capital Fund shall be permissive.

5. The Commission's Plan rejected the proposal heretofore made by the Committee that the election of directors should be by cumulative voting in order to insure representation to all interests, and particularly to the holders of the new Preferred Stock, who will be chiefly the existing First Mortgage Bondholders. The record shows that ACJ, a junior creditor, also has substantial control of the Debtor's stock and also holds a substantial amount of existing First Mortgage Bonds. The Committee does not believe that it is fair or equitable to create a voting system under which a junior creditor who will receive for his junior claim Common Stock having a remote interest in income will, because he also owns or controls a minority of the existing First Mortgage Bonds, be able to elect the entire Board of Directors of the New Company. Accordingly, the Committee's Modified Plan provides for the election of directors by cumulative voting. It will be noted that under such a system of voting the present junior creditors, including ACJ, as holders of new Common Stock will also be assured

representation on the Board of Directors of the New Company.

6. The Commission's Plan does not create a capital structure adequate to provide for future capital expenditures and at the same time maintain a sound character.

The Commission's Plan provides that new First Mortgage Bonds in excess of the $10,000,000 to be issued in the reorganization for new money shall not be issued against future capital expenditures unless the income of the New Company available for fixed charges in a period of 12 consecutive calendar months within the 18 calendar months immediately preceding the date of authentication and delivery of the bonds equals or exceeds 1½ times the fixed charges including interest on the bonds then applied for. It provides no authorized Income Mortgage Bonds for use in future financing.

[733]

The foregoing provisions will prevent the issue of fixed charge obligations in periods of low earnings when the New Company would be unable to borrow except by the use of fixed interest bearing obligations (thus tending to induce insolvency) and, on the other hand, will permit the use of fixed interest bearing obligations during periods of high earnings when the capital structure should be so arranged as to encourage financing through Income Mortgage Bonds or Stock upon a reasonable basis.

A study of the earnings record and security issues of carriers now in receivership or Section 77 pro-

ceedings and of carriers generally regarded as having sound capital structures indicates that the provisions of the Commissioner's Plan would not have prevented the exaggerated debt of many of the present insolvent carriers, while, on the other hand, they would have resulted in the insolvency of several carriers whose capital structures generally are regarded as sound and which the Commission has certified are not in need of reorganization. (See Debtor's Brief dated May 31, 1938, before the Bureau of Finance in Chicago, Milwaukee, St. Paul and Pacific Reorganization, Finance Docket No. 10,882, pages 66-70.)

The Committee's Modified Plan obviates this objection by provisions which are the result of long study by representatives of institutional and other bondholders in this and other reorganization proceedings and which, it is believed, have now been so worked out as to avoid objections made to somewhat similar provisions in other reorganization cases.

7. The Commission's Plan provides that the Reorganization Committee which shall carry out the reorganization shall be composed of one person named by the First Mortgage Bondholders, one person by RFC, RCC and ACJ as a group (which, in view of the amount of collateral held by RFC, means RFC), and one person by the purchaser of the new First Mortgage Bonds (which, as a practical matter, means RFC). [734]

While there can be no doubt that RFC is entitled to representation on the Reorganization Committee, particularly if it provides the new money, the Committee does not believe that its position entitles it, and certainly the junior creditors as a class are not entitled, to two-thirds of the Reorganization Committee, as against the holders of approximately $62,000,000 senior claim of the existing First Mortgage Bondholders.

The Committee's Modified Plan therefore provides that the Reorganization Committee shall be composed of three persons designated by the holders of existing First Mortgage Bonds in such manner as the Commission may prescribe, one, by RFC and one, by RCC and ACJ jointly.

It will be noted that the Committee does not seek to name the representatives of the First Mortgage Bondholders to serve as the members of the Reorganization Committee but leaves the manner of their selection to the Commission's determination. The Committee, however, is insistent that a method of electing representatives of the First Mortgage Bondholders shall be adopted by the Commission which shall result in representation of the First Mortgage Bondholders by those whose interest lies solely in the First Mortgage Bonds and not by those whose real interest lies in a junior position.

8. The Commission's Plan does not provide adequate means for executing the Plan and, by eliminating the provisions originally suggested by the Committee for carrying out the Plan through a

sale at an upset price to be fixed by the Court, will create a cloud on title of the New Company and make questionable the marketability of the new First Mortgage Bonds, even to RFC.

The Committee's Modified Plan obviates this objection through a provision for a sale at an upset price to be fixed by the Court which is materially different in form from that originally suggested by the Committee, and which the Committee believes avoids all the objections made to similar provisions in previous Reports of the Commission and its Bureau of Finance. [735]

The provision now contained in the Committee's Modified Plan

(a) is operative only after the confirmation of the Plan;

(b) is optional with the Court and not mandatory;

(c) creates no "coercion" against junior creditors, confining the possibility of such "coercion" to the invocation of the power of the Court under subdivision (e) of Section 77 to confirm the Plan as against classes of creditors having an interest in the property but not, as a class, accepting the Plan. The Committee's Modified Plan, in this latter respect, conforms to the Commission's overruling of the Committee's objection to such unqualified invocation of subdivision (e);

(d) gives to any dissenting class of creditors and to the stockholders a privilege (not given

in the absence of such a provision) either to buy the Debtor's property at such a sale or to procure other buyers and obtain the benefit of any price other buyers will pay. This privilege in the present case is not illusory, whatever might be said in other reorganizations, for the three classes of junior creditors and the sole stockholder, which have not already expressed approval of the Committee's Modified Plan, are three large corporations and between them undoubtedly financially able to provide funds, or obtain their provision by others, sufficient to purchase the property at such a sale; and

(e) contemplates the sale of the property as an entirety and not piece-meal in a manner to break up the Western Pacific System.

The inclusion of such a provision for sale of the Debtor's property is necessary if the reorganization is not [736] to be delayed indefinitely. The junior creditors and sole stockholder who are seeking to bring about such delay naturally oppose the inclusion in any Plan of such a provision because they know that, lacking such a provision, no acceptable title can be created in the New Company and that probably its new securities will not be marketable. Accordingly, by refusing to permit the inclusion of such a provision, expressly contemplated by subdivision (b) (5) of Section 77, the Commission's Plan facilitates obstruction, not only by those secured junior creditors who admittedly have an interest in the property, but also by the unsecured

creditors and sole stockholder whose interests the Commission has found to have no value.

9. The effective date of the Commission's Plan is July 1, 1938, a date already well past, in effect requiring the waiver by creditors of their interest accrued from that date to the present time. The Committee's Modified Plan substitutes January 1, 1939.

10. The Commission's Plan does not seem to the Committee and its counsel to be a complete Plan dealing with all the matters which are required to be dealt with before securityholders are asked to vote upon the Plan. Indeed, it is the impression of the Committee and its counsel that the Commission's Plan does not purport to be such a complete Plan. Since the Committee's Modified Plan does purport to be a complete Plan, it deals with various matters which are not dealt with at all by the Commission's Plan, but in a manner which it is believed will be unobjectionable both to the Commission and to the other classes of securityholders.

IV.

The Committee respectfully suggests that, in order to simplify and expedite the submission to the securityholders of the Plan, as finally approved, and the subsequent [737] proceedings under Section 77, the Commission should approve the Committee's Modified Plan in the form submitted herewith, with such modifications, if any, as the Commission may deem necessary or desirable; and that, if the Com-

mission deems any modifications necessary or desirable, the specific language of such modifications be incorporated in such Plan after conference with representatives of all the parties herein, so that there may be one complete document which constitutes the Plan, and that, so far as possible, unintentional erroneous expression may be avoided.

Wherefore, the Committee prays that the Report and Order of the Commission, dated October 10, 1938, be modified by the approval of the Committee's Modified Plan; that, if the Commission shall deem such a hearing necessary, a rehearing before Division 4 of the Commission be granted in the above-entitled proceeding; and that the Commission enter such further order or orders as to it may seem just and reasonable.

Dated New York, N. Y., December 8, 1938.

FREDERICK H. ECKER,
JOHN W. STEDMAN,
REEVE SCHLEY,
As a Committee representing a group of institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company.

By LITTLETON GROOM,
Secretary.

CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys for the Committee, as aforesaid, No. 15 Broad Street, New York City. [738]

State of New York,
County of New York—ss.

Littleton Groom, being duly sworn, deposes and says:

That he is the Secretary of the Committee referred to in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same are true as stated, except as to matters and things, if any, stated to be on information and belief; and that as to those matters and things he believes them to be true.

LITTLETON GROOM

Subscribed to in my presence and sworn to before me this 8th day of December, 1938.

(Notarial Seal) SAUL SCHNEIDERMAN, Notary Public, Kings County. Kings Co. Clk's No. 1149, Reg. No. 9486. N. Y. Co. Clk's No. 1, Reg. No. 9 S 816.

Commission expires March 30, 1939. [739]

EXHIBIT A

The Western Pacific Railroad Company

PLAN OF REORGANIZATION

Dated January 1, 1939

Effective Date, January 1, 1939

Proposed by the Committee representing Institutional Bondholders [740]

List of Certain Abbreviated Terms

A. C. J.—A. C. James Company.

Committee.—The Committee representing certain institutional holders of First Mortgage Bonds of the Company, acting under a group agreement dated as of September 1, 1936, and consisting of Frederick H. Ecker, Chairman, John W. Stedman and Reeve Schley.

Bankruptcy Trustees.—The Trustees now or hereafter operating the properties of The Western Pacific Railroad Company by appointment of the Court in the Reorganization Proceeding.

Commission.—The Interstate Commerce Commission.

Company or Debtor.—The Western Pacific Railroad Company.

Consummation of the Plan.—The transfer to the New Company, to the extent contemplated by the Plan, of the properties and assets of the Company.

Court.—The District Court of the United States for the Northern District of California, Southern Division.

Effective Date of the Plan.—The date from which interest shall run on the new securities provided in the Plan, namely, January 1, 1939.

First Mortgage Bonds.—Bonds issued under the First Mortgage dated June 26, 1916, from the Company to First Federal Trust Company and Henry E. Cooper, as Trustees (Crocker First National Bank and Samuel S. Armstrong, Successor Trustees) designated as the First Mortgage.

General and Refunding Bonds.—Bonds issued under the Mortgage dated January 1, 1932, from the Company to The Chase National Bank of the City of New York as Trustee (Irving Trust Company now Successor Trustee), designated as the General and Refunding Mortgage.

New Company.—The corporation, whether the Company or a new corporation, which shall acquire the greater part of the properties now held by the Bankruptcy Trustees and issue the new securities provided for by the Plan.

Plan.—This proposed plan of reorganization.

Reorganization Committee.—The Reorganization Committee appointed as herein provided.

R. C. C.—The Railroad Credit Corporation.

R. F. C.—Reconstruction Finance Corporation.

Reorganization Proceeding.—The pending proceeding under Section 77 of the Bankruptcy Act, as amended, before the Court involving the properties

of the Company (Docket No. 7,004), including also (unless the context otherwise indicates) the related proceeding before the Commission (Finance Docket No. 10,008).

W. P. Corp.—The Western Pacific Railroad Corporation, sole stockholder of the Company. [741]

I.

Present Capital Liabilities as of January 1, 1939 (including unpaid interest)

			Fixed Annual* Interest
Equipment Trusts, Baldwin Lease and Pullman Contract		$ 2,750,050	$ 94,202
First Mortgage 5% Bonds due 1946:			
Principal	$49,290,100		2,464,505
Unpaid Interest	13,143,777		
Total		62,433,877	
Notes to R. F. C. (secured by pledge of $10,750,000 General and Refunding Bonds; also by a second lien upon $2,000,000 General and Refunding Bonds pledged to secure Note to R. C. C.):			
Principal	$ 2,963,000		177,780
Unpaid Interest	899,870		
Total		3,862,870	
Note to R. C. C. (Secured by pledge of $4,000,000 General and Refunding Bonds; also by a second lien upon $10,750,000 General and Refunding Bonds pledged to secure the Note to R. F. C.; also by a first lien upon the rights of the Company under the Marshalling and Distributing Plan of 1931):			
Principal	$ 2,445,610		24,456
Unpaid Interest	146,503		
Total		2,592,113	
Note to A. C. J. (Secured by pledge of $4,249,500 of General and Refunding Bonds. $2,000,000 of the General and Refunding Bonds pledged to secure the Note to R. C. C. were initially pledged to secure the Note to A. C. J. and by it repledged as additional collateral with the R. C. C.)			
Principal	$ 4,999,800		249,990
Unpaid Interest	1,249,950		
Total		6,249,750	
Unsecured Obligations to W. P. Corp.**			
Principal	$ 5,817,543		290,877
Unpaid Interest	1,992,096		
		7,809,639	
Preferred Stock		28,300,000	
Common Stock		47,500,000	
		$161,498,299	$3,301,810*

Unpaid Interest	13,143,777		
Total		62,433,877	
Notes to R. F. C. (secured by pledge of $10,750,000 General and Refunding Bonds; also by a second lien upon $2,000,000 General and Refunding Bonds pledged to secure Note to R. C. C.):			
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Unpaid Interest	1,992,096		
		7,809,639	
Preferred Stock		28,300,000	
Common Stock		47,500,000	
		$161,498,299	$3,301,810*

*Without interest on interest accrued and unpaid on First Mortgage Bonds, on R. F. C., R. C. C. or A. C. J. Notes or on W. P. Corp. Advances; and computing interest on the R. C. C. Note at 1%, the New York Federal Reserve Bank discount rate as of November 1, 1938.

**Includes advances from Western Realty Company—$50,000 principal; $11,667 interest.

778

Fund shall be applied to the redemption of the Income Mortgage Bonds, Series A, on the next succeeding interest payment date. All bonds so acquired shall be cancelled and no bonds may be issued to refund any such bonds.

D. Issue of Additional Income Mortgage Bonds.

Income Mortgage Bonds, in addition to those to be issued in the reorganization, may be issued from time to time to refund outstanding Income Mortgage Bonds or in lieu of First Mortgage Bonds, for the purposes and subject to the restrictions stated under "Issue of Additional First Mortgage Bonds" above, to the extent that First Mortgage Bonds are not issued for such purposes.

E. Restrictions Designed to Encourage Future Financing Through Stock and Restrictions on Pledges.

No Income Mortgage Bonds (other than those to be issued under the Plan) may be authenticated and delivered unless (1) the New Company shall have contracted forthwith to sell or pledge such bonds and (2) the Board of Directors of the New Company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the Board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of Preferred Stock at a price which would give a current dividend return of 6% or less, or (b) by the

sale of Common Stock at a price (not less than $50 per share) which would give a current dividend return (based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6% or less.

The Income Mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all Income Mortgage Bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10% of the aggregate principal amount of all Income Mortgage Bonds then authenticated and uncancelled.

F. Modification of Income Mortgage.

The Income Mortgage will provide, within conditions and limits to be therein prescribed, for the modification and alteration thereof and of the rights and obligations of the New Company and of the holders of the Income Mortgage Bonds thereunder, at any time by the concurrent action of the New Company and of the holders of not less than 66⅔% in aggregate principal amount of the bonds then outstanding; provided, however, that no such change or modification shall alter or impair the obligation of the New Company to pay the [747] principal of any bond without the consent of the holder of such bond. In the event of any unification of the properties of the New Company with the

II

Proposed Capitalization of the New Company

1. Summary

The capitalization proposed herein for the New Company is substantially as follows:

Title of Issue	Presently Issued	Interest or Dividends
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract	$ 2,750,650	$ 94,202
First Mortgage 4% Bonds, Series A, due 1964	10,000,000	400,000
Total Annual Fixed Charges		494,202
Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due 2014	20,901,240	940,556
Total Funded Debt	33,651,290	
Total Annual Charges (fixed and contingent) and Capital Fund		1,934,758
Income Mortgage Sinking Fund		104,506
Participating Preferred 5% Stocks, Series A (par value $100)	31,351,900	1,567,595
Total Annual Charges, Capital Fund, Sinking Fund and Preferred Dividend Requirements		3,606,859
Common Stock (without par value)	287,025 shs.	
Capitalization (Common at $100 per share)	$ 93,705,690	

2. First Mortgage Bonds

A. Lien of Mortgage.

The First Mortgage will be a lien, directly or through pledge of securities, subject only to liens upon equipment, on all the properties and assets owned by the New Company on the consummation of the Plan, including securities, equipment, and the equity in such equipment as is subject to equipment obligations. The First Mortgage will also be a lien on all similar property acquired by the New Company after the reorganization, except that (a) if the New Company shall acquire the properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939), constituting a Class I carrier as defined by the rules then in force of the Interstate Commerce Commission or other public regulatory bodies having jurisdiction at the time, such properties shall not be subject to the lien of the First Mortgage unless acquired in whole or in part by the use of First Mortgage Bonds or Income Mortgage Bonds, or moneys deposited under the First Mortgage or the Income Mortgage, and (b) if the New Company shall be consolidated with, or shall be merged into, or shall sell its assets substantially as an entirety to, any other company which at the time is a Class I carrier as defined as aforesaid, no properties theretofore owned or thereafter acquired by such other company shall be subject to the lien of the First Mortgage except properties thereafter acquired which shall be appurtenant or incident to

properties subject to the lien of the First Mortgage, or which shall be within the maintenance or replacement covenants of the First Mortgage, or which shall be acquired in whole or in part by the use of First Mortgage Bonds or Income Mortgage Bonds or moneys deposited under the First Mortgage or the Income Mortgage.

B. Issue Limited—Sinking Fund if Certain Limits Exceeded.

The amount of bonds issuable under the First Mortgage will be limited to $50,000,000.

The First Mortgage will provide (1) that on each May 1 when the aggregate principal amount of First Mortgage Bonds outstanding shall equal or exceed $20,000,000, the New Company will pay to the Trustee [743] under the First Mortgage as a Sinking Fund a sum equal to ½ of 1% of the maximum principal amount of First Mortgage Bonds theretofore at any one time authenticated and uncancelled; and (2) that on each May 1 when the aggregate principal amount of First Mortgage Bonds outstanding plus all other funded debt bearing fixed interest shall exceed either (a) 35% of the total capitalization of the New Company, determined as hereinafter provided, or (b) 50% of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the New Company, in addition to the sums provided in Clause (1) of this Subdivision B to be paid, will pay into said Sinking Fund a sum equal to

50% of the Available Net Income of the next preceding calendar year that remains after providing for all Income Mortgage sinking funds and charges prior thereto (i. e., that remains after the deductions made pursuant to paragraphs (1), (2), (3), (4) and (5) of Subdivision G of Section 3 of this Article II; or after the provisions of said Subdivision G shall have ceased to be operative, 50% of net income as defined by the accounting rules or practice referred to in said Subdivision G). Such Sinking Fund shall be applied to the retirement of First Mortgage Bonds, by purchase in the open market or by call or tenders at not exceeding the redemption price (or in the case of bonds not redeemable, the principal amount and accrued interest), and whenever the amount in the Sinking Fund exceeds $50,000 and First Mortgage Bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking Fund shall be applied to the redemption of new First Mortgage Bonds on the next succeeding interest payment date. All bonds so acquired shall be cancelled and no bonds may be issued to refund any such bonds. First Mortgage Bonds and Income Mortgage Bonds outstanding shall be deemed to include all bonds authenticated and delivered to the New Company which shall not have been cancelled or assured of retirement through the deposit of cash. Funded debt shall include an amount equal to the capitalized value, at 5% per annum, of fixed rents payable for leased roads, other than terminal of

bridge properties; but shall not include (a) obligations (other than mortgage bonds or equipment trust obligations) maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge of bonds having a lien on property of the New Company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the New Company as to interest or principal or both (other than bonds of a terminal or bridge company) shall be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the New Company's basic proportion of the principal liability. There shall be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without par value, at $100 a share in case of the stock issuable under the Plan, and, in case of other stock, at the capital value at which such stock is carried on the books of the Company, not exceeding, however (except to the extent that earned surplus shall have been duly capitalized), the net amount received by the New Company on the issue thereof.

C. Issue in Series

The First Mortgage Bonds may be issued from time to time in different series, subject to such limitations and restrictions as may be specified in the First Mortgage, payable on such date or dates, in

such denomination, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration and sinking funds and having such other characteristics as may be prescribed by the Board of Directors of the New Company at the time of issue, but with respect to the lien of the First Mortgage all equally secured. So long as any First Mortgage Bonds, Series A, shall be outstanding no additional First Mortgage Bonds shall be issued having a maturity earlier than January 1, 1964.

D. Bonds of Series A to be Issued in Reorganization.

$10,000,000 First Mortgage Bonds, Series A, are to be authenticated and issued in the reorganization for the purpose of providing the $10,000,000 of new money required in the reorganization.*

The Bonds of Series A shall be dated January 1, 1939, shall mature January 1, 1964, shall bear interest at the rate of 4% per annum, payable semi-annually, and shall be redeemable, in whole or in part, at any time [744] on thirty days' notice, at their principal amount and accrued interest, plus a premium of 3% of their principal amount if redeemed on or before December 31, 1941, 2½% if redeemed thereafter and on or before December 31, 1945, 2% if redeemed thereafter and on or before

*See Article III below.

December 31, 1949, 1½% if redeemed thereafter and on or before December 31, 1953, 1% if redeemed thereafter and on or before December 31, 1957, and ½% if redeemed thereafter and on or before December 31, 1960, and without any premium if redeemed on or after January 1, 1961.

E. Issue of Additional First Mortgage Bonds.

First Mortgage Bonds, in addition to those to be authenticated in the reorganization, may be authenticated from time to time: (a) to refund First Mortgage Bonds (excluding bonds issued solely by way of pledge, except as hereinafter provided) or outstanding obligations secured by First Mortgage Bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the New Company for, not exceeding 75% of expenditures made after December 31, 1938, but not more than three years prior to the date of such authentication (including expenditures for the acquisition or construction of new railroad equipment, free from other lien, but not including expenditures for the making of additions and betterments to equipment) which, under the accounting rules of the Interstate Commerce Commission or other federal regulatory bodies having jurisdiction in the premises, at the time in force, are properly chargeable to capital account; provided, however, that

(a) Except when bonds are authenticated in respect of new mileage (or securities representative thereof) or in respect of new equipment the said 75% shall be applied to the net amount of said capital expenditures after deducting therefrom, to such extent and on such basis as may be specified in the First Mortgage, credits to capital account after December 31, 1938;

(b) If any First Mortgage Bonds are authenticated or cash deposited under the First Mortgage is withdrawn to provide or reimburse for the acquisition of railroad equipment, a sinking fund shall be established (in addition to any other sinking fund then in effect for any series of First Mortgage Bonds) payable in equal annual instalments in an amount sufficient to retire (at par) within the expected efficient service life of such equipment (in no case to exceed fifteen years) a principal amount of First Mortgage Bonds equal to (1) the principal amount of bonds so authenticated or (2) the amount of deposited cash so paid;

(c) If any property is acquired subject to existing liens the amount of additional First Mortgage Bonds issuable therefor or issued to refund prior lien obligations thereon, together with the aggregate amount of existing liens to which such property is subject, shall not exceed 75% of the net cost thereof, including as part of such cost the amount of such existing

liens whether or not the indebtedness secured thereby is assumed by the New Company; and

(d) No bonds shall be issued on the basis of the acquisition of equipment under equipment trust obligations or any obligations for the deferred or serial payment of the purchase price for equipment, or on the basis of the retirement of any such obligations.

F. Restrictions Designed to Limit Future Financing through First Mortgage Bonds and Restrictions on Pledges.

The First Mortgage will contain a covenant substantially to the effect that no First Mortgage Bonds (other than those to be authenticated under the Plan) will be sold or pledged unless (1) the New Company shall have contracted forthwith to sell or pledge such bonds and (2) the Board of Directors of the New Company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the Board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of Income Mortgage Bonds having a maturity of twenty years or more at a price which would give a yield to maturity of 5% or less, or (b) by the [745] sale of Preferred Stock at a price which would give a current dividend return of 6% or less, or (c) by the sale of Common Stock at a price (not less than $50 per share) which would give a current dividend return (based on the regular divi-

dend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6% or less.

The First Mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all First Mortgage Bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10% of the aggregate principal amount of all First Mortgage Bonds then authenticated and uncancelled.

3. Income Mortgage Bonds

A. Lien of Mortgage.

The Income Mortgage shall constitute a lien, subject to the lien of the First Mortgage, upon all property from time to time subject to the lien of the First Mortgage.

B. Issuable in Series.

The Income Mortgage Bonds may be issued, without limit as to aggregate amount or within such limit as may be specified in the Income Mortgage, from time to time, in different series, subject to such limitations and restrictions as may be specified in the Income Mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or moneys of payment, registration and sinking funds, and having

such other characteristics as may be prescribed by the Board of Directors of the New Company at the time of issue, but with respect to the lien of the Income Mortgage all equally secured. No interest shall be mandatorily payable on Income Mortgage Bonds of any series (except at maturity or redemption) except out of Available Net Income, as hereinafter provided.

C. Income Bonds, Series A, to be Issued in Reorganization.

$20,901,240 of Income Mortgage Bonds, Series A, are to be authenticated and issued in the Reorganization, as set out in Articles IV and V below.

The Income Mortgage Bonds of Series A shall be dated January 1, 1939, shall mature January 1, 2014, shall bear interest at the rate of 4½% per annum, due and payable as hereinafter provided, and shall be redeemable, in whole or in part, on May 1 in any year, on thirty days' notice at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of 4½% per annum from the last preceding December 31 to the redemption date.

The Income Bonds of Series A shall be convertible into shares of Common Stock, as at the time constituted, at any time at the rate of 20 shares per $1,000 principal amount of such Bonds.

Interest on Income Mortgage Bonds, Series A, accruing for each calendar year shall (up to the

limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but shall be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest shall be mandatorily payable (except as hereinafter provided) only out of Available Net Income of the New Company that remains after providing for the Capital Fund and charges prior thereto (i. e., that remains after the deductions made pursuant to paragraphs (1) and (2) of Subdivision G of Section 3 of this Article II). All interest that comes due and is not paid on the next following May 1 shall accumulate up to the maximum amount of 13½% at any one time, but not beyond. Accumulated interest shall be mandatorily payable (a) whenever, and to the extent that, there is Available Net Income for any subsequent year remaining after the deductions made pursuant to said paragraphs (1) and (2) of Subdivision G (in which case such amount shall be paid on the next following May 1), or (b) in any event (whether earned or not) at [746] the maturity or on redemption of the Income Mortgage Bonds of Series A. For the purposes of the two sentences next hereinabove payments of interest shall be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The Board of Directors of the New Company may at any time, in its discretion, pay any interest accrued on the Income Mortgage Bonds, Series A,

even if not earned, out of any funds lawfully available therefor.

The Income Mortgage will provide for the payment on May 1 of each year while any Income Mortgage Bonds, Series A, are outstanding of an instalment of Sinking Fund, if earned, as, and in the amount, hereinafter specified. Such instalment shall be payable only out of Available Net Income for the last preceding calendar year that remains after paying interest on outstanding Income Mortgage Bonds (i. e., that remains after the deductions made pursuant to paragraphs (1), (2) and (3) of said Subdivision G). The amount of such instalment shall equal (a) ½ of 1% of the maximum principal amount of Income Mortgage Bonds, Series A, theretofore at any one time authenticated and uncancelled, plus (b) an amount equal to interest on all Income Mortgage Bonds, Series A, theretofore purchased or redeemed out of the Sinking Fund, calculated at the rate paid on said May 1 upon outstanding Income Mortgage Bonds of Series A. Such accruals of the Sinking Fund instalments shall not be cumulative. The Sinking Fund shall be applied, from time to time to the retirement of Income Mortgage Bonds, Series A, by purchase in the open market or by call for tenders at not exceeding their redemption price, and whenever the amount in the Sinking Fund exceeds $50,000 and Income Mortgage Bonds, Series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking

properties of any other company, the modifications hereinabove authorized may include provisions excluding in whole or in part the earnings from such other properties in determining Available Net Income and providing for the determination of such Available Net Income without the maintenance of separate accounts.

G. Determination and Application of Available Net Income.

Available Net Income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter, so long as any Income Mortgage Bonds remain outstanding. When no Income Mortgage Bonds remain outstanding, the provisions of this Subdivision B shall cease to be operative.

Available Net Income for each such calendar year shall be determined by deducting all fixed charges of the New Company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the New Company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with the accounting rules of the Interstate Commerce Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice), provided, however, that if the New Company shall not come

into ownership and possession of the properties now operated by the Bankruptcy Trustees on or before January 1, 1939. Available Net Income for any period after January 1, 1939, until the New Company comes into ownership and possession of such properties shall be computed as if the New Company had come into such ownership and possession on January 1, 1939 and had issued, as of that date, the new securities issuable under the Plan, other than the $10,000,000 of new First Mortgage Bonds, Series A, and in lieu of interest on such Bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding Trustees' Certificates or other obligations issued to provide funds for rehabilitation purposes.

Available Net Income shall be ascertained for each such calendar year, as the accounts shall be stated on the books of the New Company during such calendar year, without adjustments, except that: (1) in determining Available Net Income there shall not be deducted any amounts from the proceeds of the Trustees' Certificates issued for rehabilitation purposes, notwithstanding that under the accounting rules hereinbefore mentioned such expenditures may be chargeable as operating expenses; (2) if in respect of any calendar year the Available Net Income is a deficit, the amount of such deficit may, in the discretion of the Board of Directors of the New Company, be carried forward and be deducted in determining Available Net In-

come for the succeeding calendar year or calendar years until such deficit (or accumulated or remaining deficits) be extinguished by earnings which in the absence of such deficit or deficits, would be Available Net Income; and (3) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books whether cleared through income or profit and loss accounts, so far, but only in so far, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available Net Income for each calendar year shall be applied to the following purposes and in the following order:

(1) To the creation, if and when the aggregate principal amount of First Mortgage Bonds outstanding shall equal or exceed $20,000,000, of the Sinking Fund provided for in Clause 1 of Subdivision B of Section 2 hereinabove, in an amount up to, but not exceeding, in respect of any calendar year, ½ of 1% of the maximum principal amount of First Mortgage Bonds theretofore at any one time authenticated and uncancelled.

(2) If the Board of Directors of the New Company in its discretion shall so determine, Available Net Income of each calendar year may be applied to the creation of a Capital Fund to be applied to, or to provide for, or to reimburse the treasury of the New Company for, Capital Investments, as defined by the Interstate Commerce Commission Clas-

sification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Roads, Accounts Nos. 701 Investment in road and equipment, 702 Improvements on leased railway property and 705 Miscellaneous physical property (or advances to subsidiaries for expenditures which, [748] if made directly by the New Company in respect of its owned or leased properties, would be charged to said accounts), or such substituted accounts as may at the time be in effect, to the extent that such Capital Investments have been made or contracted for during such calendar year or within three months thereafter, and including therein (but only to the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or purchased under conditional sale agreements and instalments of sinking fund provided for by paragraph (b) of Subdivision E of Section 2 of this Article II (relating to First Mortgage Bonds issued for equipment), provided, however, that

(a) The amount set aside in the Capital Fund out of Available Net Income of any calendar year shall not exceed $500,000 in respect of any calendar year, or such lesser sum as may be required, together with unappropriated accumulations in the Fund as of the close of the calendar year prior to that for which the

payment is to be computed, less charges for additions and betterments during said calendar year for which payment is to be computed, to bring the total in the Fund to $1,000,000; provided, however, that the Capital Fund shall not exceed $1,000,000 at any one time.

(b) The Capital Fund may be applied only to such part of the cost of Capital Investments as hereinabove defined as remains after deducting from such cost all retirements of roadway and structures charged against income in such calendar year;

(c) To the extent that expenditures are so provided for or reimbursed out of the Capital Fund, the Company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the Preferred Stock of Series A to capitalize or reimburse such expenditures; provided, however, that such expenditures (if for purposes for which First Mortgage Bonds or Income Mortgage Bonds may be issued) may, within such limits, if any, as may be specified in the First Mortgage or the Income Mortgage, be used to supply, in whole or in part, the excess of capital expenditures required to be certified under either such mortgage over the principal amount of the bonds that may be issued under the terms thereof; and

(3) Any then remaining Available Net Income for any calendar year shall be applied to the payment on the next succeeding May 1, of interest on the then outstanding Income Mortgage Bonds (not including any thereof then held in any sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon.

(4) Any then remaining Available Net Income for any calendar year shall be applied, so long as any Income Mortgage Bonds, Series A, are outstanding, to the payment on the next succeeding May 1, of the sinking fund instalment provided for in Subdivision C of this Section 3 (relating to Income Mortgage Bonds, Series A).

(5) Any then remaining Available Net Income for any calendar year may be applied to the creation of a sinking fund for Income Mortgage Bonds of series other than Series A, if any such sinking fund shall have been provided for at the time of the creation of any such series.

(6) Any then remaining Available Net Income for any calendar year shall be applied to the payment on the next succeeding May 1 of the instalment, if any, then due under the sinking fund provisions of Clause (2) of Subdivision B of Section 2 hereinabove (relating to First Mortgage Bonds when outstanding in excess of certain limits).

(7) Any then remaining Available Net Income for any calendar year may be applied to any proper corporate purpose of the New Company (except

dividends on the new Common Stock), including, if and to the extent that such dividends shall be declared by the Board of Directors of the New Company, the payment of dividends upon the Preferred Stock in respect of such year and of any accrued and unpaid cumulative dividends on the Preferred Stock; such dividends to be paid, except as hereinafter provided, on such date or dates in the next succeeding year as may be specified in the Certificate of Incorporation or By-Laws of the New Company, or in the certificates for the Preferred Stock. [749]

(8) Any then remaining Available Net Income for any calendar year may be applied to any proper corporate purpose of the New Company, including (but only after all accrued and unpaid cumulative dividends on the Preferred Stock to the end of such year shall have been paid, or declared and set apart for payment) dividends on the Common Stock.

No interest need be paid on Income Mortgage Bonds if the amount to be paid is less than ¼ of 1%. Any excess available for interest but not paid because of the foregoing provision shall be reserved and added to the income available for interest on the Income Mortgage Bonds for the next succeeding calendar year.

If there are outstanding Income Mortgage Bonds of different series, the amount applicable to interest on such bonds shall be distributed among the respective series in proportion to the unpaid inter-

est at the time accumulated on the bonds of such series, respectively.

Dividends may be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the Board of Directors shall have determined that the Available Net Income for such year applicable for the purposes specified in the foregoing paragraphs (1), (3), (4), (5) and (6) will be more than sufficient to pay the amounts payable out of such Available Net Income pursuant to said paragraphs and such amounts shall have been deposited in trust for the purposes specified in said paragraphs. Dividends on Common Stock may be so declared only if, prior to such declaration, the Board of Directors shall have determined that the applicable part of Available Net Income for such year will be more than sufficient to pay the amount hereinabove specified for dividends (including accumulations) on the Preferred Stock and such amount shall have been deposited in trust for the purpose of paying such dividends.

4. Preferred Stock

A. Authorized Issue.

There will be authorized 750,000 shares of Preferred Stock, each of the par value of $100, of which 313,519 shares of Series A are to be issued in the

reorganization as set out in Articles IV and V below.

The additional authorized Preferred Stock not issued in the reorganization will be issuable from time to time in the discretion of the Board of Directors of the New Company, but (unless for purposes for which First Mortgage Bonds might otherwise have been issued) only after the concurring vote or consent of the holders of a majority of the outstanding Preferred Stock. So far as permitted by law, such additional Preferred Stock may be of Series A, or of any other series, one or more, and Preferred Stock of any such other series may bear dividends at such rate, cumulative or non-cumulative, may be redeemable or non-redeemable, convertible, or non-convertible, and may have such other rights and privileges and be subject to such limitations and restrictions, as may be from time to time determined by the board of directors prior to the issue of Preferred Stock of any such other series. If there are outstanding shares of Preferred Stock of different series, the earnings applicable to dividends thereon shall be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively.

B. Preference on Liquidation.

In any liquidation or winding up of the New Company, whether voluntary or involuntary, the Preferred Stock shall be entitled to receive, out of the assets of the New Company, its par value,

plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution shall be made on the Common Stock, but shall not be entitled to any further participation in such assets.

C. Voting rights.

Holders of Preferred Stock shall be entitled to one vote per share on all matters, except that in elections of directors, which shall be by cumulative voting, each holder of stock of either class shall be entitled to as many votes per share as the number of directors to be elected. [750]

The New Company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new Preferred Stock, (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new First Mortgage, the new Income Mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75% of the purchase price of such property; (2) create or issue any bonds, notes or other evidences of indebtedness maturing more than two years from their date, except new First Mortgage Bonds and new Income Mortgage Bonds and except purchase money obligations given for not more than 75% of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new Preferred Stock, or

(4) permit any subsidiary, all of whose stock except directors' shares, shall be owned by the New Company, to create any mortgage or other lien upon any of its properties or issue any such bonds, notes or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall be acquired by the New Company.

D. Preferred Stock, Series A.

The Preferred Stock, Series A, shall be entitled to receive all accumulated unpaid dividends and current dividends at the rate of 5 % per annum in respect of any calendar year before any dividends shall be paid or declared or set apart for payment on the Common Stock in respect of such year. Such dividends shall be cumulative to the extent earned in any calendar year but not paid; but such dividends shall otherwise be non-cumulative. For the purposes of the next preceding sentence hereinabove, Preferred Stock dividends shall be considered to be earned in any calendar year to the extent covered by the Available Net Income for such year that remains after providing for prior charges (i.e., that remains after the deductions made pursuant to paragraphs (1), (2), (3), (4), (5) and (6) of Subdivision G of Section 3 of this Article II); or after the provisions of said Subdivision G shall have

ceased to be operative, to the extent covered by net income (as defined by the accounting rules or practice referred to in said Subdivision G).

After dividends shall have been paid or declared or set apart for payment, on the new Common Stock at the rate of $3 per share in respect of any year, each share of Preferred Stock, Series A, shall be entitled to share equally with each share of new Common Stock in any dividends paid or declared or set apart for payment, in respect of such year.

The Preferred Stock, Series A, shall be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year.

The holders of Preferred Stock, Series A, shall not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class.

5. Common Stock

There will be authorized 1,000,000 shares of Common Stock, without par value, of which 287,025 shares are to be issued in the reorganization as set forth in Articles IV and V below and 418,025 shares shall be reserved for the conversion of Income Mortgage Bonds, Series A.

Holders of Common Stock shall be entitled to one vote per share on all matters except that directors shall be elected by cumulative voting as aforesaid.

So far as permitted by law, any vote or consent

by the holders of Common Stock, authorizing the issuance of additional shares of stock of any class or of securities convertible into stock of any class, may waive, on such terms and conditions, if any, as may be specified in such vote or consent, the preemptive right of all the holders of shares of Common Stock to subscribe to such additional shares or securities. [751]

III.

Reconstruction Finance Corporation and Provision of New Money

$10,000,000 of new money is required by the New Company for the purpose of retiring Trustees' Certificates issued to provide for the expenditures under the 1936, 1937 and 1938 rehabilitation program. Said $10,000,000 in new money is to be provided for by the sale at par and accrued interest to R. F. C. (subject to approval and authorization of the Interstate Commerce Commission and the delivery to R. F. C. of a legal opinion satisfactory to it as to the validity of the acquisition by the New Company of title to the properties of the Debtor and the validity of the new First Mortgage Bonds, Series A, and the new First Mortgage) of the $10,000,000 of First Mortgage 4% Bonds, Series A, due 1964, to be issued in the reorganization.

In consideration of R. F. C.'s providing said new money by so purchasing said First Mortgage Bonds, Series A, R. F. C.'s existing claim against

the Company, amounting as of January 1, 1939, to $3,862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by General and Refunding Mortgage Bonds of the Company and other collateral, shall be provided for under the Plan in like securities and in like proportions as those given holders of the Company's existing First Mortgage Bonds; that is, R. F. C., upon purchasing at par and accrued interest said $10,000,000 of First Mortgage 4% Bonds, Series A, of the New Company, shall receive Income Mortgage 4½% Bonds, Series A, of the New Company for 40% of the principal of its said claim and 5% Preferred Stock, Series A ($100 par value) of the New Company for 60% of the principal of its said claim and Common Stock, taken at the price of $66⅔ per share, for 100% of the interest accrued and unpaid on its said claim. The amounts of securities of the New Company so to be received by R. F. C. are $1,185,200, principal amount, Income Mortgage 4½% Bonds, Series A, $1,777,800, par value, 5% Preferred Stock, Series A, and 13,498 shares of Common Stock.

IV.

Treatment of Existing Securities

1. Existing equipment trusts, Baldwin lease and Pullman contract, aggregating $2,750,050, shall remain undisturbed and shall be assumed by the New Company.

2. Holders of existing First Mortgage Bonds will receive for each $1,000 principal amount thereof, together with $266.66⅔ of interest accrued and unpaid thereon to January 1, 1939:

$400 Income Mortgage 4½% Bonds, Series A (being 40% of the principal amount of said existing Bonds);

$600 5% Preferred Stock, Series A (being 60% of the principal amount of said Bonds); and

4 shares Common Stock (being Common Stock taken at the price of $66⅔ per share for 100% of said accrued and unpaid interest).

3. R.F.C. will receive in respect of the $10,000,000 of new money provided for in Article III (or the surrender of Trustees' Certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to January 1, 1939:

$10,000,000 New First Mortgage 4% Bonds, Series A (being 100% of said new money);

$1,185,200 Income Mortgage 4½% Bonds, Series A (being 40% of the principal of said claim);

$1,777,800 5% Preferred Stock, Series A (being 60% of the principal of said claim); and

13,498 shares Common Stock (being Common Stock taken at the price of $66⅔ per share for 100% of said accrued and unpaid interest).

[752]

4. R.C.C. will receive in respect of its claim in the principal amount of $2,445,610, together with $146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of said amounts by the application, prior to the date of issue of the new securities under the Plan, of any proceeds from the distributive shares of the Company or its subsidiaries under the Marshalling and Distributing Plan, 1931):

37,030 shares Common Stock (being Common Stock taken at the price of $70 per share for 100% of the aggregate amount of said claim).

5. A. C. J. will receive in respect of its claim in the principal amount of $4,999,800, together with $1,249,950 of interest accrued and unpaid thereon to January 1, 1939:

39,340 shares of Common Stock (being an amount of Common Stock which bears to the amount of Common Stock allotted to the claim of R. C. C., the same proportion that the principal amount of General and Refunding Mortgage Bonds of the Company held by A. C. J. as collateral for said claim, bears to the principal amount of such Bonds held by R. C. C. as collateral for its claim).

6. Neither unsecured creditors nor stockholders shall be entitled to participate in the reorganization.

V

Distribution of New Securities

Existing Securities	New First Mortgage 4 %, Bonds, Series A	New Income Mortgage 4½ %, Bonds, Series A	New 5 %, Preferred Stock, Series A	New Common Stock
5% First Mortgage Bonds		$19,718,040	$29,574,100	197,157 shs.
R. F. C.				
New Money	$10,000,000			
Collateral Note		1,185,200	1,777,800	13,498 shs.
R. C. C. Collateral Note				37,030 shs.
A. C. J. Collateral Note				39,340 shs.
Totals	$10,000,000	$20,901,240	$31,351,900	287,025 shs.

VI

Claims Not Affected by the Plan

The following claims are not affected by the Plan: (a) current liabilities of the Company incurred in the ordinary conduct of its business prior to the institution of the Reorganization Proceeding, which are entitled to priority over one or more of the mortgages of the Company, and (b) current liabilities and obligations of the Bankruptcy Trustees incurred during the Reorganization Proceeding. To the extent that such claims, liabilities or obligations are not paid by the Company or the Bankruptcy Trustees pursuant to order of the Court in the Reorganization Proceeding, they are to be paid in cash or assumed by the New Company. All such claims, liabilities and obligations may be adjusted or compromised and dealt with or paid or discharged by the New Company, all as may be determined by the Board of Directors of the New Company subject to approval by the Court.

The New Company shall be deemed to have assumed such of the contracts of the Company which are executory in whole or in part, including any executory leases and liabilities under guaranties, as shall have been affirmed by the Bankruptcy Trustees in the Reorganization Proceeding with the approval of the Court prior to the date of confirmation of the Plan, and also any executory contracts made by the Bankruptcy Trustees with the approval of the Court in the Reorganization Proceeding

which, by their terms, do not terminate at the conclusion of the Reorganization Proceeding. [753]

VII

Method of Executing the Plan

Existing mortgages on the Company's properties shall be released and cancelled, and all funds on deposit with the Trustees under the Company's mortgages representing sums paid from time to time to such Trustees for the release of properties, sale of scrap, and otherwise, and all collateral pledged under the Company's mortgages, shall be surrendered to the New Company free from liens of the Company's mortgages, after deductions therefrom of any amounts which the Court may find should be deducted under the provisions of such mortgages and consistent with this Plan. All collateral pledged by others than the Company as security for the Company's notes to R. F. C., R. C. C. and A. C. J. shall be surrendered to the pledgors thereof, and all collateral pledged by the Company as security for said notes shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the New Company and cancelled, except that R. C. C. shall not release or surrender any right or interest in the distributive shares of the Company or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive shares after the effective date of the Plan, shall become the property

of and be retained by the R. C. C., but to the extent to which received prior to the issue of the new securities under the Plan shall be applied in reduction of the claim of the R. C. C. in respect of which such new securities are to be issued at the rates provided in Article IV.

The Plan shall be carried out under the supervision of a Reorganization Committee consisting of five persons, three of whom shall be designated by holders of existing First Mortgage Bonds in such manner as the Commission may prescribe, one by R. E. C., and one by R. C. C. and A. C. J. jointly.

The Plan may be carried out either by re-vesting the properties formerly of the Company in the Company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the Plan.

The method of carrying out the Plan shall be determined by the Reorganization Committee in its discretion, and the Reorganization Committee shall also determine, subject to the approval of the Court, the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages, bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the Reorganization Committee necessary or desirable in connection with carrying out the Plan.

The Reorganization Committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The Reorganization Committee may employ such agents, attorneys and others as it may deem desirable for the purposes of the Plan. The Reorganization Committee may from time to time delegate to others any power or discretion conferred upon it by the Plan; and the members of the Reorganization Committee shall not be liable for any action taken by them in good faith or by any person employed by the Reorganization Committee in good faith, or otherwise, except for their respective individual malfeasance or wilful neglect.

In case any class of creditors or stockholders shall not accept the Plan in accordance with Section 77, any party may nevertheless move the Court to confirm the Plan on the ground that the interests of such class of creditors have no value, or as the case may be, that the equity of such class of stockholders has no value, or on the ground that the Plan provides for payment in cash to such class of an amount not less than the value of their interests or equity, if any, in accordance with subdivision (c) of Section 77, through the sales hereinafter provided for in accordance with clause (5) of subdivision (b) of Section 77.

If so ordered by the Court, the Plan may be executed by a sale at public auction, at not less than a fair upset price as determined by the Court, of all or any part of the properties and assets of the Com-

pany, free from all liens or claims, other than those herein expressly stated not to be affected by the Plan. Upon any such sale, the properties and assets offered for sale may be purchased for the benefit of the New Company by the Reorganization Committee, or by a purchaser nominated by the Reorganization Committee, and in that event there shall be applied on account of the purchase price the distributive share, if any, of the proceeds of [734] such sale of all securities the holders of which shall have accepted the Plan, and the securities, though not accepting the Plan of all classes which, as a class, have accepted the Plan in accordance with Section 77. The Reorganization Committee or its representative may bid, at any such sale, such amounts as the Reorganization Committee may determine.

All properties and assets so sold which are purchased by the Reorganization Committee or its representative shall be transferred to the New Company.

In the event of any such sale, the Reorganization Committee may in its discretion sell all or any portion of the new securities distributable under the Plan in respect of securities of any creditor, if neither such creditor nor the class to which such creditor belongs shall have accepted the Plan in accordance with Section 77. The proceeds of any such sale, together with any other funds which, in the judgment of the Reorganization Committee, are available among the assets of the Debtor Estate or of the New Company may be used to pay the por-

tion of the purchase price payable in cash on any such sale.

Upon any such sale, non-assenting secured creditors of any class which, as a class, shall not have accepted the Plan in accordance with Section 77 and the unsecured creditors and the stockholders of either class shall be entitled to receive, in lieu of the securities, if any, otherwise issuable under the Plan, their aliquot proportion of the proceeds of such sale, after deducting therefrom all expenses of such sale and the amount which would be required to pay in full, of principal and unpaid interest accrued to the date of such sale, all creditors whose claims are prior in lien or superior in equity to the claims of such non-assenting secured creditors or the rights of such unsecured creditors or stockholders.

If any properties and assets are purchased at any such sale by others than the Reorganization Committee or its representative, security holders having an interest in such properties and assets shall be entitled, in accordance with the priorities of their respective interests, to receive, in lieu of the securities, if any, issuable to them hereunder, their aliquot portion of the proceeds of the sale of such property and assets, after deducting therefrom all expenses of such sale. In that event the Reorganization Committee shall, with the approval of the Commission and the Court, make such modifications in the Plan as may be appropriate under the circumstances.

VIII

Method of Giving Notice

Unless otherwise provided in Section 77 or any order or orders of the Court in the Reorganization Proceeding or of the Commission, whenever notice shall be required or permitted to be given under or pursuant to the Plan, such notice shall be given by publishing a copy of such notice once in each week on any secular day in each such week for two successive weeks in one newspaper published and of general circulation in the Borough of Manhattan, City and State of New York, and in one newspaper published and of general circulation in the City of San Francisco, State of California, and also (1) in case of notices to security holders who have accepted the Plan, by mailing such notice, postage prepaid, to the addresses of such security holders set forth in the acceptances signed by them; and (2) in case of notices to security holders who shall not have accepted the Plan, by mailing such notice, postage prepaid, to such security holders whose names and addresses appear on the books of the Company or of the New Company, as the case may be, but failure to mail any such notices, or delay in mailing any such notices, shall not invalidate the notice by publication above provided for, which alone shall be sufficient.

IX

Expenses of the Reorganization

All expenses in connection with the Plan and its consummation, and all costs of administration and

other allowances made by the Court in the Reorganization Proceeding, shall be paid by the New Company, subject to the provisions of Section 77, and shall constitute a charge upon the properties of the New Company as a cost of administration prior in lien to all new securities issued under the Plan. [755]

There shall be included in such expenses such reasonable compensation for necessary services rendered and reimbursement for actual expenses incurred in connection with the Reorganization Proceeding and the Plan by the Trustees under the mortgages, the Reorganization Committee, the Committee, and other parties in interest and the attorneys or agents of any thereof as may be approved by the Commission and the Court in the Reorganization Proceeding pursuant to Section 77, but no compensation shall be paid to members of the Committee for their services as such members.

X

Management

The Board of Directors of the New Company shall consist of not less than seven nor more than eleven members who shall be elected by the holders of the Preferred Stock and the Common Stock of the New Company at an election to be held not later than ninety days after the consummation of the Plan. Pending such election the Board of Directors shall consist of such persons as may be designated by the Reorganization Committee with the approval of the Court.

[Endorsed]: Filed Oct. 5, 1939. [756]

Before the
Interstate Commerce Commission

Finance Docket No. 10913

In the Matter
of
The Western Pacific Railroad Company
Reorganization

PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY FOR REHEARING OF ITS PETITION FOR A MODIFICATION OF THE REPORT AND ORDER OF OCTOBER 10, 1938, AND FOR A MODIFICATION OF THE COMMISSION'S REPORT AND ORDER OF JUNE 21, 1939, AND FOR THE APPROVAL OF THE ANNEXED PLAN OF REORGANIZATION IN SUBSTITUTION FOR THE MODIFIED PLAN OF REORGANIZATION PROMULGATED BY THE COMMISSION. [757]

This Petition of The Western Pacific Railroad Company (herein sometimes called the "Debtor") filed pursuant to Rule XV of the Rules of Practice of the Interstate Commerce Commission as well as under Subsection (d) of Section 77 of the Bankruptcy Act, respectfully shows:

First: Following the hearing in this proceeding held January 20, 1939, certain parties undertook to negotiate an agreed-upon Plan of Reorganiza-

tion which might be acceptable to the Interstate Commerce Commission and susceptible of early consummation. These negotiations were delicate and protracted but on June 24, 1939, an agreement seemed imminent upon a Plan to be made effective as of January 1, 1939, providing for the following capital structure and allocation of new securities:

[758]

SUMMARY OF CAPITALIZATION OF NEW CORPORATION AND ALLOCATIONS OF NEW SECURITIES

Title of Issue	Presently Issued	Interest or Dividends
Undisturbed Equipment Trusts	$ 2,750,050	$ 94,202.00
First Mortgage 4% Bonds, Series A, due 1964 (to be taken by Reconstruction Finance Corporation in exchange for $10,000,000 Trustees' Certificates)	10,000,000	400,000.00
Income Mortgage 4½% Bonds, Series A, due 2014 (to be taken by holders of First Mortgage Bonds and by Reconstruction Finance Corporation for 50% of the principal of their debt)	26,126,550	1,175,694.75
Participating 5% Preferred Stock, Par Value $100.00 (to be taken by holders of First Mortgage Bonds and by Reconstruction Finance Corporation for 50% of the principal of their debt and by The Railroad Credit Corporation for 100% of the principal of its debt)	28,572,160	1,969,896.75
Total Funded Debt and Preferred Stock	$67,448,760	
Common Stock (without par value)		520,000 shares
To holders of First Mortgage Bonds	246,450	
Reconstruction Finance Corporation	16,850	
The Railroad Credit Corporation	2,745	
A. C. James Co.	72,350	
The Western Realty Company	365	
The Western Pacific Railroad Corporation as creditor and stockholder	181,240	520,000 shares

An outline of the foregoing Plan was submitted informally on that date to Division 4 of the Interstate Commerce Commission and request made for a reasonable delay in the pending proceeding to enable the negotiation of a complete agreement upon said Plan by all parties of record to the extent that they might lawfully agree thereon.

Second: Assents to said Plan were given by the following parties by the following described letters upon the terms and conditions and subject to the reservations therein stated:

The Railroad Credit Corporation, by letter addressed by its President, E. C. Buckland, to F. C. Nicodemus, Jr., dated June 28, 1939.

A. C. James Co., by letter addressed by its attorney, Robert E. Coulson, to Hon. Claude R. Porter, Interstate Commerce Commission, dated June 30, 1939.

The Western Pacific Railroad Corporation and The Western Pacific Railroad Company, by letter addressed by its counsel, F. C. Nicodemus, Jr., to Hon. Claude R. Porter, Interstate Commerce Commission, dated June 30, 1939.

Reconstruction Finance Corporation, by letter addressed by its Chairman, Jesse H. Jones, to Hon. Claude R. Porter, Interstate Commerce Commission, dated July 11, 1939.

The original of each of the above letters is in the files of the Interstate Commerce Commission.

The foregoing include all parties of record in this proceeding except (a) the Trustees under the First

Mortgage and the General and Refunding Mortgage of The [760] Western Pacific Railroad Company who are not authorized to represent holders of Bonds under such Mortgage for the purpose of accepting or rejecting any plan of reorganization, and (b) Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing certain institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company under a group agreement dated as of September 1, 1936, who asked for certain modifications of the Plan as the condition of their acceptance thereof or acquiescence therein.

Third: On July 24, 1939, the respective counsel for the above named Committee, for the A. C. James Co. and for The Western Pacific Railroad Corporation and The Western Pacific Railroad Company, agreed upon the modifications of the Plan asked by said Committee and on July 25, 1939, were in process of securing the approval thereof by their respective clients to the extent that they were authorized to approve the same when the Interstate Commerce Commission released its Report and Order dated June 21, 1939, modifying the Plan of Reorganization promulgated in its Report and Order dated October 10, 1938. The Plan so approved by counsel for the said Committee, for the A. C. James Co. and for The Western Pacific Railroad Corporation and The Western Pacific Railroad Company, differs from the earlier Plan referred to in paragraph First hereof slightly in mat-

ters of detail and in the following matters of substance:

(a) The maturity date of the new First Mortgage Bonds is changed from the year 1964 to the year 1989.

(b) The number of shares of Common Stock (without par value) is increased from 520,000 to 525,300 shares, which are allocated as follows: [761]

To holders of First Mortgage Bonds	262,875
To Reconstruction Finance Corporation	17,995
To Railroad Credit Corporation	2,930
To A. C. James Co.	72,350
To The Western Realty Company	365
To The Western Pacific Railroad Corporation, as creditor and stockholder	168,785

(c) The provision for the creation of a Reorganization Committee was recast so as to read: "The Plan shall be carried out under the supervision of a Reorganization Committee consisting of five persons, three to be selected by vote of the First Mortgage Bondholders in such manner as the Commission shall direct, one by R. F. C. (meaning Reconstruction Finance Corporation) and one by A. C. J. (meaning A. C. James Co.)"

A copy of the final proof of the Plan is hereto annexed as Exhibit A.

Fourth: Your petitioner avers that notwithstanding the release by the Interstate Commerce Commission on July 25, 1939, of its Report and Order dated June 21, 1939, modifying the Plan promulgated under its Report and Order dated October 10, 1938, the parties in interest may desire the Commission to certify to the Court in substitution for its modified Plan the Plan set forth in Exhibit A hereto (herein and in the annexed brief sometimes called the "agreed-upon Plan") for the following reasons:

(a) The agreed-upon Plan is susceptible of early consummation whereas the Commission's modified Plan could be made effective if at all only at the end of litigation which is almost certain to be protracted.

(b) Under the agreed-upon Plan, the existing First Mortgage Bonds in consideration of [762] concessions made to the junior creditors and stockholders secure the relinquishment of the following lien claims, among others, asserted by the Trustee of the General and Refunding Mortgage of the Railroad Company:

1. A first and paramount lien on an undivided half interest in the Northern California Extension representing a total investment of not less than $10,000,000.

2. A first and paramount lien upon the equity in equipment having a depreciated book value as of December 31, 1935, of $6,169,121.48.

Under the modified Plan of the Interstate Commerce Commission, holders of First Mortgage Bonds will receive 230,593 shares of Common Stock out of a total issue of 319,441 shares or 72.189% thereof whereas under the agreed-upon Plan they will receive 262,875 shares out of a total issue of 525,300 shares or 50.042% thereof. They also concede a preferred stock position to Railroad Credit Corporation for the principal of its debt. By making this concession to Railroad Credit Corporation and agreeing to an increase in the number of shares of Common Stock by the amount of 205,859 shares of which increased number of shares they themselves are allotted 32,282 shares—a net dilution as against the holders of First Mortgage Bonds of 173,577 shares—holders of First Mortgage Bonds avoid litigation and the delays and expense incident thereto and secure the complete relinquishment of the substantial lien claims specified above. Although these lien claims are resisted by the Trustees of the First Mortgage and by the Committee representing the institutional group of First Mortgage Bondholders, and although the Interstate Commerce Commission has determined these lien issues in favor of the First Mortgage and against the General and Refunding Mortgage, it [763] is obvious that the claims are substantial and of such character that they must be determined by a Court of last resort before it will be practicable either under the machinery provided by Section 77 of the Bank-

ruptcy Act or by equity foreclosure to make effective any Plan other than an agreed-upon Plan.

Fifth: The Board of Directors of The Western Pacific Railroad Corporation will recommend to its stockholders approval of the agreed-upon Plan in the form annexed hereto as Exhibit A and upon such acceptance by its stockholders, The Western Pacific Railroad Corporation and The Western Pacific Railroad Company will cooperate in every possible way to facilitate its early consummation.

Wherefore, your petitioner prays the Commission for a rehearing of its petition for a modification of the Report and Order of October 10, 1938, and for a modification of the Commission's Report and Order of June 21, 1939, and for the approval of the annexed Plan of Reorganization in substitution for the modified Plan of Reorganization promulgated by the Commission.

Answers to this Petition are required within ten days under Rule XV(b) of the Interstate Commerce Commission.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,

Counsel, The Western Pacific Railroad Company,
40 Wall Street, New York City.

Dated, August 1, 1939. [764]

State of New York,
County of New York—ss.

Michael J. Curry, being duly sworn, deposes and says: That he is Vice-President of the above named petitioner, The Western Pacific Railroad Company; that he has read the foregoing petition and knows the contents thereof and verily believes it to be true in all respects.

MICHAEL J. CURRY.

Subscribed and sworn to before me this 1st day of August, 1939.

(Seal) HOWARD A. FISCHER,
Notary Public, Kings Co. No. 123, Reg. No. 230.
Cert. filed in N. Y. Co. No. 306, Reg. No. O-F-187.
Commission expires March 30, 1940. [765]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

BRIEF IN SUPPORT OF THE FOREGOING PETITION

On August 2, 1935, four years ago tomorrow, The Western Pacific Railroad Company filed its petition for reorganization under Section 77 of the Bankruptcy Act. During the four years that have since elapsed, the property has been rehabilitated at a cost of $10,000,000 and is now an up-to-date property ripe for immediate reorganization.

On July 24, 1939, all parties of record or their counsel, as the result of negotiations which have been practically continuous since the final argument in this proceeding on [766] January 20, 1939, had agreed upon a Plan of Reorganization, a proof of which is annexed as Exhibit A to the foregoing petition.

On July 25, 1939, while counsel were in process of securing for filing with the Interstate Commerce Commission formal assents of their clients to the agreed-upon Plan, the Interstate Commerce Commission released its Report and Order dated June 21, 1939, which modified in detail but not in prin-

ciple the Plan of Reorganization promulgated by the Commission under its Report and Order of October 10, 1938.

No provision is made for the unsecured creditors and stockholders of the Railroad Company whose investment is threatened with extinction.

The Western Pacific Railroad Company, in order to make possible an early reorganization giving recognition to the investment of its junior creditors and stockholders and to avert unnecessary and wasteful litigation injurious to its property as well as to the entire railway industry, now asks that the Commission substitute the agreed-upon Plan for its own modified Plan and certify the agreed-upon Plan for the approval of the Court.

For convenience of comparison, the agreed-upon Plan and the Commission's modified Plan are set out in parallel columns: [767]

Title of Issue	Agreed-Upon Plan — Effective date January 1, 1939		Commission's Modified Plan — Effective date January 1, 1939	
	Capital Issue	Interest, dividend or other charge	Capital Issue	Interest, dividend or other charge
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract	$ 2,750,050	$ 94,202.00	$ 2,750,050	$ 94,202.00
First Mortgage Bonds, Series A	10,000,000	400,000.00	10,000,000	400,000.00
Total Annual Fixed Charges		494,202.00		494,202.00
		300,000.00		500,000.00
Income Mortgage 4½% Bonds, Series A	26,126,550	1,175,694.75	21,219,075	954,858.00
Total Funded Debt	$38,876,600		$33,969,125	
Total Annual Charges (fixed and contingent) and Capital Fund		1,969,896.75		949,060.00
Income Mortgage Sinking Fund		130,632.75		106,093.00
Participating Preferred Stock, 5% Series (par value $100)	28,572,160	1,428,608.00	31,850,297	1,592,515.00
Total of Funded Debt and Preferred Stock	$67,448,760		$65,819,422	
Total Annual Charges, Capital Fund, Sinking Fund and Preferred Dividend requirements		3,529,137.50		3,647,670.00
Common Stock (without par value)	525,300 Shares		319,411 shares	

Under the agreed-upon Plan, the maturity of the new First Mortgage Bonds is 1989 whereas under the Commission's modified Plan the maturity date is 1964 and the Capital Fund is mandatory at $300,000 and permissive up to $500,000, whereas under the Commission's modified Plan the Capital Fund is mandatory at $500,000. The allotments of no par value Common Stock under the respective Plans are set out below.

Allottees of Common Stock	Agreed-Upon Plan	Commission's Plan
Holders of First Mortgage Bonds	262,875	230,593
Reconstruction Finance Corporation	17,995	15,788
The Railroad Credit Corporation	2,930	35,425
A. C. James Co.	72,350	37,635
The Western Pacific Railroad Corporation, as creditor	44,850	
The Western Pacific Railroad Corporation, as stockholder	123,935	
Western Realty Company	365	
Totals	525,300 shares	319,441 shares

[768]

For purposes of this brief we assume that all parties of record (except the mortgage Trustees who are not permitted either to accept or reject a Plan of Reorganization on behalf of their cestuis que trustent Bondholders) will in their answers to our petition reaffirm their adhesion to the agreed-upon Plan.

We also assume that the Interstate Commerce Commission will not hesitate to substitute the

agreed-upon Plan for its own modified Plan if convinced—

(a) that the agreed-upon Plan is compatible with the public interest;

(b) that the assents of record are sufficient to give reasonable assurance of acceptance of the Plan by the requisite percentages of the several classes of creditors and security holders;

(c) that the agreed-upon Plan is not unfair to any party in interest not represented by the parties of record who have assented to the Plan.

We shall briefly discuss these propositions in their order as stated.

(a) The agreed-upon Plan is compatible with the public interest.

The agreed-upon Plan differs from the Commission's modified Plan in only two aspects that could have any relation to the public interest—

(1) the allotment of Income Mortgage 4½% Bonds to holders of First Mortgage Bonds and to Reconstruction Finance Corporation for the principal of their debt is increased from 40% to 50% and the allotment of Preferred Stock is correspondingly decreased;

(2) the number of shares of Common Stock without par value is increased from 319,441 shares to 525,300 shares. [769]

Otherwise the capital structures under the two Plans are almost identical.

The increase of the allotment of Income Mortgage 4½% Bonds from 40% to 50% may be passed over without argument, because (1) a better balanced capital structure results; (2) better treatment is given to holders of First Mortgage Bonds and to Reconstruction Finance Corporation and (3) the allotment of equal amounts of Income Bonds and preferred stock for the principal of senior debt conforms to the Plan recently approved by both the Commission and the Court for the Chicago and Eastern Illinois Railway Company.

The increase in the number of shares of Common Stock (without par value) from 319,441 shares to 525,300 shares cannot be deemed to affect adversely the public interest.

The Commission's modified Plan provides for a capitalization of $97,763,522 calculating 319,441 shares of common stock without par value at $100 per share. As we understand it this capitalization reflects the amount of capital upon which the Commission estimates the future earnings may yield a return.

The agreed-upon Plan provides for a capitalization of $67,448,760 exclusive of 525,300 shares of common stock without par value to which no value is assigned but which if calculated at $50 per share will produce a capitalization *below* that provided for the in the Commission's modified Plan.

But it is neither necessary nor desirable to complicate our reorganization problem by attempting at this time to fix any stated value for the no-par value common stock. [770]

This question should be determined *after* reorganization and following a hearing to determine the composition of the initial balance sheet of the reorganized company in respect of which the Commission will retain all jurisdiction that it now has to prescribe a book value for such no par value stock predicated upon its estimate of the probable future earning power of the property. (Atlanta, Birmingham and Coast Railroad Company v. United States, 296 U. S. 33 (1935).)

(b) The assents of record are sufficient to give reasonable assurance of acceptance of the Plan by the requisite percentages of the several classes of creditors and security holders.

Each of the three secured creditors, i. e., Reconstruction Finance Corporation, The Railroad Credit Corporation and the A. C. James Co. is a corporation qualified to accept a Plan either under or in advance of formal submission in accordance with Section 77 of the Bankruptcy Act. Apart from these three secured creditors and the mortgage trustees who are sterilized by Section 77 the only parties in interest are (a) holders of First Mortgage Bonds and (b) The Western Pacific Railroad Corporation, as an unsecured creditor and the sole stockholder of The Western Pacific Railroad Company.

As explained at the oral argument on January 20, 1939, the acceptance of the Plan by The Western Pacific Railroad Corporation must be made subject to the subsequent approval of the stockholders of The Western Pacific Railroad Corporation; but the concentration of large amounts of this stock in the ownership of interests identified with the present management of the Railroad Company reasonably assures the prompt acceptance of the Plan by such stockholders. [771]

Approximately one-third of the outstanding First Mortgage Bonds are represented by the Committee for institutional holders of First Mortgage Bonds. Substantial additional amounts of First Mortgage Bonds are owned by The Western Pacific Railroad Corporation and are pledged to the Curtiss Southwestern Company and Central Hanover Bank and Trust Company and further amounts are held by interests closely identified with the management. With these large blocks of First Mortgage Bonds supporting the agreed-upon Plan, it is reasonable to anticipate almost unanimous support of other holders of First Mortgage Bonds. If the Plan is approved by the Commission and the Court, assents on behalf of the requisite percentage of First Mortgage Bonds seem a foregone conclusion.

(c) The agreed-upon Plan is not unfair to any party in interest not represented by the parties of record who have assented to the Plan.

It has been suggested that the Interstate Commerce Commission should hesitate to approve the

agreed-upon Plan unless and until satisfied that it is fair and equitable to holders of First Mortgage Bonds, approximately two-thirds of which are not represented of record by the Committee.

Apart from the increase in the allotment to holders of First Mortgage Bonds of 50% of the principal thereof in Income Mortgage 4½% Bonds instead of 40% as provided in the Commission's modified Plan and the use of preferred stock in adjusting the principal debt held by Railroad Credit Corporation, the only substantial change affecting holders of First Mortgage Bonds is in the increase of the number of shares of Common [772] Stock without par value from 319,441 shares to 525,300 shares and a reallocation of certain of the additional shares among the junior creditors and stockholders of the Railroad Company. This increase and reallocation of the Common Stock reduces the percentage of the entire issue allocated to First Mortgage Bonds from 72.189% to 50.042%.

For this concession to Railroad Credit Corporation and the relinquishment of 22.147% of the equity to the junior interests, holders of First Mortgage Bonds receive the following considerations, among others:

(a) assurance of an early, economical reorganization;

(b) avoidance of litigation which the Commission's modified Plan *forces* upon the junior interests whose equity of approximately $25,-

000,000 based upon the Commission's own 19-A Valuation is to be taken from them and transferred to senior creditors, largely to holders of First Mortgage Bonds;

(c) relinquishment of the lien claims of the secured creditors of the Railroad Company asserted by the Trustee under the General and Refunding Mortgage (1) to an undivided half interest in the Northern California Extension and (2) to the equity in equipment having depreciated book value as of December 31, 1935, of $6,169,121.48.

Any one of items (a), (b) and (c) is alone an adequate consideration for the concession to Railroad Credit Corporation and the relinquishment by holders of First Mortgage Bonds to the junior interests of 22.147% of the equity (which the Commission seems to regard as a remote equity) represented by the common stock of the reorganized company. It would unduly extend this brief to [773] discuss these items in detail or to emphasize the many points of resistance to the Commission's modified Plan which we think inevitable if it is certified to the Court.

A brief exposition of the lien claim asserted by the General and Refunding mortgage against the new north and south line known as the Northern California Extension will be sufficiently illustrative.

By the terms of the First Mortgage, the lien thereof extends to any newly acquired railway or extension constructed or acquired by the use of First Mortgage Bonds or their proceeds but does not attach to such railway or extension if financed independently of the First Mortgage.

The Northern California Extension was constructed at an approximate cost of $10,000,000 of which one-half was provided through the sale of First Mortgage Bonds and one-half by junior interests (who ultimately became pledgees of General and Refunding Mortgage Bonds), the project having cost double the amount of the original estimate.

If the extension had been constructed in two sections, one section financed through the First Mortgage, the other section through resources independent of the First Mortgage, there would be no lien controversy—the First Mortgage and the General and Refunding Mortgage each would have an uncontested lien on approximately one-half of the entire mileage.

The construction did not, however, take that form. Rights of way for practically the entire mileage were acquired at the outset and cash provided by sale of First Mortgage was expended indiscriminately over the whole project.

Upon this state of facts the trustees of the First Mortgage assert with apparent confidence a first and paramount lien on the entire Extension while the trustees of [774] the General and Refunding

Mortgage with equal confidence asserts a lien on an undivided half interest—a lien proportionate to capital which the junior interests put into the enterprise.

"Equity regards substance rather than form"—is one of the most favored maxims of the Equity Courts.

Looking only to substance and disregarding form as equity is wont to do no one can well question that *only* one-half of the Northern California Extension was constructed through funds provided under the First Mortgage.

It is not our purpose to suggest what is the correct determination of this lien question but merely to make clear that it contains the germ of a major lawsuit the outcome of which no one can possibly predict. Should a Chancellor (as he might readily do) accord to the General and Refunding Mortgage a lien upon an undivided half interest in this important property the result would probably be fatal to the Commission's modified Plan. It would be necessary to start de novo and to develop a basically different Plan—in all probability one involving partial if not complete liquidation of the junior secured debt collateralized by bonds issued under the General and Refunding Mortgage.

Settlement of this and other controversial issues is not only an adequate consideration for the recession to junior interests of the 22.147% of their own equity and the other concessions provided for in

the agreed-upon Plan but is a splendid result for the holders of First Mortgage Bonds.

It must be borne in mind that even after ceding 22.147% of the equity back to the junior creditors and stockholders of the Railroad Company the holders of the First Mortgage Bonds will still retain *two* shares of the [775] common stock of the reorganized company for each $100 of unpaid interest.

That so many railway properties remain in trustee-ship or receiver-ship is one of the criticisms of the railway industry to which there has been no answer. The reaction to that condition made possible the passage by the United States Senate of the coercive measure known as the Wheeler Bill. The progress of this legislation has been halted in the House. The strongest argument for its ultimate defeat would be one sound reorganization under the existing statute brought about through the co-operative effort of the railway industry and the Interstate Commerce Commission.

The Western Pacific security holders or their counsel have done their part. They have agreed upon a fair and equitable Plan that recognizes every interest in the property and forecloses no interest. They have done what the Chandler Act, the latest declaration of Congressional policy says they should do; they have themselves agreed upon a Plan.

Acceptance of this Plan by the Interstate Commerce Commission as a modification of its own

Plan would be a constructive act making possible a sound reorganization and a discharge of the property from the Court not later than December 1, 1939—the maturity date of $10,000,000 of Trustees' Certificates.

Respectfully submitted.

FRANK C. NICODEMUS, JR.,
Counsel, The Western Pacific
Railroad Company,
40 Wall Street,
New York City.

Dated, August 1, 1939. [776]

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 1939, I served the foregoing document on all parties of record by mailing or delivering a true copy thereof to each of said parties.

FRANK C. NICODEMUS, JR.

[777]

EXHIBIT A

The Western Pacific Railroad Company

PLAN OF REORGANIZATION

Effective Date, January 1, 1939

[778]

List of Certain Abbreviated Terms

A. C. J.—A. C. James Company.

Committee.—The Committee representing certain institutional holders of First Mortgage Bonds of the Company, acting under a group agreement dated as of September 1, 1936, and consisting of Frederick H. Ecker, Chairman, John W. Stedman and Reeve Schley.

Bankruptcy Trustees.—The Trustees now or hereafter operating the properties of The Western Pacific Railroad Company by appointment of the Court in the Reorganization Proceeding.

Commission.—The Interstate Commerce Commission.

Company or Debtor.—The Western Pacific Railroad Company.

Consummation of the Plan.—The transfer to the New Company, to the extent contemplated by the Plan, of the properties and assets of the Company.

Court.—The District Court of the United States for the Northern District of California, Southern Division.

Effective Date of the Plan.—The date from which interest shall run on the new securities provided in the Plan, namely, January 1, 1939.

Existing First Mortgage Bonds.—Bonds issued under the First Mortgage dated June 26, 1916, from the Company to First Federal Trust Company and Henry E. Cooper, as Trustees (Crocker First National Bank and Samuel S. Armstrong, Successor Trustees) designated as the First Mortgage.

General and Refunding Bonds.—Bonds issued under the Mortgage dated January 1, 1932, from the Company to The Chase National Bank of the City of New York as Trustee (Irving Trust Company now Successor Trustee), designated as the General and Refunding Mortgage.

New Company.—The corporation, whether the Company or a new corporation, which shall acquire the greater part of the properties now held by the Bankruptcy Trustees and issue the new securities provided for by the Plan.

Plan.—This proposed plan of reorganization.

Reorganization Committee.—The Reorganization Committee appointed as herein provided.

R. C. C.—The Railroad Credit Corporation.

R. F. C.—Reconstruction Finance Corporation.

Reorganization Proceeding.—The pending proceeding under Section 77 of the Bankruptcy Act, as amended, before the Court involving the properties of the Company (Docket No. 7,004), includ-

ing also (unless the context otherwise indicates) the related proceeding before the Commission (Finance Docket No. 10,008).

W. P. Corp.—The Western Pacific Railroad Corporation, sole stockholder of the Company. [779]

I

Present Capital Liabilities as of January 1, 1939
(including unpaid interest)

			Fixed Annual* Interest
Equipment Trusts, Baldwin Lease and Pullman Contract		$ 2,750,050	$ 94,202
First Mortgage 5% Bonds due 1946:			
Principal	$49,290,100		2,464,505
Unpaid Interest	13,143,777		
Total		62,433,877	
Notes to R. F. C. (secured by pledge of $10,750,000 General and Refunding Bonds; also by a second lien upon $2,000,000 General and Refunding Bonds pledged to secure Note to R. C. C.):			
Principal	$ 2,963,000		177,780
Unpaid Interest	899,870		
Total		3,862,870	
Note to R. C. C. (Secured by pledge of $4,000,000 General and Refunding Bonds; also by a second lien upon $10,750,000 General and Refunding Bonds pledged to secure the Note to R. F. C.; also by a first lien upon the rights of the Company under the Marshalling and Distributing Plan of 1931):			
Principal	$ 2,445,610		24,456
Unpaid Interest	146,503		
Total		2,592,113	
Note to A. C. J. (Secured by pledge of $4,249,500 of General and Refunding Bonds. $2,000,000 of the General and Refunding Bonds pledged to secure the Note to R. C. C. were initially pledged to secure the Note to A. C. J. and by it repledged as additional collateral with the R. C. C.)			
Principal	$ 4,999,800		249,990
Unpaid Interest	1,249,950		
Total		6,249,750	
Unsecured Obligations to W. P. Corp.**			
Principal	$ 5,817,543		
Unpaid Interest	1,992,096		
Total		7,809,639	290,877
Preferred Stock		28,300,000	

Present Capital Liabilities as of January 1, 1939
(including unpaid interest)

			Fixed Annual* Interest
Equipment Trusts, Baldwin Lease and Pullman Contract		$ 2,750,050	$ 94,202
First Mortgage 5% Bonds due 1946:			
Principal	$49,290,100		2,464,505
Unpaid Interest	13,143,777		
Total		62,433,877	
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Total		6,249,750	
Unsecured Obligations to W. P. Corp.**			
Principal	$ 5,817,543		
Unpaid Interest	1,992,096		
Total		7,809,639	290,877
Preferred Stock		28,300,000	
Common Stock		47,500,000	
		$161,498,299	$3,301,810*

*Without interest on interest accrued and unpaid on First Mortgage Bonds, on R. F. C., R. C. C. or A. C. J. Notes or on W. P. Corp. Advances; and computing interest on the R. C. C. Note at 1%, the New York Federal Reserve Bank discount rate as of November 1, 1938.

**Includes advances from Western Realty Company—$50,000 principal; $11,667 interest.

[7807]

II.

Proposed Capitalization of the New Company

1. Summary

The capitalization proposed herein for the New Company is substantially as follows:

Title of Issue	Presently Issued	Interest or Dividends
Undisturbed Equipment Trusts, Baldwin Lease and Pullman Contract	$ 2,750,050	$ 94,202.00
First Mortgage 4% Bonds, Series A, due 1989	10,000,000	400,000.00
Total Annual Fixed Charges		494,202.00
Capital Fund		300,000.00
Income Mortgage 4½% Bonds, Series A, due 2014	26,126,550	1,175,694.75
Total Funded Debt	$38,876,600	
Total Annual Charges (fixed and contingent) and Capital Fund		1,969,896.75
Income Mortgage Sinking Fund		130,632.75
Participating Preferred Stock, 5% Series (par value $100)	28,572,160	1,428,608.00
Total of Funded Debt and Preferred Stock	$67,448,760	
Total Annual Charges, Capital Fund, Sinking Fund and Preferred Dividend Requirements		3,529,137.50
Common Stock (without par value)	525,309 shs.	

2. First Mortgage Bonds

A. Lien of Mortgage.

The First Mortgage will be a lien, directly or through pledge of securities, subject only to liens upon equipment, on all the properties and assets owned by the New Company on the consummation of the Plan, including securities, equipment, and the equity in such equipment as is subject to equipment obligations. The First Mortgage will also be a lien on all similar property acquired by the New Company after the reorganization, except that (a) if the New Company shall acquire the properties of any other company (except a company which is a wholly owned railway subsidiary on January 1, 1939), constituting a Class I carrier as defined by the rules then in force of the Interstate Commerce Commission or other public regulatory bodies having jurisdiction at the time, such properties shall not be subject to the lien of the First Mortgage unless acquired in whole or in part by the use of First Mortgage Bonds or Income Mortgage Bonds, or moneys deposited under the First Mortgage or the Income Mortgage, and (b) if the New Company shall be consolidated with, or shall be merged into, or shall sell its assets substantially as an entirety to, any other company which at the time is a Class I carrier as defined as aforesaid, no properties theretofore owned or thereafter acquired by such other company shall be subject to the lien of the First Mortgage except properties thereafter acquired

which shall be appurtenant or incident to properties subject to the lien of the First Mortgage, or which shall be within the maintenance or replacement covenants of the First Mortgage, or which shall be acquired in whole or in part by the use of First Mortgage Bonds or Income Mortgage Bonds or moneys deposited under the First Mortgage or the Income Mortgage.

B. Issue Limited—Sinking Fund if Certain Limits Exceeded.

The amount of bonds at any time outstanding under the First Mortgage will be limited to $50,000,000.

The First Mortgage will provide (1) that on each May 1 when the aggregate principal amount of First Mortgage Bonds outstanding shall equal or exceed $20,000,000, the New Company will pay to the Trustee under the First Mortgage as a Sinking Fund a sum equal to ½ of 1% of the maximum principal amount of First Mortgage Bonds theretofore at any one time authenticated and uncancelled; and (2) that on each May 1 when the aggregate principal amount of First Mortgage Bonds outstanding plus all other funded debt bearing fixed interest shall exceed either (a) 35% of the total capitalization of the New Company, deter- [781] mined as hereinafter provided, or (b) 50% of such total capitalization, less the principal amount of funded debt bearing contingent interest at the time outstanding, the New Company, in addition to the

sums provided in Clause (1) of this Subdivision B to be paid, will pay into said Sinking Fund a sum equal to 50% of the Available Net Income of the next preceding calendar year that remains after providing for all Income Mortgage sinking funds and charges prior thereto (i.e. that remains after the deductions made pursuant to paragraphs (1), (2), (3), (4) and (5) of Subdivision G of Section 3 of this Article II; or after the provisions of said Subdivision G shall have ceased to be operative, 50% of net income as defined by the accounting rules or practice referred to in said Subdivision G). Such Sinking Fund shall be applied to the retirement of First Mortgage Bonds, by purchase in the open market or by call for tenders at not exceeding the redemption price (or in the case of bonds not redeemable, the principal amount and accrued interest), and whenever the amount in the Sinking Fund exceeds $50,000 and First Mortgage Bonds are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking Fund shall be applied to the redemption of First Mortgage Bonds on the next succeeding interest payment date. All bonds so acquired shall be cancelled and no bonds may be issued to refund any such bonds. First Mortgage Bonds and Income Mortgage Bonds outstanding shall be deemed to include all bonds authenticated and delivered to the New Company which shall not have been cancelled or assured of retirement through the deposit of cash. Funded debt shall include an amount equal to the

capitalized value, at 5% per annum, of fixed rents payable for leased road, other than terminal or bridge properties, but shall not include (a) obligations (other than mortgage bonds on equipment trust obligations) maturing not more than two years after their date, or (b) obligations of longer maturity secured by pledge of bonds having a lien on property of the New Company except to the extent, if any, by which the principal amount of such obligations exceeds the principal amount of such bonds so pledged. Bonds guaranteed by the New Company as to interest or principal or both (other than bonds of a terminal or bridge company) shall be included in funded debt, but, in case of a joint and several guaranty with other corporations, only to the extent of the New Company's basic proportion of the principal liability. There shall be included in determining total capitalization only (a) obligations constituting funded debt, (b) stock having par value, at such par value, and (c) stock without par value, at $100 a share in case of the stock issuable under the Plan, and, in case of other stock, at the capital value at which such stock is carried on the books of the Company, not exceeding, however (except to the extent that earned surplus shall have been duly capitalized), the net amount received by the New Company on the issue thereof.

C. Issue in Series.

The First Mortgage Bonds may be issued from time to time in different series, subject to such limitations and restrictions as may be specified in the

First Mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to redemption, conversion, taxes, place or places and money or moneys of payment, registration and sinking funds and having such other characteristics as may be prescribed by the Board of Directors of the New Company at the time of issue, but with respect to the lien of the First Mortgage all equally secured.

D. Bonds of Series A to be Issued in Reorganization.

$10,000,000 First Mortgage Bonds, Series A, are to be authenticated and issued in the reorganization for the purpose of providing the $10,000,000 of new money required in the reorganization.*

The Bonds of Series A shall be dated January 1, 1939, shall bear interest at the rate of 4% per annum, payable semi-annually, and shall be redeemable, in whole or in part, at any time upon thirty days' notice, at their principal amount and accrued interest, plus a premium of 1/10th of 1% of their principal amount for each six months, or fraction thereof, from the date of redemption to the date then fixed for their maturity as hereinafter provided. The Bonds of Series A shall mature January 1, 1989, provided, however, that if while any Bonds of Series A shall be outstanding additional Bonds shall be issued under the First Mortgage having a

*See Article III below.

fixed maturity earlier than January 1, 1989, then the Bonds of Series A shall mature on the earliest date at which any such additional Bonds so issued shall mature. [782]

E. Issue of Additional First Mortgage Bonds.

First Mortgage Bonds, in addition to those to be authenticated in the reorganization, may be authenticated from time to time: (a) to refund First Mortgage Bonds (excluding bonds issued solely by way of pledge, except as hereinafter provided) or outstanding obligations secured by First Mortgage Bonds to the extent so secured or obligations secured by prior lien on after acquired property; or (b) upon the deposit of new cash equal to the principal amount to be issued; or (c) to provide for, or to reimburse the New Company for, not exceeding 75% of expenditures made after December 31, 1938, but not more than three years prior to the date of such authentication (including expenditures for the acquisition or construction of new railroad equipment, free from lien, but not including expenditures for the making of additions and betterments to equipment) which, under the accounting rules of the Interstate Commerce Commission or other federal regulatory bodies having jurisdiction in the premises, at the time in force, are properly chargeable to capital account; provided, however, that

(a) Except when bonds are authenticated in respect of new mileage (or securities representative thereof) or in respect of new equipment the said 75% shall be applied to the net amount of said capi-

tal expenditures after deducting therefrom, to such extent and on such basis as may be specified in the First Mortgage, credits to capital account after December 31, 1938;

(b) If any First Mortgage Bonds are authenticated or cash deposited under the First Mortgage is withdrawn to provide or reimburse for the acquisition of railroad equipment, a sinking fund shall be established (in addition to any other sinking fund then in effect for any series of First Mortgage Bonds) payable in equal annual instalments in an amount sufficient to retire (at par) within the expected efficient service life of such equipment (in no case to exceed fifteen years) a principal amount of First Mortgage Bonds equal to (1) the principal amount of bonds so authenticated or (2) the amount of deposited cash so paid;

(c) If any property is acquired subject to existing liens the amount of additional First Mortgage Bonds issuable therefor or issued to refund prior lien obligations thereon, together with the aggregate amount of existing liens to which such property is subject, shall not exceed 75% of the net cost thereof, including as part of such cost the amount of such existing liens whether or not the indebtedness secured thereby is assumed by the New Company; and

(d) No bonds shall be issued on the basis of the acquisition of equipment under equipment trust obligations or any obligations for the deferred or serial payment of the purchase price for equipment;

or on the basis of the retirement of any such obligations.

F. Restrictions Designed to Limit Future Financing through First Mortgage Bonds and Restrictions on Pledges.

The First Mortgage will contain a covenant substantially to the effect that no First Mortgage Bonds (other than those to be authenticated under the Plan) will be sold or pledged unless (1) the New Company shall have contracted forthwith to sell or pledge such bonds and (2) the Board of Directors of the New Company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the Board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of Income Mortgage Bonds having a maturity of twenty years or more at a price which would give a yield to maturity of 5% or less, or (b) by the sale of Preferred Stock at a price which would give a current dividend return of 6% or less, or (c) by the sale of Common Stock at a price (not less than $50 per share) which would give a current dividend return (based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate at which dividends shall have been paid during the last twelve calendar months) of 6% or less.

The First Mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all First Mortgage Bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10% of the aggregate principal amount of all First Mortgage Bonds then authenticated and uncancelled. [783]

3. Income Mortgage Bonds

A. Lien of Mortgage.

The Income Mortgage shall constitute a lien, subject to the lien of the First Mortgage, upon all property from time to time subject to the lien of the First Mortgage.

B. Issuable in Series.

The Income Mortgage Bonds may be issued, without limit as to aggregate amount or within such limit as may be specified in the Income Mortgage, from time to time in different series, subject to such limitations and restrictions as may be specified in the Income Mortgage, payable on such date or dates, in such denominations, bearing interest at such rates and containing such provisions in regard to accumulation of interest, redemption, conversion, taxes, place or places and money or moneys of payment, registration and sinking funds, and having such other characteristics as may be prescribed by the Board of Directors of the New Company at the time of issue, but with respect to the lien of the Income Mortgage all equally secured. No interest shall

be mandatorily payable on Income Mortgage Bonds of any series (except at maturity or redemption) except out of Available Net Income, as hereinafter provided.

C. Income Bonds of Series A to be Issued in Reorganization.

$26,126,550 of Income Mortgage Bonds, Series A, are to be authenticated and issued in the Reorganization, as set out in Article IV below.

The Income Mortgage Bonds of Series A shall be dated January 1, 1939, shall mature January 1, 2014, shall bear interest at the rate of 4½% per annum, due and payable as hereinafter provided, and shall be redeemable, in whole or in part, on May 1 in any year, on thirty days' notice at their principal amount plus (a) full interest for the last preceding year and all unpaid accumulated interest for prior years and (b) interest at the rate of 4½% per annum from the last preceding December 31 to the redemption date.

The Income Bonds of Series A shall be convertible into shares of Common Stock, as at the time constituted, at any time at the rate of 15 shares for $1,000 principal amount of such Bonds.

Interest on Income Mortgage Bonds, Series A, accruing for each calendar year shall (up to the limits of accumulation hereinafter specified) become absolutely due as a debt on December 31 in such year, but shall be payable on May 1 of the next succeeding year or thereafter as provided below. Such interest

shall be mandatorily payable (except as hereinafter provided) only out of Available Net Income of the New Company that remains after providing for the Capital Fund and changes prior thereto (i.e., that remains after the deductions made pursuant to paragraphs (1) and (2) of Subdivision G of Section 3 of this Article II). All interest that comes due and is not paid on the next following May 1 shall accumulate up to the maximum amount of 131½%, but not beyond. Accumulated interest shall be mandatorily payable (a) whenever, and to the extent that, there is Available Net Income for any subsequent year remaining after the deductions made pursuant to said paragraphs (1) and (2) of Subdivision G (in which case such amount shall be paid on the next following May 1), or (b) in any event (whether earned or not) at the maturity or on redemption of the Income Mortgage Bonds of Series A. For the purposes of the two sentences next hereinabove payments of interest shall be considered as applied to interest accrued for the last preceding calendar year before being applied to accumulations. The Board of Directors of the New Company may at any time, in its discretion, pay any interest accrued on the Income Mortgage Bonds, Series A, even if not earned, out of any funds lawfully available therefor.

The Income Mortgage will provide for the payment on May 1 of each year while any Income Mortgage Bonds, Series A, are outstanding of an instalment of Sinking Fund, if earned, as, and in the

amount, hereinafter specified. Such instalment shall be payable only out of Available Net Income for the last preceding calendar year, that remains after paying interest on outstanding Income Mortgage Bonds (i.e., that remains after the deductions made pursuant to paragraphs (1), (2) and (3) of said Subdivision G). The amount of such instalment shall equal (a) ½ of 1% of the maximum principal amount of Income Mortgage Bonds, Series A, theretofore at any one time authenticated and uncancelled, plus (b) an amount equal to interest on all Income Mortgage Bonds, Series A, theretofore purchased or redeemed out of the Sinking Fund, calculated at the rate paid on said May 1 upon outstanding Income Mortgage Bonds of Series A. Such [784] accruals of the Sinking Fund instalments shall not be cumulative. The Sinking Fund shall be applied from time to time to the retirement of Income Mortgage Bonds, Series A, by purchase in the open market or by call for tenders at not exceeding their redemption price, and whenever the amount in the Sinking Fund exceeds $50,000 and Income Mortgage Bonds, Series A, are not tendered or cannot otherwise be purchased at less than their redemption price, the funds then in the Sinking Fund shall be applied to the redemption of the Income Mortgage Bonds, Series A, on the next succeeding interest payment date. All bonds so acquired shall be cancelled and no bonds may be issued to refund any such bonds.

D. Issue of Additional Income Mortgage Bonds.

Income Mortgage Bonds, in addition to those to be issued in the reorganization, may be issued from time to time to refund outstanding Income Mortgage Bonds or, in lieu of First Mortgage Bonds, for the purposes and subject to the restrictions stated under "Issue of Additional First Mortgage Bonds" above, to the extent that First Mortgage Bonds are not issued for such purposes.

E. Restrictions Designed to Encourage Future Financing Through Stock and Restrictions on Pledges.

No Income Mortgage Bonds (other than those to be issued under the Plan) may be authenticated and delivered unless (1) the New Company shall have contracted forthwith to sell or pledge such bonds and (2) the Board of Directors of the New Company, by resolution adopted by two-thirds of the entire number of directors, shall have determined that, in the opinion of the Board, taking into account market and all other relevant conditions at the time, it is impracticable to provide the amount of money needed (a) by the sale of Preferred Stock at a price which would give a current dividend return of 6% or less, or (b) by the sale of Common Stock at a price (not less than $50 per share) which would give a current dividend return (based on the regular dividend rate then in effect, or, if no regular dividend rate is in effect, on the average rate

at which dividends shall have been paid during the last twelve calendar months) of 6% or less.

The Income Mortgage will also contain a covenant substantially to the effect that the excess of the aggregate principal amount of all Income Mortgage Bonds under pledge at any one time over the principal amount of all indebtedness so secured shall not exceed 10% of the aggregate principal amount of all Income Mortgage Bonds then authenticated and uncancelled.

F. Modification of Income Mortgage.

The Income Mortgage will provide, within conditions and limits to be therein prescribed, for the modification and alteration thereof and of the rights and obligations of the New Company and of the holders of the Income Mortgage Bonds thereunder, at any time by the concurrent action of the New Company and of the holders of not less than 66⅔% in aggregate principal amount of the bonds then outstanding; provided, however, that no such change or modification shall alter or impair the obligation of the New Company to pay the principal of any bond without the consent of the holder of such bond. In the event of any unification of the properties of the New Company with the properties of any other company, the modifications hereinabove authorized may include provisions excluding in whole or in part the earnings from such other properties in determining Available Net Income and providing for the determination of such Available Net Income without the maintenance of separate accounts.

G. Determination and Application of Available Net Income.

Available Net Income shall be determined for each calendar year beginning with the year 1939, and continuing thereafter so long as any Income Mortgage Bonds remain outstanding. When no Income Mortgage Bonds remain outstanding, the provisions of this Subdivision G shall cease to be operative.

Available Net Income for each such calendar year shall be determined by deducting all fixed charges of the New Company and its wholly owned railway subsidiaries accrued during such calendar year from the consolidated income of the New Company and its wholly owned railway subsidiaries available for fixed charges for such calendar year (determined in accordance with the accounting rules of the Interstate Commerce Commission or other analogous Federal authority having jurisdiction in the premises at the time in force, or, to the extent not governed by such accounting rules, in accordance with sound accounting practice); provided, however, that if the New Company shall not come into ownership and possession of the properties now operated by the Bankruptcy Trustees on or before January 1, 1939, Available Net Income for any period after January 1, 1939, until the New Company comes into ownership and possession of such [785] properties shall be computed as if the New Company had come into such ownership and possession on January 1, 1939 and had issued, as of that date, the new securi-

fies issuable under the Plan, other than the $10,000,000 of new First Mortgage Bonds, Series A, and in lieu of interest on such Bonds there shall be charged the amount of interest actually accruing during such period upon any then outstanding Trustees' Certificates or other obligations issued to provide funds for rehabilitation purposes.

Available Net Income shall be ascertained for each such calendar year, as the accounts shall be stated on the books of the New Company during such calendar year, without adjustments, except that: (1) if in respect of any calendar year the Available Net Income is a deficit, the amount of such deficit may, in the discretion of the Board of Directors of the New Company, be carried forward and be deducted in determining Available Net Income for the succeeding calendar year or calendar years until such deficit (or accumulated or remaining deficits) be extinguished by earnings which in the absence of such deficit or deficits, would be Available Net Income; and (2) debits or credits to adjust income in prior years shall be treated as income items for the year in which entered on the books whether cleared through income or profit and loss accounts, so far, but only in so far, as such debits and credits reflect cash receipts or disbursements in the year in which they are entered on the books.

Available Net Income for each calendar year shall be applied to the following purposes and in the following order:

(1) To the creation, if and when the aggregate principal amount of First Mortgage Bonds outstanding shall equal or exceed $20,000,000, of the Sinking Fund provided for in Clause 1 of Subdivision B of Section 2 hereinabove, in an amount up to, but not exceeding, in respect of any calendar year, ½ of 1% of the maximum principal amount of First Mortgage Bonds theretofore at any one time authenticated and uncancelled.

(2) To the creation of a Capital Fund to be applied to, or to provide for, or to reimburse the treasury of the New Company for, Capital Investments, as defined by the Interstate Commerce Commission's Classification of Income, Profit and Loss and General Balance Sheet Accounts for Steam Railroads, Accounts Nos. 701 Investment in road and equipment, 702 Improvement on leased railway property and 705 Miscellaneous physical property (or advances to subsidiaries for expenditures which, if made directly by the New Company in respect of its owned or leased properties, would be charged to said accounts), or such substituted accounts as may at the time be in effect, to the extent that such Capital Investments have been made or contracted for during such calendar year or within three months thereafter, and including therein (but only to the extent that such payments during such calendar year shall exceed depreciation of equipment charged against income for such calendar year) payments made for new equipment, or initial and principal payments upon equipment leased under equipment trusts or

purchased under conditional sale agreements and instalments of sinking fund provided for by paragraph (b) of Subdivision E of Section 2 of this Article II (relating to First Mortgage Bonds issued for equipment), provided, however, that

(a) The annual amount set aside in the Capital Fund shall be $300,000, which amount shall be cumulative, provided, however, that (1) if the Board of Directors of the New Company in its discretion shall so determine, additional amounts not exceeding $200,000 in respect of any calendar year may be set aside in the Capital Fund, and (2) the amount in the Capital Fund unappropriated shall not exceed $1,000,000 at any one time.

(b) The Capital Fund may be applied only to such part of the cost of Capital Investments as hereinabove defined as remains after deducting from such cost all retirements of roadway and structures charged against income in such calendar year;

(c) To the extent that expenditures are so provided for or reimbursed out of the Capital Fund, the Company shall not thereafter have the right to issue any bonds or other evidences of indebtedness or any stock ranking, as to either assets or dividends, in priority to, or on a parity with, the Preferred Stock, 5% Series, to capitalize or reimburse such expenditures; provided, however, that such expenditures (if for purposes for which First Mortgage Bonds

or Income Mortgage Bonds may be issued) may, within such limits, if any, as may be specified in the First Mortgage or the Income Mortgage, be used to supply, in whole or in part, the excess of capital expenditures required to be certified under either such mortgage over the principal amount of the Bonds that may be issued under the terms thereof; and [786]

(3) Any then remaining Available Net Income for any calendar year shall be applied to the payment on the next succeeding May 1, of interest on the then outstanding Income Mortgage Bonds (not including any thereof then held in any sinking fund) accrued during the last preceding calendar year, and of any accumulated unpaid interest thereon.

(4) Any then remaining Available Net Income for any calendar year shall be applied, so long as any Income Mortgage Bonds, Series A, are outstanding, to the payment on the next succeeding May 1, of the sinking fund instalment provided for in Subdivision C of this Section 3 (relating to Income Mortgage Bonds, Series A).

(5) Any then remaining Available Net Income for any calendar year may be applied to the creation of a sinking fund for Income Mortgage Bonds of series other than Series A, if any such sinking fund shall have been provided for at the time of the creation of any such series;

(6) Any then remaining Available Net Income for any calendar year shall be applied to the pay-

ment on the next succeeding May 1 of the instalment, if any, then due under the sinking fund provisions of Clause (2) of Subdivision B of Section 2 hereinabove (relating to First Mortgage Bonds when outstanding in excess of certain limits).

(7) Any then remaining Available Net Income for any calendar year may be applied to any proper corporate purpose of the New Company (except dividends on the new Common Stock), including, if and to the extent that such dividends shall be declared by the Board of Directors of the New Company, the payment of dividends upon the Preferred Stock in respect of such year and of any accrued and unpaid cumulative dividends on the Preferred Stock; such dividends to be paid, except as hereinafter provided, on such date or dates in the next succeeding year as may be specified in the Certificate of Incorporation or By-Laws of the New Company, or in the certificates for the Preferred Stock.

(8) Any then remaining Available Net Income for any calendar year may be applied to any proper corporate purpose of the New Company, including (but only after all accrued and unpaid cumulative dividends on the Preferred Stock to the end of such year shall have been paid, or declared and set apart for payment) dividends on the Common Stock.

No interest need be paid on Income Mortgage Bonds if the amount to be paid is less than ¼ of 1%. Any excess available for interest but not paid because of the foregoing provision shall be reserved and added to the income available for interest on

the Income Mortgage Bonds for the next succeeding calendar year.

If there are outstanding Income Mortgage Bonds of different series, the amount applicable to interest on such bonds shall be distributed among the respective series in proportion to the unpaid interest at the time accumulated on the bonds of such series, respectively.

Dividends may be paid on stock of any class (subject to the relative rights of the several classes of stock) out of the income of any calendar year prior to the close of such calendar year if, but only if, prior to the declaration of such dividends, the Board of Directors shall have determined that the Available Net Income for such year applicable for the purposes specified in the foregoing paragraphs (1), (3), (4), (5) and (6) will be more than sufficient to pay the amounts payable out of such Available Net Income pursuant to said paragraphs and such amounts shall have been deposited in trust for the purposes specified in said paragraphs. Dividends on Common Stock may be so declared only if, prior to such declaration, the Board of Directors shall have determined that the applicable part of Available Net Income for such year will be more than sufficient to pay the amount hereinabove specified for dividends (including accumulations) on the Preferred Stock and such amount shall have been deposited in trust for the purpose of paying such dividends.

4. Preferred Stock

A. Authorized Issue.

There will be authorized 750,000 shares of Preferred Stock, each of the par value of $100, of which 285,722 shares of a 5% Series are to be issued in the reorganization as set out in Article IV below.

The additional authorized Preferred Stock not issued in the reorganization will be issuable from time to time in the discretion of the Board of Directors of the New Company, but (unless for purposes for which First Mortgage Bonds might otherwise have been issued) only after the concurring vote or consent of the [787] holders of a majority of the outstanding Preferred Stock. So far as permitted by law, such additional Preferred Stock may be of the 5% Series issued upon this reorganization, or of any other series, one or more, and Preferred Stock of any such other series may bear dividends at such rate, cumulative or non-cumulative, may be participating or non-participating, may be redeemable or non-redeemable, convertible or non-convertible, and may have such other rights and privileges and be subject to such limitations and restrictions, as may be from time to time determined by the board of directors prior to the issue of Preferred Stock of any such other series.

B. Preference on Liquidation.

In any liquidation or winding up of the New Company, whether voluntary or involuntary, the Preferred Stock shall be entitled to receive, out of

the assets of the New Company, its par value, plus any accrued and unpaid cumulative dividends thereon, plus such premium, if any, as may be specified for any series, before any distribution shall be made on the Common Stock, but shall not be entitled to any further participation in such assets.

C. Voting Rights.

Holders of Preferred Stock shall be entitled to one vote per share on all matters, except that in elections of directors, which shall be by cumulative voting, each holder of stock of either class shall be entitled to as many votes per share as the number of directors to be elected.

The New Company shall not, without the vote or consent of the holders of at least two-thirds in par value of the outstanding new Preferred Stock: (1) create or permit to be created any mortgage or other lien upon any of its properties, excepting the new First Mortgage, the new Income Mortgage or purchase money liens (including equipment obligations) upon property hereafter acquired, given for not more than 75% of the purchase price of such property; (2) create or issue any bonds, notes or other evidences of indebtedness maturing more than two years from their date, except purchase money obligations given for not more than 75% of the purchase price of property hereafter acquired; (3) create any stock ranking, either as to assets or dividends, in priority to, or on a parity with, the new Preferred Stock, or (4) permit any subsidiary,

all of whose stock except directors' shares, shall be owned by the New Company, to create any mortgage or other lien upon any of its properties or issue any such bonds, notes or other evidences of indebtedness (except purchase money liens or obligations limited as aforesaid), or issue any additional stock of any class, unless the obligations secured by such mortgage or other lien or such other obligations or such stock shall be acquired by the New Company.

D. Preferred Stock, 5% Series.

The Preferred Stock, 5% Series, shall be entitled to receive all accumulated unpaid dividends and current dividends at the rate of 5% per annum, in respect of any calendar year before any dividends shall be paid or declared or set apart for payment on the Common Stock in respect of such year. Such dividends shall be cumulative to the extent earned in any calendar year but not paid; but such dividends shall otherwise be non-cumulative. For the purposes of the next preceding sentence hereinabove, Preferred Stock dividends shall be considered to be earned in any calendar year to the extent covered by the Available Net Income for such year that remains after providing for prior charges (i.e., that remains after the deductions made pursuant to paragraphs (1), (2), (3), (4), (5) and (6) of Subdivision G of Section 3 of this Article II); or after the provisions of said Subdivision G shall have ceased to be operative, to the extent covered by net income as defined by the accounting rules or prac-

tice referred to in said Subdivision G). If there are outstanding shares of Preferred Stock of different series, the earnings applicable to dividends thereon shall be apportioned among the respective series in proportion to the dividends accumulated on the shares of such series respectively.

After dividends shall have been paid or declared or set apart for payment, on the new Common Stock at the rate of $3 per share in respect of any year, each share of Preferred Stock, 5% Series, shall be entitled to share equally with each share of new Common Stock in any dividends paid or declared or set apart for payment, in respect of such year.

The Preferred Stock, 5% Series, shall be redeemable, in whole or in part, at any time at its par value plus accrued and unpaid cumulative dividends, and proportionate dividend for the current year.

The holders of Preferred Stock, 5% Series, shall not have any preemptive right to subscribe to any additional issues of stock of any class or of securities convertible into stock of any class. [788]

5. Common Stock

There will be authorized 1,250,000 shares of Common Stock, without par value, of which 525,300 shares are to be issued in the reorganization as set forth in Article IV below and 522,531 shares shall be reserved for the conversion of Income Mortgage Bonds, Series A.

Holders of Common Stock shall be entitled to one vote per share on all matters except that directors shall be elected by cumulative voting as aforesaid.

So far as permitted by law, any vote or consent by the holders of Common Stock, authorizing the issuance of additional shares of stock of any class or of securities convertible into stock of any class, may waive, on such terms and conditions, if any, as may be specified in such vote or consent, the preemptive right of all the holders of shares of Common Stock to subscribe to such additional shares or securities.

III.

Reconstruction Finance Corporation and Provision of New Money

$10,000,000 of new money is required by the New Company for the purpose of retiring Trustees' Certificates issued to provide for the expenditures under the 1936, 1937 and 1938 rehabilitation program. Said $10,000,000 in new money is to be provided for by the sale at par and accrued interest to R. F. C. (subject to approval and authorization of the Interstate Commerce Commission and the delivery to R. F. C. of a legal opinion satisfactory to it as to the validity of the acquisition by the New Company of title to the properties of the Debtor and the validity of the new First Mortgage Bonds and the new First Mortgage) of the $10,000,000 of First Mortgage 4% Bonds, Series A, due 1989, to be issued in the reorganization.

As consideration for R. F. C.'s providing said new money by purchasing said First Mortgage Bonds, R. F. C.'s existing claim against the Company, amounting as of January 1, 1939, to $3,-

862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by collateral junior to the existing First Mortgage Bonds of the Company, shall be provided for under the Plan in like securities and in like proportions as those given holders of the Company's existing First Mortgage Bonds.

The New Company will enter into an agreement with R. F. C. that so long as R. F. C. shall own $5,000,000 of said First Mortgage Bonds, the New Company will not, without the prior consent of R. F. C., issue bonds under the First Mortgage in excess of the aggregate principal amount at any one time outstanding of $20,000,000.

IV.

Treatment of Existing Securities

1. Existing equipment trusts, Baldwin lease and Pullman contract, aggregating $2,750,050, shall remain undisturbed and shall be assumed by the New Company.

2. Holders of existing First Mortgage Bonds will receive for each $1,000 principal amount thereof, together with $266,66⅔ of interest accrued and unpaid thereon to January 1, 1939:

$500 Income Mortgage 4½% Bonds, Series A (being 50% of the principal amount of existing Bonds);

$500 Preferred Stock, 5% Series (being 50% of the principal amount of said Bonds); and

Five and one-third shares of Common Stock, without par value.

3. R. F. C. will receive in respect of the $10,000,000 of new money provided for in Article III (or the surrender of Trustees' Certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to January 1, 1939:

$10,000,000 New First Mortgage 4% Bonds, Series A (being 100% of said new money);

$1,481,500 Income Mortgage 4½% Bonds, Series A (being 50% of the principal of the said claim);

$1,481,500 Preferred Stock, 5% Series (being 50% of the principal of the existing claim); and

Seventeen thousand nine hundred and ninety-five shares of Common Stock, without par value. [789]

4. R. F. C. will receive in respect of its claim in the principal amount of $2,445,610, together with $146,503 of interest accrued and unpaid thereon to January 1, 1939:

$2,445,610 Preferred Stock, 5% Series (being 100% of the principal of said claim); and

Twenty-nine hundred and thirty Shares of Common Stock without par value.

Subject to reduction by the application, prior to the date of issue of the new securities under the Plan, of any proceeds from the distributive shares of the Company or its subsidiaries under the Marshaling and Distributing Plan, 1931.

5. A. C. J. will receive in respect of its claim in the principal amount of $4,999,800 together with $1,249,950 of interest accrued and unpaid thereon to January 1, 1939:

Seventy-two thousand three hundred and fifty shares of Common Stock, without par value.

6. W. P. RR. Corp. will receive in respect of its claim in the principal amount of $5,767,543, together with $1,980,429 of interest accrued and unpaid thereon to January 1, 1939:

Forty-four thousand eight hundred and fifty shares of Common Stock, without par value.

7. Western Realty Company will receive with respect of its claim in the principal amount $50,000, together with $11,667 of interest accrued and unpaid thereon to January 1, 1939:

Three hundred and sixty-five shares of Common Stock, without par value.

8. W. P. RR. Corp. will receive in respect to its equity in the Debtor, represented by the difference between the depreciated investment in the Debtor of $120,000,000 (approx.) and its aggregate debts as of January 1, 1939, with accrued interest, amounting to $95,698,299:

One hundred twenty-three thousand nine hundred and thirty-five shares of Common Stock of no par value.

V.

Claims Not Affected By the Plan

The following claims are not affected by the Plan: (a) current liabilities of the Company incurred in

the ordinary conduct of its business prior to the institution of the Reorganization Proceeding, which are entitled to priority over one or more of the mortgages of the Company, (b) current liabilities and obligations of the Bankruptcy Trustees incurred during the Reorganization Proceeding, and (c) expenses of reorganization allowed by the Court within the maximum limits fixed by the Commission. To the extent that such claims, liabilities or obligations are not paid by the Company or the Bankruptcy Trustees pursuant to order of the Court, they are to be paid in cash or assumed by the New Company, provided that any amounts so assumed by the New Company shall constitute a charge upon the properties of the New Company prior in lien to all new securities issued under the Plan. All such claims, liabilities and obligations may be adjusted or compromised and dealt with or paid or discharged by the New Company, all as may be determined by the Board of Directors of the New Company subject to approval by the Court.

The New Company shall be deemed to have assumed such of the contracts of the Company which are executory in whole or in part and which by their terms do not terminate at or prior to the conclusion of the Reorganization Proceeding, including any executory leases and liabilities under guaranties, as shall have been affirmed by the Bankruptcy Trustees with the approval of the Court, or shall not have been disaffirmed by the Bankruptcy Trustees, prior to the date of confirmation of the Plan, and

also any executory contracts made by the Bankruptcy Trustees with the approval of the Court which by their terms do not terminate at or prior to the conclusion of the Reorganization Proceeding.

VI.

Method of Executing the Plan

Existing mortgages on the Company's properties shall be released and cancelled, and all funds on deposit with the Trustee under the Company's mortgages representing sums paid from time to time to [790] such Trustees for the release of properties, sale of scrap, and otherwise; and all collateral pledged under the Company's mortgages, shall be surrendered to the New Company free from liens of the Company's mortgages, after deductions therefrom of any amounts which the Court may find should be deducted under the provisions of such mortgages and consistent with this Plan. All collateral pledged by others than the Company as security for the Company's notes to R. F. C., R. C. C. and A. C. J. shall be surrendered to the pledgors thereof, and all collateral pledged by the Company as security for said notes shall be surrendered to the New Company and cancelled, except that R. C. C. shall not release or surrender any right or interest in the distributive shares of the Company or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive shares after the effective date of the Plan, shall become the property of and be retained by the

R. C. C., but to the extent to which received prior to the issue of the new securities under the Plan shall be applied in reduction of the claim of the R. C. C. in respect of which such new securities are to be issued at the rates provided in Article IV.

The Plan shall be carried out under the supervision of a Reorganization Committee consisting of five persons, three to be selected by vote of the existing First Mortgage Bondholders in such manner as the Commission shall direct, one by R. F. C., and one by A. C. J. The selections shall be communicated to the Court for its consideration, and designated by the Court immediately upon confirmation of the Plan. Any vacancy which may occur in the Committee shall be filled through a new selection by the person or persons who had selected the retiring member.

The Plan may be carried out either by re-vesting the properties formerly of the Company in the Company or by transferring said properties to a new corporation organized for the purpose, and the execution by the corporation in which said properties are vested of the new mortgages and the issue by it of the new securities contemplated by the Plan.

Subject to any requirements of law and to the requisite approval of the Court and the Commission, the Reorganization Committee shall have the power to provide the method by which creditors and other interested parties may participate in the Plan, to determine the form, and, except as herein otherwise expressly provided, the provisions, of all mortgages,

bonds, coupons, charters, by-laws, stock certificates, voting trust certificates, acceptances, assents, and all other instruments in the judgment of the Reorganization Committee necessary or desirable in connection with carrying out the Plan, and to take all such action and to enter into such arrangements, financial and otherwise, as the Reorganization Committee may deem necessary or advisable, in order to consummate and carry into execution the Plan or any modification thereof.

The Reorganization Committee may act by a majority of its members as from time to time constituted, at a meeting or in writing without a meeting. The Reorganization Committee may employ such agents, attorneys and others as it may deem desirable for the purposes of the Plan. The Reorganization Committee may from time to time delegate to others any power or discretion conferred upon it by the Plan; and the members of the Reorganization Committee shall not be liable for any action taken by them in good faith or by any person employed by the Reorganization Committee in good faith, or otherwise, except for their respective individual malfeasance or neglect. The terms of any solicitation of deposits of securities or authorizations to represent shall be subject to the approval of the Commission.

In case any class of creditors or stockholders shall not accept the Plan pursuant to Section 77, any party may nevertheless move the Court to confirm the Plan on the ground that the interests of such

class of creditors have no value, or, as the case may be, that the equity of such class of stockholders has no value, or on the ground that the Plan provides for payment in cash to such class of an amount not less than the value of their interests or equity, if any, in accordance with subdivision (c) of Section 77, through the sales hereinafter provided for in accordance with clause 5 of subdivision (b) of Section 77.

If so ordered by the Court, the Plan may be executed by a sale at public auction, at not less than a fair upset price as determined by the Court, of all or any part of the properties and assets of the Company, all on such conditions and in such manner as the Court may direct. Upon any such sale, the properties and assets offered for sale may be purchased for the benefit of the New Company by the Reorganization Committee, and in that event there shall be applied on account of the purchase price the distributive share, if any, of the proceeds of such sale of all securities the holders of which shall have assented to the Plan, and the securities, though not assenting to the Plan, of all classes which shall have accepted the Plan. If the properties and assets of the Company so offered for sale are purchased at any such sale by others than the Reorganization Committee, the Plan shall be deemed inoperative except in so far as provision is made therein for the sale of the properties and assets of the Company at such sale as may be ordered by the Court. [791]

All properties and assets so sold which are purchased by the Reorganization Committee or its representative shall be transferred to the New Company.

In the event of any such sale, the Reorganization Committee may in its discretion sell all or any portion of the new securities distributable under the Plan in respect of securities of any creditor, if neither such creditor nor the class to which such creditor belongs shall have accepted the Plan. The proceeds of any such sale may be used to pay the portion of the purchase price payable in cash on any such sale.

Upon any such sale, non-assenting creditors of any class which shall not have accepted the Plan and the stockholders of either class shall be entitled to receive, in lieu of the securities, if any, otherwise issuable under the Plan, their aliquot proportion of the proceeds of such sale, after deducting therefrom all expenses of such sale and the amount which would be required to pay in full, of principal and unpaid interest accrued to the date of such sale, all creditors whose claims are prior in lien or superior in equity to the claims of such non-assenting creditors or the rights of such stockholders, provided that such non-assenting creditors and such stockholders shall have the right, if they shall notify the Reorganization Committee within a period of 30 days after the approval of such sale by the Court, to assent to the Plan and receive the securities allocated to them under the Plan in lieu of their aliquot share of the proceeds of such sale.

VII.

Construction of the Plan

The construction of the Plan by the Court shall be final and conclusive. The Court may cure any defect, supply any omission, or reconcile any inconsistency in such manner or to such extent as may be necessary or expedient in order to carry out the Plan effectively. Acceptance of the Plan shall include acceptance of the provisions of the Mortgage, the bonds issued thereunder in the reorganization, the stock certificates, and all instruments necessary and appropriate to the carrying out of the Plan, to the same effect as if the terms of such documents and instruments were set forth in full herein.

VIII.

Management

The Board of Directors of the New Company shall consist of not less than seven nor more than eleven members who shall be elected by the holders of the Preferred Stock and the Common Stock of the New Company at an election to be held not later than ninety days after the consummation of the Plan. Pending such election the Board of Directors shall consist of such persons as may be designated by the Reorganization Committee with the approval of the Court.

[Endorsed]: Filed Oct. 5, 1939. [792]

Finance Docket No. 10913

WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

Submitted August 3, 1939.

Decided September 19, 1939.

Upon further consideration of the record and the petition of the Western Pacific Railroad Company for modification of the plan for the reorganization of the Western Pacific Railroad Company approved October 10, 1938, as modified and approved on June 21, 1939, petition denied.*

Appearances as in prior reports.

REPORT OF THE COMMISSION ON CONSIDERATION OF PETITION FOR FURTHER MODIFICATION OF APPROVED PLAN OF REORGANIZATION.

By the Commission:

By our report and order issued October 10, 1938, in this proceeding, we approved a plan for the reorganization of the Western Pacific Railroad Company, hereinafter called the debtor, pursuant to the provisions of section 77 of the Bankruptcy Act, as amended, 230 I. C. C. 61. On December 30, 1938,

*Previous reports 207 I. C. C. 793, 230 I. C. C. 61, and 233 I. C. C. .....

pursuant to petitions filed by the debtor and certain intervenors for modifications of the plan we had approved, we reopened the proceeding for further consideration. On June 21, 1939, after having heard the parties on oral argument concerning the petitions, we issued our report and order approving a modified plan for the reorganization of the debtor.

On August 2, 1939, the debtor filed a petition for a rehearing of its petition for a modification of our report and order of October 10, 1938; and for a modification of the [793] modified plan of reorganization approved by our report and order of June 21, 1939, proposing therein a plan of reorganization, herein referred to as the new plan, in substitution of the modified plan approved by us on June 21, 1939.

By the new plan it is proposed to make the maturity date of the new first-mortgage bonds 1989 instead of 1974 and to make the capital fund mandatory at $300,000 and permissible up to $500,000 instead of mandatory at $500,000 as in the approved plan. It is proposed to increase the number of shares of no-par value common stock from 319,441 shares to 525,300 shares. Under the approved plan the common stock is allocated, 72.19 percent to the present first-mortgage bondholders, 4.94 percent to the Reconstruction Finance Corporation, hereinafter called the Finance Corporation, 11.09 percent to the Railroad Credit Corporation, hereinafter called the Credit Corporation, and 11.78 percent to the A. C. James Company. The new plan

would allocate 50.04 percent to the first-mortgage bondholders, 3.43 percent to the Finance Corporation, 0.56 percent to the Credit Corporation, 13.77 percent to the A. C. James Company, 8.51 percent to the Western Pacific Railroad Corporation in its capacity as a general creditor, 23.59 percent to the Western Pacific Railroad Corporation in its capacity as stockholder, and 0.07 percent to the Western Realty Company as a general creditor.

The new plan proposes $26,126,550 of new income-mortgage bonds, an increase of $4,907,475 over the $21,219,075 provided in the approved plan. Under the new plan the first-mortgage bondholders and the

[793-A]

Finance Corporation would each be given 50 percent of the principal of their securities in income-mortgage bonds and 50 percent in preferred stock, instead of 40 percent in income bonds and 60 percent in preferred stock as under the approved plan. It would not allocate any income bonds to the Credit Corporation and the A. C. James Company, whereas the approved plan allocated $154,111 and $163,724, respectively, to them.

Under the new plan $28,572,160 par value of preferred stock would be issued in lieu of the $31,850,297 under the approved plan. The decrease of $3,278,137 is accounted for by the new proportional basis, above described, for allocating income bonds and preferred stock to the first-mortgage bondholders and the Finance Corporation, by allocating $2,445,610 instead of $241,681 to the Credit Corporation, and by allocating none to the A. C. James Com-

pany instead of the $256,756 under the approved plan.

The fixed interest debt, $12,750,050, and the yearly interest charges thereon, $494,202 would be the same under the new plan as under the approved plan. The combined fixed-interest and contingent-interest debt under the new plan would be $38,876,600, compared with $33,969,125 under the approved plan. The yearly fixed-interest, capital fund, and contingent-interest charges under the new plan would be $2,169,897, compared with $1,949,060 under the approved plan. In this comparison it is assumed that the board of directors would exercise its discretion in favor of increasing the $300,000 mandatory amount of the capital fund under the new plan to the discretionary amount of $500,000. Under the new plan the yearly fixed-interest, [794] capital fund, contingent-interest, sinking fund for income bonds, and preferred stock dividend requirements would be $3,729,138, compared with $3,647,670 under the approved plan. Under the new plan the total capitalization would be $67,448,760 plus 525,300 shares of common stock without par-value, compared with $65,819,422 plus 319,441 shares without par-value under the approved plan.

The debtor states, as one of its reasons for presenting its petition at this time, that the new plan has been substantially agreed to by the parties. The Credit Corporation joins in the request of the debtor for the substitution of the new plan for the one approved. The A. C. James Company states that it

is willing to accept the proposals of the new plan on condition that it is promptly accepted by all other parties and approved by us, without waiving any of its rights heretofore raised, under any other plan. The committee representing institutional holders of about one-third in amount of first mortgage bonds of the debtor, in its answer to the petition states that in view of the approval by us of a plan of reorganization on June 21, 1939, it is now unable to recommend to the security holders which it represents, the compromise proposed in the new plan, although it was willing to do so prior to that order. It now opposes the reopening of the record of the proceedings before us and prays that the plan heretofore approved by us be certified to the court immediately.

The debtor explains in its brief accompanying its petition that acceptance of the plan by the Western Pacific Railroad Corporation must be made subject to the subsequent approval of the stockholders of that corporation, but that [794-A] concentration of large amounts of the stock in the ownership of interests identified with the present management of the debtor reasonably assures the prompt acceptance of the plan by such stockholders. It urges that our approval of the new plan would assure an early reorganization of the debtor and that it would forestall litigation likely to arise under the approved plan between the interests junior to the first-mortgage bondholders and the first-mortgage bondholders.

Conclusions

We are not satisfied that the mandatory feature of the capital fund should be reduced from $500,000 to $300,000. In both of our prior reports we found in effect that yearly contributions of $500,000 to the capital fund were essential to meet the debtor's requirements. In our report of June 21, 1939, we considered requests that the yearly contributions to the capital fund be reduced to $300,000. The debtor's petition does not offer to prove or set forth facts even tending to show that we were in error in our finding that the capital fund should be mandatory at $500,000.

The allocation of 8.54 percent of the new common stock to the Western Pacific Railroad Corporation, in its capacity as a general creditor, and 23.59 percent to it in its capacity as a stockholder, and 0.07 percent to the Western Realty Company as a general creditor would require a reversal of our findings that those interests have no value, or a finding that the concessions required of the senior interests are justified and are compensated by concessions to be made by the junior interests. This proposed sharing of common stock affects also our previous finding as to what constitutes fair and equitable treatment of part of the interests of [795] the first-mortgage bondholders. The debtor's petition does not set forth or offer to prove facts indicating that our findings with respect to these matters were erroneous or furnish any other basis for a finding

that the proposed new plan would be fair and equitable.

In our report of October 10, 1938, we found that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital and sinking funds, should not exceed $2,000,000 per annum. In our report of June 21, 1939, we modified that finding to the extent of approving a plan by which those annual charges would slightly exceed $2,000,000, viz, $2,055,155. Under the new plan those charges would be $2,300,530. There has been no showing or offer of proof of new facts or changed conditions that would warrant our modifying our basic finding to that extent.

We are not persuaded that there is justification for changing the relationship of fixed debt to total capitalization from that of the approved plan to that resulting from the capitalization under the new plan.

Nor do the responses we have received warrant our regarding the new plan as one agreed to by the parties.

For the reasons stated, the petition will be denied.

An appropriate order will be entered.

Eastman, Commissioner, concurring:

I agree, subject to the reservations in my expression of partial concurrence in connection with the prior report.

Commissioner Miller dissents.

Commissioners Aitchison and Splawn did not participate in the disposition of this proceeding.

[795-A]

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of September, A.D. 1939.

Finance Docket No. 10913

Western Pacific Railroad Company Reorganization

Investigation of the matters and things involved in the petition filed August 2, 1939, in the above proceeding, by The Western Pacific Railroad Company, debtor, for a rehearing on its petition filed December 9, 1938, for a modification of the report and order of the Commission of October 10, 1938, approving a plan for the reorganization of the debtor, for a modification of the report and order of the Commission of June 21, 1939, approving a modified plan for the reorganization of the debtor, and for the approval of a plan for the reorganization of the debtor in substitution for the modified plan of reorganization approved by the Commission on June 21, 1939, having been made, and the Commission having further considered the record and having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It Is Ordered, That the petition be, and it is hereby, denied.

By the Commission.

(Seal), W. P. BARTEL,
Secretary.

[Endorsed]: Filed Sept. 26, 1939. [796]

[Title of District Court and Cause.]

OBJECTIONS OF A. C. JAMES CO., TO COMMISSION PLAN OF REORGANIZATION, STATEMENT OF CLAIMS FOR EQUITABLE TREATMENT, AND PETITION FOR AMENDMENT OF SUCH PLAN TO CORRECT DEFECTS THEREIN.

To the Honorable A. F. St. Sure, Judge of the United States District Court for the Northern District of California, Southern Division:

A. C. James Co., a secured creditor of the debtor above named, hereby objects to the Plan of Reorganization of the debtor (hereinafter designated as the "Commission Plan") as promulgated by the Interstate Commerce Commission in its order in Finance Docket No. 10943, dated June 21, 1939, and presents its claims for equitable treatment, pursuant to the provisions of the order of this Court, dated November 8, 1939, and to the provisions of Sub-section (e) of Section 77 of the Bankruptcy Act, and does hereby represent to the Court and petition as follows: [853]

I. General Objections to Commission Plan.

Subject to the more detailed and specific objections and claims for equitable relief hereinafter set forth, your petitioner objects generally to the Commission Plan of June 21, 1939, on the ground:

(a) That the Commission Plan is not "fair and equitable" as to your petitioner within the purpose and express requirement of Section 77 of the Bankruptcy Act as amended, fails to give due recognition to the legal rights and equitable claims of your petitioner, and discriminates unfairly against your petitioner as a secured creditor in a separate class;

(b) That the Commission Plan is not "fair and equitable" to your petitioner and other creditors secured by the General and Refunding Mortgage of the debtor, in that said plan is based in part upon a determination by the Commission that the property of the debtor which is subject to the lien of the General and Refunding Mortgage but is free from the lien of the First Mortgage of the debtor, is insufficient in value to fully secure all the debts secured by the General and Refunding Mortgage, with interest, which determination is beyond the authority of the Commission under Section 77 of the Bankruptcy Act, is contrary to the evidence, and is contrary to law;

(c) That the Commission, while apparently adopting the valuation of the property previ-

ously found by it under Section 19 (a) of the Interstate Commerce Commission Act, and recognizing the undisputed investment in the property of the debtor heretofore made, has completely disregarded such valuation and such investment, without authority of law, and, in the Plan which it has originated and promulgated, seeks to im- [854]. pose a capital structure based not upon evidence of values, but on a mere estimate of future earnings and a theory that the Commission should not authorize a capital structure which includes capital stock on which dividends are unlikely to be paid in the near future; this capital structure unnecessarily produces gross discrimination as between various classes of investors in the property, including your petitioner, and results in a complete disregard of the legal rights and equitable claims of general creditors and equity owners in the property;

(d) That the Commission Plan is not in conformity with the law of the land and that the manner in which it was conceived and promulgated is without support under Section 77 of the Bankruptcy Act;

(e) That in numerous instances, the Commission in the course of the hearings before it, over the objections and exceptions of your petitioner, erred in its rulings respecting the competency and admissibility of evidence; with the result that the findings made and the conclu-

sions reached by the Commission and the plan of reorganization certified by it to this Court, as set forth in the Commission's order dated June 21, 1939, are in important respects based upon evidence which is incompetent, irrelevant and insufficient in law;

(f) That in sundry instances, more specifically set forth below, the Commission has made findings of fact which are unsupported by and contrary to the evidence presented and determinations of questions of law which are without justification under Section 77 of the Bankruptcy Act and in violation of the law of the land; and

(g) That in sundry other respects, more specifically set forth below, the Commission, by its Plan, unnecessarily and without authority in law, seeks to im- [855] pose burdens upon the several classes of creditors and investors whose legal and equitable interests in the property of the debtor are entitled to due recognition.

(h) That Section 77 of the Bankruptcy Act, as amended, as interpreted and applied in the Commission Plan is unconstitutional and void in that the Commission Plan takes from your petitioner valuable rights in the property of the debtor without just compensation, all in violation of the provisions of the Fifth Amendment to the Constitution of the United States, upon

which your petitioner relies and the provisions of which your petitioner respectfully invokes.

To all of which your petitioner objects, and presents its claims for equitable treatment, all as is set forth in detail and specifically below.

II. Petitioner's claim: Origin, evidence, security and purpose for which funds were used.

Your petitioner is a secured creditor of the debtor in the principal amount of $4,999,800, together with unpaid accrued interest thereon at the rate of 5 per cent per annum from January 1, 1934, which unpaid interest to January 1, 1939 (the effective date of the Commission Plan) amounted to $1,249,950, or an aggregate debt on the date specified of $6,249,750.

This indebtedness resulted from cash advances made by your petitioner to the debtor from time to time during the years 1931 and 1932. It was originally represented, pursuant to authority granted by the Interstate Commerce Commission, by Five Per Cent Gold Debentures of the debtor, which debentures had been issued under the Indenture dated as of July, 1930, made by and between the debtor [856] and The Chase National Bank of the City of New York, as Trustee.

The indebtedness is now evidenced by three promissory notes of the debtor, the principal amount, date, and date of maturity of which are respectively as follows:

	Principal Amount	Date	Maturity
(1)	$4,504,000	March 28, 1932	March 28, 1935
(2)	347,000	March 28, 1932	March 28, 1935
(3)	148,800	May 31, 1932	May 31, 1935

The notes now held by your petitioner are secured as follows: By $6,249,500 principal amount of the debtor's General and Refunding Mortgage bonds, issued under an indenture dated as of January 1, 1932, executed by the debtor to The Chase National Bank of the City of New York, as Trustee, which General and Refunding Mortgage bonds were deposited with and are now held by your petitioner; except that $2,000,000 principal amount of said bonds, at the request of the debtor, were delivered by your petitioner to The Railroad Credit Corporation, to be held by said The Railroad Credit Corporation as additional collateral against advances made to the debtor by said The Railroad Credit Corporation, your petitioner retaining all its rights as lienor in and to said $2,000,000 principal amount of the debtor's General and Refunding Mortgage bonds, subject only to the prior rights which have accrued to The Railroad Credit Corporation as first lienor from the acts of the parties set in this paragraph.

All these cash advances made by your petitioner to the debtor in 1931 and 1932 were applied by the debtor to the costs of constructing the Northern California Extension of the debtor, which has been held by the Interstate Commerce Commission (as-

suming a jurisdiction which is not clearly granted to the Commission under Section 77 of the [857] Bankruptcy Act, as amended, or elsewhere) to be subject to the lien of the First Mortgage of the debtor. Said Northern California Extension is an important source, present and prospective, of earnings to the debtor.

A proof of claim was duly filed by your petitioner in the above entitled proceedings for reorganization of the debtor.

By an order, entered August 20, 1935, this Court classified the above described claim of your petitioner as a separate and distinct class for the purposes of Section 77 of the Bankruptcy Act, as amended.

III. Status of debtor as to liabilities and assets on January 1, 1939.

The Commission Plan uses the basic date of January 1, 1939. The total liabilities of the debtor on that date, including the outstanding equipment trusts and leases, Trustees Certificates, First Mortgage bonds, claims of the secured creditors and claims of the general creditors, with interest in all cases accrued to January 1, 1939, as reported by the Commission, amounted in the aggregate to $95,699,502.

These obligations were subdivided as follows:

1. Existing Equipment Trusts, Leases and Contracts		$ 2,750,050
2. Trustees Certificates		10,000,000
3. First Mortgage Bonds:		
Principal	$49,290,100	
Interest	13,143,777	62,433,877
4. Claims of Creditors:		
Reconstruction Finance Corporation:		
Principal	$ 2,963,000	
Interest	899,870	3,862,870

[858]

The Railroad Credit Corporation:		
Principal	$ 2,445,610	
Interest	146,503	2,592,113
A. C. James Co.:		
Principal	$ 4,999,800	
Interest	1,249,950	6,249,750
The Western Pacific Railroad Corporation:		
Principal	$ 5,768,746	
Interest	1,980,429	7,749,175*
The Western Realty Company:		
Principal	$ 50,000	
Interest	11,667	61,667*

*These figures are from the books of the debtor.

Against these debts stands on the record before the Court, property of the debtor company which the Interstate Commerce Commission, under Section 19(a) of the Interstate Commerce Commission Act, had valued for rate purposes, with allowances for "the net costs of additions and retirements", to December 31, 1935, at $139,600,455 (Report of October 10, 1938, pages 24-25).

It is not denied that the depreciated investment of the property of the debtor company would amount to upwards of $120,000,000 (Record, Ex. 29, Statement 16, page 2; see also opinion of Commissioner Miller, Report of October 10, 1938, page 73).

Petitioner contends that the debtor is not insolvent, and that the property of the debtor represents an investment and present value substantially in excess of the total debts of the debtor with interest accrued to January 1, 1939.

The equity in the debtor represented by the excess of the investment in its property and its present value over and above its present debts constitutes an asset of The [859] Western Pacific Railroad Corporation, a Delaware corporation, which owns all the capital stock of the debtor, consisting of $28,300,000 of preferred stock, and $47,500,000 of common stock, all of which stock was issued in the 1916 reorganization of the debtor's operating predecessor, in exchange for first mortgage bonds previously outstanding as evidencing investment in the property now owned by the debtor.

IV. Relation of petitioner to other parties in interest in proceeding.

The only direct interest of your petitioner in securities of the debtor company is its interest as a secured creditor, set forth in Section II above. However corporations affiliated with your petitioner, and directors and officers of your petitioner, hold or control in the aggregate upwards of $9,000,000 principal amount of First Mortgage bonds of the debtor. In addition, corporations affiliated with your petitioner, and directors and officers of your petitioner, hold or control in the aggregate approximately 40% of the outstanding voting stock of The Western Pacific Railroad Corporation, which has a substantial claim as a general creditor against the debtor company and also owns all of the outstanding stock, preferred and common, of the debtor company.

V. Origin of Commission Plan and relation of the various parties thereto.

The Commission Plan is neither an "agreed-upon plan", nor a plan prepared and submitted to the Commission by any party in interest.

In the original proceedings before the Commission three plans were submitted to the Commission by parties to the [860] proceeding: (a) the Debtor Plan, under date of February 8, 1936; (b) the Institutional Bondholders Committee Plan, under date of September 28, 1936; and (c) the plan prepared and submitted by your petitioner, under date of October 26, 1936.

The Commission Plan, as finally promulgated in its Order of June 21, 1939, is not based upon any one of the three above-mentioned plans, but is substantially a plan which the Bureau of Finance of the Commission evolved independently and submitted to the parties in a tentative report on or about August 2, 1937.

After formal hearings, this Bureau of Finance plan, with minor modifications, was approved by the Commission in its Order of October 10, 1938.

When all the parties petitioned for a rehearing, the Commission re-opened the matter and made additional changes in its Plan of October 10, 1938, by adopting certain modifications in that plan urged upon it by counsel for the Institutional Bondholders Committee.

The Commission Plan, as finally promulgated in the Order of June 21, 1939, is satisfactory to the Institutional Bondholders Committee (representing institutions holding only 34.37% of the First Mortgage Bonds) because their full demands for modification in their interest, as asserted at the re-hearing before the Commission, were adopted by the Commission.

It is satisfactory to the Reconstruction Finance Corporation because of the substantial preferences granted to it in consideration of its services as an underwriter of the new First Mortgage bonds.

The Commission Plan is inequitable, discriminatory and unsatisfactory to every other party interested in the [861] property: secured creditors, gen-

eral creditors and equity owner. It cannot adequately protect the interests in the property, as a whole, in respect of future financing, future rate problems, and possible consolidations with other properties.

VI. Treatment accorded petitioner's claim under Commission Plan.

In the Commission Plan, your petitioner is allotted for its above stated claim, $163,724 of Income Mortgage 4½ Per Cent Bonds, Series A, $256,756 of 5 Per cent Preferred Stock, Series A, and 37,635 shares of Common Stock of the reorganized company. Such common stock is no par value stock and in the Commission Plan it is allotted to other creditors at prices varying from $57 to $62 per share. Using the highest price assigned by the Commission to such common stock, the total allotment of securities to your petitioner amounts to $2,753,850, against an aggregate claim of $6,249,750, or approximately 44 per cent of the face of said claim. Using the same valuation, no other secured creditor is allotted less than 100 per cent of its claim.

VII. Discriminatory and inequitable treatment of petitioner's claim as compared with claims of other secured creditors.

Your petitioner advanced to the debtor company during 1931 and 1932 (during the depression), a total of $4,999,800. The advances were in cash and enabled the debtor company to complete the Northern California Extension, now a factor of admitted

importance in the earning power of the Company. Your petitioner was given, under Commission [862] authorization, General and Refunding Mortgage bonds of the debtor company as collateral, to the extent of 125 per cent of principal amount of its advances.

At about the same time, functioning under Section 5 of the Reconstruction Finance Corporation Act, the Commission required from the debtor company $10,750,000 face amount of such General and Refunding Mortgage bonds as *part* collateral for advances by the Reconstruction Finance Corporation aggregating $2,963,000* principal amount. In other words, disregarding other substantial collateral, the Reconstruction Finance Corporation now holds under authority of the Commission General and Refunding Mortgage bonds of the debtor, as collateral, to the extent of about 363 per cent of the principal amount of its advances, as compared with the 125 per cent furnished to your petitioner.

Functioning under somewhat similar statutory provisions requiring approval by the Commission of advances to be made to railroads by The Railroad Credit Corporation, from the rate advance fund accumulated in its hands, the Commission similarly required collateral for The Railroad Credit Corporation advances to the debtor, which advances stood

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*The original principal amount of this loan was $3,063,000, and the collateral required by the Commission therefore represented approximately 351% of the principal amount of the original loan.

as of January 1, 1939, at $2,445,610 principal amount, in a ratio considerably in excess of that authorized in the case of advances made by your petitioner.

The monies advanced to the debtor by The Railroad Credit Corporation were used in their entirety to pay unearned interest to the First Mortgage bondholders and interest on equipment trusts. The monies advanced by the Reconstruction Finance Corporation were also used in large part for the payment of interest to First Mortgage [863] bondholders and others, but in part for a portion of the costs of the Northern California Extension and other purposes (see Record, Ex. 36).

While the application of the monies advanced by The Railroad Credit Corporation and the Reconstruction Finance Corporation may well give rise to special equities in favor of The Railroad Credit Corporation and the Reconstruction Finance Corporation as against the First Mortgage bondholders, there is no ground for regarding such advances as having special characteristics entitling them to greater equitable consideration than the advances made almost contemporaneously by your petitioner to build the Northern California Extension.

The Commission has, however, in its Plan of June 21, 1939, treated these three creditors on quite dissimilar bases. The Reconstruction Finance Corporation is regarded, for the purpose of the Plan, on the same basis as if its debt was represented by First Mortgage bonds of the debtor company. This

is on the express ground (See page 9, Report of June 21, 1939) that such treatment is in consideration of the purchase by the Reconstruction Finance Corporation of $10,000,000 First Mortgage bonds of the reorganized company, the proceeds of which are to be used to pay off the Trustees Certificates, all of which are now held by the Reconstruction Finance Corporation. The new First Mortgage bonds in question are to be an exclusive first lien on property to be transferred to the reorganized company, representing an investment, after application of full depreciation, of upwards of $120,000,000. On the basis of the present operations of the debtor company, even under depression conditions, it appears probable that the fixed charges on the new First Mortgage bonds will be earned from two and a half to three times during the calendar year 1939. Yet the Commission has provided that, virtu- [864] ally as an underwriting fee for taking this $10,000,000 of new First Mortgage bonds in payment of an existing debt secured by Trustees Certificates, the Reconstruction Finance Corporation shall have its remaining claim as a secured creditor advanced to a preferred position equal to that of the old First Mortgage bondholders and infinitely superior to that of your petitioner.

The Commission has, in other situations, recorded itself as favoring a public offering of securities. Every consideration of equity would suggest that the new First Mortgage bonds in question first be offered for public bidding and, only in the event

that no responsible purchaser at par or better could be found, should the Reconstruction Finance Corporation be given, as an underwriter, an underwriting fee represented by special treatment of its claim as a secured creditor.

As to The Railroad Credit Corporation, the Commission allots to it, as against its claim of $2,445,610 principal amount, and $146,503 of interest thereon, $154,111 of Income Mortgage 4½ Per Cent Bonds, $241,681 of 5 Per Cent Preferred Stock and 35,425 shares of Common Stock (being common stock taken at the price of $62 per share).

The Commission Plan allots to your petitioner, as against its claim of $4,999,800 principal debt and $1,249,950 interest, $163,724 of Income Mortgage 4½% Bonds, $256,756 of 5 Per Cent Preferred Stock, and 37,635 shares of Common Stock without par value.

In other words, the Reconstruction Finance Corporation is to receive, under the Commission Plan, 100 per cent of the principal of its claim in the Income Mortgage bonds and Preferred Stock of the reorganized company, and the accrued interest on its claim in Common Stock at $57 a share. The Railroad Credit Corporation is to receive slightly over 16 per cent of its principal claim in Income Mortgage bonds [865] and Preferred Stock and the balance of principal and interest in Common Stock at $62 a share. But your petitioner is to receive only a little over 8 per cent of its principal claim in Income Mortgage bonds and Preferred Stock and, against

the balance of $5,829,270, 37,635 shares of Common Stock which, at $62 a share would cover only slightly more than 40 Per Cent of this balance.

While the General and Refunding Mortgage bonds, which are the sole collateral held by your petitioner, and part of the collateral held by the Reconstruction Finance Corporation and The Railroad Credit Corporation, are held in varying ratios, these bonds were authorized by the Commission solely for use as collateral in connection with the advances of the particular creditors concerned. The mere fact that the Commission required such excess collateral to be issued to the Reconstruction Finance Corporation and to The Railroad Credit Corporation as compared with your petitioner, on loans made almost concurrently and for equally meritorious purposes, cannot multiply the actual debt claims of the Reconstruction Finance Corporation or The Railroad Credit Corporation at the expense of your petitioner.

Even though the General and Refunding Mortgage bonds held by the three secured creditors were to be regarded as ordinary and usual collateral furnished by the debtor company (which they clearly are not), your petitioner contends that greater distribution to one creditor than to another in this proceeding could be justified only upon a showing that the value of the property of the debtor in which its creditors claim an interest is less than the total amount of the secured creditors' claims. The Commission has at all times failed to make any appra-

sal of the value of the property of the debtor company other than its appraisal under Section 19 (a) of the Interstate Commerce [866] Commission Act, which appraisal would indicate that the value of the property of the debtor company is substantially greater than all the debts of the debtor, including not only the claims of the secured creditors, but of the general creditors.

Your petitioner objects that the Commission Plan discriminates unfairly in favor of the Reconstruction Finance Corporation and The Railroad Credit Corporation, does not give due recognition to the rights of your petitioner, and does not conform to the requirements of the law of the land.

VIII. Inequitable treatment of secured creditors generally as compared with holders of First Mortgage Bonds.

All the monies advanced to the debtor by the Reconstruction Finance Corporation, The Railroad Credit Corporation and your petitioner, and now represented by the secured debt obligations of the debtor, were advanced during the depression years and used for the most part (a) to pay unearned interest to the First Mortgage bondholders; (b) to pay taxes and equipment trust obligations which were prior in lien to the First Mortgage bonds; and (c) to provide for the construction of the Northern California Extension, a valuable and essential integral part of the operating railroad property of the debtor.

Your petitioner contends that the General and Refunding Mortgage created by the debtor to provide security for these secured creditors was not subordinated to the lien of the First Mortgage as to all the property of the debtor, but, on the contrary, was intended to give, and did give, a first lien on substantial and essential parts of the operating properties of the debtor and on securities and equipment [867] of the debtor. In this connection reference is made to the objections filed herein by the Irving Trust Company, as substitute trustee of the General and Refunding Mortgage, and to the facts shown by the Record as to the large elements of the property of the debtor on which said General and Refunding Mortgage represents a first lien.

Neither in Section 77 of the Bankruptcy Act nor elsewhere, can be found a delegation to the Commission of the right to dispose of the complicated questions of law involved in the issues as to the conflicting liens of the First Mortgage and the General and Refunding Mortgage. Nor, as a practical matter, is the Commission equipped to decide these questions, which are essentially questions of local law. Section 77 contemplates that these questions should be decided by the Court. Yet the Commission has attempted to determine upon what assets the First Mortgage is a primary lien and upon what assets the General and Refunding Mortgage is a primary lien.

Your petitioner objects that the Commission, in determining the issues as to the conflicting liens of

the First Mortgage and the General and Refunding Mortgage, has received and relied upon incompetent evidence and has arrived at conclusions which are erroneous in law and unsupported by evidence. Your petitioner insists that the property of the debtor which is subject to the lien of the General and Refunding Mortgage but free from the First Mortgage of the debtor is sufficient in value to fully secure the debts of your petitioner and the other two secured creditors. In this connection your petitioner concurs in the objections filed herein by the Irving Trust Company, as substitute trustee under the General and Refunding Mortgage. [868]

Your petitioner contends that the Commission Plan should be modified so as to accord to The Railroad Credit Corporation, as well as to your petitioner, the same treatment that is accorded under the Plan to the holders of the existing First Mortgage bonds and to the Reconstruction Finance Corporation.

IX. Confiscatory and inequitable treatment of general creditors and equity under Commission Plan.

The Commission Plan not only fails to provide for more than approximately 44 per cent of the claim of your petitioner as a secured creditor, but expressly finds that the general creditors and stockholders of the debtor have no "interest" in the property. This finding is not based on any factual evidence presented to the Commission in the hearings

before its examiners, but upon the theory that the capitalization should be based solely upon a mere estimate of future earnings, made by the Commission's Bureau of Finance. No basis for this procedure can be found within the four corners of Section 77, nor is it sustained by the law of the land. The application of this theory, if approved and confirmed, would not only work substantial injustice to secured creditors, general creditors and the equity owners of this property, but would, if applied generally, be substantially prejudicial to the whole future of the railroad industry.

The Commission does not, in either its Report of October 10, 1938, or its Report of June 21, 1939, make any new determination of the value of the property to be taken over by the reorganized company. It does refer to, and apparently adopts, its valuation of the property of the debtor company, made by the Commission under Section 19 (a) of the Interstate Commerce Commission Act, which amounted, with allowances for "the net costs of additions and [869] retirements" to December 31, 1935, to $139,600,455. (Report of October 10, 1938, pages 24-25).

It is not denied that the depreciated investment in the property of the debtor company would amount to upwards of $120,000,000 (Record, Ex. 29, Statement 16, page 2; see also opinion of Commissioner Miller, Report of October 10, 1938, page 73).

The total debts running against the debtor, including the outstanding equipment trusts and leases, Trustees Certificates, First Mortgage bonds, claims

of the secured creditors and claims of the general creditors, with interest in all cases accrued to January 1, 1939, amounted in the aggregate to $95,699,502.

Your petitioner contends that the depreciated investment in the property used or useful in the public service should be, under the law of the land and the requirement of equitable treatment of the various interests in the property, the primary measure in determining the limits of the capital structure of the reorganized company, and that any drastic reduction in such capitalization based solely on the present reduced earnings of the enterprise in an attempt to assure dividends on the common stock of the reorganized company is inequitable and without support in law.

The effect of the Commission Plan is to transfer to other creditors of the debtor part of the interest which your petitioner has in the property of the debtor as a creditor and the entire interest in the property of the debtor which the general creditors of the debtor (The Western Pacific Railroad Corporation and Western Realty Company) have, as well as all of the interest represented by the stock of the debtor company, all of which is held by The Western Pacific Railroad Corporation. [870]

It is contended by your petitioner that not only do the secured creditors and the general creditors have a real and substantial "interest" in the property of the debtor company, but the stockholders have a like interest. These interests of the general creditors and stockholders might, of course, be ter-

minated, because of the recent inability of the property to earn its fixed charges, by foreclosure of the respective liens of the First Mortgage and General and Refunding Mortgage. But in a reorganization under Section 77 of the Bankruptcy Act creditors are entitled to insist that fair values, and not forced sale values, should be used in determining the capitalization of the reorganized company and the securities to be given each class of creditors.

This principle is recognized in the brief of the United States, amicus curiae, which was largely relied upon by the United States Supreme Court in Case v. Los Angeles Lumber Products Company, decided November 6, 1939 (84 L. Ed. 22), at pages 16 and 17 of the brief:

> "In cases of liquidation no one questions the right of senior security holders to full payment before any distribution of assets to junior interests. Reorganization is an alternative for liquidation in the event of financial failure. It seeks to substitute going concern values for the forced sale values of liquidation, with the object of yielding greater ultimate returns to the senior interests, and allowing wider participation if the values permit. But it presents no occasion or excuse for a different treatment of priorities in disregard of senior contract rights. * * *"

See also

First National Bank of Cincinnati v. Flershem, 290 U. S. 504;

In re Dutch Wooderaft Shops, 14 Fed. Supp. 467. [871]

The Commission is empowered under Section 77 to determine the value of the property of the debtor and certify the same to the Court for its approval, and, in determining such value, the Commission is empowered to give due consideration to the earning power of the property, but, expressly, it must give that effect to "the present cost of reproduction new, and less depreciation, and original cost of the property and the actual investment therein as may be required under the law of the land."

Your petitioner respectfully submits that under the established law of the land no interest of a creditor or stockholder can be disregarded in the formulation of a plan of reorganization under Section 77, except on the basis of an appraisal of the property. In this case the Commission has made no appraisal except its undisputed appraisal under Section 19 (a) of the Interstate Commerce Commission Act, on the basis of which the general creditors and the equity owners all have a substantial interest in the property of the debtor.

For the reasons above stated your petitioner has throughout the proceedings before the Commission and in the plan which it submitted to the Commission for consideration, consistently urged that no

plan of reorganization of the debtor company can be held to be fair or equitable, consonant with the purposes of Section 77 and consistent with the law of the land, unless recognition is given to the interests of the general creditors and the equity owners, and, further, that such recognition should be determined primarily on the basis of the actual investment in the property, less accrued depreciation. [872]

X. Capitalization theory of the Commission fallacious and without support in law.

The basic fallacy in the Commission Plan lies in its drastic and unnecessary wiping out of private rights in an unrealistic adherence to a mere theory of capitalization, which theory of capitalization finds no support in the language of Section 77 or elsewhere.

The Commission spells out its theory for partially or entirely disregarding substantial interests in the property in its Report of October 10, 1938, which is referred to and adopted in its Report of June 21, 1939 (See page 7, Report, June 21, 1939).

The Report of October 10, 1938, (page 40) states that Section 77 of the Bankruptcy Act provides that an approved plan should be "compatible with the public interest". It states that "public interest is not defined", but interprets the phrase to require, among other things, "that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company,

and that proposed charges, whether fixed or contingent, be within its probable earning power."

Without regard to logical connection, the Commission proceeds to state, on page 41 of its Report of October 10, 1938, what it apparently deems to be a corollary to the foregoing proposition, to the effect that consideration should be given to the investment in the property of the debtor company "only to the extent that such investment is justified by probable earnings reasonably forseeable for the future."

Having thus touched lightly on the question of investment in the property, the Commission then moves forward to the conclusion that it ought not to authorize a capital [873] structure for the reorganized company which includes capital stock on which dividends are not reasonably likely to be paid. At pages 51-52 of its Report of October 10, 1938, the Commission states:

> "the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans" (those proposed by the parties to the proceeding). "We have hereinbefore stated, however, the reasons why,

in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company" (apparently referring to its argument as summarized above).

The Commission has never tried to explain further why its theory that a material return should be assured or expected on the capital stock of the reorganized company should, "in the public interest", take the place of "a conservative appraisal of the assets to be taken over by the reorganized company", to which the Commission refers on page 40 of its Report of October 10, 1938. Any justification that might be grounded on the argument that, if common stock of the reorganized company pays immediate dividends, it may prove a channel for future financing is completely negatived by the fact that the operation of the Commission theory at the present time is to disregard the substantial rights of secured creditors, general creditors and stockholders in the property and, in effect, to confiscate these rights on the basis of a mere theory of capitalization. No one thing could more clearly and certainly destroy common [874] stock as a vehicle for future financing of railroad properties than this proposed action of the Commission.

At a hearing before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary of the House of Representatives

on June 21, 1939, Chairman Eastman of the Interstate Commerce Commission stated:

> "Any estimate of the future earnings of a railroad can at best be no more than an 'educated guess', but there has never been a time in the history of the country when it has been more difficult to make such a guess than now. Anything remotely approaching accuracy is impossible."

At a later point in his testimony he stated:

> "To deprive thousands of investors who in the past have put their savings into railroad securities of all hope of recoupment is a very serious step, for if our capitalistic society is to succeed, it demands as scrupulously fair treatment of investors as of labor."

While Section 77 gives the Commission the express power to limit fixed charges provided by a plan which comes before it, there is nowhere in Section 77 such express power vested in the Commission to limit the total capitalization of the reorganized enterprise solely to insure that dividends will be paid on the capital stock which it authorizes. Even more clearly it may be asserted that there is complete absence of power given to the Commission to declare the interest of a creditor of the debtor without value solely on the basis of such a theory of capitalization.

Your petitioner contends that Section 77 of the Bankruptcy Act is not a condemnation statute and

objects that the Commission's theory of capitalization results in dis- [875] crimination as between the various classes of investors in the property, including your petitioner; and results in confiscation of the legal and equitable claims of unsecured creditors and stockholders, all of which is contrary to the law of the land.

XI. Special factors affecting future earnings of this property not given adequate weight by Commission.

In addition to the general objection which may fairly be urged to the cutting off of existing property rights and interests on the basis of a mere estimate of future earnings, there are special factors existing as to this property which render the Commission procedure particularly unfair and inequitable.

The Commission estimate of future earnings is based upon an examination of the earnings record of the property during recent years. The Commission estimate is substantially less than the estimates of the management as to future earnings, which appear in the record before the Commission.

Three special factors exist which render the earnings record of this particular property for the past ten or twelve years an unsatisfactory guide or spring-board for an estimate of future earnings.

When new investment came into the stock of this property some twelve years ago, the management soon found that the property required substantial

improvement and rehabilitation for efficient operation. All dividends were immediately stopped and a program of improvement and rehabilitation promptly started. When this program was interrupted by the 1929 depression, approximately $8,000,000 had been spent, of which, under Commission accounting [876] rules, almost half was charged as operating expense. When the property came into trusteeship the improvement program was resumed. $10,000,000 was borrowed upon Trustee Certificates with the approval of the Court and this money expended to complete the program. Of the $10,000,000 so spent in 1936, 1937 and 1938, almost half was, under Commission accounting rules, charged as operating expenses.

The substantial effect of the termination of these special charges and the completion of the Rehabilitation Program on the earnings position of the debtor is evidenced by the fact that in the first nine months of 1939, while "Total Railway Operating Revenues" increased only $1,728,278.89 over the corresponding period of 1938, "Net Revenue from Railway Operations" increased by $2,473,531.51; That is, from a deficit of $656,594.23 in 1938 to an actual net of $1,816,937.28, in 1939.

Moreover, in 1931 and 1932, the Company built its Northern California Extension, a connection with the Great Northern Railway, which cost approximately $10,000,000. This addition has already resulted in an enormous improvement in the traffic

position of the property and has a large and, as yet, not fully measured relationship to the future earnings of the property. While this Northern California Extension was under construction, however, and while it was becoming seasoned as a channel for traffic, there was, of necessity, an additional and substantial burden of expense thrown upon the property, which necessarily distorted its earnings figures.

The third special factor having to do with the earnings record of the debtor is that during the depression there was put into operation the so-called Dotsero Cut-off on the Denver and Rio Grande lines, which greatly improved the facilities for traffic moving over the Western Pacific [877] through the Denver gateway and which, it is believed, will ultimately have an important and beneficial effect on the net earnings of the debtor property.

By reason of these special factors and general business conditions, progressive improvement in the earnings of the debtor's property is indicated.

Moreover, in recent months there have been substantial increases in traffic over the debtor lines, and over the lines of other carriers similarly situated. It is difficult, at the present time to adequately estimate the possible scope and extent of such traffic improvement, which has resulted in part from the impact of a general European war. Any estimate of railroad earnings made prior to the development of war conditions must be revised.

Terminating existing property rights and interests in the debtor on the basis of future earnings estimates based on the experience of the past ten or twelve years, in view of the factors set forth above, is clearly inequitable and prejudicial to the rights of creditors and stockholders.

XII. Objection to funding of accrued interest in common stock so as to give present First Mortgage bondholders control of the reorganized company.

The Commission Plan proposes to give to the First Mortgage bondholders 40 per cent of their principal claim in Income Mortgage 4½ per Cent. Bonds and 60 per cent of the principal amount of their claims in 5 Per Cent Preferred Stock. This Preferred Stock carries a participating feature which entitles the Preferred Stock, after receiving its 5 per cent dividend, to share equally with Common Stock in all distributed earnings of the enterprise after $3.00 per share per year have been paid on the Common Stock. [878]

The Commission then proposes to distribute to the First Mortgage bondholders, against interest accumulated since January, 1934, amounting to $13,143,777 (for the most part unearned by the debtor company during that period) securities for 100 per cent of this accrued and unpaid interest in the form of Common Stock taken at the price of $57.00 a share. This common stock to be issued to

the First Mortgage bondholders for accrued and unpaid interest would amount to 230,593 shares of Common Stock out of the total Common Stock authorized for the reorganized company of 319,441 shares; or more than 72 per cent of such total issue.

When the Western Pacific Railway Company, a predecessor company owning this property, was reorganized in 1916 the then existing debt to the First Mortgage bondholders was paid off in preferred and common stock of The Western Pacific Railroad Corporation, organized to hold all the stock of The Western Pacific Railroad Company, a new corporation organized to continue the operations of the railroad. As is the case at the present time, a large part of the mortgage debt of the predecessor company, the Western Pacific Railway Company, was held in 1916 by insurance companies and fiduciaries who were under legal compulsion to sell the stock so received within a reasonable time after it was received in exchange for the bonds previously held. In the case of the insurance companies, it was possible in most instances for them to obtain from the Superintendents of Insurance in the various states extension of time in which to sell such stock.

Complete control of the operations of the new enterprise was, by the method of reorganization adopted, vested in the prior bondholders, who had become involuntary stockholders. During the period from 1917 to 1927 approxi- [879] mately $18,000,000 was paid out in dividends to the preferred and com-

mon stockholders, as indicated by the following table:

Year	Common or Preferred		Dividend Paid
1917	Preferred		$ 2,062,500
1918	None		—
1919	Preferred		825,000
1920	Preferred		1,925,000
1921	Preferred		1,650,000
1922	Preferred		1,650,000
1923	Preferred		1,650,000
1924	Preferred		1,650,000
1925	Common—	$2,374,970	
	Preferred	2,078,450	4,453,420
1926	Preferred		1,650,000
1927	Preferred		412,500
1928 to 1938	None		
	Total		$17,928,420

When, in 1926 and 1927, interests affiliated with your petitioner acquired a substantial interest (upwards of 40 per cent) in the preferred and common stock of The Western Pacific Railroad Company, a survey was promptly made of the operating property. This survey disclosed that the expenditure of approximately $18,000,000 would be required to rehabilitate the operating property and to make additions and betterments necessary to put it in first class operating condition. Dividends on the stock were immediately discontinued and an improvement and rehabilitation program commenced. From 1927 up to the interruption of the program

in the 1929 depression approximately $8,000,000 was spent upon this program. The program was renewed in 1936 under the supervision of this Court, and the balance of approximately $10,000,000 was spent in 1936, 1937 and 1938 to complete the rehabilitation [880] program. Almost half of these expenditures were deferred maintenance charges, and were necessarily so treated under Commission accounting rules, and do not appear as capital items in the Commission's appraisal under Section 19 (a) of the Interstate Commerce Commission Act or in the investment account of the property of the debtor, elsewhere referred to in this statement.

Your petitioner contends that it is theoretically unsound, and has been demonstrated by experience in connection with this particular property to be unsound in practice, to put actual control of a railroad enterprise in the hands of those who have involuntarily become owners of equity stock and are under legal compulsion to market such stock within a reasonable period after its receipt by them. It is objected that, to the extent that interest is properly to be funded for the benefit of the First Mortgage bondholders, it should be funded in the same type of securities issued to them for their principal debt.

XIII. Commission Plan allows excessive accrued interest to Reconstruction Finance Corporation.

The Commission Plan proceeds on the theory that the Reconstruction Finance Corporation is entitled,

as of January 1, 1939, to accrued interest amounting to $899,870, which result apparently flows from the application of a straight 6% rate per annum to the principal debt to the Reconstruction Finance Corporation. The amount of interest actually due on January 1, 1939, to Reconstruction Finance Corporation, based on various authorized modifications of the 6% rate for various periods, as shown by the books of the debtor, is $723,864 (Record, Ex. 36). [881]

XIV. Commission Plan discriminates in favor of The Railroad Credit Corporation by permitting it to retain, after reorganization, debtor's interest in marshalling and distributing plan of 1931.

Under Subdivision (R) of the Commission's Order of June 21, 1939, The Railroad Credit Corporation is expressly authorized to retain, after the reorganization, all sums which may accrue upon the debtor's interest under the marshalling and distributing plan of 1931, although all other secured creditors are required to surrender their entire collateral. This preferential treatment of The Railroad Credit Corporation is inequitable and discriminatory as to your petitioner.

XV. Commission Plan imposes unnecessary limitations upon management through provision for mandatory rather than discretionary capital fund.

The Commission Plan provides (Order of June 21, 1939, Subdivision (L) Pages 17-18) for a com-

pulsory capital fund at the rate of $500,000 per year as a deduction from income. Under the capital structure proposed by the Commission no party to the proceeding could properly object to a discretionary capital fund in the amount stated. The past history of this property, to which reference is hereinabove made, emphasizes the importance of full provision for maintenance expenditures, even though necessarily chargeable to capital in part, before distribution of earnings to the investor. The attention of the Court is, however, directed to the objections to a compulsory capital fund, as distinct from a permissive capital fund, as well expressed by Chairman Eastman of the Interstate Commerce Commission in his dissenting opinions in this proceeding and in the Spokane International Railway, Company Reorgani- [882] zation, 230 Interstate Commerce Commission 81, 107. Your petitioner urges that the provision for a capital fund be modified to provide that such capital fund be a matter of managerial discretion within the limits specified by the Commission Order.

XVI. Sinking fund provisions of Commission Plan unnecessarily burdensome.

The Commission Plan provides for no sinking fund upon the proposed new First Mortgage bonds, unless and until the amount of new First Mortgage bonds outstanding be doubled, as compared with the amount presently to be issued.

It provides, on the contrary, that an immediate sinking fund, at the rate of ½ per cent of principal amount annually, be created as to the proposed Income Bonds to be issued to the present First Mortgage bondholders.

Your petitioner agrees that there is no need for a requirement of the present amortization of a fixed interest debt of only $10,000,000 on a railroad property representing an investment, less depreciation, of upwards of $120,000,000.

On the other hand, your petitioner objects that there is no necessity or justification for a provision that the Income Bonds be amortized. The effect of this sinking fund provision will necessarily be to reduce the possibility that the reorganized company will be able to finance its future needs by the marketing of additional preferred or common stock to meet future capital needs. The capital represented by existing First Mortgage bonds must necessarily be regarded as a permanent investment in the enterprise. Its gradual retirement from [883] earnings is not, as a practical matter, a feasible objective. The disadvantages to the reorganized company which will flow from any such impairment of the marketability of its capital stock issues far outweighs the advantage to the holders of the income bonds of a small sinking fund provision.

These considerations have especial weight in view of the fact that, as a matter of common knowledge, a substantial part of the present First Mortgage Bonds are held by institutions or trustees, who will

be compelled ultimately to dispose of any capital stock which they may receive in the reorganization, but will be permitted to continue to hold the income bonds received. Anything that militates against the marketability of the preferred stock to be issued to present First Mortgage bondholders in the reorganization will be definitely prejudicial to the position of those First Mortgage bondholders who find it necessary to market their preferred stock within a reasonable period of time after receipt thereof.

XVII. Division under Commission Plan of Securities as between Income Bonds and Preferred Stock unnecessarily burdensome to creditors.

On the same grounds set forth in the preceding paragraph, your petitioner contends that the Commission Plan is defective in allotting to existing First Mortgage bondholders 40 per cent of income bonds and 60 per cent of preferred stock. Since the bonds are income obligations, no future default on the part of the reorganized company will flow from a failure to meet interest payments on the income bonds, if such interest is unearned, any more than it will from a failure to declare dividends. The Income Bonds, as provided in the Commission Plan, will not mature until [884] January 1, 2014. It is true that one may theoretically consider the contingency of providing for the maturity of these income bonds sixty-five years from the date of issue, while, in the case of preferred stock, no such contingency arises, yet this is a somewhat theoretical

basis on which to narrowly limit the proportion of income bonds which shall be issued in lieu of the existing First Mortgage bonds.

In the plan which your petitioner submitted to the Interstate Commerce Commission it was expressly provided, for the reasons hereinbefore set forth, that the entire First Mortgage debt should be retained in the form of debt on an income basis. Your petitioner still feels that that position is sound and in the substantial interest of a large class of present First Mortgage bondholders.

Your petitioner objects to the allocation proposed by the Commission and contends that at least 50 per cent of the existing First Mortgage debt should be refunded into income bonds and the remaining 50 per cent into preferred stock.

XVIII. Objection to interest rate for Income Bonds provided by Commission Plan.

In the original Commission Plan, as promulgated by its order of October 10, 1938, the Income Bonds were to carry interest at 4%. This was a realistic recognition of the present prevailing level of interest rates generally. At the rehearing before the Commission, upon motions made by the various parties, counsel for the Insurance Company Committee strongly urged an increase in this rate to 4½%, and this request was granted by the Commission in the modifications in its plan provided under its order of June 21, 1939. [885]

The maintenance of the 4 per cent interest rate on the proposed Income Bonds would improve the status of the preferred stock and common stock without corresponding detriment to those creditors who are given Income Bonds under the Commission Plan. So far as the present First Mortgage bondholders are concerned, any such reduction of the interest rate on the new Income Bonds, would be subject to possible recoupment in part through the participating feature of the preferred stock, issued to them for a substantial part of their claims, while the credit of the enterprise generally would be helped by the resulting reduction of contingent charges.

XIX. Alternative organization of new corporation contemplated by Commission Plan is unnecessarily expensive and burdensome.

The Commission Plan, Subdivision (R) Order of June 21, 1939, authorizes the reorganization committee, constituted under the Plan, to organize a new corporation to take over the properties of the debtor, or to recapitalize the debtor corporation, in its discretion. Whatever might be the merits of the organization of a new corporation under the old processes of equity reorganization, your petitioner submits that Section 77 permits and contemplates the substantial economies which will flow from the retention of the present corporate structure of the debtor, and its recapitalization to effect its reorgan-

ization pursuant to such plan as may ultimately be approved.

XX. Plea to the Court for correction of defects in Commission Plan.

Your petitioner is advised and believes that if this Court shall remove, or cause to be removed, by its recommendation to the Commission of appropriate amendments [886] to the Commission Plan, the defects in said Commission Plan, which are set forth above, such proposed Amended Plan would meet with the approval of the statutory percentage of each class of creditor and stockholder of the debtor. Moreover, the amendments necessary to remove such objections would not change the capital structure proposed under the Commission Plan for the reorganized company so as to increase fixed charges, or so substantially increase other securities, as to render such proposed Amended Plan fairly open to any finding by the Commission that it was not in the public interest.

There is set out below a comparison of the capital structure proposed under the Commission Plan and that which would exist under the amendments now proposed by your petitioner in Article XXII of this statement, as hereinafter set forth, to correct the defects set out above.

CAPITAL STRUCTURE OF REORGANIZED COMPANY

	Under Commission Plan	Under Proposed Amendments Thereof
Undisturbed Equipment Trusts and Leases	$ 2,750,050	$ 2,750,050
New First Mortgage 4% Bonds	10,000,000	10,000,000
New Income Mortgage 4% Bonds	21,219,975	37,481,302
New 5% Participating Preferred Stock	31,850,297	37,481,302
New Common Stock without par value	319,441	319,441

Under the proposed Amended Plan the present First Mortgage bondholders would have approximately 45 per cent of the voting power in the reorganized company and receive approximately 45 per cent of the equity earnings of the reorganized company after the payment of their Preferred Stock dividends and the payment of $3.00 a share on the Common Stock. [887]

XXI. Procedure for correction of Commission Plan.

The procedure contemplated by Section 77, where substantial amendments in a plan reported by the Commission seem to the Court to be necessary to meet the equitable claims of the parties and to conform such plan to the law of the land, is that the Court refer back to the Commission the Plan with recommendations for modifications, which recom-

mendations will, no doubt, be promptly accepted by the Commission. (See Louisiana and North West Railroad Company, Reorganization, 230 I. C. C. 171.)

At a hearing before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary of the House of Representatives, on June 21, 1939, Honorable Joseph B. Eastman, now Chairman of the Interstate Commerce Commission, approved this procedure. In discussing a legislative proposal for the amendment of Section 77 of the Bankruptcy Act, Mr. Eastman said:

> "However, in most of the important reorganization cases now pending before the Commission the record has already been made, and the time thus consumed cannot now be saved. Any conclusions that the Commission may reach in these cases as to respective liens and priorities will be helpful to the judge as the equivalent of a report by a master, and the Commission will readily respond to adjustments of the plan to any different conclusions he may reach as to such matters."

XXII. Specific amendments proposed to Commission Plan.

Your petitioner respectfully requests that the Commission Plan be referred back to the Commission for modification so as to cure the defects set forth above, and by specifically modifying the Commission Plan as follows: [888]

(1) Amending Subdivision (B) of the Commission Plan, as it appears on page 2 of the Commission Order of June 21, 1939, by increasing the amount of new Income Mortgage 4½% Bonds from $21,219,075 to $37,481,302 and decreasing the rate for said bonds from 4½% to 4%; increasing the amount of new 5% Preferred Stock from $31,850,297 to $37,481,302.

(2) Amending Subdivision (J) of the Commission Plan, as it appears at pages 10 and 11, Order of June 21, 1939, so as to provide that the amount of such Income Mortgage Bonds, Series A, shall be $37,481,302, instead of $21,219,075 and that the rate upon such Bonds shall be 4% instead of 4½%; eliminating the provision for a sinking fund which appears as the next to last paragraph of Subdivision (J) on pages 12 and 13 of the Order of the Commission of June 21, 1939.

(3) Amending Subdivision (L) of the Commission Plan, as to the second numbered paragraph on page 17, Order of June 21, 1939, by inserting, after the word "creation" in the first line of the said paragraph number two, the phrase, "in the discretion of the board of directors of the reorganized company"; and amending the language of sub-paragraph (a) of said numbered paragraph two, appearing on page 18 of the Order of the Commission of June 21, 1939, by inserting in the second line

thereof, in lieu of the word "be" which appears as the fourth word in that line, the words "not be more than".

(4) Amending Subdivision (L) of said Commission Plan, at page 19 of the Order of June 21, 1939, by striking out numbered paragraphs 4 and 5 as to the sinking fund on Income Mortgage Bands and renumbering the remaining paragraphs on that page.

(5) Amending Subdivision (M) of the Commission Plan, at page 20, Order of June 21, 1939, by providing that 374,813 2/100 shares of Preferred Stock, Series [889] A, are to be issued in the reorganization in lieu of 318,502 97/100 shares.

(6) Amending Subdivision (N) of the Commission Plan at page 24, Order of June 21, 1939, by providing that 1,100,000 shares of Common Stock without par value, will be authorized instead of 1,000,000 shares, as therein set forth; and that 749,626 shares shall be reserved for Income Mortgage Bonds, Series A, instead of 424,382, as therein set forth.

(7) Amending Subdivision (O) of the Commission Plan appearing at pages 24 and 25 of the Commission Order of June 21, 1939, so as to read as follows:

"The ten million dollars First Mortgage Bonds, Series A, shall be offered at public bidding, and sold at the best price obtainable, but not less than the face amount plus ac-

crued interest thereon. In the event no bid is received of at least the face amount plus accrued interest for said bonds, said bonds shall be sold at their face amount plus accrued interest to Reconstruction Finance Corporation, subject to the approval of the Commission of such purchase in a separate proceeding, and in such event such reasonable underwriting fee as may be fixed by the Commission in said proceeding shall be paid by the reorganized company to Reconstruction Finance Corporation."

(8) Amending Subdivision (P) of the Commission Plan, appearing on page 25 to 27 of the Commission Order of June 21, 1939, to read as follows:

"P. The existing securities of the debtor shall be treated as follows:

"1. Existing equipment trusts, Baldwin lease, and Pullman contract, aggregating $2,750,050 shall remain undisturbed and shall be assumed by the reorganized company.

[890]

"2. Holders of existing First Mortgage bonds shall receive for each $1,000 of indebtedness, including interest accrued to January 1, 1939, $500 of new Income Mortgage 4 Per Cent Bonds, Series A, and $500 of 5 Per Cent Participating Preferred Stock, Series A.

"3. Reconstruction Finance Corporation shall receive for its existing claim of $3,686,-

864, which includes accrued interest to January 1, 1939, $1,843,432 of new Income Mortgage 4 Per Cent Bonds, Series A, and $1,843,432 of 5 Per Cent Participating Preferred Stock, Series A.

"4. The Railroad Credit Corporation shall receive for its existing claim of $2,592,113, which includes accrued interest to January 1, 1939, $1,296,056.50 of new Income Mortgage 4% Bonds, Series A, and $1,296,056.50 of 5% Participating Preferred Stock, Series A. This provision is subject to the reduction of said amounts, pro rata, by the application, prior to the date of actual issue of the new securities under the plan, of any proceeds from the distributive shares of the debtor or its subsidiaries, under the marshalling and distributing plan, 1931. Adjustment in cash for fractional shares or fractional parts of the smallest denomination of the new Income Mortgage 4% Bonds, Series A, shall be made.

"5. A. C. James Co. shall receive for its existing claim of $6,249,750, which includes interest accrued to January 1, 1939, $3,124,875 of new Income Mortgage 4% Bonds, Series A, and $3,124,875 of 5% Participating Preferred Stock, Series A.

"6. Western Realty Company shall receive for its unsecured claim of $61,667, which includes interest accrued to January 1,

1939, 617 shares of Common Stock without par value. [891]

"7. The Western Pacific Railroad Corporation shall receive for its unsecured claim of $7,749,175, 77,492 shares of Common Stock without par value.

"8. The Western Pacific Railroad Corporation shall receive for its holding of $28,300,000 in Preferred Stock and $47,500,000 in Common Stock of the debtor (being all the outstanding stock of each class) 241,332 shares of Common Stock without par value."

(9) Amending Subdivision (R) of the Commission Plan, appearing on pages 29 and 30 of the Commission Order of June 21, 1939, (a) by striking out the exception in the second paragraph of said Subdivision (R) which would permit The Railroad Credit Corporation to retain for its own benefit the proceeds of the distributive shares of the debtor and its subsidiaries under the marshalling and distributing plan, 1931, after the effective date of the Plan; (b) by providing that the Reorganization Committee shall consist of five persons, all to be approved by the Court, who shall be designated, one by the Insurance Company Committee, one by the Reconstruction Finance Corporation, one by The Railroad Credit Corporation, one by your petitioner, and one by The Western Pacific Railroad Corporation; and (c) by providing expressly that the reorganiza-

tion shall be carried out by the recapitalization of the debtor, rather than by the organization of a new corporation.

Wherefore your petitioner respectfully prays:

(a) That this Court return to the Commission, the Commission Plan with the recommendation that it be amended in the various respects specifically set out in Article XXII above; and [892]

(b) That, unless said Plan be so amended and corrected, said Commission Plan be disapproved as discriminatory and unfair and inequitable to your petitioner and to other parties in interest and not in conformity with the law of the land;

And for such other and further relief as to the Court may seem just and proper.

Dated: December 8, 1939.

A. C. JAMES CO.,
By W. W. CARMAN,
Vice President and Treasurer.

WHITMAN, RANSOM, COULSON & GOETZ,
ROBERT E. COULSON,
HORACE E. WHITESIDE,
40 Wall Street,
New York, New York.

GARRET W. McENERNEY and
ANDREW F. BURKE,
2002 Hobart Building,
San Francisco, California,
Attorneys for Objector and Petitioner. [893]

State of New York,
County of New York—ss.

W. W. Carman, being first duly sworn, deposes as follows:

I am an officer, to wit, the Vice-President and Treasurer of A. C. James Co., the objector and petitioner named in the foregoing Objections and Petition, and am duly authorized to make this affidavit and verify said Objections and Petition; I have read said Objections and Petition and know the contents thereof; the same are true of my own knowledge except as to matters therein stated on information and belief, and as to those matters I believe the same to be true.

W. W. CARMAN.

Subscribed and sworn to before me this 4th day of December, 1939.

JAMES YUILLE,
Notary Public, Westchester County.

Certificate filed in New York County.
New York County Clerk's No. 73.
New York County Register's No. 1 Y 39.
Commission expires March 30, 1941.

[Endorsed]: Filed Dec. 8, 1939. [894]

[Title of District Court and Cause.]

OBJECTIONS OF THE WESTERN PACIFIC RAILROAD CORPORATION TO COMMISSION PLAN OF REORGANIZATION, STATEMENT OF CLAIMS FOR EQUITABLE TREATMENT, AND PETITION FOR AMENDMENT OF SUCH PLAN.

The Western Pacific Railroad Corporation (hereinafter designated "Corporation"), an unsecured creditor of the debtor, and owner and holder of all the issued and outstanding capital stock of the debtor, hereby objects to the modified Plan of Reorganization of the debtor (hereinafter designated the "Commission Plan"), approved by the Interstate Commerce Commission (hereinafter designated the "Commission") and certified to this Court, and presents its claims for equitable treatment, pursuant to the provisions of subdivision (e) of Section 77 of the Bankruptcy Act, as amended, and to the order of this Court filed herein November 8, 1939.

The Corporation's objections, generally stated, are that said Commission Plan is unfair and inequitable as to the Corporation, does not afford due recognition to the rights of unsecured creditors and stockholders of the debtor, discriminates unfairly in favor of certain classes of secured creditors, does not conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders as required by subdivision (e) of Section 77, and that said Section

77, as [896] interpreted and applied by the Commission, is invalid in that it deprives the Corporation of its property and of its interest in the property of the debtor without compensation and without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

For a more detailed statement of said objections and of the claims of the Corporation for equitable treatment the Corporation represents to the Court and petitions as follows:

I. The Corporation's Claim as Unsecured Creditor.

The Corporation (a corporation organized under the laws of the State of Delaware) is an unsecured creditor of the debtor in the principal amount of $5,768,746. Interest accrued thereon to January 1, 1939 amounts to $1,980,429, making a total claim for principal and interest to January 1, 1939 of $7,749,175.

The indebtedness represents advances on open account, advanced by the Corporation to the debtor from time to time before the institution of the reorganization proceedings.

The Western Realty Company, a Colorado corporation, is an unsecured creditor of the debtor, its claim amounting to $50,000 principal with interest to January 1, 1939 of $11,667, a total of $61,667.

A proof of claim was duly filed by the Corporation in the above entitled proceedings for reorgan-

ization of the debtor. A similar proof of claim was likewise filed by The Western Realty Company.

By an order entered August 20, 1935 this Court classified the above described claim of the Corporation and the claim of The Western Realty Company as separate and distinct classes for the purposes of Section 77 of the Bankruptcy Act, as amended. The Corporation's claim was by such order classified as Class 10 and the claim of The Western Realty Company as Class 11. [897]

II. The Corporation's position as owner of the equity in the debtor's property.

The Corporation is the owner of all the outstanding stock of the debtor consisting of $28,300,000 par value of preferred stock and $47,500,000 par value of common stock. By the said order of August 20, 1935 the preferred stock was classified as Class 12 and the common stock as Class 13.

All of said stock, preferred and common, was issued in 1916, in connection with the reorganization of the predecessor company of the debtor and was issued in exchange for first mortgage bonds of said predecessor then outstanding. Said first mortgage bonds of said predecessor company represented money actually paid to said predecessor and used by it for capital expenditures in the construction, equipment and maintenance of the railroad properties.

The ultimate beneficial ownership of the unsecured claim against the debtor, and of the stock of

the debtor, owned by the Corporation, resides in the stockholders of the Corporation who are many thousands in number.

III. The Commission's treatment of the Corporation's claim as a general creditor and as sole stockholder of the debtor.

The Commission Plan makes no provision whatever for recognition of the unsecured claim of the Corporation (or of The Western Realty Company).

It makes no provision whatever for recognition of the equity of the Corporation as the owner and holder of all the outstanding stock, preferred and common, of the debtor.

IV. Objections of Corporation to Commission Plan.

Conceding that secured claims are entitled to full protection out of the assets of the debtor before unsecured claims, and that unsecured claims are entitled to like recognition in priority to stockholders, the Corporation's position is that there is no justification under Section 77 of the [898] Bankruptcy Act or under the law of the land for destroying or confiscating either the claims of general creditors or the equity of stockholders, unless the debtor is insolvent in the bankruptcy sense, that is, unless the aggregate of its property "shall not at a fair valuation be sufficient in amount to pay his (its) debts". (Bankruptcy Act, as amended, Section 1(19).)

(a) The Commission did not find that the debtor was or is insolvent in the bankruptcy sense. The undisputed evidence before the Commission, and the Commission's findings, show that the debtor was not insolvent.

(b) The total liabilities of the debtor on January 1, 1939, exclusive of the claims of the Corporation and The Western Realty Company, as reported by the Commission in its report of June 21, 1939, approving a modified plan, amounted to $87,888,660. This amount represents the aggregate of secured claims, and provision for this sum only is made in the Commission Plan. As already stated, no provision of any kind, whether by payment in cash or in allotment of securities, is made for either the unsecured creditors or the stockholders.

(c) The Commission did not in its proceedings make a new determination of the value of the debtor's property under the authority of subdivision (e) of Section 77. It did, however, refer in its report of October 10, 1938 to a final valuation theretofore made by it pursuant to Section 19(a) of the Interstate Commerce Act. Section 19(a) makes such valuation "prima facie evidence of the value of the property * * * in all judicial proceedings brought to * * * set aside * * * in whole or in part any order of the Interstate Commerce Commission". This valuation, with allowance for the net costs of additions and retirements, between valuation dates and December 31, 1935, amounted to $139,600,455 (230 I. C. C. Rep. 76). Between Jan-

uary 1, 1936 and December 31, 1938 this figure has been increased by the net cost of further additions less retirements. It is not disputed that the original cost of the debtor's property, less depreciation, would amount to more than $120,000,000. (R. Exh. 29, Statement 16, p. 2; see Op. [899] of Commissioner Miller, Rep. of October 10, 1938, 230 I. C. C. Rep. 108.)

It follows that the report of the Commission itself shows that the debtor's property has a value of many millions of dollars in excess of all claims, secured and unsecured, and that there remains a surplus of value to be applied to the stock of the debtor, and a fortiori to the payment or protection of unsecured claims.

(d) The Commission found (Rep. of October 10, 1938, 230 I. C. C. Rep. 101) that the "equity of the existing stock has no value" and that "the claims of the unsecured creditors, The Western Pacific Railroad Corporation and The Western Realty Company" have no value. It is upon these findings, apparently, that the Commission reached the conclusion that the holders of stock "are not entitled to participate in the plan" and that "no securities or cash should be distributed under the plan in respect of" the claims of unsecured creditors. The Corporation objects to these findings as without support in any evidence before the Commission. It objects, likewise, to the conclusions drawn from those findings as discriminatory, unjust and confiscatory as against the general creditors

and the holder of all the stock, and as not in conformity with the provisions of Section 77 or with the law of the land.

(e) In concluding that the claims of unsecured creditors and the equity of the stock were valueless, the Commission disregarded the valuation which it had made under Section 19(a) of the Interstate Commerce Act, which it apparently adopted in its report in this proceeding. It gave consideration solely to the earnings of the property, allowing no weight to other elements, to which, under subdivision (e) of Section 77, consideration would have been given if value had been separately ascertained in the present proceeding, i. e., all other relevant facts, as well as present cost of reproduction new and less depreciation and original cost of the property and the actual investment therein. Even with respect to "the earning power of the property, past, present and prospective", which is one [900] element under Section 77(e), the Commission did not comply with the statute. The report shows that the Commission, while purporting to estimate maximum prospective earnings, in reality took past earning history as virtually the only guide or index to value.

Past earnings over a period of years, taken alone, are not a sufficient basis for determining future earnings or value, particularly where, as here, the period considered is abnormal and not fairly indicative of the future because (a) it included years of severe depression affecting railroads as well as

business and industry generally; (b) during these years unusual rehabilitation costs were charged in large part to operating expense, thus distorting the earning picture; and (c) during these years the debtor constructed its Northern California extension at a cost of approximately $10,000,000. Until this extension was completed and until its contribution of earnings to the debtor's property had become settled and established the future earnings were not fairly indicated by the history of the period considered by the Commission.

(f) Under the Commission Plan all of the common stock authorized is allotted to secured creditors. In so far as this stock represents a value, present or prospective, in excess of the secured claims, such allotment results in transferring from the Corporation and The Western Realty Company, as unsecured creditors, and from the Corporation, as holder of all the stock of the debtor, their respective interests in the property.

(g) The Commission Plan erroneously computes accrued interest due the Reconstruction Finance Corporation at an amount $176,005 in excess of the true amount due under the agreement between the Reconstruction Finance Corporation and the debtor, as modified by these parties.

(h) For all the reasons hereinabove stated the Commission Plan does not comply with the provisions of Section 77(e) in that it is not "fair and equitable", it does not "afford due recognition to the rights of each class of creditors and stockhold-

ers", and particularly unsecured [901] creditors and stockholders. It "discriminates unfairly in favor of any class of creditors", i. e., in favor of secured creditors.

(i) For all the reasons hereinabove stated the Commission Plan does not conform to the requirements of the law of the land reagrding the participation of the various classes of creditors and stockholders. (Section 77(e).)

(j) For the same reasons the Commission Plan is in violation of the law of the land in that it deprives the unsecured creditors and the stockholders of their property without just compensation and without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

V. The "public interest" does not justify the confiscation of property or the transfer of one person's property to another.

Section 77(d) requires that the plan approved by the Commission shall be "compatible with the public interest". Without undertaking here to analyze the attempt of the Commission in its report of October 10, 1938 (230 I. C. C. Rep. p. 87) to interpret and apply this provision, the Corporation urges that the "public interest", however defined, cannot justify the confiscation, without compensation, of the interest of unsecured creditors or stockholders, and the transfer of that interest to secured creditors where the property of the debtor

has a value in excess of the secured claims. (Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 602, 79 L. Ed. 1593, 1611.)

VI. Amendments to Commission Plan Proposed and Requested by Corporation.

The Plan can and should be modified so as to give some protection to the unsecured claims and to the stock of the equity, without impairing the prior position of the secured claims. This could be accomplished by allotting to the secured claims, in lieu of the common stock allotted to them under the Commission Plan, additional income bonds and preferred stock in such amounts as would preserve and [902] protect their priorities. Common stock should be issued to the unsecured creditors and to the sole stockholder in such amounts and proportions as may be just. It may be that for some years the earnings will not be such as to permit the disbursement of much or anything in dividends. If, however, the earnings of the railroad should increase so as to give earning power to the common stock, fairness and equity require that the unsecured creditors and the stockholder should have a chance to get some benefit from those earnings after the preferred creditors are fully protected. It is not just, fair or equitable that any such possible or prospective increase over and above the proper protection of their claims should go to the secured creditors to the total exclusion of the general creditors and the stock equity. The suggested modifications

would fully protect the priorities of the secured creditors. Whatever value there would be in the common stock would be subordinate to the securities issued to the secured creditors and would not affect their rights.

The Corporation is not directly concerned with the proportions in which senior securities are allotted to the various secured creditors. That is a question which can best be presented by the secured creditors themselves. Since, however, there is a value over and above the amounts sufficient to satisfy all secured claims, that excess should be capitalized in the form of common stock of no par value and be allotted to the unsecured creditors and the holder of the stock of the debtor.

In order to interfere as little as possible with the Commission Plan, the Corporation suggests that the number of shares of common stock of no par value to be authorized shall be the number provided for in the Commission Plan, i. e., 319,441 shares. The Corporation requests and petitions that the plan be modified:

(a) By allotting to the secured creditors in lieu of common stock of the reorganized company additional income bonds and preferred stock in such amounts as will fully protect their true claims and priorities, and [903] that the amount of income bonds and preferred stock to be issued be increased accordingly;

(b) That the common stock consisting of 319,441 shares of no par value be allotted as follows:

To The Western Realty Company for its unsecured claim of $61,667—617 shares of such common stock;

To the Corporation for its unsecured claim of $7,749,221—77,492 shares of such common stock;

To the Corporation for its holding of $28,300,000 in preferred stock and $47,500,000 in common stock of the debtor—the balance of such proposed issue of common stock, amounting to 241,332 shares thereof.

Wherefore, the Corporation respectfully prays that this Court return to the Commission the Commission Plan with the recommendation that it be amended as hereinabove requested, and for such other and further relief as to the Court may seem just and proper.

M. C. SLOSS,
SLOSS, TURNER & FINNEY,
Attorneys for The Western Pacific Railroad Corporation. [904]

State of California,
City and County of San Francisco—ss.

M. C. Sloss, being duly sworn, deposes and says that The Western Pacific Railroad Corporation, named in the foregoing document, is a corporation organized under the laws of the State of Delaware, that it has no office and no officer within the State of California; that affiant is an attorney for said

Corporation, that he has been duly authorized to sign and verify the foregoing document on behalf of said Corporation, and that said document entitled "Objections of The Western Pacific Railroad Corporation to Commission Plan of Reorganization, Statement of Claims for Equitable Treatment and Petition for Amendment of Such Plan" is true except as to matters therein stated on information and belief and as to those matters he believes it to be true.

M. C. SLOSS.

Subscribed and sworn to before me this 6th day of December, 1939.

(Seal) VIOLET NEUENBURG,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 31, 1942.

[Endorsed]: Filed Dec. 8, 1939. [905]

[Title of District Court and Cause.]

OBJECTIONS OF THE RAILROAD CREDIT CORPORATION TO THE PLAN OF REORGANIZATION CERTIFIED BY THE INTERSTATE COMMERCE COMMISSION, AND STATEMENT OF CLAIM FOR EQUITABLE TREATMENT.

Now comes The Railroad Credit Corporation, a secured creditor of the Western Pacific Railroad

Company, Debtor, and, pursuant to the Order of this Court dated November 8, 1939, submits its *objections* to the Plan of Reorganization approved by the Interstate Commerce Commission by order dated June 21, 1939, and its *claims* for equitable treatment.

The detailed and specific objections of The Railroad Credit Corporation are that said Plan does not meet the requirements of subsection (e) of Section 77 of the Federal Bankruptcy Act as amended, in that:

1. Said Plan provides for an arbitrary "effective [907] date" that will be at least a year earlier than the actual effective date of a plan of reorganization herein (I. C. C. Order, Par. A), and fails to make adequate provision and adjustments for the application of proceeds and income from collateral security during the interim.

2. The Plan provides for a maximum capitalization that is so low as to be confiscatory, and diverts assets of the Debtor from junior creditors to senior creditors (I. C. C. Order, Pars. B and P-6). This situation is recognized in the Plan itself: the value of new common stock to be issued upon reorganization is treated for most purposes as being $50 per share (See Item 4, below), but for the purpose of computing capitalization, it is to be taken at $100 per share (I. C. C. Order, Par. D).

3. The Plan, though providing for a low capitalization, and leaving substantial assets uncapi-

talized, requires the establishment and maintenance of a capital fund, thus diverting income from some creditors, especially the collaterally secured creditors whose status the Plan proposes to change by shifting them in part from a creditor to an equity position (I. C. C. Order, Par. L).

4. The Plan further depreciates the standing accorded by it to existing collaterally secured creditors (a) by diverting income to sinking funds for both the new fixed and income mortgages (I. C. C. Order, Pars. D, J, and L); (b) by providing for the conversion of income bonds into common stock at the rate of 20 shares per $1,000, principal amount of such bonds (I. C. C. Order, Par. J); (c) by providing that new preferred stock shall share ratably with common stock in dividends declared in excess of 3% upon such common stock, and by other provisions (such [908] as sale price of new stock) of a like effect (I. C. C. Order, Par. M). The effect of such a course upon future financing is obvious.

5. The Plan authorizes 1,000,000 shares of no par common stock, but so restricts the issue thereof that no such stock is to be issued to unsecured creditors (I. C. C. Order, Pars. N and P, and Item 2, supra); and further requires that unsecured claims against the Debtor not entitled to priority over the first mortgage shall be canceled (I. C. C. Order, Par. R).

6. The Plan provides that the collaterally secured claim of the Reconstruction Finance Corpo-

ration "shall be provided for under the plan in like securities and in like proportions as those given holders of the debtor's first mortgage bonds" (I. C. C. Order, Pars. O and P). The treatment proposed for the claim of the Reconstruction Finance Corporation is fully justified on the basis of the collateral securing that claim, viz., general mortgage bonds of the Debtor, but not otherwise. The claims of The Railroad Credit Corporation and A. C. James Company, to the extent that they are secured by the same bonds, or equivalent value, are entitled to comparable treatment, but the Plan does not so provide (I. C. C. Order, Par. P). The securities to be issued for new money should stand on their own footing.

7. The Plan provides that the sale of $10,000,000 principal amount of new first mortgage bonds to Reconstruction Finance Corporation (on account of which Reconstruction is to receive preferential treatment in respect of its existing secured claim), shall be "subject to the approval and authorization of this Commission" (I. C. C. Order, Par. O). By this is meant that the [909] Reconstruction Finance Corporation, even though it is ready and willing to act (and even though said Plan has been assented to by the requisite amount of all affected security holders and has been approved and confirmed by the Court), will not be permitted to purchase said bonds upon any terms at date of reorganization or at any other time unless and until the Commission, in a separate proceeding which may

not be instituted until after final confirmation of the Plan, has approved such purchase by the Reconstruction Finance Corporation upon the record then made before it (I. C. C. Report dated June 21, 1939, sheet 9).

8. The Plan provides that certain collateral pledged by the Debtor as security for notes to the Reconstruction Finance Corporation, The Railroad Credit Corporation, and the A. C. James Company shall, for some undisclosed reason, be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled, but it provides no machinery for such reduction to possession (I. C. C. Order, Par. R).

9. The Plan modifies in some degree the erroneous allocation of assets of the Debtor as between the first mortgage and the general mortgage (I. C. C. Report dated June 21, 1939, sheet 12), but otherwise perpetuates the error in the earlier report (dated October 10, 1938) wherein the Commission said, "We conclude that, for the purpose of determining the equity of plans of reorganization for the debtor, the lien of the general mortgage on the Northern California extension and various branches and spurs in question should be considered subject to the lien of the first mortgage. * * * We consider, for the purposes of a plan of reorganization, that * * * the [910] debtor's equity in that equipment (viz., rolling stock subject to leases, conditional-sale agreements, or equipment-trust

agreements) is subject to the lien of the first mortgage. We consider that the property characterized as non-carrier real estate is also covered by the lien of the first mortgage. * * * While due recognition must be accorded to the rights of the creditors with whom are pledged general-mortgage bonds, those creditors are not entitled to the same treatment as first-mortgage bondholders, who should be considered as having a first lien upon practically all the assets of the debtor" (I. C. C. Report decided October 10, 1938, sheets 58, 59 and 60). There is necessarily involved in these erroneous conclusions, the erroneous construction placed by the Commission upon certain provisions of the first mortgage, and the effects which were assumed to follow (id. sheets 56, 57).

Note: The Report of the I. C. C. (dated June 21, 1939) should have stated that the plan proposed by The Railroad Credit Corporation (sheets 2-8) was put forward as a *compromise* plan upon which it was believed that all parties would agree in order to expedite reorganization, and not as a plan which The Railroad Credit Corporation itself believed was fair and equitable from its own standpoint.

The claims of The Railroad Credit Corporation for equitable treatment are that the Plan should be so modified that:

(a) The Railroad Credit Corporation may be accorded treatment consonant with its status as a secured creditor, [911] and receive new securities representing a fair equivalent of the several items of collateral security pledged with it by the Debtor, or issued or created by the Debtor and pledged with it by third persons.

(b) The Railroad Credit Corporation may not be prejudiced in its holdings of collateral pledged with it by third persons, whether such collateral was issued or created by the Debtor or others; and The Railroad Credit Corporation may not be prejudiced in the application by it of income and proceeds of collateral pending the carrying out of a plan of reorganization herein.

(c) The priority of the general mortgage, as asserted in this proceeding by the Trustee under said mortgage will be recognized, and appropriate adjustments made in the allocation of assets of the Debtor, as between the general mortgage and the first mortgage, and, as a consequence, in the allocation of new securities to the holders of general mortgage and first mortgage bonds, respectively, and also in the allocation of new securities to The Railroad Credit Corporation.

(d) The capital structure will reflect the actual value of the property, regardless of the special or economic desirability of holding back a cushion of uncapitalized but capitalizable assets, to the end that the claims of the Western Pacific Railroad Corporation against the Debtor, which The Railroad

Credit Corporation holds in pledge, may duly share in the distribution of the assets of the Debtor upon reorganization.

(e) The income of the reorganized company may not be unduly diverted for the benefit of some creditors, to the prejudice of other creditors, whether by the establishment of unnecessary capital or sinking funds, or otherwise. [912]

Wherefore, The Railroad Credit Corporation prays that the Plan of Reorganization, as certified to the Court by the Interstate Commerce Commission, shall be disapproved and referred back to said Commission for further action in accordance with the provisions of Section 77 of the Federal Bankruptcy Act as amended, so as to give due effect to the rights and interests of The Railroad Credit Corporation as the same may be finally determined and decreed.

Respectfully submitted,

THE RAILROAD CREDIT CORPORATION,

By D. WILLARD, JR.

Vice-president and General Counsel.

Baltimore, Md.,
December 4, 1939.

[Endorsed]: Filed Dec. 6, 1939. [913]

CLERK'S COPY.

Vol. III

TRANSCRIPT OF RECORD

537028

163

Cir. C. A. 9

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING ~~INTERNATIONAL~~ BONDHOLDERS COMMITTEE, PETITIONERS, Foreclosure

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 30, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1941.
JANUARY 17, 1942.
FEBRUARY 28, 1942.
MARCH 30, 1942.

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME III

Page 963 to 1432

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

[Title of District Court and Cause.]

OBJECTIONS OF THE WESTERN PACIFIC RAILROAD COMPANY, THE DEBTOR HEREIN, TO PLAN OF REORGANIZATION CERTIFIED TO THIS COURT BY THE INTERSTATE COMMERCE COMMISSION, AND CLAIM OF SAID DEBTOR FOR EQUITABLE TREATMENT.

The Western Pacific Railroad Company, the Debtor herein, pursuant to Subsection (e) of Section 77 of the Act of Congress commonly known as the Bankruptcy Act, and to the order of the Honorable A. F. St. Sure, Judge of this Court, filed herein November 8, 1939, hereby objects to the Plan of Reorganization of said Debtor approved by [914] the Interstate Commerce Commission on October 10, 1938 by its order bearing said date, as modified by the Report and Order of said Commission dated June 21, 1939, and thereafter certified to this Court pursuant to the provisions of said Subsection (e) of said Section 77 on the grounds that said Plan of Reorganization is unfair and inequitable, does not afford due recognition to the rights of each class of creditors and stockholders of the Debtor, discriminates unfairly in favor of certain classes of creditors and stockholders, and does not conform to the requirements of the law of the land regarding the participation therein of the various classes of creditors and stockholders of the Debtor, and for a more detailed and specific

statement of said Objections and of the claims of the Debtor for equitable treatment of its creditors and stockholders, the Debtor further states and shows to the Court as follows:

(a) The modified Plan of the Interstate Commerce Commission without warrant of law and without lawful evidence attempts to limit the capitalization of the reorganized Company (taking no par value stock at $100 per share) to $97,763,522, which is lower than (1) the cost of the Debtor's railroad property devoted to public use adequately depreciated, or (2) the value of its property as reported by the Interstate Commerce Commission pursuant to Section 15(a) of the Interstate Commerce Act together with capital expenditures between the valuation date and January 1, 1939, or (3) the value of the Debtor's property entitled to the protection of the Fifth Amendment to the Constitution of the United States. [915]

(b) The modified Plan of the Interstate Commerce Commission, without warrant of law and without lawful evidence attempts to exclude from any participation therein or in the distribution of securities of the reorganized Company thereunder and to treat as without value and extinguish or expropriate $7,809,639 of unsecured indebtedness, and $28,300,000 par value of Preferred Stock, and $47,500,000 par value of Common Stock of the Debtor, although after making whole all claims entitled to priority there is a residuum of property value or equity applicable thereto of not less than

$22,215,138 on any of the three bases specified in the preceding paragraph (a).

(c) The modified Plan of the Interstate Commerce Commission disregards Subsection (1) of said Section 77 which provides that the rights and liabilities of creditors and of all persons with respect to the Debtor and its property shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day the Debtor's petition was filed, which day was August 2, 1935, and without warrant of law and without lawful evidence provides for the issue to holders of First Mortgage Bonds of the Debtor and to secured creditors of the Debtor of shares of Common Stock of the reorganized Company in respect of many millions of dollars of interest accrued but unearned after said date thereby reducing the shares of such Common Stock fairly and equitably available for distribution to the Debtor's other creditors and stockholders.

(d) The modified Plan of the Interstate Commerce Commission attempts unlawfully to abridge or impair the [916] right of the reorganized Company to manage its own affairs by providing for a mandatory Capital Fund of $500,000 in each year regardless of the necessities of the property.

(e) The modified Plan of the Interstate Commerce Commission is an impracticable Plan unacceptable to the requisite percentages of creditors and stockholders of the Debtor entitled to participate therein and unless modified so as to afford fair

and equitable treatment to all classes of creditors and stockholders of the Debtor will precipitate litigation of many serious issues of law and fact such as the true valuation of the Debtor's property involving a judicial review and revision of the principles of valuation stated by the Interstate Commerce Commission in Texas Midland Railroad, 77 I. C. C. 1, and subsequent cases; the conflicting lien claims of the Trustees of the Debtor's First Mortgage and General and Refunding Mortgage in respect of the Northern California Extension representing an investment in excess of $10,000,000; the operation and incidence of the after-acquired property clauses of the Debtor's First Mortgage and General and Refunding Mortgage in respect of equipment representing an investment of many millions of dollars made subsequent to the execution and delivery of the First Mortgage; and other issues which the Supreme Court of the United States in its opinion in the case of Thomas K. Case, and others v. Los Angeles Lumber Products Company, Ltd., decided November 6, 1939, states are proper subjects of adjustment and compromise in proceedings under the Federal Bankruptcy Act.

As the concrete claim of the Debtor for fair and equitable treatment of its creditors and stockholders and [917] as a sound basis for the adjustment and compromise of serious issues of law and fact and the avoidance of wasteful litigation, the Debtor respectfully asks that this Court approve and recommit to the Interstate Commerce Commission,

together with a transcript of additional evidence in support thereof, the Plan of Reorganization annexed as Exhibit A to its Peti ion filed with the Interstate Commerce Commission on August 2, 1939.

Subject to possible modifications in detail which might readily be worked out in a pretrial conference under Rule 16 of the Rules of Civil Procedure, this Plan of Reorganization, which represents the result of conferences between substantial creditor and stockholding interests extending over a period of many weeks immediately prior to the release of the Interstate Commerce Commission's modified Plan, is one that should prove acceptable to the requisite percentages of the Debtor's creditors and stockholders and if supported by additional evidence deemed essential by the Interstate Commerce Commission should also prove acceptable to the Interstate Commerce Commission.

To the end that this Court may receive evidence to supply or correct any factual deficiencies in the record as certified by the Interstate Commerce Commission, attention is respectfully directed to the conclusions of said Commission in its Report and Order dated September 19, 1939, denying the Petition of the Debtor for the substitution of the above-mentioned Plan, Exhibit A, for the Commission's modified Plan. The Commission says:

(First Conclusion)

"We are not satisfied that the mandatory [918] feature of the capital fund should be

reduced from $500,000 to $300,000. In both of our prior reports we found in effect that yearly contributions of $500,000 to the capital fund were essential to meet the debtor's requirements. In our report of June 21, 1939, we considered requests that the yearly contributions to the capital fund be reduced to $300,000. The debtor's petition does not offer to prove or set forth facts even tending to show that we were in error in our finding that the capital fund should be mandatory at $500,000."

At the hearing on these Objections the Debtor will be prepared to present evidence showing that the Capital Fund should be wholly discretionary and that a mandatory Capital Fund of $500,000 is in excess of the probable requirements of a property recently rehabilitated at a cost in excess of $10,000,000.

The Commission further says:

(Second Conclusion)

"The allocation of 8.54 percent of the new common stock to the Western Pacific Railroad Corporation, in its capacity as a general creditor, and 23.59 percent to it in its capacity as a stockholder, and 0.07 percent to the Western Realty Company as a general creditor would require a reversal of our findings that those interests have no value, or a finding that the concessions required of the senior interests are justified and are compensated by concessions to

be made by the junior interests. This proposed sharing of common stock affects also our previous finding as to what constitutes fair and equitable treatment of part of the interests of the first-mortgage bondholders. The debtor's petition does not set forth or offer to prove facts indicating that our findings with respect to these matters were erroneous or furnish any other basis for a finding that the proposed new plan would be fair and equitable."

The Debtor maintains that the Interstate Commerce Commission has made no such finding of value as the amended Bankruptcy Act contemplates as the basis for excluding the Debtor's unsecured creditors and stockholders from [919] participating in the Plan of Reorganization certified to the Court and that no value of the Debtor's property has been certified to this Court under Subsection (e) of Section 77 of the Bankruptcy Act, and that the record contains no evidence or factual data to support such a finding, but even if such a finding had been made it is ineffectual for any purpose under said Subsection (e) unless and until affirmed by this Court. But said Commission here recognizes that such a finding is inappropriate if under an agreed-upon Plan of Reorganization in which doubtful issues of fact and law are adjusted and compromised, "the concessions required of the senior interests are justified and are compensated by concessions to be made by the junior interests".

At the hearing upon these Objections, the Debtor will be prepared to present evidence to show that 32.20% of the Common Stock proposed to be issued to the junior interests under the substitute Plan of Reorganization annexed as Exhibit A to its Petition filed August 2, 1939, is valued by the Interstate Commerce Commission under the modified Plan at $5,863,020, and that by conceding this amount in Common Stock of the reorganized Company to the junior interests, the senior interests will receive under the adjustment or compromise the following considerations, among others:

(1) Recognition of approximately $10,000,000 of interest accrued but unearned subsequent to August 2, 1935, and of doubtful validity as a provable claim under Subsection (1) of said Section 77.

(2) "Relinquishment of the substantial claim of the General and Refunding Mortgage to an undivided half [920] interest in the Northern California Extension representing an investment of more than $10,000,000.

(3) Relinquishment of the substantial claims of the General and Refunding Mortgage to a first lien on the equity in equipment valued at $6,179,121.48, and on $892,700.98 of free cash on hand on August 2, 1935, and other claims of like character.

Not only are these concessions by the junior interests to the senior interests adequate as a consideration for the concession by the senior interests to the junior interests of 32.20% of the Common Stock

of the reorganized Company valued by the Interstate Commerce Commission at $5,863,020, but the compromise and adjustment is one that this Court after hearing may find to be extremely favorable to the senior interests.

The Commission further says:

(Third Conclusion)

"In our report of October 10, 1938, we found that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital and sinking funds should not exceed $2,000,000 per annum. In our report of June 21, 1939, we modified that finding to the extent of approving a plan by which those annual charges would slightly exceed $2,000,000, viz., $2,055,155. Under the new plan those charges would be $2,300,530. There has been no showing or offer of proof of new facts or changed conditions that would warrant our modifying our basic finding to that extent.

We are not persuaded that there is justification for changing the relationship of fixed debt to total capitalization from that of the approved plan to that resulting from the capitalization under the new plan."

Whether the claims of the senior creditors should be settled by the allocation of income bonds and preferred [921] stock on the basis of 40% in income bonds and 60% in preferred stock or should

be settled through the issue of 50% of income bonds and 50% of preferred stock is a minor issue readily adjustable in conference. The Debtor objects to the allocation on the basis of 40% in income bonds and 60% in preferred stock on the ground that this adjustment is unfair and inequitable to the senior creditors and at the hearing will ask permission of the Court to offer additional evidence with respect to the earning power of the Debtor's property. Estimates of prospective earnings were offered by the Debtor solely on the issue of a conservative fixed interest charge. No estimates were offered as a basis for limiting capitalization or fixing the proportion of capitalization to be represented by Income Bonds. The Debtor contends that these subjects are not within the Commission's jurisdiction under Section 77 of the Bankruptcy Act.

In its fourth and final conclusion the Commission states:

> "Nor do the responses we have received warrant our regarding the new plan as one agreed to by the parties."

The Debtor recognizes that the agreement of the parties of record to accept the substitute Plan was inchoate at the time the Interstate Commerce Commission released its own modified Plan and that the Insurance Group Committee representing substantial holdings of First Mortgage Bonds of the Debtor failed to support the Debtor's petition filed August

2, 1939, asking that the said Commission approve and certify the substitute Plan to this Court in lieu of its own modified Plan. A pretrial under Rule 16 of the Rules of Civil Procedure offers this Committee a locus [922] penitentiae as well as an opportunity to propose constructive amendments designed to bring all parties together in support of a Plan of Reorganization that will be fair and equitable to all creditors and stockholders, will be in the public interest, and will avert costly and destructive litigation.

(f) The modified Plan of the Interstate Commerce Commission is predicated upon an erroneous determination of judicial questions specified in the preceding paragraph (e) all of which the Debtor asks be reviewed and determined by this Court in the exercise of its judicial authority under said Section 77 unless settled under sanction of this Court as "a normal part of the process of reorganization".

Dated, December 8, 1939.

PIERCE & GREER,
40 Wall Street,
New York, N. Y.,
C. W. DOOLING,
878 Mills Building,
San Francisco, California,
Attorneys and Counsel for Debtor.

[Endorsed]: Filed Dec. 8, 1939. [923]

[Title of District Court and Cause.]

OBJECTIONS OF IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER GENERAL AND REFUNDING MORTGAGE, TO PLAN OF REORGANIZATION APPROVED BY INTERSTATE COMMERCE COMMISSION ON JUNE 21, 1939.

[924]

Irving Trust Company is the Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company dated as of January 1, 1932, whereunder there are now issued and outstanding $18,999,500 principal amount of bonds. Pursuant to the provisions of the order of this Court dated November 8, 1939, it hereby objects, on behalf of the holders of bonds issued under said Mortgage, and on its own behalf, to the Plan of Reorganization approved by the Interstate Commerce Commission in its report and order in Finance Docket No. 10913, decided June 21, 1939, upon the following grounds:

I. On Behalf of the Holders of Said Bonds:

1. Said Plan of Reorganization is not fair and equitable and does not afford due recognition to the rights of the holders of bonds secured under said General and Refunding Mortgage and discriminates unfairly in favor of [925] the holders of bonds secured by the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916.

2. Upon information and belief, said General and Refunding Mortgage bonds are pledged to se-

cure debts aggregating approximately $10,481,685.60, plus interest; and said General and Refunding Mortgage is a first lien prior to or on a parity with any lien of the First Mortgage upon properties of the Debtor greater in value than the debts secured by said General and Refunding Mortgage bonds; and the holders of General and Refunding Mortgage bonds are entitled to treatment in any reorganization plan on a parity with the treatment accorded to holders of First Mortgage bonds.

3. In its report in this matter dated October 10, 1938, the Interstate Commerce Commission stated as follows:

> "* * * While due recognition must be accorded to the rights of the creditors with whom are pledged general-mortgage bonds, those creditors are not entitled to the same treatment as first-mortgage bondholders, who should be considered as having a first lien upon practically all the assets of the debtor. It follows that holders of the debtor's first-mortgage bonds should receive securities of a higher rank than those allotted to other creditors, at least to the extent that existing conditions will permit."

The Plan proposed by the Commission and annexed to its said report dated October 10, 1938, provided that holders of existing First Mortgage Bonds should receive for each $1,000 principal amount of such bonds and accrued and unpaid interest thereon,

$400 of new income mortgage bonds, $600 of new preferred stock and 3.13 shares of new common stock, and that holders of General Mortgage Bonds should receive only new [926] common stock in satisfaction of their claims.

4. The report of said Commission dated June 21, 1939, modified its report dated October 10, 1938, in certain respects and allocated to the holders of General Mortgage Bonds a total of $732,010 of new income mortgage bonds and $1,147,955 of new participating preferred stock, in recognition of the admittedly prior lien of the General and Refunding Mortgage upon $223,732 of cash in the hands of the Mortgage Trustee and upon a note of Tidewater Southern Railroad Company for $508,278 and $1,147,955 par value of capital stock of Tidewater Southern Railroad Company pledged under the General and Refunding Mortgage.

5. The report of said Commission dated June 21, 1939, failed to give any recognition to the lien of the General and Refunding Mortgage, which this Trustee contends is prior to any lien thereon of the First Mortgage aforesaid, upon (a) the debtor's equity in rolling stock subject to lease, conditional sale or equipment trust agreement and having a value of over $6,000,000 above all amounts due thereon, (b) non-carrier real estate having a valuation of approximately $3,427,923.80 and (c) branch lines and jointly owned tracks aggregating approximately 23.33 miles in length, the Commission having previously, and erroneously, ruled in its report

dated October 10, 1938 (although recognizing that final adjudication of such questions must be made by the Court) that the properties last mentioned were subject to the lien of the First Mortgage.

[927]

6. The report of said Commission dated June 21, 1939 erroneously held that the prior lien of the General and Refunding Mortgage on stock and bonds of Central California Traction Company, having a book value of $633,367.10 and stock of Alameda Belt Line, having a book value of $465,300, had no material value, and refused to give any recognition thereto in determining the allocation of securities.

7. The report of said Commission dated October 10, 1938, was based on the conclusion that the lien of the General and Refunding Mortgage on that portion of the debtor's railway known as the Northern California Extension was subject to the prior lien of the said First Mortgage to the extent of the entire debt secured by the First Mortgage; and said report and Plan, dated June 21, 1939, was likewise based on that conclusion, and gave no recognition, in determining the allocation of securities, to the lien of the General and Refunding Mortgage upon said Northern California Extension. Upon information and belief, said Northern California Extension was constructed during the years 1930, 1931 and 1932 at a total cost of approximately $10,434,408, of which only $4,875,000 was supplied from the proceeds of the First Mortgage Bonds; only ap-

proximately one-half of the right of way upon which said Northern California Extension is constructed was acquired with proceeds of First Mortgage Bonds; and the actual value of said Northern California Extension is greatly in excess of the amount of proceeds of First Mortgage bonds used in the construction thereof. Upon information and belief, the First [928] Mortgage is entitled to a lien only upon the portion of said Northern California Extension which was constructed with the proceeds of First Mortgage Bonds, and only for the amount of the proceeds of First Mortgage Bonds which were used in its construction; and the General and Refunding Mortgage, which specifically describes said Northern California Extension as subject to the lien thereof, is entitled to a prior lien upon the portion of said Northern California Extension which was not constructed with the proceeds of First Mortgage Bonds and to a lien upon the balance of said Northern California Extension, subject only to a lien in favor of the First Mortgage Trustees for the amount of the proceeds of First Mortgage Bonds used in the construction thereof.

8. The report and Plan of said Commission dated June 21, 1939 gave no recognition to the fact that cash in the Debtor's possession on the date of institution of the reorganization proceedings amounting to $848,452.50 and miscellaneous notes, advances and unpledged securities having a book value of approximately $101,409.35, were not subject to the lien of any mortgage, and that there-

fore the creditors secured by General Mortgage Bonds were entitled to share in the distribution thereof and to receive securities of the same type issued to holders of First Mortgage Bonds on account of their share therein.

9. This Trustee, on behalf of the holders of bonds issued under the General and Refunding Mortgage, as its claim for equitable treatment, asserts that the holders of such bonds are entitled to receive securities of the same classes [929] and in the same proportions as may be awarded under the Plan to the holders of First Mortgage Bonds.

II. On Behalf of the Holders of Said Bonds and on Behalf of the Trustee Individually:

10. The Plan and report of said Commission dated June 21, 1939, provide for the payment of expenses of reorganization allowed by the Court within the maximum fixed by the Commission, and direct that existing mortgages on the debtor's properties be released and cancelled and all funds on deposit with the Trustees under said mortgages and all collateral pledged thereunder be surrendered to the reorganized company free from the liens of said mortgages, after deduction therefrom of any amounts which the Court may find should be deducted under the provisions of said mortgages and consistent with the Plan. The Commission in prior proceedings has held that the amount of compensation and expenses of mortgage trustees (including counsel fees), allowable under Section

77(c)(12) of the Bankruptcy Act, is to be restricted according to the extent to which such services have been of benefit to the Debtor's estate and to the reorganization plan; and the compensation fixed by the Commission for such services and expenses may be less than that to which the mortgage trustee would be entitled pursuant to its contract right under the General and Refunding Mortgage in respect of services and expenses in the administration of the trust under said Mortgage. [930]

11. No express provision is made in the report and plan of the Commission herein for the determination and satisfaction of this Trustee's lien under Article Eleven, Section 1(g), of the General and Refunding Mortgage upon property held under said Mortgage for its compensation and expenses (including counsel fees), in respect of services in the administration of the trust but which may not be covered by compensation within the maximum limits fixed by the Commission under Section 77(c)(12) of the Bankruptcy Act. The said Trustee's lien under the General and Refunding Mortgage is required by Section 77—particularly Section 77(b)(5) and Section 77(f)—to be fully provided for and satisfied by the reorganization plan before any property subject to be lien of said Mortgage may be transferred free and clear of said lien, and before the Trustee may be required to join in a transfer and conveyance of the mortgaged property or to release and cancel said mortgage. There should be contained in the reorganization

plan an express and clear provision for the satisfaction of said lien by the full payment thereof.

12. Said Plan finds that claims against the Debtor entitled to priority over any of its mortgages are not affected thereby, and provides that the Court may cure any defect, supply any omission or reconcile any inconsistency in such manner and to such extent as may be necessary or expedient in order to carry out the Plan effectively. This Trustee is uncertain as to whether said provision of the Plan would permit this Court, as a part of the presently [931] proposed Plan, to provide for the payment and discharge of said Trustee's lien, or whether it would be necessary for the Court to refer the proceeding back to the Commission for further action in respect of said lien. By either the one or the other of such methods, this Court should see that the reorganization plan as finally adopted herein shall provide for the full payment and discharge of said lien; and this Trustee asserts that it would be equitable and proper for the reorganization plan to provide for such payment and discharge without taking away from the creditors secured by the General and Refunding Mortgage bonds any of the new securities which would be distributable to them as such creditors and without deducting the amount of said Trustee's lien from the value of the security for such creditors.

Wherefore the Substituted Trustee respectfully prays: (a.) that this Court determine the lien of the General and Refunding Mortgage upon the

Debtor's property, and the Substituted Trustee's claim for equitable treatment; (b) that this Court disapprove the proposed reorganization plan as not fair and equitable to the holders of the debtor's General and Refunding Bonds; (c) that this Court, in order to cure defects, supply omissions or reconcile inconsistencies in the proposed Plan, or in order to have a new and proper plan, determine that the lien of the Substituted Trustee for compensation and expenses (including counsel fees), in so far as the same may not be covered by allow- [932] ances made within the maximum fixed by the Commission under Section 77(c)(12), shall be fully paid in cash from the funds in the hands of the Substituted Trustee; (d) that the Court refer the proceedings back to the Interstate Commerce Commission for further action in accordance with the rights of the creditors secured by the General and Refunding Mortgage bonds as asserted and to be asserted by this Trustee and as this Court shall determine; and (e) for such other and further relief as may be just and proper.

Dated: New York, December 5, 1939.

IRVING TRUST COMPANY,
as Substituted Trustee under General and Refunding Mortgage of The Western Pacific Railroad Company dated as of January 1, 1932,

By F. G. HERBST,
Vice-President.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building,
San Francisco, California.
DAVIES, AUERBACH,
CORNELL & HARDY,
One Wall Street,
New York City.
H. C. McCOLLOM,
Of Counsel,
Attorneys for Substituted
Trustee.

[Endorsed]: Filed Dec. 8, 1939. [933]

[Title of District Court and Cause.]

OBJECTIONS TO COMMISSION PLAN OF REORGANIZATION, STATEMENT OF CLAIMS FOR EQUITABLE TREATMENT, AND PETITION FOR AMENDMENT OF SUCH PLAN TO CORRECT DEFECTS THEREIN.

To The Honorable A. F. St. Sure, Judge of the United States District Court for the Northern District of California, Southern Division:

The Western Realty Company, an unsecured creditor of the Debtor above named, hereby objects to the Plan of Reorganization of the Debtor (hereinafter designated as the "Commission Plan") as promulgated by the Interstate Commerce Commis-

sion in its order in Finance Docket No. 10913, dated June 21, 1939, and presents its claims for equitable treatment, pursuant to the provisions of the order of this Court, dated November 8, 1939, and to the provisions of Subsection (e) of Section 77, of the Bankruptcy Act, and does hereby represent to the Court and [934] petition as follows:

I. General Objections to Commission Plan:

Subject to the more detailed and specific objections and claims for equitable relief hereinafter set forth, your petitioner objects generally to the Commission Plan of June 21, 1939 on the ground:

(a) That the Commission Plan is grossly unfair and inequitable as to your petitioner, fails to give due recognition to the legal rights and equitable claims of your petitioner and discriminates unfairly against your petitioner.

(b) That although the Commission has adopted the valuation of the property of the Debtor previously found by it under Section 19 (a) of the Interstate Commerce Commission Act, and has recognized in making such valuation the undisputed investment in the property of the Debtor heretofore made, the Commission has nevertheless, in the plan which it has originated and promulgated, and without authority of law, completely disregarded such valuation and such investment, and proposes a capital structure based not upon evidence but upon unsupported theory; that the proposed capital structure promulgated by the Commission, ignoring

true values of railroad property, discriminates unfairly as between various classes of creditors, completely disregards the legal rights and equitable claims of the general creditors of the debtor, including your petitioner.

(c) That the Commission Plan is not in conformity with the law of the land, and is unauthorized by the provisions of Section 77 of the Bankruptcy Act.

(d) That the Commission Plan is grossly unfair to the unsecured creditors of the Debtor, including your petitioner, and to the equitable owners of the property, in that, although the valuation of the property of the Debtor is greatly in excess of its entire indebtedness, the Commission Plan appropriates the [935] entire excess to the overpayment of secured creditors and thereby the Commission Plan appropriates the property of your petitioner and others without due process of law and in violation of the law of the land.

To all of which your petitioner objects and presents its claims for equitable treatment, all as is set forth in detail and specifically below.

II. Petitioner's Claim:

Your petitioner is an unsecured creditor of the Debtor in the principal amount of $50,000 together with unpaid and accrued interest thereon at the rate of five (5) per cent per annum from July 18, 1930, which unpaid interest to January 1, 1939, (the effective date of the Commission Plan)

amounted to $11,666.68, or an aggregate debt on January 1, 1939, of $61,666.68.

The said indebtedness owned by the Debtor to your petitioner arises from an advance made on open account by your petitioner to the Debtor as follows:

On July 18, 1930, at the request of the Debtor, The Western Pacific Railroad Company, your petitioner advanced to the Debtor the sum of $100,000 in cash, to be repaid with interest thereon at the rate of five (5) per cent per annum; of this sum, the Debtor on July 1, 1931 repaid $50,000, leaving a balance due of $50,000; no part of said balance of $50,000 has been paid, and no interest on said indebtedness incurred July 18, 1930, has been paid, except interest to April, 1934.

A proof of claim was duly filed by your petitioner in the above entitled proceedings for reorganization of the Debtor.

By an order entered August 20, 1935, this Court classified the above described claim of your petitioner as a separate and distinct class for the purposes of Section 77 of the Bankruptcy Act as amended. [936]

III. Treatment Accorded Petitioner's Claim Under the Commission Plan:

The Commission finds that your petitioner's claim, and other unsecured claims not entitled to priority over existing mortgages are without value and that no securities or cash should be distributed

under the plan in respect to such claims. (Report of October 10, 1938 (230 I. C. C. 61, 100-101); Order of June 21, 1939, page 27.)

IV. Property of the Debtor and Rights Thereto and Therein:

Your petitioner is an unsecured junior creditor. Its claim against the debtor corporation is relatively a small one, though the recognition and fair treatment of said claim is no less important on that account to your petitioner.

It is the established law of the land, which your petitioner recognizes, that in proceedings under Section 77 of the Bankruptcy Act, the value of the property of the Debtor is available, first to satisfy the claims of secured creditors, according to their prior rights; second, to meet and satisfy the claims of unsecured, general creditors, and third to protect and preserve the interests and investment of the equity owners, if and to the extent that this may be possible.

Northern Pacific Rwy. Co. v. Boyd, 228. U. S. 482

Louisville Trust Co. v. Louisville Rwy. Co., 174 U. S. 674

Kansas City Terminal Ry. v. Central Union Trust Co., 271 U. S. 445

But it is equally, and without dispute, the law of the land that the entire property of the Debtor, at its fair and reasonable value, constitutes for the purposes of such proceedings a fund for the recognition and fair treatment of ALL creditors, of what-

ever class, and the stockholders, subject only to prior rights as among the interests represented. In the Boyd case, the Court held that no plan can be fair and equitable which endeavors to satisfy the interests of bondholders and [937] stockholders and squeezes out the legitimate claims of general creditors. And, where the Debtor is hopelessly insolvent, both in the equity sense and in the bankruptcy sense, and a plan of reorganization is proposed which undertakes to recognize the rights of stockholders at the expense of failure to meet fully the prior claims of bondholders, the Court will not approve such plan.

Case v. Los Angeles Lumber Products Co. Ltd., U. S. (decided Nov. 6, 1939)

But where in fact the valuation of the property, as in the instant case, exceeds by more than thirty per cent the aggregate of all creditors' claims, secured and unsecured, your petitioner respectfully insists that no plan which wholly ignores such excess, and which would distribute the entire property to prior secured creditors, can be, in fact or in law, "fair and equitable."

There is nothing clearer in our law than that, in any reorganization proceeding, wherein there is to be determined the capitalization of the reorganized company and the securities to be given to each class of creditors, each creditor is entitled to insist that the values employed for that purpose be fair and not forced sale values.

In the recently decided case of Case v. Los Angeles Lumber Products Co. Ltd.—U. S.—Nov. 6, 1939, a brief was filed by the United States, in the preparation of which the Solicitor General, Special Assistants of the Attorney-General, the Chief Counsel for the Interstate Commerce Commission and the Counsel and Attorneys for the Securities Exchange Commission participated. In that brief occurs the following significant passage, bearing on the proper interpretation of Sections 77 and 77 B:

> "In cases of liquidation no one questions the right of senior security holders to full payment before any distribution of assets to junior interests. [938] Reorganization is an alternative for liquidation in the event of financial failure. *It seeks to substitute going concern values for the forced sales values of liquidation with the object of yielding greater ultimate returns to the senior interests, and allowing wider participation if the circumstances permit.*" (Italics ours)

See also

In re Dutch Woodcraft Shops—14 Fed. Supp. 467

First Nat. Bank v. Flershem—290 U. S. 504

Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lien-holders are satisfied, whether this is pres-

ent or prospective, for dividends or only for purposes of control.

Kansas City Terminal Rwy. v. Central Union Trust Co., 271 U. S. 445

So, in a case where the total value of the assets exceeded the bonded indebtedness of the debtor company, it was recently held by the Circuit Court of Appeals, Ninth Circuit, under Section 77B, that preferred stockholders were entitled to be included in the plan; that it was not unfair by reason of the fact that bondholders were to receive in new bonds one-half of the present amount of the face value of the bonds theretofore held by them, and the remaining one-half in new preferred stock; nor was the plan to be deemed unfair because the stockholders were permitted under it to continue the operation of the debtor's business. The bondholder, the Court holds, is entitled only to payment of the debt due him, principal and interest, and is not ordinarily entitled to take over the management of the business.

DuBois v. Consolidated Rock Products Co.—C. C. A., 9th Circuit, Nov. 4, 1939, CCH Bankruptcy Law Service, page 51671, par. 52118.

V. The Value of Debtor's Property:

We come then to the question, what is the value of the Debtor's property.

The valuation of the property of The Western Pacific [939] Railroad Company, made by the In-

terstate Commerce Commission under Section 19A amounted, with additions at cost to December 31, 1935, to $139,600,455 (Report of Commission, Oct. 10, 1938, p. 24-25, in these proceedings). With further additions and improvements, under the rehabilitation plan now being concluded, such valuation with additions at cost up to the present time would be considerably increased. Your petitioner respectfully directs the attention of the Court to the fact that the Commission in its Report and Order of October 10, 1938, and again in its Report and Order of June 21, 1939, refers to and apparently adopts and reaffirms its Section 19A valuation of the Debtor's property. The Commission does not, in either Report, make any other or different or new "appraisal" of the assets of the Debtor company. There is nothing in the record before the Commission which supports any other or different appraisal of the value of the assets of the Debtor.

The investment in the property of the debtor would, after the deduction of all accrued depreciation, amount to at least $120,000,000. (Record, Ex. 29, Statement 16, page 2, Dissenting Opinion of Commissioner Miller, pages 72-73, Report of October 10, 1938.)

Again this value of the Debtor's property, the total indebtedness due from the Debtor to all its creditors of every class, including the outstanding equipment trusts and leases, the Trustees Certificates, First Mortgage Bonds, and the claims of se-

cured creditors, with interest to January 1, 1939, in all such cases, amounts to $87,880,660.

On the basis of the only appraisal and valuation of the Debtor's property in the record before this Court, it would therefore seem perfectly clear that the assets of The Western Pacific Railroad Company exceed by more than $30,000,000 the aggregate of the claims of all lienholders. Your petitioner [940] asserts that by reason of this condition, not only the general creditors of the corporation but its stockholders as well have a real and substantial interest in the property of the Debtor.

It is true that, because of the recent and temporary inability of the Debtor, in common with a substantial number of the other railroads of the United States, to pay its fixed charges during a period of unparalleled depression, foreclosure of the liens of the First Mortgage and General and Refunding Mortgage would, perhaps, terminate the interest of general creditors and stockholders. Even in such an event, the Court will, because of the very nature of the property and the interests involved, give every consideration to the protection and preservation of the interests of minor and unsecured creditors and the equitable owners of the property. A railroad is not simply private property, but an instrument of public service. Railroad mortgages and trust deeds are ordinarily so large in amount that, on foreclosure, only the mortgagees and their representatives can be considered as possible purchasers. The character of a railroad's business,

and the public obligations which it assumes—obligations from which, unlike other private corporations, it can obtain no relief, or in the carrying out of which it cannot, like others, effect economies by curtailment of personnel or service, in times of business depression—these are factors which both require and justify a court of equity to look beyond the mere technical rights created by contract and recorded obligations, to give due weight to equitable and public considerations and to conserve, wherever possible, the interests of all parties who have any rights in the property, whether as mortgagee, creditor or mortgagor.

Louisville Trust Co. v. Louisville etc. Rwy. Co., 174 U. S. 674 [941]

Your petitioner contends that this represents the purpose and the meaning of Section 77 of the Bankruptcy Act, and that in the formulation of an equitable plan for reorganization under said Section, the interests of general creditors and stockholders should never be terminated or sacrificed unnecessarily. The intendment of the Act and the public interest in the healthy maintenance of its railroads alike require that every reasonable consideration be given to the preservation of such rights. And where, as here, the appraised investment value of the assets of the Debtor, fully depreciated, still exceeds by more than $30,000,000—i. e., by more than thirty per cent—the entire debt due lienholders of the Debtor, the interest of the general creditors, to

say nothing of the stockholders, is so substantial that your petitioner believes that no plan of reorganization can be held to be fair or equitable which takes no cognizance of such interests. The valuation made by the Commission, and referred to and apparently adopted by it in its Order of June 21, 1939, fairly represents and sets forth the present fair value of the Debtor's assets. Hence the interest of your petitioner, of The Western Pacific Railroad Corporation as the other unsecured creditor, and of the stockholders, involves $30,000,000 of the property of a railroad which is today better equipped and in better operating condition than ever before in its history.

It is significant that three plans of reorganization were submitted to the Commission, one by the Debtor itself, one by a committee representing certain institutional bondholders, and one by A. C. James Co., a secured creditor. In its proposed plan of reorganization the Debtor fixed the value of its properties as of January 1, 1936, on the Interstate Commerce Commission basis, at $143,500,000, and suggested a plan of reorganization involving $78,226,003 in bonds, and 300,000 shares of [942] common stock of no-par value, and recognizing and providing for every claim, secured or unsecured, and every stockholder.

The bondholders proposed a plan of reorganization which would have authorized a total of undisturbed equipment trust, etc., obligations, bonds and preferred stock amounting to $121,764,230 together

with 500,000 shares of common stock, without par value. This plan required immediate issuance of such obligations, bonds and preferred stock aggregating $69,553,050 and of not less than 339,995 shares of stock without par value. And the bondholders' plan provided for the issuance of securities escrow certificates or rights to all creditors of every class, and to the present stockholders of the Debtor.

A. C. James Co. proposed a total capitalization of $125,096,203, involving $77,596,203 in undisturbed obligations, bonds and preferred stock and $47,500,000 in common stock.

It is not without significance as to the true present value of the property of this railroad that (1) the company itself, (2) a group of bondholders involving institutions specializing in industrial investments, and (3) the largest individual creditor of the Debtor unite in proposing capital structures which, however they differed in details, agreed upon a present value of the property in excess of $120,000,000 and upon the possibility and equitable desirability of preserving the interests of lienholders, general creditors and the Debtor.

It was, perhaps, with these considerations in mind that Commissioner Miller, in dissenting from the plan proposed by the Commission in its Report of October 10, 1938, said: "I am strongly of the view that the capitalization should be generally on the basis of original cost less depreciation amounting to over $120,000,000, which is about the same

as is proposed in two of the three plans referred to * * *. The no-par-value common stock may have little or no market value when the [943] company is reorganized, but the issuance of in the neighborhood of $30,000,000 more than the majority would authorize would give the present stockholders a chance to participate in the future profits of the reorganized company."

VI. The Commission Plan, and Theory:

The Commission now proposes, and has certified to the Court a plan of reorganization of the Debtor company (Report of June 21, 1939, P. 13, Order P. 2, 3). The following table shows the capital structure proposed by the Commission's Report of October 10, 1938, (230 I. C. C. 61, 96), and the capital structure now proposed by the Commission:

	Oct. 10, 1938	June 21, 1939
Equipment obligations	$ 3,066,117	$ 2,750,000
1st Mtge. Bonds (4%)	10,000,000	10,000,000
Income Bonds	19,716,040 (4%)	21,219,075 (4½%)
Preferred Stock (5%)	29,574,060	31,850,297
Common Stock (No-par)	31,370,300 (a)	31,944,100 (b)

(a). 313,703 shares at $100 each

(b) 319,441 shares at $100 each

The proposed effective date of the initial plan of the October 10, 1938 report was fixed as of July 1, 1938. The effective date of the modified plan set forth in the Report of June 21, 1939 is fixed as January 1, 1939.

The attention of the Court is respectfully invited, first, to the differences apparent in these

two plans promulgated within eight months of each other. The 1939 plan involves a proposed total capitalization of the reorganized company $4,036,955 higher than could be sanctioned by the Commission just eight months before. It proposes to permit a total of undisturbed obligations, bonds and preferred stock $3,463,155 higher than the maximum which in October 1938 the Commission would approve. It permits the issuance of 5,738 additional [944] shares of common stock of no-par value, but which the Commission for the purposes of financing assumes to have a value of $100 each, thereby increasing the value of the total authorized common stock to the extent of $573,800. It proposes not only to increase by $1,503,035 the aggregate of the Income Bonds to be authorized to pay claims of present secured creditors, but it goes further and proposes an increase from 4% to 4½% in the interest rate to be paid thereon. It increases the interest payable annually to the holders of these Income Bonds from $788,641.60 to $954,858.38, and thereby adds to the charges to be paid out of earnings, before dividends can be paid, the sum of $166,216.78 over the maximum which in October 1938 the Commission thought wise.

These differences are respectfully urged upon the attention of the Court for the reason that they demonstrate clearly the fundamental fallacy of the basic, underlying theory upon which the Commission has promulgated its plan, a theory which your petitioner contends is without support in the law

of the land, unauthorized by the provisions of Section 77 of the Bankruptcy Act, and which would, if it were adopted as a standard for reorganization of the railroads of the country, result in wholesale destruction of investment values and drive investors out of the market for railroad securities.

This basic and confiscatory theory is simply that the Commission will not approve a capital structure in a plan of reorganization unless a material and immediate return on the common stock of the proposed reorganized company is to be expected. Upon this novel and startling "earnings theory" of capitalization the Commission Plan proceeds to appropriate $120,000,000 in sound values to the payment of secured liens amounting only to $87,888,660. The Report of the Commission (Oct. 10, 1938, page 40) states that Section 77 of the Bankruptcy [945] Act provides that the approved plan should be "compatible with the public interest." It states that "the public interest is not defined" in the Act, but it assumes that "the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent, be within its probable earning power." The Commission then argues (page 41) that the capital structure of the reorganized company must be "realistically related" to its actual earning power, and concludes that consideration is to be given to the investment in the property "only to the extent that such investment is justified by probable earn-

ings reasonably foreseeable for the future." Conceding that "it is true that considered alone, the data pertaining to the rate-making value of the Debtor's property, and its investment, would support capitalizations approximating those proposed plans," (i. e. $125,000,000 to $150,000,000), the Commission nevertheless thinks "those factors cannot be of controlling importance" and holds that "the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of stock are not to become mere tokens of stock market speculation." Making no reappraisal of the Debtor's property, and ignoring the valuation which the Commission itself has placed upon it (fixed as of Dec. 31, 1935 by the Commission Report of October 10, 1938, page 25) at $139,600,455, the Commission sets up a plan which deprives the general creditors and stockholders of this company of any interest or participation therein.

The basis for its conclusions lies, apparently, wholly in the statement of the earnings of the Debtor during the period 1926-1936, which, it states, provided consolidated net income for the payment of interest on funded debt as follows: (Report Oct. 10, 1938, p. 20). [946]

Year		Operating ratio Percentage
1926	$4,759,282	70.3
1927	2,674,494	79.2
1928	2,964,371	80.3
1929	2,529,846	83.2
1930	1,552,487	84.0
1931	186,708 (deficit)	91.0
1932	252,706	85.8
1933	674,007	83.0
1934	1,084,244	81.1
1935	805,589	83.7

But the background of these figures is of greater importance than the figures themselves. During that period this railroad in common with every other road, and every other corporation in the United States was confronted with the greatest business depression in the history of America. Dividends were discontinued and an improvement and rehabilitation program was undertaken. From 1927 to date a total of $16,600,000 was expended in the revision, renewal and rehabilitation of its properties and equipment, approximately half of which the Commission required to be charged as operating expenses. Of this $8,782,000 has been expended under the supervision of this Court since 1936, so recently that as yet the benefits of inevitable increased earnings are not fully realized. In 1931 and 1932 the company completed at a cost of approximately $10,000,000 its Northern California Extension, connecting with the Great Northern Railway and enormously increasing the ultimate, prospective income and net earnings of the Company. A very large portion of the present indebtedness of the company

results from these long-time, statesmanlike improvements and additions which must ultimately be reflected in enhanced business and earnings.

[947]

To assume that, in the depths of the greatest depression, any railroad should necessarily earn immediate net profit sufficient to carry fixed charges on these improvements is almost an absurdity. To argue that by reason of the Debtor's temporary inability to do so, the value of such additions to its assets must be written off as worthless and that future reasonable earnings cannot be expected to justify them is to fly in the face of the facts of our economic history. The facts are all in the record. The management of the Debtor, upon the basis of its performance, is entitled, you petitioner believes, to the confidence of the Court and the creditors whose interests are here involved. The earnings of the road are steadily increasing, under excellent management. In the first nine months of 1939 Total Railway Operating Revenue increased $1,728,278.89 as compared to the same months of 1938. Operating Expenses were reduced $745,252.62, resulting in a net gain in Revenue from Railway Operation of $2,473,531.51 in one year. Its properties are in better condition than ever before in its history. The country is steadily climbing out of the depression. The gross and net earnings, not of the Debtor alone, but of every major railroad in the country are increasing.

Yet in the face of these favorable conditions and increasing earnings, the Commission Plan

says, in effect, to the general creditors: "We were able in October 1938 to authorize the issuance of enough securities in the reorganized company to amount to more, taking the no-par value stock at $100, than the total claims of all the creditors, but we gave it all to the secured creditors. We more than paid their claims. We are now, in June 1939, more optimistic about the value of this property and its probable earnings. We are now able to make the authorized capitalization of the company $4,000,000 more than we thought we could last October. We can add nearly $3,500,000 to [948] undisturbed obligations, bonds and preferred stock. We can even increase the rate of interest to be paid on them $166,000 a year, to make them more valuable. And finally we are now sufficiently sure that the new shares of stock will not become "mere tokens of stock market speculation" that we can even grant an increase of nearly $600,000 worth of these shares. But we still cannot give you any interest in this company in payment of the money you advanced to aid in creating these values. We must give it all, regardless of $30,000,000 excess of value over secured debts, to the secured creditors. We want not only to pay them full, but to pay some of them more than the total principal and interest owned. (Report June 21, 1939, pages 13, 14). We therefore hold your claims without value."

VII. Section 77 and the Commission Theory:

Your petitioner contends that the limitation upon capitalization which is embodied in the plan now before the Court is not authorized and can-

not be justified by and specific limitation within the four corners of Section 77. The only limitation definitely indicated by the Act is to be found in Subsection (b) (4), which refers only to securities to be issued which set up fixed charges, "that, after due consideration of the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, there shall be adequate coverage of *such fixed charges* by the probable earnings available for the payment thereof." And in Subsection (e) the Act further requires that a plan of reorganization be approved only if, besides complying with the provisions of Subsection (b), "it is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes [949] of creditors and stockholders." It is contended by your petitioner that the provisions of Section 77 contemplate and require (1) that the capitalization of the reorganized company is to be determined only upon the basis of the appraised value of the property involved; (2) that "earnings" are not the only measure to be used for the purpose of determining the aggregate of new securities to be authorized; (3) that nothing in the Act authorizes or requires any restriction upon capitalization to insure common stock dividends; (4) that under the law of the land, wherever the property of the debtor exceeds in appraised value

the sum total of all the claims against it, no plan can be fair and equitable which accounts the claims of unsecured creditors and the interest of stockholders as worthless.

> "A proceeding under #77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very accomplishment of which was the sole aim of the Section, and thereby render its provisions futile."
>
> Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Rwy. 294 U. S. 648, 676

The unsoundness and unfairness of the "earnings theory" upon which the limitation of capitalization is fixed in the Commission Plan is nowhere better demonstrated than in a comparison of the Plan outlined and approved October 10, 1938, and the Plan approved June 21, 1939. If the Commission was right in Plan of 1938, no increase in capitalization could be sanctioned in 1939 except because increased earnings subsequent to October 1938 showed that the railroad could earn and pay interest and dividends on a larger capital structure. If the Commission is now right in adding $4,000,000 to the proposed capital structure, in June 1939, then quite obviously its "guess" as to the capitalization which prospective earnings would reasonably support, made in October 1938, was wrong.

[950]

On June 21, 1939, the date of the present Order of the Commission, the Chairman of the Commission, Mr. Eastman, appeared before the Special Subcommittee on Bank and Bankruptcy of the Committee on the Judiciary of the House of Representatives. He there made the following wise and pertinent statement:

> "Any estimate of the future earnings of a railroad can at best be no more than an 'educated guess,' but there has never been a time in the history of the country when it has been more difficult to make such a guess than now. Anything remotely approaching accuracy is impossible. . . . To deprive thousands of investors who in the past have put their savings into railroad securities of all hope of recoupment is a very serious step, for if our capitalistic society is to succeed, it demands as scrupulously fair treatment of investors as of labor."

Your petitioner contends that Section 77 nowhere implies or authorizes the setting up of a capital structure on this basis.

VIII. The True Basis of Value:

The primary measure contemplated by Section 77 for determining the limits of the capital structure of a company reorganized under that Section, and for the allocation and distribution to the creditors and stockholders of the debtor company, is simply the fair, reasonable depreciated value of the investment in the property which it employs in

rendering its services to the public and the nation. This property, so appraised and valued, constitutes a trust fund for the benefit and security of lien-holders, creditors and shareholders, alike, available subject to prior rights which the law recognizes and will enforce, for satisfying in an equitable manner the claims and interests of these parties. The law sanctions no drastic and arbitrary reduction or limitation of such a capital structure based entirely upon estimates of earnings derived not from the entire history of 22 years of operation, but drawn solely from the reduced earnings of a world wide depression period from which it is already emerging. [951]

Property rights do not disappear simply because no high return can be realized at present or guaranteed for the immediate future. And immediate and present payment of interest, dividends, or income is by no means the only, or even the most important index of value. Fortunes have been made, in every important city in America, by the purchase of unimproved land, upon which for many years the owners paid taxes without immediate income of any sort. Banks and shrewd private investors purchase short term government obligations with an exceedingly low interest rate, mere fractions of one per cent, at times. The proceeds of an insurance policy, left with the company, to bear a low rate of interest and payable for the life of the beneficiary may be of far more certain value than

the same money invested in an industrial enterprise paying three to four times as high an interest return. It is a matter of common knowledge that in the City of San Francisco within recent years, every one of the principal hotels was vacant and unused for a period of months, by reason of a temporary crisis caused by a strike of hotel employees. The value of the properties involved was not thereby wiped out in toto. As of the time of the filing of these objections, the municipal wharves and terminal facilities, as well as private terminals on both sides of San Francisco Bay have been idle for similar reasons. This does not necessarily mean a complete destruction of the value of the property. Temporary business crises affect the immediate earning power of invested capital, but investment values are to be determined, soundly, by reference only to long-term earnings under normal conditions.

The true value of a railroad in so far as it is affected by its earnings, is determined by what it has earned and can earn under reasonably normal conditions. What a railroad can earn in the future cannot, for this purpose, be determined by its earnings during an unprecedented depression and in the [952] abnormal circumstances resulting from the pendency of Section 77 proceedings.

IX. The Commission Plan and the Public Interest:

In the promulgation of its plan, the Commission refers to the phrase in Section 77, Subdivision

(d) which provides that the plan approved by the Commission shall be one that will, in *its opinion*, be "compatible with the public interest." This phrase is not repeated in Subdivision (e), but it appears perfectly obvious from the provisions of the latter section that if, upon hearing and consideration of objections to a proposed plan, the Court finds such plan wanting in respect to the standards set forth in Subdivision (e), modifications of the proposed plan may be made, and the plan *as modified* may still be entirely "compatible with the public interest."

And your petitioner insists, with all deference to the Commission, that a plan which wipes out 25% of the true value of the Debtor's property by a drastic and unnecessary forced reduction of capitalization, based upon earnings during a depression period only, is not compatible with the public interest. If, as here, such plan renders the legitimate, undisputed claims of general creditors and stockholders worthless, it is not fair and equitable, but confiscatory and discriminating.

The public interest is in no wise better served than by the preservation and protection of sound investment of private capital. No single thing could more clearly or certainly destroy the use of common stock as a means of financing railroad properties than the confirmation by the Courts of this unsound theory of the Commission. Railroad earnings are subject to the regulations and restructions imposed by the Commission. They are also subject, like the

earnings of other corporations, to the vicissitudes of business cycles. Because of the large capitalization necessarily required and the public nature of the service [953] rendered, it is peculiarly important and in the public interest that such investments, when made by the private investor, shall be in the nature of conservative, long-term investments. Security of investment coupled with a fair but by no means high return is to be desired. It is in the public interest, emphatically, that men shall be able to invest in, or extend credit to, the railroads of the land, who are more concerned with the safety of the investment than with the payment of dividends. There could be no more deadly blow to railroad credit than for the Commission to adopt, with the approval of the Courts; the position that, at the end of any downward cycle of business prosperity and decreased earnings, reorganization of railroads would be permitted upon a plan which, ignoring investment values and normal earnings on them, would render the claims of unsecured creditors and stockholders valueless. Safe extensions of credit to railroads would thereafter be impossible, except where secured by mortgages on the property. Common stock would disappear as a safe medium of investment and shares issued on whatever basis would indeed become "mere tokens of stock market speculation."

The principal here involved transcends the boundaries of the case now before this Court. It affects directly the welfare of every railroad in the country.

Your petitioner contends that there is nothing incompatible with the public interest, in the instant case, in a capitalization fairly based on the true values of the Debtor's property, by the structure of which the issue of bonds and preferred stock to the secured creditors might be authorized to the extent necessary to pay their claims and *in addition by authorizing the issue of common stock, of no-par value, sufficient fairly to satisfy the claims of the two general creditors and of the stockholders.* Since such shares are without par value, there is no reason why, except for the purpose of [954] equitable division among the claimants, any dollar amount of capitalization should be fixed thereon. The essential characteristic of common stock with no par value is simply that it represents a fractional interest in property, whatever the value of the property may be. The total number of such shares represents only the number of units into which the equity in the reorganized company is divided. Save for purposes of distribution to satisfy claims, there is no more reason to allocate a value of $100 to such proposed stock than $200, or $25, or $1. Nor is there any reason for assuming that such shares when issued must or should earn $3 per share, or $6, or any other amount. The shares in the aggregate represent the whole equitable ownership of the property. Their value is fairly and precisely determined by the division of the net earnings, after payment of bond interest, fixed charges and dividends on preferred stock, among the holders of such no-par-value stock.

"A plan of reorganization must meet two requirements: it should give to each creditor and stockholder the value of his interest in the property, and it should fully recognize the priority of claims."

In re Dutch Woodcraft Shops—14 Fed. Supp. 467

The primary right of unsecured creditors to the assets of an insolvent corporation remaining after lienholders are satisfied, must be adequately protected.

Kansas City Terminal Rwy. v. Central Union Trust Co. 271 U. S. 445

But this rule does not require the impossible and make it necessary to pay an unsecured creditor in cash, as a condition of stockholders retaining an interest in the property. His interest can be preserved by the issuance to him on equitable terms of shares of stock, preferred or common.

Northern Pacific Rwy. Co. v. Boyd, 228 U. S. 482, P. 508 [955]

And where a plan is not fair and equitable as a matter of law, it cannot be approved by the Court, even though the percentage of the various classes of security holders required for confirmation of the plan has consented.

"Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be fair and equitable. The former is not a

substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection. . . . Every important determination by the court calls for an informed, independent judgement."

National Surety Co. v. Coriell, 289 U. S. 426, p. 436

See also Taylor v. Standard Gas & Elec. Co. 306 U. S. 307

and Case v. Los Angeles Lumber Products Company, Ltd.-U. S. (decided Nov. 6, 1939)

It is true that the three cases just cited arose and came before the court under Section 77B, but your petitioner believes and contends that the principles applied by the Supreme Court in interpreting Section 77B are essentially the same as the principles to be applied to the interpretation of Section 77, and to cases arising thereunder.

X. Treatment of Secured Creditors discriminatory and Unfair as to General Creditors:

Your petitioner believes and the valuation made by the Commission indicates that the value of the Debtor's property is $120,000,000. The Commission Plan proposes to turn over the property of the Debtor to the reorganized company upon a new capital structure, as follows:

Undisturbed Equipment Trusts and Leases	$ 2,750,050
New First Mortgage 4% Bonds	10,000,000
New Income Mortgage 4½% Bonds	21,219,075
New 5% Participating Preferred Stock	31,850,297
Total Securities Prior to Common Stock	$65,819,422

And 319,441 shares of Common Stock without par value. [956]

By the allocation of all of the bonds, preferred and common stock of the new company to the present secured creditors, the Plan appropriates the entire $120,000,000 of the Debtor's assets to the satisfaction of secured claims which involve but $87,880,660. Your petitioner contends that this involves an overpayment of the claims of secured creditors, and renders the proposed Plan unfair and inequitable as to all interests junior thereto, and is an appropriation of the property of your petitioner without due process of law and in violation of the law of the land.

Your petitioner contends that securities in the reorganized company should be authorized in an amount sufficient to equal in full the claims, including principal and interest, of the holders of existing first mortgage bonds, the Reconstruction Finance Corporation, the Railroad Credit Corporation, and A. C. James Company, in the form of new Income Bonds and Participating Preferred Stock and issued to each such class of secured creditors; that the value of the property still remaining, which would be approximately $32,000,000, should be al-

located to the general creditors and present shareholders, in the form of common stock without par value; that such common stock should be issued in payment of the claims of your petitioner and The Western Pacific Railroad Corporation as general creditors to be taken at $100 per share, and the residue of such shares then remaining should be issued to The Western Pacific Railroad Corporation as the owner of the preferred and common stock of the Debtor Company.

XI. Amendments to Plan Requested by your Petitioner:

Your petitioner respectfully asks that the Plan promulgated by the Commission be referred back to the Commission, as provided in Section 77 (e), for correction and modification in respect to the matters hereinabove set forth, and in [957] conformity with the law of the land, and particularly as follows:

1. By amending the Order of June 21, 1939, Subdivision B, page 2, to provide for the authorization of the New Income Mortgage 4% Bonds of the face value of one-half of the aggregate claims against the Debtor to January 1, 1939, including accrued interest, held by each of the secured creditors, including the present First Mortgage Bondholders, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company; and for the authorization of new 5% Participating Preferred Stock of the face value

of one-half of the aggregate of the claims, including interest.

2. By amending the Order of June 21, 1939, Subdivision P, paragraph 2, 3, 4 and 5, to provide that the present First Mortgage Bondholders, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. Jones Company shall each receive for its existing claim, including accrued interest to January 1, 1939, new Income Mortgage 4% Bonds to the extent of one-half thereof, and new 5% Participating Preferred Stock to the extent of one-half thereof.

3. By amending Subdivision P, paragraphs 6 and 7, of the Plan, page 28, Order of June 21, 1939, to provide as follows:

P. 6—The Western Realty Company shall receive for its unsecured claim of $50,000, together with interest accrued thereon to January 1, 1939, in the sum of $11,667, 617 shares of common stock without par value; and The Western Pacific Railroad Corporation shall receive for its unsecured claim of $5,768,746 together with interest accrued thereon to Januray 1, 1939 in the sum of $1,980,475, 77,492 shares of comon stock without par value.

P. 7—The Western Pacific Railroad Corporation, as the owner of all of the 283,000 shares of the preferred stock, and all of the 475,000 shares of the common stock of the Debtor, shall receive for its holding 241,332 shares of common stock without par value.

Wherefore, your petitioner respectfully prays (a) that the Court return the Commission Plan to the Interstate [958] Commerce Commission with its recommendation that it be corrected and amended as herein set forth; (b) that unless said Commission Plan be so corrected and amended, it be disapproved by the Court as unfair, inequitable and discriminatory to your petitioner as well as to other parties in interest and as not being in conformity with the law of the land; and for such other and further relief as the Court may deem just and proper.

THE WESTERN REALTY COMPANY
By D. C. DeGRAFF

LEROY R. GOODRICH
Attorney for Petitioner

State of California,
City & County of San Francisco—ss.

D. C. DeGraff being duly sworn, deposes and says, that he is an officer, to-wit: the Auditor of The Western Realty Company, a corporation; that as such officer he is duly authorized to sign and verify the foregoing Objections on behalf of said corporation; that he has read the same, and that the same is true except as to those matters stated therein to be on information and belief and as to those matters he believes it to be true.

D. C. DeGRAFF

Subscribed and sworn to before me this 5th day of December, 1939.

[Seal] FLORA HALL

Notary Public in and for City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 8, 1939. [959]

[Title of District Court and Cause.]

STIPULATION AS TO FACTS NOT IN DISPUTE*

Whereas the Debtor has been in process of reorganization under Section 77 of the Federal Bankruptcy Act since August 2, 1935; and

Whereas hearings have been held before the Interstate Commerce Commission (hereinafter referred to as the Commission) and a Report and Order on Further Consideration approving a modified plan of reorganization for the Debtor [960] has been issued by the Commission under date of June 21, 1939; and

Whereas such plan of reorganization (hereinafter referred to as the Commission Plan) together with the record before the Commission has been certified to the Court herein; and

[Clerk's Note: *The Stipulation as to Facts not in Dispute has been amended to conform to Exhibit "N" thereto, Memorandum of Corrections and changes in 'Stipulation as to Facts not in Dispute'" and such Exhibit "N" will not be hereinafter set forth.]

Whereas the parties hereto desire to expedite the reorganization of the Debtor and to assist the Court in the determination of the issues before it by agreeing upon certain of the undisputed facts relating to such issues:

It is hereby stipulated and agreed by the parties to the proceedings herein:

1. For the purpose of aiding the Court in the determination of the issues, and for the purpose of any appeal, the parties hereto have entered into this Stipulation of Facts, which includes (a) facts which appear in the testimony and exhibits in the record certified to the Court by the Interstate Commerce Commission, and (b) additional facts not in dispute. Subject to the reservations hereinafter contained, the matters of fact hereinafter set forth may be treated by the Court as facts proved in open court. Notwithstanding this stipulation, the record in the proceedings before the Interstate Commerce Commission (Finance Docket No. 10913), and the exhibits filed therein, shall be a part of the record before this Court, and may be used by any party on argument or brief (free from the objection that any such facts from the Commission record or exhibits tend to limit, control or qualify facts herein set forth), and may be the basis of findings by the Court. The materiality, relevancy or [961] competency of any fact herein set forth may be disputed by any party, except that no objection based on the best evidence rule may be made. Any party may

call witnesses and offer any proof for the purpose of proving such additional facts as such party may see fit, free from the objection that such additional facts tend to limit, control or qualify facts herein set forth. All figures and statistical data are subject to check prior to the date set for the hearing in this proceeding. The Trustee under the General and Refunding Mortgage reserves the right to contend that it is not bound by any evidence offered before the Commission before it became a party to the proceedings before the Commission. [962]

2. The Debtor is a railroad corporation organized and existing under the laws of the State of California. On and prior to August 2, 1935, it was engaged in the operation of its railroad and properties as a common carrier of persons and property for hire in interstate and intrastate commerce in and between the States of California, Nevada and Utah, and was not a street, suburban or interurban electric railway. On August 2, 1935, and for more than six months prior thereto, it had its principal operating office in the City of San Francisco, in the State of California, in the Northern District of California, Southern Division.

3. On August 2, 1935, the Debtor filed its petition in the Court stating that it was unable to meet its debts as they matured and that it desired to effect a reorganization under Section 77 of the Federal Bankruptcy Act, as amended. Simultaneously therewith it filed a copy of said petition with the Interstate Commerce Commission. On said date the

Court, being satisfied that said petition complied with said Section 77 and had been filed in good faith, entered an order approving said petition as properly filed and authorizing and directing the Debtor, pending further order of the Court, to continue in possession of and to operate its railroad and properties wherever situate and otherwise to manage, operate and conduct its business subject to the supervision and control of the Court. Pursuant to said order and supplemental orders entered herein, the railroad and properties of the Debtor were operated by the Debtor as from August 1, 1935, to November 13, 1935.

4. On August 2, 1935, the Court entered an order which, among other things, restrained and enjoined all persons [963] and corporations holding collateral theretofore pledged by the Debtor as security for its notes or obligations from selling, converting or otherwise disposing of such collateral or any part thereof until further order of the Court. Said restraining order and injunction has not been modified or revoked.

5. On August 31, 1935, the Court entered an order that a hearing be held on September 23, 1935, for the appointment of one or more Trustees of the Debtor's property. Notice having been given and published as provided in said order, and said notice having been in accordance with the provisions of paragraph 1 of Subsection (*e*) of said Section 77, hearings were had before the Court on September 23, 1935, for the appointment of Trustees. After

said hearings, the Court on September 23, 1935, appointed T. M. Schumacher, chairman of the Executive Committee of the Debtor, Charles Elsey, President of the Debtor, and Sidney M. Ehrman, who within one year prior to the date of the order had not been an officer, director or employee of the debtor corporation, or of any subsidiary corporation, or any holding company connected therewith, as Trustees of the properties of the Debtor, said appointment to become effective as of the beginning of business on October 1, 1935, upon ratification thereof by the Interstate Commerce Commission as provided in Subsection (c) of said Section 77.

6. On September 30, 1935, said order was modified by an order of the Court to provide that appointment of said Trustees should be effective as of the beginning of business on the first day following the ratification of said appointments by the Interstate Commerce Commission. On October 30, 1935, the Interstate Commerce Commission entered its order ratifying the appointment of Messrs. Schumacher and Ehrman as Trustees. [964]

7. Thereafter, by order entered November 9, 1935, the Court fixed the amounts of the bonds of the Trustees and confirmed the appointment of Messrs. Schumacher and Ehrman as such Trustees. Thereupon, on November 13, 1935, the Trustees qualified and began, and have since continued, to operate the business of the Debtor, subject to the control of the Court and subject to the jurisdiction of the Interstate Commerce Commission.

8. By ex parte order entered August 20, 1935, the Court divided the creditors and stockholders of the Debtor into the following classes:

(1) First Mortgage 5% Bonds, hereinafter called the First Mortgage Bonds ($49,290,100), principal amount, issued under the First Mortgage executed July 14, 1916, as of June 26, 1916 (hereinafter called the First Mortgage) by the Debtor to First Federal Trust Company and Henry E. Cooper, Trustees (Crocker First National Bank of San Francisco and Samuel Armstrong, successor Trustees). Said bonds provide that interest shall be paid on the principal amount thereof at the rate of 5% per annum from the date of issue to the date of payment. No interest has been paid thereon since September 1, 1933, except $250.00 on Coupon No. 38 due March 1, 1935, paid November, 1935. Unpaid interest from September 1, 1933, to August 2, 1935, computed at 5% amounts to $4,730,480.42 and from August 2, 1935, to January 1, 1939, amounts to $8,413,546.24, or an aggregate of $13,143,776.66.)

(2) General and Refunding Mortgage Bonds, hereinafter called the Refunding Mortgage Bonds ($18,999,500 principal amount issued under the General and Refunding Mortgage executed February 29, 1932, as of January 1, 1932 (hereinafter called the Refunding Mortgage) by the Debtor to The Chase National Bank of the City of New York, Trustee (Irving Trust Company, successor Trustee). None of such Bonds has been issued except by way of pledge as hereinafter stated. The entire $18,-

999,500, principal amount, thereof are pledged as collateral under the loans of the Debtor held by A. C. James Co., Reconstruction Finance Corporation and The Railroad Credit Corporation. Said bonds provide that interest shall be paid on the principal amount thereof at the rate of 5% per annum from the date of issue to the date of payment. No interest has ever been paid thereon.)

(3) The Debtor's secured promissory notes to A. C. James Co. ($4,999,800, face amount. Said notes provide [965] that interest shall be paid on the face amount thereof at the rate of 5% per annum from the date of issue to the date of payment. No interest has been paid thereon since January 1, 1934. Interest from January 1, 1934, to August 2, 1935, computed at 5% amounts to $396,511.92 and from August 2, 1935, to January 1, 1939 (the effective date of the Plan) amounts to $853,438.08, or an aggregate of $1,249,950. Said notes are secured by the pledge of $6,249,500, principal amount, of Refunding Mortgage Bonds, Series A, of which $2,000,000, principal amount, are subject to the prior lien of The Railroad Credit Corporation as pledgee, A. C. James Co. having repledged said $2,000,000, principal amount, of such Bonds with the Railroad Credit Corporation as additional collateral security for the Debtor's note to the Railroad Credit Corporation.)

(4) The Debtor's secured promissory notes to Reconstruction Finance Corporation ($2,963,000, principal amount. Said notes provide that interest

shall be paid on the principal amount thereof at the rate of 6% per annum from the date of issue to the date of payment. No interest has been paid on said notes since November 30, 1933, January 26, 1934, December 25, 1933, December 29, 1933, and February 1, 1934, respectively. Interest from said respective dates to August 2, 1935, computed at 6%, amounts to $393,691, and from August 2, 1935, to January 1, 1939, to $506,179, or an aggregate of $899,869.98. Said notes are secured by the pledge of $10,750,000, principal amount, of Refunding Mortgage Bonds ($8,750,000, Series A and $2,000,000 Series B); by the pledge of voting trust certificates for 150,000 shares of Common Stock of the Denver and Rio Grande Western Railroad Company (being 50% of the outstanding voting stock of The Denver and Rio Grande Western Railroad Company) pledged with Reconstruction Finance Corporation by The Western Pacific Railroad Corporation, sole stockholder of the Debtor; and by second lien upon $2,000,000, principal amount, of Refunding Mortgage Bonds, Series A, pledged with The Railroad Credit Corporation).

(5) The Debtor's secured promissory notes to The Railroad Credit Corporation. ($2,445,609.88, principal amount. Said notes bear interest at varying rates from date of issue to the date of payment. No interest has been paid thereon since December 29, 1933. Interest from said date to August 2, 1935, computed at the rates provided in the notes amounts to, after deducting application of collateral re-

ceipts, $57,307.94 and from August 2, 1935, to January 1, 1939, to $88,006.29, or an aggregate of $145,314.23. Said notes are secured by the pledge of $4,000,000, principal amount, of the Refunding Mortgage Bonds ($2,000,000 Series A and $2,000,000 Series B), of which $2,000,000 principal amount, Series A, were repledged with it by A. C. James Co. In addition, such notes are secured by a second lien upon all the securities pledged with Reconstruction Finance Corporation as collateral security for notes of the Debtor held by Reconstruction Finance Corporation; by a first lien on the Debtor's distributive share in the fund established under the Marshalling and Distributing Plan, 1931; by a first lien on the advances from the Western Pacific Railroad Corporation to the Debtor [966] in the sum of $5,494,722; by a first lien on the advances made by the Western Pacific Railroad Corporation to Standard Realty and Development Company in the sum of $120,000; and by a lien on the advances made by The Western Pacific Railroad Corporation to Sacramento Northern Railway in the sum of $856,260, subject as to said latter advances to any and all rights and claims in respect thereof, if any, of the trustees or holders of any of the bonds issued under the First Mortgage).

(6) Equipment obligations to Baldwin Locomotive Works (assigned to Fidelity-Philadelphia Trust Company). $188,799, principal amount, outstanding as of January 1, 1939).

(7) Equipment Trust Certificates (Series B) under agreement dated March 1, 1923. (The Chase National Bank of the City of New York, Trustee. As of January 1, 1939, all of said Equipment Trust Certificates had been paid off and discharged or moneys for the payment thereof had been deposited with the Trustee under said Equipment Trust Agreement.)

(8) Equipment Trust Certificates (Series C) under agreement dated March 15, 1924. (The Chase National Bank of the City of New York, Trustee. As of January 1, 1939, all of said Equipment Trust Certificates had been paid off and discharged or moneys for the payment thereof had been deposited with the Trustee under said Equipment Trust Agreement.)

(9) Equipment Trust Certificates (Series D) under agreement dated May 1, 1929. (The Chase National Bank of the City of New York, Trustee. $365,000, principal amount, of such Certificates were outstanding as of January 1, 1939. $73,000, principal amount, of such Certificates were paid off at their maturity on November 1, 1939, or funds for the payment thereof had been deposited with the Trustee under said Equipment Trust Agreement.)

(10) The Debtor's obligations as to advances made on open account by The Western Pacific Railroad Corporation. (As of January 1, 1939, the sum of such advances was $5,768,791. No interest has been paid thereon since November 1, 1931. Interest on interest bearing portion of advances from said

date to August 2, 1935, computed at 5% amounts to $1,042,510.59, and from August 2, 1935, to January 1, 1939, to $937,918.52, or an aggregate of $1,980,429.11. Such advances are wholly unsecured.)

(11) The Debtor's obligations as to advances made an open account by the Western Realty Company. (As of January 1, 1939, the sum of such advances was $50,000. Such advances bear interest at the rate of 5% from the date of the making thereof to the date of payment. No interest has been paid thereon since May 1, 1934. Interest from said date to August 2, 1935, computed at 5% amounts to $3,131.94, and from August 2, 1935, to January 1, 1939, to $8,534.73, or an aggregate of $11,666.67. Such advances are wholly unsecured.) [967]

(12) The Debtor's Preferred Capital Stock. (As of January 1, 1939, there were outstanding 283,000 shares of the par value of $100 per share.)

(13) The Debtor's Common Stock. (As of January 1, 1939, there were outstanding 475,000 shares of the par value of $100 per share.)

(14) All other claims, obligations and liabilities of the Debtor not hereinabove specifically described. None of the foregoing claims or obligations is affected by any plan of reorganization proposed before the Commission, by the Commission Plan, or by any modification thereof proposed in the objections to said Commission Plan, except items (1), (2), (3), (4), (5), (10), (11), (12), and (13) enumerated above.

9. In addition to the claims against the Debtor hereinabove in paragraph 8 described, there were issued, pursuant to the order of the Court entered October 5, 1938, as supplemented by the order entered November 7, 1938, $10,000,000, principal amount, of Trustees' Certificates of Indebtedness, dated December 1, 1938, maturing December 1, 1939, bearing interest at the rate of 3% per annum and payable semi-annually as provided in said Certificates (said Certificates having been issued and disposed of at a discount from the par value thereof by an amount that, when added to the interest at said rate of 3% per annum from the date of issuance to the date of maturity, equals the amount of interest on said certificates for the same period at a rate of 4% per annum). Pursuant to the order of the Court entered November 29, 1939, the maturity of said [968] $10,000,000 of Certificates was extended by endorsement to December 1, 1940, said Certificates to bear interest at the rate of 4% per annum, payable monthly.

10. There were also issued, pursuant to the order of the Court entered January 27, 1937, $2,320,000, principal amount, of 3% Equipment Trust Certificates, Series of 1937, dated February 1, 1937 and maturing annually in the amount of $155,000 each February 1, 1938 to 1951, inclusive, and $150,000 on February 1, 1952. The proceeds of such Certificates, which were sold at slightly above par, were used as part payment for rolling stock purchased by the Debtor's Trustees. As of January

1, 1939, there were outstanding $2,165,000, principal amount, of such Certificates.

11. On August 20, 1935, the Court, pursuant to the provisions of Paragraphs (7) and (8) of Subsection (c) of said Section 77, by order fixed September 15, 1935, as the date on or before which all claims and interests of creditors and stockholders of the Debtor should be filed or evidenced. Said order provided the manner in which such claims and interests should be filed or evidenced and required the Debtor to give notice to the corporate trustees under the Debtor's mortgages and equipment obligations, to A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company, by mailing a copy of said order to such persons or corporations at their respective addresses as shown by the records of the Debtor, and by publication of a brief summary of the order in a newspaper of general circulation published in the City of San Francisco and in [969] a newspaper of general circulation published in the Borough of Manhattan, City of New York. Such mailing and publication having been duly made as provided in said order prior to September 1, 1935, verified statements of claims or interests were filed by or on behalf of the holders or pledgees of the First Mortgage Bonds, Refunding Mortgage Bonds, and equipment obligations, as provided in said order, by the trustees under the respective mortgages or agree-

ments under which such Bonds and obligations were issued, and by A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation (both as a creditor and as the sole stockholder of the Debtor) and The Western Realty Company at the time and in the manner provided in said order.

12. The Debtor, pursuant to the provisions of Paragraph (4) of Subsection (c) of said Section 77, and within the time limit set by the Court, filed with the Clerk of the Court a list of all known bondholders and creditors of the Debtor and the amounts and character of their debts, claims and securities, and the last known post office address or place of business of each bondholder and creditor, and a list of all known stockholders of the Debtor, with the last known post office address or place of business of each, copies of which list were transmitted by the Clerk to the Interstate Commerce Commission as required by the General Orders in Bankruptcy of the United States Supreme Court.

[970]

13. By orders of the Court herein entered from time to time, the following have been given leave to intervene generally in this proceeding and to become parties hereto:

Crocker First National Bank of San Francisco and Samuel Armstrong, successors of First Federal Trust Company and Henry E. Cooper, as Trustees under the First Mortgage (the Trustees for the time being in office under

the First Mortgage, whether original or successors, being hereinafter sometimes called the First Mortgage Trustees);

The Chase National Bank of the City of New York, as Trustee under the Refunding Mortgage;

Irving Trust Company, successor to The Chase National Bank of the City of New York, as Trustee under the Refunding Mortgage (the Trustee for the time being in office under the Refunding Mortgage, whether original or successor, being hereinafter sometimes called the Refunding Mortgage Trustee);

Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing a group of institutional holders of substantial amounts of the Debtor's First Mortgage Bonds (hereinafter referred to as the Institutional Bondholders Committee);

A. C. James Co.;

Reconstruction Finance Corporation;

The Western Pacific Railroad Corporation; and

The Western Realty Company. [971]

14. A Plan of Reorganization was filed by the Debtor with the Court and the Interstate Commerce Commission on February 8, 1936, within the time and in the manner prescribed by Subsection (d) of said Section 77. Pursuant to said Subsection (d), the Interstate Commerce Commission,

after due notice to all stockholders and creditors of the Debtor, given by publication on February 28, and March 6, 1936, in one newspaper of general circulation in the City of San Francisco and one newspaper of general circulation in the Borough of Manhattan, City of New York, held public hearings on March 23, April 21, September 28, October 26, November 19 and December 9, 1936. Said notice of hearing also provided that plans of reorganization might be filed at any time before, or with consent of the Commission, during the hearing, by the Debtor's Trustees, or by or on behalf of creditors having not less than 10 per centum in amount of any class of creditors, or by or on behalf of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission, by any party in interest. In addition to the debtor's Plan, a plan was filed with the Commission on September 28, 1936, on behalf of the Institutional Bondholders Committee and on October 26, 1936, on behalf of A. C. James Co., the Commission having consented to the filing thereof. At such hearings, opportunity was given to any interested party to be heard on said Plans.

15. On or about August 1, 1937, the Bureau of Finance of the Interstate Commerce Commission issued a proposed report containing a recommended plan of reorganization to which exceptions were filed by the Debtor, the Institutional Bond- [972] holders Committee, the First Mortgage Trustees, the Refunding Mortgage Trustee, A. C. James Co.,

Reconstruction Finance Corporation and The Railroad Credit Corporation. Oral argument on said exceptions to said proposed report was had before the Interstate Commerce Commission at Washington on November 17, 1937.

16. On October 10, 1938, the Interstate Commerce Commission issued its original report and order (hereinafter referred to as the Original Report and Order) approving a plan of reorganization. The Commission transmitted a copy of said Original Report and Order, under the seal of the Commission, to the Court, which was filed with the Clerk of the Court in this proceeding on October 21, 1938, and became a part of the record herein.

17. Thereafter, on December 9, 1938, the Debtor, the Institutional Bondholders Committee, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation and the Railroad Credit Corporation filed their separate petitions with the Interstate Commerce Commission for rehearing and modification of said Original Report and Order and the plan of reorganization approved therein. Answers to certain of said petitions were filed with the Commission by the First Mortgage Trustees and The Railroad Credit Corporation. Proposals for modification of the Commission's Plan of October 10, 1938, were attached to or contained in such petitions. A rehearing on the basis of these petitions was granted by order of the Interstate Commerce Commission entered December

30, 1938, and oral argument on said petitions was had before the Commission on January 20, 1939.

18. Under date of June 21, 1939, the Commission [973] issued its "Report and Order on Further Consideration" (hereinafter referred to as the Supplemental Report and Order) approving a modified plan of reorganization (hereinabove and hereinafter referred to as the Commission Plan). By its said report and order of June 21, 1939, the Commission modified the original report of October 10, 1938, and revoked and rescinded the original order of October 10, 1938. Said Supplemental Report and Order were issued by the Commission prior to certifying to the Court, as required by Subsection (d) of said Section 77, the plan of reorganization approved by the Commission together with a transcript of the proceedings before the Commission and of the report and order approving the plan.

19. On or about August 1, 1939, and prior to the certifying to the Court of the Commission Plan and the record before the Commission, the Debtor filed a petition for rehearing and modification of said Commission Plan. Answers thereto were filed by certain parties. Said petition was denied by the Commission by a report and order entered September 19, 1939. Said Debtor's petition, said answers, and said report and order of the Commission of September 19, 1939, constitute a part of the record before the Commission.

20. Pursuant to the requirements of said Subsection (d) of said Section 77, the Interstate Com-

merce Commission on or about September 28, 1939, certified to the Court said Commission Plan together with a transcript of the proceeding before it and a copy of said Supplemental Report and Order approving said Commission Plan, and the same were filed in this proceeding by the Clerk of the Court on October 4, 5 and 6, 1939, and became a part of the record herein. [974]

21. On November 8, 1939, the Court, pursuant to the provisions of Subsection (e) and of Clause 8, of Subsection (c) of Section 77 of the Bankruptcy Act, entered its order fixing the time within which objections to the Commission Plan and claims for equitable treatment might be filed herein, fixing the time within which applications might be filed for expenses and fees incident to the reorganization, and fixing December 8, 1939, as the date for the filing of such objections and claims for equitable treatment and petitions for an allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred in connection with the proceeding and plan of reorganization up to and including October 31, 1939, and providing for the giving of due notice by the Debtor's Trustees to creditors and stockholders, or their representatives, and all other parties in interest.

22. Pursuant to said order of November 8, 1939, objections to said Commission Plan and Claims for equitable treatment were duly filed by or on behalf of the following parties in interest:

The Debtor;

The Institutional Bondholders Committee;

The Refunding Mortgage Trustee;

A. C. James Co.;

Reconstruction Finance Corporation;

The Railroad Credit Corporation;

The Western Pacific Railroad Corporation; and

The Western Realty Company.

23. Pursuant to said order of November 8, 1939, [975] petitions for an allowance for compensation for services rendered or for expenses (including reasonable counsel fees) incurred, in connection with the proceeding and plan of reorganization, up to and including October 31, 1939, were filed by the following persons, corporations and committees:

The Debtor and its counsel;

The Institutional Bondholders Committee and its counsel;

Crocker First National Bank of San Francisco, as Corporate Trustee under the First mortgage;

Samuel Armstrong, as Individual Trustee under the First Mortgage;

The Chase National Bank of the City of New York, as Trustee (until November 13, 1936) under the Refunding Mortgage;

Irving Trust Company, as successor Trustee under the Refunding Mortgage;

A. C. James Co. and its counsel; and

Reconstruction Finance Corporation.

Said petitions fully disclosed, so far as can now be ascertained, the maximum amounts to be paid by the Debtor or by any corporation acquiring its assets for expenses and fees incident to the proceeding and the plan of reorganization through October 31, 1939.

24. By various orders entered in this proceeding the Debtor or the Debtor's Trustees have been authorized to enter into various contracts, leases and equipment agreements and leases extending beyond the period of the reorganization proceeding. The Commission Plan [976] provides for the adoption of all such contracts, leases and equipment agreements and leases by the Reorganized Company (which may be the Debtor corporation or a new corporation), and, therefore, satisfies the conditions imposed by said Section 77 or by the Court with respect to said contracts, leases and equipment agreements and leases.

25. The Debtor owns or operates 1,207.51 miles of standard gauge railroad. A main line extends eastward 924.17 miles from Oakland, California, to Salt Lake City, Utah. The Northern California Extension extends northward 11.81 miles from Keddie to Bieber, California, with operating rights from Bieber to Hambone, California—46.38 miles—over the Great Northern Railway. In addition to said main line mileage and the Northern California Extension, the Debtor has approximately 131.66 miles of branch line mileage springing from the Oakland-Salt Lake City line.

26. The Debtor's branches and the mileage thereof are as follows:

Niles Jct. to San Jose, Cal.	23.07 miles
Carbona to Moy, Cal.	4.43 miles
Terminous Jct. to Terminous, Cal.	7.92 miles
Calpine Jct. to Calpine, Cal.	12.62 miles
Hawley to Loyalton, Cal.	12.79 miles
Gulling Jct. to Bridge 6, Cal.	2.41 miles
Reno Jct. to Reno, Nevada	33.11 miles
Main Line to Oregon Short Line, Wells, Nev.	1.18 miles
Ellerbeck to M. P. 371 and Dolomite, Utah	5.85 miles
Burmester to Warner, Utah	15.52 miles
North of Stockton to Stockton	5.90 miles
Glannvale to Bradford Winery	1.61 miles

[977]

Adelaide to Hutchinson's Mill	1.01 miles
Land to Bidwell Bar	2.02 miles
Spanish Creek (Peak) Spur	0.60 miles
Blairsden to Davies Mill	1.00 miles
Gerlach to connection with Pacific Portland Cement Company's railroad	6.02 miles
Total	131.66 miles

27. The Debtor also owns an undivided one-half interest in the following:

1. Tracks owned jointly with Southern Pacific Company in Oakland, Alameda County, California—total length—4.41 miles.

2. Track owned jointly with Southern Pacific Company near Niles, Alameda County, California—total length—0.24 miles.

3. Tracks owned jointly with Southern Pacific Company in San Jose, Santa Clara County, California—total length—0.36 miles.

4. Track owned jointly with California Fruit Exchange at Graeagle—total length—0.01 miles.

5. Track owned jointly with Southern Pacific Company at Reno, Washoe County, Nevada—total length—0.17 miles.

6. Track owned jointly with Oregon Short Line Railroad in Salt Lake City, Salt Lake County, Utah—total length—0.30 miles.

28. The Debtor also owns an undivided one-third interest in the following:

Tracks owned jointly with Southern Pacific Company and Sacramento Northern Railway in Sacramento County, California—total length—0.13 miles.

29. The Debtor also operates 4.2 miles of ferry service from Oakland to San Francisco and 183.13 miles of second main track, of which 182.91 miles between Weso and Alazon, Nevada, are owned by the Southern Pacific. The territory in which the second main track is operated is [978] known as the "Paired Track" district since the lines of the Debtor and the Southern Pacific are used as a double track railroad by both the Debtor and the Southern Pacific.

30. The Debtor also owns all the outstanding capital stock of Sacramento Northern Railway, an electrically operated standard gauge freight and passenger railroad, operating 276.2 miles of road serving and connecting San Francisco and Oakland

with various Sacramento Valley cities, principally Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa and Oroville. 9,995 shares of the capital stock of Sacramento Northern Railway of a par value of $999,500, together with $5,213,475, principal amount, of First Mortgage Bonds of Sacramento Northern Railroad and $4,524,744 face amount of notes of Sacramento Northern Railway are physically pledged under the Debtor's First Mortgage. The Debtor also holds obligations of the Sacramento Northern Railway as to advances made on open account to it by the Debtor in the sum of $4,348,356.42, which the First Mortgage Trustees claim are subject to the lien of the First Mortgage.

31. Through its ownership of more than 97% of the outstanding capital stock of the Tidewater Southern Railway, it controls that subsidary, which operates a standard gauge steam freight line aggregating 61.38 miles of road connecting Stockton with Manteca, Escolon, Modesto and Turlock in the San Joaquin Valley of California. All of the capital stock of said Tidewater Southern Railway owned by the Debtor (1,147,968 shares of the par value of $1 per share), together with a note of said Railway in the amount of $508,278.61 due March 1, 1945, and bearing interest at the [979] rate of five per cent. per annum, payable on March 1 and September 1 of each year, is physically pledged under the Refunding Mortgage.

32. The Debtor also owns all of the outstanding capital stock of Deep Creek Railroad Company

which, prior to its abandonment in July 1939, owned and operated a standard gauge steam railroad from Wendover to Gold Hill, Utah, a distance of 46.0 miles. The capital stock of Deep Creek Railroad Company (4,500 shares of par value of $100 per share) is physically pledged under the First Mortgage. A note of Deep Creek Railroad Company in the face amount of $45,000 is physically pledged under the Refunding Mortgage, but the lien created by said latter pledge is claimed by the First Mortgage Trustees to be subordinate to the lien thereon of the First Mortgage. The Debtor also holds obligations of Deep Creek Railroad Company as to advances made on open account to it by the Debtor in the sum of $128,230.40, which the First Mortgage Trustees claim are subject to the lien of the First Mortgage.

33. The Debtor also owns all the outstanding capital stock (except directors' qualifying shares) of Standard Realty and Development Company, which has various holdings of real property. Such capital stock (4,000 shares of the par value of $100 per share) is physically pledged under the First Mortgage. A note of Standard Realty and Development Company in the face amount of $251,273.07 is physically pledged under the Refunding Mortgage, but the lien created by said latter pledge is claimed by the First Mortgage Trustees to be subordinate to the lien of the First Mortgage. The Debtor also holds [980] obligations of Standard Realty and Development Company as to advances made on open

account to it by the Debtor in the sum of $363,310.86, which the First Mortgage Trustees claim are subject to the lien of the First Mortgage.

34. Jointly operated affiliated railroad companies are:

(a) The Salt Lake City Union Depot & Railroad Company (capital stock owned 50% by The Denver and Rio Grande Western Railroad Company and 50% by Debtor). The capital stock owned by the Debtor (996 shares of the par value of $100 per share) is physically pledged under the First Mortgage.

(b) Central California Traction Company, operating an electric freight railroad from Stockton to Sacramento, California, 53.78 miles (capital stock owned one-third by Atchison, Topeka & Santa Fe Railway Company, one-third by Southern Pacific Railroad Company and one-third by the Debtor). The capital stock of the Traction Company owned by the Debtor (2,642-2/3 shares of Preferred Stock and 967-2/3 shares of Common Stock, each class of the par value of $100 per share) and First Mortgage Bonds of the Traction Company in the principal amount of $270,000 are physically pledged under the Refunding Mortgage. The Debtor also holds obligations of the Traction Company as to advances made on open account to it by the Debtor in the sum of $208,346.47, which the Refunding Mortgage Trustee

claims are subject [981] to the lien of the Refunding Mortgage.

(c) Alameda Belt Line, operating 17.85 miles of terminal switching line in the city of Alameda on San Francisco Bay (capital stock owned one-half by Atchison, Topeka & Santa Fe Railway Company and one-half by the Debtor). The capital stock owned by the Debtor (4,656 shares of the par value of $100 per share) is physically pledged under the Refunding Mortgage. The Debtor also holds obligations of Alameda Belt Line as to advances made on open account to it by the Debtor in the sum of $71,975.55, which the Refunding Mortgage Trustee claims are subject to the lien of the Refunding Mortgage.

None of the above subsidiary or affiliated companies has filed a petition under Section 77 of the Bankruptcy Act nor is any of them being operated by a receiver.

35. The Debtor, a California corporation, was organized on June 6, 1916 and as of July 14, 1916, succeeded to the railroads and other properties of the Debtor's predecessor company, Western Pacific Railway Company, sold at foreclosure on June 28, 1916, at an upset price of $18,000,000 pursuant to a plan of reorganization dated December 15, 1915, a copy of which is annexed to a copy hereof filed with the Court, marked Exhibit A. Pursuant to

said foreclosure sale, said properties of said predecessor company on July 14, 1916 were conveyed to the Debtor by a deed dated July 1, 1916, which is referred to in Clause First of the Granting Clauses of the First Mortgage dated June 26, 1916.

36. Pursuant to said plan of reorganization of the [982] predecessor company two corporations were organized: (1) The Western Pacific Railroad Corporation, a Delaware corporation, as holding company, and (2) the Debtor as purchaser of said properties at said foreclosure sale, and owner thereof.

37. Upon incorporation, the Debtor had an authorized capital stock of $75,000,000, divided into $47,500,000 of Common Stock and $27,500,000 of Preferred Stock, consisting of 475,000 shares of Common Stock and 275,000 shares of Preferred Stock of the par value of $100 each, all owned by The Western Pacific Railroad Corporation. All of said capital stock was issued in the 1916 reorganization of the Debtor's predecessor in exchange for the predecessor's First Mortgage Bonds in the aggregate principal amount of $50,000,000, the proceeds of such Bonds having been used in constructing and equipping portions of the property now owned by the Debtor. An additional $800,000 par value of Preferred Stock was on December 17, 1929 issued and sold to The Western Pacific Railroad Corporation for cash at par.

38. In addition to the $75,000,000 of capital stock, the Debtor began operations in July, 1916,

with $20,000,000 of its First Mortgage Bonds outstanding. Said Bonds had been sold in connection with the reorganization of the Debtor's predecessor. The proceeds thereof, amounting to $18,0000,000, were used as follows:

$1,000,000 held in treasury for working capital.

$15,000,000 expended for capital purposes.

$2,000,000 expended for purpose (a) of paying incorporation expenses of Debtor and its parent company and the issuance of their securities, (b) compensation of trustees and counsel fees incurred in connection with foreclosure of prede- [983] cessor company's mortgage, (c) payment of distributive shares of non-participating first mortgage bondholders of the predecessor company (approximately $900,000), (d) reorganization expenses, and (e) expenses in connection with enforcement of claims against Denver and Rio Grande Railroad Company.

39. The balance of the authorized First Mortgage Bonds were issued at various times between 1921 and 1932 and were sold at varying prices, the highest being 99.75 and the lowest 85. The principal amount of the various issues, the year of issue, the price at which sold, the proceeds realized by the Debtor, and the general purpose of the issue, are as follows:

Year Issued	Face Amount	Price	Amount Realized	Purpose of Issue
1916	$20,000,000	90%	$18,000,000	Pay certain expenses of reorganization as specified in Plan, provide working capital and finance capital expenditures thereafter under Sec. 1 of Article Second of First Mortgage.
1921	$ 4,180,000	85%	$ 3,553,000	Purchase of Sacramento Northern Railroad properties through Sacramento Northern Railway.
1922	$ 3,000,000 of 6% bonds (only 6% bonds ever issued under the Mortgage and subsequently refunded—see below.)	97.7779%	$ 2,933,337	Retire outstanding Equipment Trust Certificates.
1925	$ 4,000,000	94.25%	$ 3,770,000	General Capital Purposes.
1926	$ 2,600,000	99.75%	2,593,500	General Capital Purposes. [984]
1927	$ 2,950,000	Portion Exchanged at par for outstanding 6% bonds; portion sold and discounted at 99.517%	$2,678,500 face amount sold; produced $2,665,562.84 cash; balance $271,500 exchanged for like amount of retired 6% bonds.*	Substitution of these 5% bonds for all of the Series "B" $3,000,000 6% bonds then outstanding in aggregate amount of $2,950,000.

* $271,500 face amount of 6% bondholders elected to receive in lieu of the redemption price of the 6% bonds, 5% bonds of the new issue of the same face amount, together with a cash premium of 3%.

Year Issued	Face Amount	Price	Amount Realized	Purpose of Issue
1929	5,000,000	97.50%	4,875,000	General capital purposes.
1930	572,800	99%	567,072	Purchase of San Francisco-Sacramento Railroad Company properties through Sacramento Northern Railway.
1930	5,000,000	97.50%	4,875,000	General Capital purposes of company and of subsidiary, Sacramento Northern Railway.
Various times 1931—1932	5,000,000	97.50%	4,875,000	To finance in part construction and/or acquisition of Northern California Extension.
1931	645,000	97.50%	628,875	General capital purposes.

40. As of January 1, 1939, the effective date of the Commission Plan, $49,290,100 principal amount of the First Mortgage Bonds were outstanding. The Debtor made payment of the interest on its First Mortgage Bonds until and including the instalment due September 1, 1933. By the terms of an extension agreement between the Debtor and holders of 86.58% in principal amount of the First Mortgage Bonds, [985] interest due in the year 1934 on such Bonds and aggregating $2,133,800 was extended to January 1, 1937. The interest maturing in 1934 on the notes of the Debtor held by A. C. James Co., Reconstruction Finance Corporation and The Railroad Credit Corporation, and principal and interest falling due during the calendar year

1934 on loans of The Western Pacific Railroad Corporation, were also extended to January 1, 1937, or to such date prior to January 1, 1937, as receivers should be appointed for the Debtor or a petition under Section 77 should be filed. No interest payment on the First Mortgage Bonds has been made since September 1, 1933. I. C. C. Exhibits 117 to 123, inclusive, are true copies of the documents constituting the Debtor's Extension Agreement of 1934.

41. In 1918, the Debtor issued $3,600,000 equipment Gold Notes, Series A, and sold the same at 97.049166, the total proceeds realized therefrom aggregating $3,493,770. The outstanding balance of these Notes was retired through the issue of a like face amount of 6% First Mortgage Bonds in 1922, which Bonds were refunded in 1927 by the issuance of $2,950,000 of 5% First Mortgage Bonds.

42. In addition to the aforesaid Equipment Gold Notes issued in 1918, the Debtor, prior to the filing on August 2, 1935, of its petition for reorganization under Section 77, issued the following Equipment Trust Obligations (I. C. C. Exhibits Nos. 57 and 105):

1923—$5,600,000 5½% Equipment Trust Certificates Series "B", sold at 97.25%; amount realized $5,446,000.

1924—$3,105,000 5½% Equipment Trust Certificates Series "C", sold at 100%; amount realized $3,105,000. [986]

1929—$1,095,000 5% Equipment Trust Certificates Series "D", sold at 97.25%; amount realized $1,064,887.50.

1931—$629,330 5% Equipment Obligations (commonly referred to as Baldwin Locomotive Works Lease) issued to Baldwin Locomotive Works in payment for new locomotives. Obligations assigned to Fidelity-Philadelphia Trust Company.

43. As of January 1, 1939, all of said Series B and Series C Equipment Trust Certificates (the final instalments of which matured on March 1, 1938 and December 1, 1938, respectively) had been paid off or cancelled, or funds for their payment had been deposited with the trustees under said equipment trusts. As of January 1, 1939, there were outstanding under the Series D Equipment Trust $365,000, principal amount, of Certificates. $73,000, principal amount, of such Certificates mature on each November 1 from 1939 to 1943.

44. As of January 1, 1939, there were outstanding under the Baldwin Locomotive Works Lease $188,799, principal amount, of Equipment Obligations. $31,466.50 of such obligations mature on each seventh day of January and July from 1939 to 1941.

45. As of January 1, 1939, there were outstanding unpaid instalments amounting to $30,311.35 under a Conditional Sale Contract covering the purchase of three lounge cars from the Pullman Company. Instalments thereunder are payable monthly

at the rate of four cents per mile, the minimum monthly instalment being $2,000.

46. As of January 1, 1939, there were also outstanding $2,165,000 principal amount, of 3% Equipment Trust [987] Certificates, Series of 1937. Such Certificates are a part of a total issue of $2,320,000, principal amount, of Certificates issued and sold at slightly above par by the Trustees pursuant to an order of the Court entered January 27, 1937. $155,000, principal amount, of such Certificates mature on each February 1 from 1939 to 1951, and $150,000 on February 1, 1952.

47. Since the year 1916 the Debtor has paid dividends as follows:

Year	Dividend Declared	Dividend Paid	Rate of Dividend
1916	None	None	None
1917	None	None	None
1918	None	None	None
1919	None	None	None
1920	None	None	None
1921	$1,650,000	$1,650,000	6% Preferred
1922	1,650,000	1,650,000	6% Preferred
1923	1,650,000	1,650,000	6% Preferred
1924	1,650,000	1,650,000	6% Preferred
1925	4,453,420*	4,453,420*	(See footnote)

*$2,374,970, being a 5% dividend on common stock ($5.00 per share on 474,994 shares)—special dividend, and $1,650,000, 1925 regular dividend on preferred stock ($6.00 per share on 275,000 shares and an arrears dividend of $428,450 on Preferred Stock $1.558 per share of Preferred Stock account arrears on Preferred Stock dividends)—dividends on Preferred Stock being cumulative at that time.

Year	Dividend Declared	Dividend Paid	Rate of Dividend
1926	1,650,000	1,650,000	6% Preferred
1927	412,500	412,500	1½% on "
1928	None	None	None
1929	None	None	None
1930	None	None	None
1931	None	None	None
1932	None	None	None
1933	None	None	None
1934	None	None	None
1935	None	None	None
1936	None	None	None
1937	None	None	None
1938	None	None	None

[988]

48. In the course of the year 1926, Mr. Arthur Curtiss James and certain corporations, practically all the stock of which was, and is, owned by Mr. James, acquired by purchase in the open market and now own the following shares of Preferred and Common Stock of the Western Pacific Railroad Corporation, the sole stockholder of the Debtor:

Owner	No. of Shares Preferred	No. of Shares Common	Total
Arthur Curtiss James	1,000	1,000	2,000
Curtiss Southwestern Corporation	2,000	310,690	312,690
Curtiss Southwestern Company	30,400	40,700	71,100
Total	33,400	351,398	385,790

As of January 1, 1939, said 385,790 shares constituted 40.36% of the 955,663 shares of outstanding capital stock of the Western Pacific Railroad Corporation.

49. The number of holders of common stock and preferred stock, respectively, of the Western Pacific Railroad Corporation and the number of shares held in the respective amounts set forth below are as follows:

Number of Shares Held from	Number Common Stockholders	Number Preferred Stockholders
1 to 50 Inc.	1532	2314
50 to 100 "	570	667
100 to 200 "	191	246
200 to 300 "	49	77
300 to 500 "	54	79
500 to 1000 "	38	50
Over 1000	22	41
Total	2456	3474

[989]

50. Upon a survey of operating properties of the Debtor made in 1927, after Mr. James acquired his interest in the parent company of the Debtor, it appeared that large expenditures were necessary for the rehabilitation of the Debtor's property. Dividend payments were therefore stopped and an Improvement Program initiated which contemplated the expenditure of approximately $18,000,000 to rehabilitate the Debtor's property. Approximately $8,000,000 was spent on this program before the rapid reduction in gross revenues commencing in the summer of 1929 and continuing during the subsequent depression years made the discontinuance of the Improvement Program necessary, and it was abandoned in 1931.

51. Meanwhile the Debtor had commenced the construction of the so-called Northern California

Extension, designed to connect the main line of the Western Pacific at or near Keddie, California, with the Great Northern Railway Company at or near Bieber, California. Construction of the Northern California Extension was commenced on August 16, 1930. The cost of constructing, to May 31, 1932, the Northern California Extension was $10,183,641.90. The details of the financing of the construction of said Extension are hereinafter more fully set forth.

52. The Refunding Mortgage was executed on February 29, 1932, as of January 1, 1932, with The Chase National Bank as Trustee. On November 13, 1936, Irving Trust Company was substituted as such Trustee in the manner provided for in the Refunding Mortgage. Said Mortgage authorized the issue for various purposes therein set forth of not to exceed $100,000,000 of Refunding Mortgage Bonds at any one time outstanding. [990]

53. As of January 1, 1939, $18,999,500, principal amount, of Refunding Mortgage Bonds were held as collateral to secure promissory notes of the Debtor held by A. C. James Co., Reconstruction Finance Corporation and The Railroad Credit Corporation.

54. The dates of the notes held by A. C. James Co., the dates of maturity thereof, the amount thereof and the disposition of the proceeds thereof, are as follows:

Date of Note	Date Due	Amount	Disposition of Proceeds
March 28, 1932	March 28, 1935	$4,504,000	To refund $4,504,000 of Debentures hereinafter mentioned, the proceeds of which Debentures were applied to costs of construction of Northern California Extension.
March 28, 1932	March 28, 1935	347,000	To refund $347,000 of Debentures hereinafter mentioned, the proceeds of which Debentures were applied to costs of construction of Northern California Extension.
May 31, 1932	May 31, 1935	148,800	To refund $148,800 of Debentures hereinafter mentioned, the proceeds of which Debentures were applied to costs of construction of Northern California Extension.
	TOTAL	$ 4,999,800	

I.C.C. Exhibits Nos. 9-3(a), 9-3(b) and 9-3(c) are true copies of said respective notes.

55. The dates of the Notes held by Reconstruction Finance Corporation, the dates of maturity thereof, the amount thereof and the disposition of the proceeds thereof are as follows: [991]

Date of Note	Maturity Date	Amount	Disposition of Proceeds
March 1, 1932	March 1, 1935	$799,000*	$375,000 principal installment Equipment Trust Certificates, Series B, due March 1, 1932.
			$259,000 applied to costs of construction Northern California Extension.
			$165,000 advances to subsidiary railroad companies to meet obligations due March 1, 1932.
June 29, 1932	June 29, 1935	$734,584	$14,947 interest due July 7, 1932, on Baldwin Locomotive Works contract.
			$60,637 quarterly interest due July 1, 1932, on Notes to A. C. James Co.
			$268,061 applied to costs of construction of Northern California Extension.
			$70,846 miscellaneous capital expenditures.
			$31,466 principal due July 7, 1932, on Baldwin Locomotive Works contract.
			$264,027 miscellaneous materials and supplies including fuel oil.
			$24,600 advances to subsidiary railroad companies.

*Reduced to $699,000 through the redemption at par of $100,000 First Mortgage 5% Bonds of Tidewater Southern Railway Company pledged with Reconstruction Finance Corporation as collateral. [992]

Date of Note	Maturity Date	Amount	Disposition of Proceeds
Aug. 1, 1932	Aug. 1, 1935	$ 136,045	$103,698 payment of first instalment of California gross earnings tax.
			$32,347 applied to costs of construction of Northern California Extension.
Aug. 30, 1932	Aug. 30, 1935	$1,293,440	$1,232,252.50 semi-annual interest due Sept. 1, 1932, on First Mortgage Bonds.
			$61,187.50 semi-annual interest due Sept. 1, 1932, on equipment Trust Certificates, Series B.
Mar. 25, 1933	Mar. 25, 1936	99,931	$39,294 semi-annual interest due on Equipment Trust Certificates, Series C.
			$60,637 quarterly interest due on Notes to A. C. James Co.
Total (less $100,000 payment; see footnote page 32		$2,963,000	

I.C.C. Exhibits Nos. 9-1(a), 9-1(b), 9-1(c), 9-1(d) and 9-1(e) are true copies of said respective notes.

56. The dates of the Notes held by The Railroad Credit Corporation, the dates of maturity thereof, the amounts thereof and the disposition of the proceeds thereof are as follows: [993]

Date of Note	Maturity	Amount	Disposition of Proceeds
June 29, 1932	Feb. 28, 1934	$1,303,000.00*	$1,231,500 semi-annual interest due Mar. 1, 1932 on First Mortgage Bonds.
			$71,500 semi-annual interest due Mar. 1, 1932, on Equipment Trust Certificates, Series B.
Mar. 25, 1933	March 24, 1935	$1,293,439.00	$1,232,252 semi-annual interest due Mar. 1, 1933, on First Mortgage Bonds.
			$61,187 semi-annual interest due Mar. 1, 1933, on Equipment Trust Certificates, Series B.
Total at December 31, 1938 (Less credits under the Marshalling and Distributing Plan; see footnote)		$2,445,609.88	

I.C.C. Exhibits Nos. 9-2(a) and 9-2(b) are true copies of said respective notes. Annexed hereto and made a part hereof, marked Exhibit B, is a statement of the Debtor's account under the Marshalling and Distributing Plan, 1931, showing credits in the amount of $150,829.12. Said Exhibit also sets forth

*Reduced by $150,829.12 of distributions under the Marshalling and Distributing Plan and other collateral income and proceeds (see Exhibit B hereto).

the undistributed balance of the Debtor and its subsidiaries in the Marshalling and Distributing Plan, 1931, as shown by the Books of the Railroad Credit Corporation. [994]

57. On October 4, 1929, the Interstate Commerce Commission, pursuant to Section 19(a) of the Interstate Commerce Act (49 U.S.C.A. 19 (a)), found the final valuation of the properties of the Debtor to be $63,321,000 as of June 30, 1914. (I.C.C. Exhibit No. 104; 29 I.C.C. Val. Rep 239)

58. In other proceedings (46 I.C.C. Val. Rep. 586; 46 I.C.C. Val. Rep. 540; 43 I.C.C. Val. Rep. 40) the Interstate Commerce Commission, pursuant to Section 19(a) of the Interstate Commerce Act (49 U.S.C.A. 19(a)), found the final valuation of the properties of the Debtor's wholly owned subsidiaries, Sacramento Northern Railway, Tidewater Southern Railway Company and Deep Creek Railroad Company, to be $18,123,283 as of their respective valuation dates (230 I.C.C. Val. Rep. 61, at page 76) i.e., December 31, 1927 with respect to the Tidewater Southern Railroad Company and the Deep Creek Railroad Company, and December 31, 1928 with respect to Sacramento Northern Railway.

59. On October 10, 1938, the Interstate Commerce Commission, in its report in the instant proceeding, stated that

> "If there be added to the above amounts i.e., the valuations of the properties of the Western Pacific Railroad Company and its wholly owned subsidiaries) the net costs of

additions and retirements between valuation dates and December 31, 1935, the total would be $139,600,455." (230 I.C.C. 67, at p. 76)

60. On August 2, 1937, the Bureau of Finance of the Interstate Commerce Commission, in the instant proceeding (Proposed Report of the Bureau of Finance, pp. 22 and 23), stated that the final valuation of the properties of the Debtor, as determined by the Interstate Commerce Commission [995] pursuant to the provisions of Section 19(a) of the Interstate Commerce Act (49 U.S.C.A. 19(a) as of June 30, 1914, was $63,321,000, and that in similar proceedings the Commission found the value under said Section 19(a) of the properties of the wholly owned subsidiaries of the Debtor, i.e., Sacramento Northern Railway, Tidewater Southern Railway Company and Deep Creek Railroad Company, to be $18,336,529 as of their respective valuation dates, and that

"If there be added to the above amounts capital expenditures between valuation dates and December 31, 1935, the total would be $144,619,851." (Proposed Report of Bureau of Finance, pp. 22 and 23.)

61. On August 2, 1937, the Bureau of Finance of the Interstate Commerce Commission, in the instant proceeding (Proposed Report of Bureau of Finance, p. 44), stated:

"The debtor's assets, consisting of real and personal property, have been described and its

investment in such property has been stated" i.e. $144,619,851. (Proposed Report of Bureau of Finance, p. 23.)

Which includes values of wholly owned subsidiaries of the Debtor—Sacramento Northern Railway, Tidewater Southern Railway Company and Deep Creek Railroad Company as mentioned in previous paragraph No. 60.

62. On August 2, 1937, the Bureau of Finance of the Interstate Commerce Commission, in the instant proceeding, stated the book value of the assets of the Debtor to be $171,096,992.80 as of November 30, 1936. (Proposed Report of Bureau of Finance, p. 6.)

63. On October 10, 1938, the Interstate Commerce Commission stated that the balance sheet as of June 30, 1938, of the Debtor's Trustees showed total assets of $173,650,980.19 (Commission's Report in this proceeding, p. 8.)

64. On February 27, 1932, the Interstate Commerce Commission, in its report authorizing the issuance of $15,000,000 in principal amount of general and refunding mortgage gold bonds, Series A, of the Debtor (180 I.C.C. 652; I.C.C. Exhibit No. 92, p. 4) found that the total capital [996] assets of the Debtor and affiliated companies, as of December 31, 1931, were $147,056,283.31.

65. On December 9, 1932, the Interstate Commerce Commission, in its report authorizing the issuance of $4,000,000 in principal amount of general and refunding mortgage gold bonds, Series B,

of the Debtor, found the "total capital assets (to be) $148,796,047.60" as of May 31, 1932 (189 I.C.C. 207; I.C.C. Exhibit No. 92).

66. On November 10, 1938, the Interstate Commerce Commission in its reports authorizing the borrowing of $10,000,000.00 by the Debtor's Trustees to be evidenced by Trustees Certificates stated:

> "The general balance sheet of August 31, 1938, of the Debtor and Trustees combined shows assets in the amount of $174,936,239.***" (228 I. C. C. 632).

67. On November 21, 1939, the Interstate Commerce Commission in its supplemental report authorizing an extension of payment of Trustees Certificates in the amount of $10,000,000, stated that the general balance sheet of the Debtor of August 31, 1939 "shows assets as follows*** a total of $175,263,531." (Corrected report Interstate Commerce Commission, Finance Docket No. 12213).

68. The valuation of the property of the Debtor and its subsidiaries (excluding Deep Creek Railroad Company, which was abandoned in 1939), as found by the Interstate Commerce Commission under Section 19 (a) of the Interstate Commerce Act (49 U. S. C. A. 19 (a), with additions and betterments, new lines and extensions, subsequent to date of valuation, plus non-operating properties, (all as shown by the books of the Debtor's Trustees) is as follows as of December 31, 1938: [997]

The Western Pacific Railroad Company:	
I. C. C. Valuation as of June 30, 1914, with additions and betterments, new lines and extensions, and non-operating property to December 31, 1938	$129,589,367.77
Sacramento Northern Railway, including San Francisco and Sacramento Railroad Co.:	
I. C. C. valuation as of December 31, 1928, with additions and betterments, new lines and extensions and non-operating property to December 31, 1938	19,657,709.38
Tidewater Southern Railway Company:	
I. C. C. valuation as of December 31, 1927, with additions and betterments, new lines and extensions, and non-operating property to December 31, 1938	1,660,546.34
Total Western Pacific System—December 31, 1938	$150,907,623.49

69. The total assets of the Debtor as shown upon its balance sheet, prepared in accordance with the accounting rules of the Interstate Commerce Commission, was $166,960,037.15 as of December 31, 1935. (I. C. C. Exhibit No. 10).

70. The investment made by the Debtor between June 30, 1914 (the date of its final valuation by the Interstate Commerce Commission under 19 (a) and December 31, 1935, was $77,609,391 (I. C. C. Exhibit No. 12) and if said investment is added to the said final valuation the resulting total investment is $140,930,391 as of December 31, 1935.

71. The investment in road and equipment of the Debtor and its subsidiaries (excluding Deep Creek

Railroad Company) less accrued equipment depreciation, that is, system book value less depreciation, as of [998] December 31, 1938, is as follows:

The Western Pacific Railroad Company:		
Total investment in road and equipment	$143,937,425	
Less accrued depreciation—equipment	11,084,691	$132,852,734
Sacramento Northern Railway:		
Total investment in road and equipment	9,830,709	
Less accrued depreciation—equipment	535,737	9,294,972
Tidewater Southern Railway Company:		
Total investment in road and equipment	2,874,387	
Less accrued depreciation—equipment	43,534	2,830,853
Total System investment in road and equipment (book value) less equipment depreciation		$144,978,559

72. Annexed hereto as Exhibit C is a statement of the charges for maintenance during the years 1927 to 1938, inclusive, showing the amounts charged for ordinary operating expenses and for improvement or rehabilitation program expenses.

73. As the result of the 1936-1938 rehabilitation program, there is no deferred maintenance in the Debtor's properties. Its facilities and equipment are sufficient to handle expeditiously and efficiently all traffic reasonably to be anticipated in the immediate future. [999]

74. The reported Railway Operating Revenues of the Debtor's system for the years 1922-1938, inclusive, and the first nine months of 1939, classified as between freight passenger and other revenues, respectively, are:

Year	Freight	Passenger	Other	Total
1922	$ 9,667,960	$2,184,093	$ 884,511	$12,736,564
1923	10,751,276	2,455,420	1,208,116	14,414,812
1924	11,241,579	2,106,656	1,331,078	14,669,313
1925	12,634,074	2,900,817	1,263,657	15,898,548
1926	14,259,651	2,319,151	1,372,666	17,951,468
1927	14,764,690	2,090,480	1,451,505	18,306,675
1928	15,974,137	1,870,790	1,576,924	19,421,851
1929	16,358,041	2,187,700	1,550,816	20,096,557
1930	15,450,051	1,795,834	1,573,177	18,819,062
1931	12,342,041	1,315,283	1,195,614	14,852,938
1932	10,662,430	764,977	823,664	12,251,071
1933	10,950,948	595,268	656,273	12,202,489
1934	12,338,085	629,720	811,433	13,779,238
1935	13,254,572	730,957	421,929	14,407,458
1936	15,264,675	805,673	476,996	16,547,344
1937	16,588,843	814,632	515,010	17,918,485
1938	14,934,497	680,382	442,572	16,057,451
1939	11,684,495	794,633	357,857	12,836,985
(First 9 months)				

75. The reported consolidated earnings available for interest of the Debtor and its subsidiaries for the years 1922-1938, inclusive, and the first ten months of 1939, are as follows: [1000]

1922	$2,306,124
1923	3,313,976
1924	3,144,124
1925	4,454,352
1926	4,759,282
1927	2,674,494
1928	2,964,379

1929	2,529,846
1930	1,552,487
1931	186,708 (D)
1932	252,706
1933	674,007
1934	1,084,244
1935	805,589
1936	181,102
1937	903,113 (D)
1938	1,243,916 (D)
1939 (first 10 months)	

(D) means deficit.

76. If the reported consolidated earnings available for interest for the years 1922-1938, inclusive, and the first ten months of 1939 be adjusted to take into account (a) rehabilitation expenditures in the years 1927-1931 and 1934-1938, (b) amortization of discount on First Mortgage Bonds of the Debtor in the years 1922-1938, and (c) deductions and credits in the years 1931-1934 made by the Commission to accord with its Accounting Rules and Regulations, such earnings would have been: [1001]

1922	$2,404,890
1923	4,412,234
1924	3,241,823
1925	4,557,798
1926	4,868,390
1927	3,470,861
1928	4,376,972
1929	3,718,436
1930	2,381,529
1931	220,494 (D)
1932	283,912
1933	474,365
1934	1,396,353
1935	1,377,026
1936	1,901,423

1937	1,077,407
1938	225,431
1939 (first ten months)	

(D) means deficit.

77. On July 14, 1916, the Debtor executed and delivered to First Federal Trust Company and Henry E. Cooper, as Trustees, its First Mortgage dated June 26, 1916, providing for an issue of First Mortgage Gold Bonds of the Debtor limited to $50,000,000 in aggregate principal amount at any one time outstanding. Crocker First National Bank of San Francisco and Samuel Armstrong are now the Trustees under the First Mortgage.

78. The First Mortgage was recorded in the following counties in the States of California, Nevada and Utah on the following dates:

CALIFORNIA

County	Date
San Francisco	July 17, 1916
Alameda	July 17, 1916
San Joaquin	July 17, 1916

[1002]

Sacramento	July 17, 1916
Sutter	July 17, 1916
Yuba	July 17, 1916
Butte	July 17, 1916
Plumas	July 17, 1916
Lassen	July 17, 1916
Sierra	Dec. 7, 1916
Santa Clara	Nov. 13, 1917

NEVADA

Washoe	July 17, 1916
Humboldt	July 18, 1916
Lander	July 24, 1916

County	Date
Eureka	July 18, 1916
Elko	July 17, 1916
Pershing (created from Humboldt)	

UTAH

Tooele	July 18, 1916
Salt Lake	July 18, 1916
Box Elder	July 19, 1916

79. The granting clauses of said First Mortgage are annexed hereto marked Exhibit D.

80. On February 29, 1932, the Debtor executed and delivered to The Chase National Bank of the City of New York, as Trustee, its General and Refunding Mortgage dated as of January 1, 1932, providing for an issue of General and Refunding Mortgage Gold Bonds of the Debtor limited to $100,000,000 in aggregate principal amount at any one time outstanding. Irving Trust Company is now the Trustee under the Refunding Mortgage.

81. The Refunding Mortgage was recorded in the following counties in the States of California, Nevada and Utah on the following dates: [1003]

CALIFORNIA

County	Date
Alameda	March 15, 1932
Butte	March 17, 1932
Lassen	March 14, 1932
Plumas	March 12, 1932
Sacramento	March 15, 1932
San Francisco	March 12, 1932
San Joaquin	March 15, 1932
Santa Clara	March 15, 1932

County	Date
Sierra	March 15, 1932
Siskiyou	March 15, 1932
Sutter	March 12, 1932
Modoc	March 14, 1932
Yuba	March 14, 1932
NEVADA	
Eureka	March 12, 1932
Humboldt	March 18, 1932
Lander	March 12, 1932
Pershing	March 12, 1932
Washoe	March 12, 1932
Elko	March 12, 1932
UTAH	
Salt Lake	March 19, 1932
Tooele	April 12, 1932
Box Elder	March 18, 1932

82. The granting clauses of the Refunding Mortgage are annexed hereto, marked Exhibit E.

83. At the date of the execution of the Refunding Mortgage and at the date of the institution of this proceeding equipment trust obligations of the Debtor were outstanding under the following equipment trusts:

1. Lease and Agreement dated March 1, 1923 (I. C. C. Exhibit No. 108) under which The Chase National Bank of the City of New York was the trustee under which $5,600,000 principal amount of 5½% Equipment Trust Certificates, Series B, were originally issued, maturing serially in instalments of $375,000 each on March 1 of each [1004] year beginning

March 1, 1924, and ending March 1, 1937, with a final instalment of $350,000 maturing March 1, 1938.

2. Lease and Agreement dated March 15, 1924, under which The Chase National Bank of the City of New York was the trustee, under which $3,105,000 principal amount of 5½% Equipment Trust Certificates, Series C, were originally issued, maturing serially in instalments of $207,000 each on December 1 of each year beginning December 1, 1924, and ending December 1, 1938.

3. Lease and Agreement dated May 1, 1929, under which The Chase National Bank of the City of New York is the trustee, under which $1,095,000 principal amount of 5% Equipment Trust Certificates, Series D, were originally issued, maturing serially in instalments of $73,000 on November 1 of each year beginning November 1, 1929, and ending November 1, 1943.

4. Lease of Locomotives dated June 5, 1931, from The Baldwin Locomotive Works to the Debtor (J. C. C. Exhibit No. 109—hereinafter called the "Baldwin Lease") providing for a payment by the Debtor of $11,606.43 for each locomotive upon the delivery of two of the leased locomotives, a payment of $11,678.14 for each locomotive upon the delivery of four of the leased locomotives, and semi-annual payments over a period of ten years, dating from

the average weighted delivery dates of all the leased locomotives, in the following amounts:

[1005]

$47,199.75	at the end of	6	months
46,413.08	" " "	12	"
45,626.43	" " "	18	"
44,839.76	" " "	24	"
44,053.10	" " "	30	"
43,266.43	" " "	36	"
42,479.78	" " "	42	"
41,693.11	" " "	48	"
40,906.45	" " "	54	"
40,119.78	" " "	60	"
39,333.13	" " "	66	"
38,546.46	" " "	72	"
37,759.80	" " "	78	"
36,973.13	" " "	84	"
36,186.48	" " "	90	"
35,399.81	" " "	96	"
34,613.15	" " "	102	"
33,826.49	" " "	108	"
33,039.83	" " "	114	"
32,253.16	" " "	120	"

84. The Lease and Agreement dated March 1, 1923 (I. C. C. Exhibit No. 108), the Lease and Agreement dated March 15, 1924, and the Lease and Agreement dated May 1, 1929, were each in the usual Philadelphia Plan forms and provided that the equipment was let and leased to the Debtor but that title thereto was vested in the respective trustees thereunder. Each provided for the payment to the Trustee thereunder of cash equal to the difference between the cost of the equipment delivered and the principal amount of Equipment Trust Certificates issuable in respect of such equipment.

85. The average weighted delivery dates of the locomotives covered by the Baldwin Lease are set forth in I. C. C. Exhibit No. 110.

86. The equipment originally subject to said equipment trusts, and the estimated cost thereof, as set forth in the respective instruments of lease, are as follows: [1006]

(1) Lease Dated March 1, 1923

6 Heavy Mikado Locomotives, lettered W. P. and numbered 316 to 321 both inclusive.

2,000 Steel Underframe Refrigerator Cars, 146 thereof lettered W. R. L. and numbered 7001 to 7146 both inclusive (to be re-lettered P. F. E. and re-numbered 50,001 to 50,146 both inclusive); 1,854 thereof to be lettered P. F. E. and numbered 50,147 to 52,000 both inclusive.

100 Logging Cars, lettered W. P. and numbered 2601 to 2700, both inclusive;

100 Steel Underframe Automobile Cars lettered W. P. and numbered 14,001 to 14,100 both inclusive;

20 Steel Baggage Cars lettered W. P. and numbered 101 to 120 both inclusive;

20 Steel Passenger Coaches lettered W. P. and numbered 301 to 320 both inclusive;

8 Steel Dining Cars named and marked "California", "San Francisco", "Oakland", "Stockton", "Sacramento", "Pacific", "Humboldt" and "Nevada."

Estimated cost—$6,996,000.

(2) Lease Dated March 15, 1924.

5 Heavy Mikado Locomotives, lettered W. P. and numbered 322 to 326 both inclusive;

5 Mallet Locomotives, lettered W. P. and numbered 206 to 210 both inclusive;

775 Steel Underframe Refrigerator Cars, lettered P. F. E. and numbered 52001 to 52775 both inclusive;

100 Logging Cars, lettered W. P. and numbered 2701 to 2800 both inclusive;

200 Steel Underframe Automobile Cars lettered W. P. and numbered 14101 to 14300 both inclusive;

1 Jordan Spreader, equipped with composite ditching and spreading wings, lettered W. P. and numbered 9.

Estimated cost—$3,881,250.

(3) Lease Dated May 1, 1929

5 Heavy Mikado Locomotives, lettered W. P. and numbered 332 to 336 both inclusive;

50 Fifty-foot Flat Cars, lettered W. P. and numbered 2301 to 2350 both inclusive;

[1007]

50 Steel Tank Cars, lettered W. P. and numbered 1201 to 1250 both inclusive;

150 Automobile Cars with steel ends, lettered W. P. and numbered 12,001 to 12,150 both inclusive; and

100 Automobile Cars with end doors one end and steel end other end, lettered W. P. and numbered 13,001 to 13,100 both inclusive.

Estimated cost—$1,369,827.30.

(4) Baldwin Lease

Six 2-8-8-2 type simple articulated steam locomotives with separate tenders, Lessor's classification 20 46/46 1/4 EE 1 to 6, Lessee's Road Numbers 251 to 256, built as Lessor's specification 31 D 40, including modifications subsequently agreed upon.

The lease does not contain a statement as to the estimated cost.

87. In 1933 and thereafter in each year the Debtor furnished to the Refunding Mortgage Trustee, pursuant to the requirements of Section 16 of Article Five of the Refunding Mortgage, a statement purporting to be a statement of the equipment upon which the Refunding Mortgage was a lien. These statements set forth in paragraph (1) a list of equipment stated to be "not covered by any form of Equipment Trust". Paragraphs (2) to (5) of said statements contain a list of the equipment subject to the four leases last above mentioned.

88. The total principal amount of the equipment trust obligations outstanding under the above-mentioned equipment trusts as of December 31, 1935, was $2,682,598. The initial payments and all subsequent payments under the above-mentioned equipment trusts were made out of free funds or out of proceeds of loans evidenced by notes which are secured by pledge of [1008] Refunding Mortgage Bonds. No part of the cost of said equipment was financed with proceeds of First Mortgage Bonds

or cash deposited under the First Mortgage. Additional payments under said equipment trusts have been made by the Trustees of the Debtor since December 31, 1935, and since that date the Agreement dated March 1, 1923, and the Agreement dated March 15, 1924, have been satisfied.

89. The aggregate ledger value of the equipment subject to the above-mentioned equipment trusts, the accrued depreciation thereon, the depreciated ledger value, the principal amount of outstanding obligations and the book value of the equity therein as of December 31, 1935 (the nearest date to August 2, 1935, for which computations are available) are as follows:

Ledger value	$12,933,666.13
Accrued depreciation	4,087,229.69
Depreciated ledger value	8,846,436.44
Outstanding obligations	2,682,598.00
Value of equity in said equipment	$ 6,163,838.44

90. [Eliminated by agreement of the parties.]

91. The Debtor's applications dated September 30, [1909] 1930, and December 21, 1931, submitted to the New York Stock Exchange in connection with issues of First Mortgage Bonds contain an enumeration of items of equipment on which the applications state the First Mortgage constitutes a first lien. This is followed by a statement that "The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series 'B', Series 'C', and Series 'D', as follows:", the statements quoted be-

ing followed by an enumeration of certain items of equipment.

92. All of the equipment subject to the above-mentioned equipment trusts was acquired for use on all of the Debtor's lines of railroad, including those specifically described in the granting clauses of the First Mortgage and was in fact so used.

93. A schedule is being prepared showing:

(1) the number (classified as to types of equipment) of units of equipment owned by the Debtor at the date of the execution and delivery of the First Mortgage and the depreciated book value of such equipment as of that date;

(2) the number (similarly classified as to types of equipment) of units of equipment acquired by the Debtor since the date of the execution and delivery of the First Mortgage which were made the basis of the authentication and delivery of First Mortgage Bonds of the withdrawal of deposited cash (including equipment acquired under equipment trusts as to which First Mortgage Bonds or deposited cash were used to refund outstanding equipment trust certificates), and the book value of such equipment at the date of acquisition; and

(3) the following data, as of (March 1, 1923, (b) March 15, 1924, (c) May 1, 1929, (d) August 1, 1931, (e) the date of the execution and delivery of the Refunding Mortgage, (f) the date of the institution of this proceeding, and (g) January 1, 1939:

(a) The number (classified as above) of [1010] units of equipment referred to in paragraph 1 above which had been destroyed, dismantled or otherwise disposed of;

(b) The number (classified as above) of units of equipment referred to in paragraph 2 above which had been destroyed, dismantled or otherwise disposed of; and

(c) The number (classified as above) of units of equipment acquired subsequent to the date of the execution and delivery of the First Mortgage by the use of free funds or under equipment trusts and not financed with First Mortgage Bonds or deposited cash, and the book value of such equipment at the time of acquisition.

When said schedule has been identified by signature of counsel for the Debtor's Trustees, for the First Mortgage Trustees, and for the Refunding Mortgage Trustee, it may be filed with the Court and when so filed shall constitute a part of this stipulation as Exhibit G. [1011]

94. The Northern California Extension connects with the main line of the Debtor at Keddie, Plumas County, California, and extends to a connection with the Great Northern Railroad at Bieber, Lassen County, California, a distance of approximately 112 miles. It is situate entirely within the counties of Plumas and Lassen, California.

95. The original Certificate of Incorporation of the Debtor contains no specific description of or

specific reference to the Northern California Extension. On June 17, 1929, an amendment to the Certificate of Incorporation was filed which included a specific description of the Northern California Extension.

96. Construction of the Northern California Extension was commenced on August 16, 1930, and by December 31, 1930, there had been completed 32% of the grading, 16% of the tunneling, practically all of the clearing, and a large percentage of the culvert installation; construction of concrete bridge foundations was largely under way. Connection with the Great Northern Railway at Bieber was made on November 10, 1931, and freight service was then inaugurated under the jurisdiction of the construction department. Owing to the approach of the winter season, complete ballasting of the line, as well as the completion of certain other facilities was deferred until 1932. Ballasting was practically completed in 1932, and on June 1, 1932, the line was placed in full commercial operation for freight service.

97. No supplemental indenture was ever executed in terms subjecting to the lien of the First Mortgage the Northern California Extension or any part thereof. [1012]

98. The Northern California Extension has been a substantial contributor of traffic to the Debtor since its completion. Gross revenues received by the Debtor from freight originated and terminated on, and passing over the Northern California Exten-

sion as a bridge line, from 1932 to 1938, inclusive, and for the first 9 months of 1939, were as follows:

1932	$1,098,016
1933	1,491,466
1934	2,119,427
1935	2,289,858
1936	3,151,734
1937	3,425,601
1938	3,993,674
1939 (first 9 months)	2,463,489

99. The cost of construction of the Northern California Extension to May 31, 1932, was $10,183,641.90. The cost of construction was financed (1) by the sale at 97½ to The Western Pacific Railroad Corporation of $5,000,000 principal amount of First Mortgage Bonds, (2) by the sale at par to the A. C. James Company of $5,000,000 principal amount of Debentures issued under an Indenture dated July 1, 1930, executed and delivered by the Debtor to The Chase National Bank of the City of New York, as Trustee, which were in turn refunded by notes secured by the pledge of Refunding Mortgage Bonds, and (3) by loans obtained by the Debtor from the Reconstruction Finance Corporation aggregating $559,408, evidenced by notes secured by the pledge of Refunding Mortgage Bonds. [1013]

100. Under date of May 14, 1929, while the original application of the Debtor to the Interstate Commerce Commission for a certificate of public convenience and necessity for the construction of the Northern California Extension was still pending before the Commission, the A. C. James Com-

pany wrote a letter to the Debtor of which I. C. C. Exhibit No. 45 is a true copy.

101. This financing was not carried out on the basis outlined in I. C. C. Exhibit 45, but, under date of June 19, 1929, the A. C. James Company wrote another letter to the Debtor of which I. C. C. Exhibit No. 46 is a true copy.

102. The Executive Committee of the Debtor at a meeting held June 19, 1929, adopted certain resolutions, true copies of which are set forth in Exhibit VII to I. C. C. Exhibit No. 80, Mr. A. C. James being present but not voting.

103. The issue of $5,000,000 principal amount of First Mortgage Bonds to finance in part the construction of the Northern California Extension was authorized by the Interstate Commerce Commission in an order entered October 6, 1930, of which I. C. C. Exhibit No. 51 is a true copy, pursuant to an application of the Debtor dated September 9, 1930, of which I. C. C. Exhibit No. 81 is a true copy.

104. The bonds were offered from time to time at public sale to the highest bidder in blocks of $1,000,000 principal amount or less, all of them being purchased by The Western Pacific Railroad Corporation at 97½% and accrued interest. The notice, dated January 8, 1931, of which I. C. C. Exhibit No. 93, sheet 1, is a true copy, calling for bids on the first block of $1,000,000 principal amount, referred to the specifications, form of proposals and form of contract on file with the Debtor, [1014] of which I. C. C. Exhibit No. 93, sheet 2, is a true

copy. The notices, specifications and bids in connection with the sale of the remainder of the bonds were substantially identical with those contained in I. C. C. Exhibit No. 93.

105. Mr. A. C. James was then a director of The Western Pacific Railroad Corporation.

106. The bonds were authenticated and delivered by the First Mortgage Trustees pursuant to paragraph B of Section 2 of Article Second of the First Mortgage, which provides for the authentication and delivery of bonds against the deposit with the Trustees of the cash proceeds of their sale. The dates of authentication and delivery, the principal amounts of bonds authenticated and delivered, the amounts of cash proceeds deposited, and the numbers of the I. C. C. Exhibits containing true copies of the application papers furnished to the First Mortgage Trustees, are as follows:

Date	Principal Amount of Bonds	Amount of Cash Proceeds	I. C. C. Exhibit No.
Feb. 11, 1931	$1,000,000	$975,000	61
June 25, 1931	1,000,000	975,000	63
July 23, 1931	900,000	877,500	65
Nov. 25, 1931	750,000	731,250	68
Jan. 8, 1932	350,000	341,250	70
Jan. 29, 1932	1,000,000	975,000	72

107. The deposited cash was withdrawn by the Debtor on requisitions filed with the First Mortgage Trustees, pursuant to Section 2 of Article Second of the First Mortgage, to reimburse the Debtor for expenditures made in the construction of the Northern California Extension, the expenditures certi-

fied being equal to the principal amount of the bonds represented by the deposited cash, as required by the provisions of the First Mortgage. The expenditures so certified did [1015] not constitute the entire amount of expenditures on the Northern California Extension.

108. The resolutions authorizing the withdrawal of the deposited cash were adopted by the Executive Committee of the Debtor at its meetings held on February 11, June 25, July 23, October 15, November 17, and December 21, 1931, and January 29, 1932. I. C. C. Exhibit No. 86 is a true copy of said resolutions. Mr. A. C. James was present at each of those meetings.

109. The dates and amounts of the withdrawals of deposited cash, and the numbers of the requisitions and the I. C. C. exhibit numbers of true copies of the requisition papers are as follows:

Requisition No.	Date	Amount	I. C. C. Exhibit No.
244	Feb. 11, 1931	$975,000.00	62
246	June 25, 1931	975,000.00	64
247	July 23, 1931	812,571.03	66
248	Oct. 24, 1931	64,928.97	67
250	Nov. 25, 1931	731,250.00	69
251	Jan. 8, 1932	341,250.00	71
252	Jan. 29, 1932	975,000.00	73

110. The amounts and dates of the expenditures and the itemization of the expenditures, as set forth in the officers' certificates contained in these requisitions, are as follows:

Req. No. 244 Amount $999,998.98 Date Feb. 1, 1929 to November 30, 1930

Engineering	$244,777.82
Land for Transportation Purposes	121,377.67
Grading	589,393.37
Tunnels and Subways	44,450.12
Total Expenditure	$999,998.98

Req. No. 246 Amount $1,000,000.00 Date January 1, 1931 to April 30, 1931.

Engineering	$ 25,001.21
Land for Transportation Purposes	16,965.14
Grading	358,532.33
Tunnels and Subways	298,589.02

[1016]

Bridges, Trestles and Culverts	$ 286,163.05
Ties	2,014.38
Rails	3,021.57
Track Laying and Surfacing	130.00
Right of Way Fences	3,198.56
Crossings and Signs	3,040.97
Station and Office Buildings	990.26
Water Stations	717.55
Other Expenditures—Road	1,635.96
Total Expenditure	$1,000,000.00

Req. No. 247 Amount $833,406.18 Date May 1, 1931 to June 30, 1931

Engineering	$ 27,108.10
Land for Transportation Purposes	58,732.93
Grading	346,349.05
Tunnels and Subways	67,990.50
Bridges, Trestles and Culverts	157,575.37
Ties	31,861.33
Rails	58,146.84
Other Track Material	21,748.24
Ballast	349.54
Track Laying and Surfacing	22,993.58

Right-of-Way Fences	335.64
Crossings and Signs	3,213.59
Station and Office Buildings	216.72
Water Stations	7,532.40
Telegraph and Telephone Lines	14,461.63
Other Expenditures—Road	14,790.73
Total Expenditures	$833,406.18

Req. No. 248 Amount $66,593.82 Date August 1, 1931 to August 31, 1931

Bridges, Trestles and Culverts	$66,593.82

Req. No. 250 Amount $750,000.00 Date August 1, 1931 to September 30, 1931.

Engineering	$ 16,801.95
Grading	29,350.73
Tunnels and Subways	49,636.90
Bridges, Trestles and Culverts	140,588.13
Ties	103,825.07
Other Track Material	73,112.72
Ballast	191,428.53
Track Laying and Surfacing	139,660.60
Water Stations	5,594.37
	$750,000.00

Req. No. 251 Amount $350,000.00 Date September 1, 1931 to October 31, 1931.

Engineering	$ 31,703.24
Tunnels and Subways	100,386.60
Bridges, Trestles and Culverts	217,910.16
	$350,000.00

[1017]

Req. No. 252 Amount $1,000,000.00 Date June 1, 1931, to Nov. 30, 1931.

Grading	$1,000,000.00

111. The total amount spent from all sources for land for transportation purposes in connection with the Northern California Extension was $504,590.66.

112. I. C. C. Exhibits Nos. 50, 47 and 80 are true copies, respectively of (a) the Indenture under which $5,000,000, principal amount, of Debentures were issued by the Debtor in 1931 and 1932 for the purpose of providing a portion of the money required for the construction of the Northern California Extension, (b) the order of the Interstate Commerce Commission authorizing their issue, and (c) the application of the Debtor to the Commission for authority to issue and sell the same. I. C. C. Exhibits Nos. 48 (sheets 5 and 14) and 49 are true copies, respectively, of the Debtor's published notice of January 8, 1931, calling for bids for the purchase of said Debentures, the specifications referred to in said notice, and the bid of A. C. James Co. made pursuant to said notice.

113. Mr. A. C. James was the President and a director of the A. C. James Company throughout 1931 and 1932.

114. The Debentures were authenticated and delivered pursuant to Article II of the Indenture dated July 1, 1930.

115. Said $5,000,000 of Debentures were sold to A. C. James Co. for cash at par. The dates on which the Debentures were authenticated and delivered and the respective principal amounts thereof are as follows: [1018]

Date	Amount
February 27, 1931	$1,000,000
March 26, 1931	600,000
May 25, 1931	530,000
June 20, 1931	995,000
August 25, 1931	309,000
October 20, 1931	600,000
November 25, 1931	120,000
January 28, 1932	350,000
March 28, 1932	347,000
May 31, 1932	149,000

In each case the cash was drawn down on the date the Debentures were authenticated against certificates showing expenditures made or liabilities incurred in twice the amount of the cash drawn down.

116. On March 1, 1932, contemporaneously with the delivery of the Refunding Mortgage and the authentication and delivery of the initial issue of $14,380,000, principal amount, of Refunding Mortgage Bonds, A. C. James Co. surrendered to the Trustee under the Indenture dated July 1, 1930, for cancellation $4,504,000, principal amount of Debentures, being all of the Debentures then outstanding. These Debentures were surrendered for cancellation by A. C. James Co. in exchange for a note of the Debtor in the principal amount of $4,504,000 secured by the pledge of $5,630,000, principal amount, of Refunding Mortgage Bonds, Series A.

117. The $347,000, principal amount, of Debentures authenticated and delivered on March 28, 1932, were simultaneously surrendered to the Trustee under the Indenture dated July 1, 1930, for cancellation, in exchange for the delivery to the A.

C. James Co. of a note of the Debtor in like principal amount secured by the pledge of $433,500, principal amount, of Refunding Mortgage Bonds, Series A. A similar procedure was followed in the case of the $149,000, [1019] principal amount, of Debentures authenticated and delivered on May 31, 1932, the principal amount of Refunding Mortgage Bonds, Series A, then pledged being $186,000.

118. The aggregate principal amount of bonds authenticated and delivered under the Refunding Mortgage is $18,999,500. The dates on which these bonds were authenticated and delivered to the Debtor and the respective principal amounts thereof are as follows:

Date	Amount
March 1, 1932	$14,380,000
March 28, 1932	433,500
May 31, 1932	186,000
February 27, 1933	4,000,000

All of the bonds were bonds of Series A, except the $4,000,000, principal amount authenticated and delivered on February 27, 1933, which were of Series B.

119. The issue by way of pledge of the Series A bonds was authorized by the Interstate Commerce Commission in an order entered February 27, 1932, of which I. C. C. Exhibit No. 53 is a true copy, pursuant to an application of the Debtor dated February 11, 1932, of which I. C. C. Exhibit No. 85 is a true copy. A total of $15,000,000 principal amount of bonds were authorized by said order. The issue by way of pledge of the $4,000,000 of Series B

bonds was authorized by the Commission in an order entered December 9, 1932, and a supplemental order entered February 25, 1933, of which I. C. C. Exhibit No. 92 is a true copy, pursuant to an application of the Debtor dated August 1, 1932, of which I. C. C. Exhibit No. 90 is a true copy, and a supplemental application dated January 12, 1933, of which I. C. C. Exhibit No. 91 is a true copy. All of the bonds were pledged with [1020] A. C. James Co., the Reconstruction Finance Corporation, and The Railroad Credit Corporation.

120. The Series A bonds were authenticated and delivered to the Debtor pursuant to Section 1 of Article Two of the Refunding Mortgage, which provides for an initial issue of $15,000,000, principal amount, of bonds upon the furnishing by the Debtor to the Refunding Mortgage Trustee of a certified copy of resolutions of the Board of Directors of the Debtor requesting the authentication and delivery of the bonds, together with an opinion of counsel with respect to the due authorization of the issue of the bonds by any governmental bodies having jurisdiction.

121. The Series B bonds were authenticated and delivered to the Debtor pursuant to Sections 1 and 2 of Article Two of the Refunding Mortgage. Under Section 2, $5,000,000, principal amount of Refunding Mortgage Bonds was required to be reserved for the purpose of refunding the $5,000,000 of Debentures issued under the Indenture dated July 1, 1930, but it was provided that bonds re-

served under Section 2 for the purpose of refunding Debentures could be released from reservation by a resolution of the Board of Directors of the Debtor declaring them to be no longer needed for that purpose, in which event such reserved bonds might be authenticated and delivered in accordance with the provisions of either Section 1 or Section 3 of Article Two. The Board of Directors of the Debtor, at a meeting held on July 14, 1932, adopted resolutions declaring that the $5,000,000 principal amount of Refunding Mortgage Bonds reserved under Section 2 for the purpose of refunding the $5,000,000, principal amount of Debentures need no longer [1021] be held or reserved for that purpose, and the Series B bonds were accordingly authenticated and delivered in accordance with the provisions of Section 1 of Article Two. Exhibit II annexed to I.C.C. Exhibit No. 90 is a true copy of said resolutions.

122. The construction of the Northern California extension was financed in part with funds advanced by the Reconstruction Finance Corporation on the following dates and in the following amounts:

Date	Amount
March 1, 1932	$259,000
June 29, 1932	268,061
August 1, 1932	32,347

These advances formed part of loans of larger amounts made by the Reconstruction Finance Corporation to the Debtor, which were secured by the

pledge of Refunding Mortgage Bonds and other collateral. These loans were authorized by the Interstate Commerce Commission in a certificate of approval issued February 29, 1932, of which I.C.C. Exhibit No. 52 is a true copy, a certificate of approval issued June 23, 1932, and an order entered February 25, 1933, of which I.C.C. Exhibit No. 60 is a true copy.

123. I.C.C. Exhibit No. 82 is a true copy of extracts from the Debtor's application of February 5, 1932, to Reconstruction Finance Corporation for a loan which included the first advance of $259,000 by Reconstruction Finance Corporation on account of the Northern California Extension.

I.C.C. Exhibit No. 87 is a true copy of extracts from the Debtor's application of May 23, 1932, to Reconstruction Finance Corporation for the loans which included the remainder of the advances made for the construction of the [1022] Northern California Extension. I.C.C. Exhibit No. 52 is a true copy of the report and certificate dated February 29, 1932, of the Interstate Commerce Commission approving the making of a loan to the Debtor by Reconstruction Finance Corporation.

124. Between July 14 and December 31, 1916, the average mileage operated by the Debtor was 942.98 miles. At the date of the execution of the Refunding Mortgage there were 1099.20 miles of track operated by the Debtor, exclusive of the Northern California Extension.

125. The Debtor at the date of execution of the First Mortgage owned substantial amounts of real

estate. I.C.C. Exhibit No. 113 contains an itemized statement of physical property held by the Debtor as an investment at the close of the year 1934 and carried on its books in the account entitled "Miscellaneous Physical Property"; the aggregate amount thereof being $3,854,072.54.

126. I.C.C. Exhibit No. 114 contains in more condensed form a statement of substantially the same property carried on the Debtor's books in the account entitled "Miscellaneous Physical Property", at the close of the year 1935. The aggregate amount at which this property was carried on the books of the Debtor at the close of the year 1935 was $3,856,128. Of this latter amount $1,643,114.13 represents cash outlays for additions and betterments, $325,346.71 represents track material for lease transferred from stock of material on hand, $256.80 represents donations, $324,499.97 represents credits for property sold or abandoned, and $2,211,910.32 represents adjustments. The latter amount represents items formerly included in Account 701 [1023] entitled "Investment in Road and Equipment", as follows: $1,919,821.29, land for transportation purposes (representing principally acreage in Islais Creek District of San Francisco acquired as sites for industrial plants); $252,236.21, assessments for public improvements; $27,453, shops and engine houses; $9,733.20, station and office buildings; and $2,666.62, engineering.

127. A schedule is being prepared showing an analysis of certain items appearing in Debtor's account entitled "Miscellaneous Physical Prop-

erty" at the close of the year 1935, which the Refunding Mortgage Trustee claims are not subject to the lien of the First Mortgage, together with certain facts respecting said items. When said schedule has been identified by signature of counsel for the Debtor's Trustees, for the First Mortgage Trustees, and for the Refunding Mortgage Trustee, it may be filed with the Court and when so filed shall constitute a part of this stipulation, as Exhibit H.

128. I.C.C. Exhibits Nos. 113 and 114 and said Exhibit H include items of property described as being for "non-carrier purposes". As shown by said exhibits certain of the items of property described as being "for non-carrier purposes" were transferred from the Account entitled "Investment in Road and Equipment".

129. The amount of cash of the Debtor on hand as of July 31, 1935, was $949,803.31, of which $38,120.89 represented interest paid by Tidewater Southern Railway Company to the Debtor after default on the notes secured by Refunding Mortgage Bonds. Receivables, as of said date, aggregated $1,336,664.53. The amount of cash on hand as of [1024] November 13, 1935, the date of the qualification of the Trustees of the Debtor was $1,327,456.46; and receivables totaled $1,328,561.68. The amounts of cash and receivables as of January 1, 1939, were $2,094,199.56 and $1,136,968.06, respectively. The receivables mentioned in this paragraph exclude the receivables mentioned in paragraphs 30, 32, 33 and 34 of the stipulation.

130. In 1934, the holders of 86.58% in principal amount of the outstanding First Mortgage Bonds executed instruments by which such holders agreed to the extension to January 1, 1937, of the March 1, 1934, and September 1, 1934, interest installments on the First Mortgage Bonds held by them. The aggregate amount of the Interest installments so extended was $2,133,800.

In connection with the extension of such interest installments, the Chairman of the Board of Reconstruction Finance Corporation addressed to the Debtor a letter dated June 23, 1934, of which I.C.C. Exhibit No. 117 is a true copy.

131. I.C.C. Exhibits Nos. 117 and 119 are true copies of letters received by the Debtor from A. C. James Co., The Railroad Credit Corporation and The Western Pacific Railroad Corporation in connection with the extension of interest falling due in 1934 on the First Mortgage Bonds.

132. Subsequent to the institution of this proceeding, the Trustees of the Debtor issued, pursuant to orders of the Court, their certificates of indebtedness in the aggregate principal amount of $10,000,000 for the purpose of financing expenditures in connection with the Debtor's three-year rehabilitation program. Said certificates of indebtedness were refunded at their [1025] respective maturity dates by the issue of new certificates of indebtedness of equal principal amount, and the aggregate principal amount of such certificates of indebtedness now outstanding is $10,000,000. All of said certificates of indebtedness are owned by

Reconstruction Finance Corporation and are secured by a lien prior to the respective liens of the First Mortgage and the Refunding Mortgage.

133. From time to time, pursuant to orders of the Court, funds representing the proceeds of various property of the Debtor have been deposited in escrow with Crocker First National Bank of San Francisco pending agreement or judicial determination as to which mortgage constituted the first lien thereon. As of January 1, 1939, Crocker First National Bank of San Francisco held $165,314.26 of such funds, as follows:

$ 93,202.00	representing the proceeds of property in the Islais Creek Region of San Francisco, containing approximately 186,404 square feet, sold to Federated Metals Corporation. (Order dated Sept. 23, 1937). Funds deposited October 23, 1937.
65,816.30	representing the proceeds of property in the Islais Creek Region of San Francisco, containing approximately 77,431 square feet, sold to Safeway Stores Incorporated. (Order dated Nov. 8, 1937). Funds deposited December 16, 1937.
350.00	representing the proceeds of a parcel of land in Plumas County, California, containing approximately 3½ acres, sold to Keddie Resort Incorporated. (Order dated Feb. 7, 1938). Funds deposited May 4, 1938.
5,945.96	representing the proceeds of certain property in the City of Oakland, County of Alameda, California, sold to Heafey-Moore Company. (Order dated Feb. 7, 1938). Funds deposited June 6, 1938.
$165,314.26	

[1026]

Under the same circumstances and conditions, funds amounting to $38,745.62 have been deposited in escrow since January 1, 1939, as follows:

$ 7,200.00	representing the proceeds of 96 obsolete logging flat cars, sold to Fred E. Barnett Company. (Order dated March 8, 1939.) Funds deposited May 12, 1939.
2,749.92	representing the proceeds of 2 parcels of land in San Francisco, California, sold to San Francisco Housing Authority. (Order dated May 15, 1939.) Funds deposited July 17, 1939.
12,539.45	representing the proceeds of 6 parcels of land in San Francisco, California, sold to San Francisco Housing Authority. (Order dated May 15, 1939). Funds deposited July 29, 1939.
16,256.25	representing the proceeds of 2 parcels of land in the City of Sacramento, California, sold to W. E. Hibbitt and Frances M. Hibbitt. (Order dated May 1, 1939). Funds deposited November 27, 1939.
$38,745.62	

134. As of the close of business on December 16, 1939, cash held by Crocker First National Bank of San Francisco as Trustee under the First Mortgage amounted to $317,934.91. As of January 1, 1939, said cash amounted to $292,804.22.

135. At the date of the institution of the above entitled proceeding, the following collateral was physically pledged with the Refunding Mortgage Trustee:

4,653 shares of stock of Alameda Belt Line of par value of $100 per share.

2,642-2/3 shares of preferred stock of Central California Traction Company of par value of $100 per share.

965-2/3 shares of common stock of Central [1027] California Traction Company of par value of $100 per share.

1,147,955 shares of common stock of Tidewater Southern Railway Company of par value of $1 per share.

$280,000 aggregate principal amount of Central California Traction Company First Mortgage 5% Bonds due April 1, 1936.

6% demand note of Deep Creek Railroad Company dated October 10, 1921, in principal amount of $45,000.

Note of Standard Realty and Development Company in principal amount of $251,273.07, dated March 22, 1932, payable one day after date, without interest.

5% note of Tidewater Southern Railway Company in principal amount of $508,278.61; dated June 26, 1933, payable on or before March 1, 1945.

Deposited cash in amount of $52,316.81.

136. As of January 1, 1939, the Refunding Mortgage Trustee held the same collateral except that $10,000 principal amount of Central California Traction Company First Mortgage Bonds had been redeemed, reducing the principal amount thereof physically pledged with the Refunding Mortgage

Trustee to $270,000. The deposited cash, which amounted to $52,316.81 at the date of the institution of this proceeding, amounted to $223,732.32 at the close of business on January 1, 1939, and to $275,353.21 at the close of business on December 16, 1939.

137. It is not disputed that all of the collateral in the foregoing paragraphs 135 and 136 is subject to the Refunding Mortgage as a first lien, with the exception of the above described notes of Deep Creek Railroad Company and Standard Realty and Development Company, as to which the First Mortgage Trustees contend that the lien of the Refunding Mortgage is subordinate to the lien [1028] of the First Mortgage.

138. All of the stock (except directors' shares) of Standard Realty and Development Company and all of the stock of Deep Creek Railroad Company are physically pledged with the First Mortgage Trustees. Deposited cash was withdrawn under the First Mortgage on the basis of the acquisition by the Debtor of said stock of Deep Creek Railroad Company. [1029]

139. Tidewater Southern Railway Company owns and operates approximately 61.4 miles of main and branch line standard gauge railroad extending from Ortega, San Joaquin County, to Hilmar, Merced County, California. As of December 31, 1935, it owned three locomotives, two freight cars and one piece of work equipment. At December 31, 1935, it had 1,176,782 shares of capital stock out-

standing, par value $1 per share. More than 97% of such capital stock is owned by the Debtor.

140. The Refunding Mortgage Trustee holds as pledgee a note of Tidewater Southern payable to the Debtor dated June 26, 1933 maturing March 1, 1945, in the amount of $508,278.61, representing the unpaid advances made by the Debtor in each of the years 1927 to 1931, inclusive, totalling face amount of note and used for Additions and Betterments and Miscellaneous Physical Property. Interest at the rate of 5% per annum is currently paid on said note and deposited with the Trustee under the Refunding Mortgage.

141. In the years 1927 to 1933, inclusive, advances totaling $638,200.00 were made by the Debtor to Tidewater Southern. $508,278.61 of such advances were used for the acquisition or construction of Additions and Betterments and Miscellaneous Physical Property by Tidewater Southern in the years 1927 to 1931. $129,921.39 of such advances were made in the years 1931 to 1933 to reimburse Tidewater Southern's general cash and represented the amounts necessary for application to income deficits, etc., and this amount was repaid in years 1934 and 1935.

142. As of December 31, 1935, Tidewater Southern had current assets of $192,283.94, including [1036] $153,192.06 of cash. As of the same date total current liabilities aggregated $82,289.92. Corporate surplus aggregated $909,697.15. As of January 1, 1939, Tidewater Southern had current as-

sets of $358,974.49, including $321,434.38 of cash. As of the same date current liabilities aggregated $65,450.61 and corporate surplus aggregated $1,102,290.72.

143. The earnings available for interest of the Tidewater Southern for the years 1922 to 1938 and for the first 10 months of 1939 were:

1922	$ 17,656	1931	4,899
1923	35,475	1932	50,846
1924	31,949	1933	59,461
1925	77,629	1934	113,967
1926	93,043	1935	114,512
1927	74,137	1936	101,000
1928	74,921	1937	96,213
1929	9,296	1938	102,532
1930	94,263	1939 (First 10 months)	143,295

144. The Debtor's proportion of revenues on traffic interchanged with Tidewater Southern for the years 1922-1938 and the first nine months of 1939 were:

1922	$313,461	1933	422,892
1923	388,857	1934	549,069
1924	406,266	1935	544,748
1925	507,208	1936	499,347
1926	575,183	1937	517,467
1927	629,232	1938	538,632
1928	686,818	1939	211,848
1929	546,663	(First 9 months)	
1930	756,303	Average 1929-1938	529,902
1931	474,557		
1932	449,353		

[1031]

145. Central California Traction Company owns and operates 53.78 miles of main and branch lines standard gauge electric railroad between Stockton

and Sacramento. It was incorporated in 1905 and was operated independently until 1927 when all of its outstanding stock was acquired in equal parts by the Debtor, the Santa Fe and the Southern Pacific. Southern Pacific Company having applied to the Interstate Commerce Commission in or about August 4, 1925, for authority to acquire the capital stock and a majority of the bonds of the Traction Company, the Atchison, Topeka and Santa Fe Railway Company and the Debtor intervened in the proceeding, and opposed the merger, the Santa Fe petitioning to acquire control itself if the Commission found that the public interest would be served by a merger of the Traction Company's line with a larger railway system capable of efficiently maintaining and operating the property, and the Debtor petitioning to construct a line of railroad in the event that the Traction Company became other than an independent line. The Commission, on August 5, 1927, authorized Southern Pacific Company to acquire the Traction Company's stock and bonds, provided that it should within 60 days admit the Debtor and the Santa Fe to participation equally in joint control upon payment of proportionate shares of the cost of the securities to be acquired. Both Santa Fe and the Debtor requested and were granted participation in control upon the conditions above mentioned. [1032]

146. The Traction Company has outstanding $810,000 principal amount of 5% First Mortgage Bonds, all of which are owned by the three parent

companies. Payment of the principal of said bonds was deferred upon their maturity on April 1, 1936, the three owning companies agreeing to forbear presentation of the bonds for payment, and the Traction Company agreeing to continue to pay interest at the rate of five per cent per annum on said bonds during such forbearance. The parent companies have agreed to share equally any operating deficits or profits as well as advances for bond interest, sinking fund or additions and betterments. Its operating income or loss for the years 1928-1938 and the first ten months of 1939 were:

1928	$ 7,370 (Loss)
1929	76,810 (Loss)
1930	13,225
1931	100,523 (Loss)
1932	66,022 (Loss)
1933	30,643 (Loss)
1934	14,405
1935	260
1936	28,295
1937	583 (Loss)
1938	16,502
1939 (First 10 months)	48,923

Its operating losses during the eleven years 1928-1938 exceeded its operating income by $209,264 or an average of $19,000 per year. Its average income for the five years 1934-1938 was $11,775.

147. The Debtor's Trustees in their petition to the Court of September 3, 1935, requesting authority to make advances to affiliates of the Debtor, stated:

> "As Central California Traction Company is a feeder to said trunk lines (Debtor, Santa

Fe, Southern Pacific) and does not itself produce [1033] sufficient revenue to pay all costs of operation, necessary capital expenditures, interest on its outstanding First Mortgage Bonds, or the payments into the sinking fund required by its First Mortgage, it is necessary for each of said three parent companies to advance to Traction Company one-third of additional funds required for such purposes."

The Income and Profit and Loss deficits of Central California Traction Company to be made up by the parent companies for the years 1929-1938 and the first 10 months of 1939 were:

1929	$169,366
1930	86,458
1931	195,925
1932	160,705
1933	89,991
1934	91,637
1935	61,373
1936	19,096
1937	55,745
1938	27,287
1939 (first 10 months)	None

The total Income and Profit and Loss deficits of the Central California Traction Company to be contributed by the three proprietary companies during the ten year period 1929-1938 aggregated $957,583 or an average of $95,758 per year. The portion of such deficits absorbed by the Debtor amounted to $319,194 or an average of $31,919 per year.

STATEMENT OF ACTUAL CASH ADVANCES TO CENTRAL CALIFORNIA TRACTION COMPANY BY THE THREE PARENT COMPANIES

January 1, 1929 to October 31, 1939

	Advances Account Operation	Advances for payments into Sinking Fund for Retirement of First Mortgage Bonds	Advances to Retire First Mortgage Bonds in hands of public at maturity April 1, 1936	Total Advances
1929	$ —	$ —	$ —	$ —
1930	—	—	—	—
1931	—	409,999.41	—	409,999.41
1932	660,589.99	31,410.00	—	691,999.99
1933	45,300.00	30,300.00	—	75,600.00
1934	30,150.00	29,250.00	—	59,400.00
1935	75,420.00	28,080.00	—	103,500.00
1936	51,150.00	—	96,000.00	147,150.00
1937	89,100.00	—	—	89,100.00
1938	59,700.00	—	—	59,700.00
1939 (first 10 months)	56,250.00	—	—	56,250.00
Totals	$1,067,659.99	$529,039.41	$96,000.00	$1,692,699.40
W. P. Propn.	$ 355,886.66	$176,346.47	$32,000.00	$ 564,233.13

148. The Traction Company has a value to the Debtor as a feeder and would be of value to any corporation which might succeed to its properties. The Debtor's Trustees, in their management of the Debtor's property, have considered it important that default not be permitted in the payment of interest on the outstanding bonds of the Traction Company or of the Debtor's share of other advances to the Traction Company. Annexed hereto and made a part hereof, marked Exhibit I is a true copy of a letter dated March 26, 1937, from Charles Elsey, President of the Debtor, [1034] to the Refunding Mortgage Trustee. The Debtor's proportion of revenues

from the traffic interchanged with the Traction Company during the period 1928 to 1938 and for the first 9 months of 1939 were:

1928	$257,511	1934	216,253
1929	203,706	1935	216,522
1930	286,632	1936	226,530
1931	194,263	1937	246,322
1932	219,208	1938	233,735
1933	207,638	1939 (First 9 months)	139,069

149. Alameda Belt Line owns 16.08 miles and operates 17.85 miles of standard guage belt line railroad in the City of Alameda. It has an authorized capital stock of 10,000 shares of the par value of $100 each of which 9,422 are now outstanding. Except for directors' qualifying shares, the stock is owned in equal proportions by the Debtor and the Santa Fe. The parent companies have agreed to share equally in operating deficits or profits as well as advances for additions and betterments or other requirements. At no time since its organization in 1925 has the Belt Line earned operating expenses. Its railway operating income or loss for 1928-1938 and for the first 10 months of 1939 was:

1928	$36,977 (Loss)
1929	60,417 (Loss)
1930	20,307 (Loss)
1931	25,674 (Loss)
1932	20,014 (Loss)
1933	5,699 (Loss)
1934	3,767 (Loss)
1935	9,268 (Loss)
1936	24,839 (Loss)
1937	40,147 (Loss)
1938	43,034 (Loss)
1939 (first 10 months)	44,433 (Loss)

[1035]

Railway operating losses over the period 1928-1938 aggregate $290,143 or an average of $26,376 per year.

150. The Debtor's Trustees in their petition to the Court, dated September 3, 1935, requesting authority to make advances to affiliates of the Debtor, stated in part:

> "This belt line railroad (Alameda Belt) is a feeder to said two trunk line carriers (Debtor, Santa Fe), being the contact between said trunk line carriers and the industrial district of Alameda, and its revenues are not sufficient to pay all of its expenses. The two parent companies advance to said Belt Line one-half of all such sums as are required to enable Belt Line to pay its necessary expenses of maintaining and operating its railroad, necessary capital expenditures, taxes and interest, if any, to the extent that it has not sufficient resources itself to pay said expenses. * * *"

The Income and Profit and Loss deficits of Alameda Belt Line to be made up by the parent companies for the years 1928-1938 and the first 10 months of 1939 were:

1928	$72,014
1929	59,745
1930	53,175
1931	29,925
1932	32,335
1933	18,100
1934	18,305
1935	27,727
1936	43,425
1937	60,302
1938	71,014
1939 (first 10 months)	57,195

Such deficits aggregated $486,069 during the eleven year period 1928-1938, or an average of $44,188 per year. The proportion of the deficits absorbed by the Debtor aggregated $243,035 or an average of $22,095 per year.

STATEMENT OF ACTUAL CASH ADVANCES TO ALAMEDA BELT LINE BY THE TWO PARENT COMPANIES

January 1, 1927 to October 31, 1939

(Also shows capital stock issued by Alameda Belt Line in Refund of Cash Advances)

Year	Common Capital Stock Issued to Parent Companies to Refund Advances	Cash Advances (Debit)	Value of Capital Stock (Credit)
1927	—	$ 160,000.00	$ —
1928	—	230,000.00	—
1928	3000 sh. (7-13-28)	—	300,000.00
1929	—	78,867.02	—
1930	—	262,929.92	—
1931	—	29,285.00	—
1932	—	83,300.00	—
1932	1052 sh. (6-20-32)	—	105,200.00
1932	110 sh. (12- 6-32)	—	11,000.00
1933	—	5,800.00	—
1934	—	19,174.00	—
1935	—	20,700.00	—
1936	—	26,100.00	—
1937	—	74,200.00	—
1938	—	55,800.00	—
1939 (first 10 months)	—	57,200.00	—
		$1,103,355.94	$416,200.00
Net Total Oct. 31, 1939		$ 687,155.94	
W. P. Proportion, one-half		$ 343,577.97	

151. The carloads of revenue traffic received from and delivered to the Belt Line from the Debtor for the years 1935-1938, inclusive, were [1036]

	1935	1936	1937	1938
Carloads received from Alameda Belt Line	2,167	2,980	2,767	2,435
Carloads delivered from Alameda Belt Line	2,919	1,892	2,044	2,015
Totals	5,086	4,872	4,811	4,450

152. Standard Realty and Development Company was formed as a wholly owned subsidiary of the Debtor's predecessor, Western Pacific Railway Company, primarily for the purpose of handling land purchases and sales in connection with non-operating property. It has no bonded debt. Its income for the years 1922 to 1938 and for the first 10 months of 1939 was:

1922	$ 26
1923	3,111
1924	650 (Loss)
1925	47
1926	5,417
1927	1,772 (Loss)
1928	4,681
1929	6,509 (Loss)
1930	7,793 (Loss)
1931	5,826 (Loss)
1932	9,763 (Loss)
1933	7,853 (Loss)
1934	5,859 (Loss)
1935	5,997 (Loss)
1936	6,997 (Loss)
1937	5,673 (Loss)
1938	6,183 (Loss)
1939 (First 10 months)	6,694 (Loss)

[1037]

The aggregate deficits during the 1922-1938 period exceed the aggregate income of the Development Company by $57,593, the average annual deficits during such period being $3,200.

153. As of December 31, 1935, the Debtor had advanced to the Development Company amounts aggregating $426,710 most of which was advanced between 1926 and 1928 for the acquisition of additional property. In 1935 the advances amounted to $17,612 of which $2,400 represented cash and the balance represented property transferred by the Debtor to the Realty Company. As of January 1, 1939, the aggregate advances had been reduced to $363,311 by the transfer of properties in Oakland and elsewhere to the Debtor. In addition to such advances, the Development Company is indebted to the Debtor in the amount of $251,273.07 represented by a note at present physically pledged with the Refunding Mortgage Trustee but on which the First Mortgage Trustee claims a first lien. The Development Company is also indebted to The Western Pacific Railroad Corporation, parent of the Debtor, in the amount of $110,000 on account of advances made to it by The Western Pacific Railroad Corporation. Such advances, aggregating $120,000 at June 29, 1932, were pledged with The Railroad Credit Corporation by The Western Pacific Railroad Corporation on June 29, 1932, but the First Mortgage Trustee claims a first lien thereon. Since that date, such advance has been reduced by the payment on October 8, 1935 of $2,000 and on April 9, 1936 of $8,000. In addition, the Development Company, since May 24, 1935, has currently paid interest on such advance to The Western Pacific Railroad Corporation, which latter [1038] corpora-

tion has paid them over to The Railroad Credit Corporation. The aggregate amount of interest so paid aggregates $24,019.15. It has never paid any dividends on its stock nor has it paid any interest on the advances made to it by the Debtor nor on the note held by the Debtor.

154. The balance sheet of the Development Company as of October 31, 1939 is annexed hereto as Exhibit J.

155. Annexed hereto, as Exhibit K, is a statement showing the high and low prices of First Mortgage 5% Bonds on the New York Stock Exchange during each six months period from Jan. 1, 1923 to Dec. 31, 1929; the total principal amount of First Mortgage 5% Bonds sold on the New York Exchange during each such six months period; the high and low prices of First Mortgage 5% Bonds on the New York Stock Exchange for each month from Jan. 1, 1930 to December 1, 1939; and the total principal amount of First Mortgage 5% Bonds sold on the New York Stock Exchange during each such month. The figures and data appearing in Exhibit K were copied from quotations appearing in The Commercial and Financial Chronicle. Any party to this proceeding may use in brief or argument similar data from the same publication as to market quotations of the stocks of The Western Pacific Railroad Corporation, or stocks and bonds of other railway corporations, with like force and effect.

156. The institutions of which the members of the Institutional Bondholders Committee are of-

ficers, namely, Metropolitan Life Insurance Company, The Prudential Insurance Company of America and The Chase National Bank [1039] of the City of New York, would not purchase at any price approximating par the proposed new First Mortgage bonds to be issued by the reorganized company today. Nor would they have purchased them at any price approximating par at any time since the issuance of the Commission Plan dated October 16, 1938.

157. Annexed hereto as Exhibit L is a schedule showing the ratios of annual gross revenues of the Debtor and its subsidiaries for the years 1923 to 1938, inclusive, and the annual gross revenues of Class I Carriers of the United States for the same years, with their respective average gross revenues for the years 1923 to 1927, inclusive, and showing the effect of the construction of the Northern California Extension, as prepared by the officers of the Debtor's Trustees from data obtained from the records of the Interstate Commerce Commission and from the records of the Debtor's Trustees.

158. A schedule is being prepared showing the ratios of the annual net railway operating income of the Debtor and its subsidiaries for the years 1923 to 1938, inclusive, and the annual net railway operating income of the Class I Carriers of the United States for the same years, with their respective average net railway operating income for the years 1923 to 1927, inclusive, and showing the effect of the construction of the Northern California Extension, as prepared by officers of the Debtor's Trustees from data obtained from the records of the Inter-

state Commerce Commission and from the records of the Debtor's Trustees. When said schedule has been [1040] identified by signature of counsel for the Debtor's Trustees, the Institutional Bondholders Committee, and The Western Pacific Railroad Corporation, it may be filed with the Court and when so filed shall constitute a part of this stipulation as Exhibit M.

159. The balance sheet and income statements of the Debtor's Trustees for the year 1939, when available, shall be part of the record of this proceeding.

Dated: San Francisco, California, December 20th, 1939.

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Realty Company.

[1041]

EXHIBIT A.

Western Pacific Railway Company

Plan and Agreement for Reorganization

Dated December 15, 1915

Reorganization Committee

Alvin W. Krech,
Chairman
A. M. Hunt,
James D. Phelan,
George Whittell,
David R. Forgan,
I. De Bruyn,
C. Ledyard Blair,
Frederick H. Ecker,
Starr J. Murphy,
William A. Read,
William Salomon,
Richard B. Young,

Secretary,
Lyman Rhoades,
37 Wall Street,
New York City

Counsel:

Byrne & Cutcheon,
New York
Chas. S. Wheeler
John F. Bowie,
San Francisco

Depositary: The Equitable Trust Company
of New York
37 Wall Street, New York City.

Agents of Depositary:

First Federal Trust Company,
San Francisco, California

Illinois Trust and Savings Bank,
Chicago, Illinois.

Old Colony Trust Company,
Boston, Massachusetts. [1042]

Western Pacific Railway Company

PLAN AND AGREEMENT FOR REORGANIZATION

Introductory Statement.

(Not part of Plan or Agreement.)

In order to enable the holders of certificates of deposit issued under the Western Pacific Railway Company First Mortgage Five Per Cent. Thirty Year Gold Bonds Protective Agreement, dated May 1, 1915, and holders of Western Pacific Railway Company First Mortgage Five Per Cent. Thirty Year Gold Bonds not deposited under said agreement, to judge of the propriety and expediency of the annexed Plan of Reorganization of Western Pacific Railway Company, the Protective Committee acting under said Protective Agreement has thought it best, in explanation of the Plan, to review in this introductory statement, the history of that Company and of the relations between it and The Denver and Rio Grande Railroad Company.

The Existing Road, Its History, Location and Cost.

The Western Pacific Railway Company, a California corporation, was organized in the year 1903.

In the year 1911, it completed the construction of a single track line of railway extending from Salt Lake City, Utah, to San Francisco, California, the total length of the road being 926* miles. The road is well located and is constructed on a grade which in no place exceeds one per cent. The character of the construction and the location and alignment of the road are such that the Railway is a first-class instrument of transportation.

The actual cash cost of constructing the road, including no expenditure not discharged by payment of cash and allowed by the rules of the Inter-State Commerce Commission, amounted to approximately $77,800,000.

Sources From Which Funds for Construction Were Derived.

The monies with which the Western Pacific Railway Company was constructed were obtained from the following sources:

Proceeds of sale of First Mortgage Bonds	$46,243,120.00
Proceeds of sale of Second Mortgage Bonds	18,750,000.00
Proceeds of sale of capital stock	163,000.00
Interest on trust funds deposited during construction	1,870,146.00
Accrued interest on Second Mortgage Bonds	52,905.00
Monies borrowed	16,408,650.00
Income from operation pending construction used for construction	754,353.00
Total	†$84,242,174.00

*This is the length of the main line. The Western Pacific Company owns in addition lines of about 20 miles in length.

†The difference between this sum and the

Substantially all monies expended by the Western Pacific, except those derived from the sale of First Mortgage Bonds, interest on mortgage funds deposited in trust and operating income were derived from The Denver & Rio Grande Railroad Company (the owner of five-sixths of the stock of the Western Pacific Company); either through the purchase by the Denver Company of Western Pacific Second Mortgage Bonds or through loans made directly to the Western Pacific Railway Company by the Denver Company or its subsidiaries.

Status of Accounts Between the Western Pacific Company and the Denver Company.

In round figures the indebtedness now owing by the Western Pacific Company to The Denver and Rio Grande Railroad Company and its subsidiaries computing interest to February 28th, 1916, is as follows:

Debt due Denver Company by Western Pacific Railway Company:	
Second Mortgage Bonds (all being owned by Denver Company)	
Principal amount	$25,000,000
Interest accrued and unpaid	8,200,000
Monies advanced by Denver Company upon promissory notes or open account	
Principal amount	17,500,000
Interest accrued and unpaid on notes and balances	4,800,000
Total	$55,500,000

amount of the monies spent for construction was expended in paying interest on First Mortgage Bonds accruing after the period of construction. [1043]

The monies owed the Denver Company exceed the monies advanced not only because interest has accumulated but for the reason that the Second Mortgage Bonds were purchased at a discount.

Condition of Denver Company After Completion of Western Pacific Line.

When the Western Pacific Railway was completed in the year 1911, the credit of The Denver and Rio Grande Railroad Company, the principal stockholder of the Western Pacific Company, was practically exhausted and neither corporation was able to finance the construction of feeders or extensions, although it was recognized that in the absence of advantageous traffic arrangements with other railroads in California such feeders and extensions were essential to make the Western Pacific self-supporting. Prior to the completion of the Western Pacific line such conditions with respect to transcontinental traffic had become established in California that the Western Pacific has never been able to obtain a division of interline charges yielding an adequate return for the service performed in transporting freight originating upon other transcontinental lines from the Pacific Coast to Salt Lake.

Obligations Assumed by Denver Company to Western Pacific Company and Its First Mortgage Bondholders.

The Western Pacific Railway was constructed at the instance of the Denver Company, which lent its credit to the enterprise, not only in advancing mon-

ies as above outlined but also in guaranteeing (in effect) payment of the interest on the First Mortgage Bonds of the Western Pacific. In order to facilitate the sale of the First Mortgage Bonds of the Western Pacific Company, The Denver and Rio Grande Railroad Company (of Colorado) and the Rio Grande Western Railway Company, parties of the first part, (since consolidated into the existing The Denver and Rio Grande Railroad Company, of Colorado and Utah), the Western Pacific Railway Company, party of the second part, and the Bowling Green Trust Company, Trustee under the Western Pacific First Mortgage, party of the third part, entered into an agreement dated June 23, 1905 (commonly known and herein referred to as "Contract B") by the provisions of which The Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company, parties of the first part, undertook and agreed to loan to the Western Pacific Railway Company sums which, together with the earnings of that corporation, would be sufficient to enable it to meet its operating expenses and taxes and to make the payments of interest and sinking fund monies called for by the First Mortgage Bonds of the Western Pacific Railway Company and the Mortgage securing the same. This contract contained provisions by which The Denver and Rio Grande Railroad Company and the Rio Grande Western Railway Company undertook to pay to the Trustee of the mortgage securing the First Mortgage Bonds of the Western Pacific Rail-

way Company a sum which, together with the amount actually appropriated and paid over by the Western Pacific Railway Company for that purpose, would be sufficient to discharge as the same accrued the interest payable upon the First Mortgage Bonds of the Western Pacific Railway Company. The Denver and Rio Grande Railroad Company in 1908 assumed the obligations of its predecessors under Contract B and also guaranteed the payment of interest upon many of the then outstanding Western Pacific First Mortgage Bonds by endorsement on the bonds themselves. Bonds in the principal amount of about thirty-seven million dollars are thus endorsed. The Committee, however, is advised by counsel that this endorsement does not add materially to the obligation assumed by Contract B.

Defaults in Payment of Interest.

On March 1, 1915, the Western Pacific Company defaulted in the payment of the interest then due on its First Mortgage Bonds and the Denver Company failed to perform its obligations with respect thereto. Shortly thereafter The Equitable Trust Company of New York, as substituted Trustee under the mortgage securing Western Pacific First Mortgage Bonds, commenced proceedings for the foreclosure of the First Mortgage in the United States District Court for the Northern District of California and Mr. Frank G. Drum and Mr. Warren Onley, Jr., were appointed Receivers of the Western Pacific Railway Company. On September 1, 1915, default again occurred in the payment of the interest which

on that day became due upon Western Pacific First Mortgage Bonds. Another like default must occur on March 1, 1916. The principal of the $50,000,000 of bonds has been declared due and payable forthwith. The total amount of interest which will be due and unpaid March 1, 1916, is $3,750,000.

Effect of Foreclosure Upon Rights Arising Under Contract B.

The effect of the sale of the properties of the Western Pacific Company on foreclosure will be to free the Western Pacific property in the hands of the purchaser from obligations of the Western Pacific Company to the Denver Company. In other words, foreclosure will result (unless the Denver Company purchase the Western Pacific property at foreclosure sale or some other person or corporation purchase it for more than the amount due upon the Western Pacific First Mortgage bonds) in a direct loss to the Denver Company of its entire investment in the property, an investment which is now represented by a debt of about $55,500,000. On the other hand, the Committee is [1044] advised that the foreclosure sale will not operate to discharge the obligations of the Denver Company to the Western Pacific bondholders except to the extent that monies realized from the sale are applied to the payment of the bonds or bonds are used to pay the purchase price.

Situation of Western Pacific Bondholders.

The situation, therefore, of the Western Pacific Bondholder is peculiar. He has a claim against the

Western Pacific Company and has the right to have the property of that Company sold and the proceeds applied, so far as the same will go, in discharge of his claim. He has also a claim against the Denver Company for unpaid interest and will have a claim for interest to accrue on the portion of his debt not discharged by application of the proceeds of the sale of the properties of the Western Pacific Company. Probably, moreover, the Trustee under the Western Pacific First Mortgage, if it elect to adopt that alternative, may recover judgment against the Denver Company for all of the damages suffered by the First Mortgage bondholders by reason of the Denver Company's breach of its obligation under Contract B, considered as an entirety. This makes the question of the financial responsibility of the Denver Company a matter of interest and importance to the Western Pacific bondholders.

Indebtedness and Earnings of The Denver & Rio Grande Railroad Company.

The secured debt of the Denver Company as the same now exists (it has substantially no floating debt) is substantially the following:

Bonds secured by the First Consolidated Mortgage of The Denver and Rio Grande Railroad Company (of Colorado) dated, June 15, 1886	$40,507,000
Bonds secured by the Improvement Mortgage of The Denver and Rio Grande Railroad Company (of Colorado), dated June 1, 1888	8,335,000
Bonds secured by First Trust Mortgage of The Rio Grande Western Railway Company, dated July 1, 1889	15,190,000
Bonds secured by First Consolidated Mortgage of Rio Grande Western Railway Company, dated April 1, 1889	15,080,000
Bonds secured by First Mortgage of Utah Central Railroad Company, dated January 1, 1898	390,000
Bonds secured by First and Refunding Mortgage of The Denver and Rio Grande Railroad Company (of Colorado and Utah), dated Aug. 1, 1908	*33,292,000
Bonds secured by Adjustment Mortgage of The Denver and Rio Grande Railroad Company (of Colorado and Utah), dated May 1, 1912	10,000,000
Equipment Trust Obligations secured by Equipment Trust Mortgage, dated September 1, 1907	300,000
Total	$123,094,000

*This amount does not include $7,005,000 bonds of this issue which are pledged under the Denver Company's Adjustment Mortgage.

The net income of the Denver Company for the past four years (after deducting its bond interest and taxes) is shown by the following table compiled from the records of that Company:

For year ended June 30th,	1912	1913	1914	1915
Net Income	$1,144,763.33	$2,094,179.66	$1,400,375.29	$1,418,730.58
Appropriations from Income,				
For Sinking & Renewal Funds	137,843.81	247,807.92	263,888.82	273,044.89
For Additions & Betterments		389,000.00	80,927.52	211,045.46
Total Appropriations	137,843.81	636,807.92	344,816.34	484,090.35
Balance of Income Transferred to credit of Profit & Loss	$1,006,919.52	$1,457,371.74	$1,055,558.95	$ 934,640.23

The net earnings of the Denver Company during the five months of the current year—July to November inclusive—have substantially increased as compared with the earnings of the corresponding months of 1914. The Company's business during these months has, however, been favorably affected to some extent, by special and temporary conditions.

Present Condition and Prospects of the Western Pacific Railway Company.

The assests of the Western Pacific Railway Company now in the hands of receivers consist, principally, of physical properties, the reproduction value of which your Committee believes to be at least $75,000,000. It is estimated that the receivers will have on hand at the date of sale at least $600,000 in cash or its equivalent for the purposes of the proposed reorganization. Since the completion of the line in 1911 the Western Pacific Railway Company has reported earnings over and above the cost of operation, maintenance and taxes as follows:

June 30, 1912	$ 564,214.06
June 30, 1913	1,040,330.07
June 30, 1914	321,506.95

The Receivers' report for the year ending June 30, 1915, showed a net income of $617,258.44.

The earnings of the Western Pacific for the past five months are considerably larger than those for the corresponding period of 1914, but cannot be considered an absolutely fair criterion of the present earning power of the corporation. During those

months conditions, the character of which are temporary (such as travel incident to the Panama-Pacific Exposition) have contributed to the earnings of the Company.

The Protective Committee has taken the advice of expert engineers and railroad operators with respect to the problem of rendering the Western Pacific enterprise self-supporting. It has consulted, particularly, Mr. Joseph H. Young, now President of the Norfolk Southern Railroad, who is thoroughly familiar with operating and traffic conditions in Western Pacific territory. It has also had the benefit of two reports dealing with the earnings and properties of the Western Pacific Company and the proper development of those properties, both of which were prepared prior to the organization of the Protective Committee—one (by Mr. B. F. Bush and Mr. E. L. Brown) having been prepared at the instance of the Denver Company and the other (by Mr. John F. Stevens) at [1045] the instance of the bankers who originally marketed the Western Pacific First Mortgage Bonds. The conclusions of the Committee with respect to needed improvement, equipment and extension of Western Pacific lines and the results that reasonably may be expected therefrom are based almost wholly upon views in which all of the gentlemen named seem to be in substantial agreement. This is particularly true with respect to the advisablility of constructing lines or otherwise acquiring facilities in the San Joaquin

Valley and Delta and in the Santa Clara Valley in California, also with respect to the larger items of betterments of the existing line and of additional property, particularly equipment, to be acquired for use in connection therewith. Upon the basis of traffic now carried by the Western Pacific (that is to say, without allowance for any additional business), the proposed expenditures for new equipment and for betterments of existing facilities should so increase the net earnings of the Company that they will amply provide for the interest to accrue upon the $20,000,000 principal amount of New Bonds to be issued as provided in the Plan.

Purposes and General Considerations.

The Protective Committee purposes, if it be practicable to do so at a proper price, that the Reorganization Committee, directly or through a nominee or nominees, shall acquire the properties of the Western Pacific Company on behalf of the holders of such of the First Mortgage bonds as shall be subject to the Plan and Agreement of Reorganization, using the bonds under its control, so far as permissible, in payment of the purchase price, that the properties so acquired shall thereupon be transferred to a new corporation (the proposed Operating Company) and securities issued and disposed of by that company and the proposed Holding Company, as set forth in the annexed Plan.

The Protective Committee has at all times kept in view the value attaching to the claims against the

Denver Company to be acquired as contemplated by the Plan and therefore has designed in the Plan and Agreement to provide the Reorganization Committee and later the Holding Company with powers and means to pursue the claims against the Denver Company that shall become subject to the Plan and Agreement in order that as much as possible may be realized (whether by negotiation or suit or both) on the obligations of that Company under Contract B and under its endorsed guaranties. Since the formation of the Protective Committee no negotiations with the Denver Company have taken place and no understanding of any kind with respect to any settlement or adjustment of its obligation exists in any form. The financial condition of the Denver Company is such that it has seemed possible that it may become necessary for the Holding Company to take measures to protect its claim against the Denver Company, and for that reason provision is made in the plan for the raising of funds, if necessary to prevent the extinguishment by means of the possible foreclosure of mortgages upon the Denver Company's property of the claims to be acquired by the Holding Company. The Adjustment Mortgage of the Denver Company, under which there are outstanding $10,000,000, principal amount, of Adjustment Mortgage Bonds, is now in default (although the interest on these bonds has been regularly paid) by reason of the failure to pay interest upon Western Pacific First Mortgage Bonds, and, should this Adjustment Mortgage be foreclosed, the

Refunding Mortgage of the Denver Company securing bonds in the principal amount of more than $33,000,000.00 (exclusive of about $7,000,000 thereof pledged under the Adjustment Mortgage) may come into default. For the same reason and because of the position that the Western Pacific property occupies in relation to other railway properties and the resulting necessity of protecting its traffic relations, the Protective Committee has deemed it extremely important that power shall exist also to make use of a portion of the proceeds of the $20,000,000 of New Bonds in such manner as may seem to the Reorganization Committee prior to the completion of the reorganization and thereafter to the Board of Directors of the Holding Company most advantageous in the interest of the reorganization. Accordingly in clause (b) of Article V of the Plan reasonable latitude in the application of a portion of the moneys to be raised has been provided for.

The necessity of providing for a common agency for the enforcement and protection of the claims against the Denver Company and of raising funds if needed for this purpose is one of the reasons for the formation of the Holding Company. This arrangement is supported also by other reasons, such as: the possibility that after more careful consideration it may be thought necessary or wise to organize separate corporations for the operation of the railway in the states of California, Nevada and Utah respectively, in which event a common ownership of their stocks will be necessary; the fact that

a very burdensome stockholders' liability attaches to stock in any California corporation, a liability which might seriously interfere with the saleability and consequently impair the market value of the stock of the Operating Company, if in the hands of the public; and the further fact that under the laws of California a majority of the directors of the Operating Company must reside in that State, although more than three-quarters of the new stockholders will, at least at the time of the completion of the reorganization, be residents of other sections of the country and be entitled to insist upon direct representation in the determination of the general policies and the management of the financial affairs of the reorganized company. It is possible, nevertheless, that the conditions which call for the creation of a holding company will not be of indefinite duration and that the stock of the Operating Company may within a reasonably short time be distributed among the stockholders of the Holding Company.

Statements Not to be Taken as Representations, and Mistakes and Errors Not to Form Ground for Complaint.

The statements contained in this Introductory Statement, whether of fact or opinion, have been based upon such information and advice as have been available and are believed to be substantially correct, but no such statement is intended or is to be taken to be a representation of fact or law or an inducement to any action or omission to act.

This Introductory Statement does not constitute in any sense a part of the Plan or of the Agreement hereto annexed. No error or misstatement herein of any description shall constitute ground for the withdrawal of any Depositor from the Plan and Agreement or for any complaint with respect to the Plan and Agreement or to any consequences arising from having become a party thereto [1046].

PLAN OF REORGANIZATION

I.

Terminology Used in the Plan and Agreement.

In the following Plan and Agreement certain convenient terms are employed to obviate the repetition of awkward forms of reference. The terms and their respective meanings, except where a different meaning is plainly indicated by the context, are the following:

The "Old Company" signifies the existing Western Pacific Railway Company.

The "Denver Company" signifies the existing The Denver and Rio Grande Railroad Company, a consolidated corporation of Colorado and Utah.

The term "Operating Company" refers to a proposed new corporation to be organized (probably under the laws of the State of California) for the purpose of owning and operating the existing lines of Western Pacific Railway Company and proposed extensions thereof. In the discretion of the Reorganization Committee two or more corporations may be organized for this purpose, as may

seem most advantageous having regard to laws of the states of California, Nevada and Utah, respectively. The term "Operating Company" wherever used in this Plan is to be understood to comprehend whatever corporation or corporations may be employed for the purposes stated, as finally determined by the Reorganization Committee.

The term "Holding Company" refers to a proposed new corporation to be organized under the laws of such state as may be selected by the Reorganization Committee, for the purpose of owning and holding all of the capital stock of the Operating Company (except directors' qualifying shares) and of holding and enforcing or otherwise realizing upon claims against the Denver Company acquired from Depositors as provided in the Plan and Agreement and existing or to arise either under the contract, known as "Contract B" (an agreement dated June 23, 1905, between (a) the former The Denver and Rio Grande Railroad Company and Rio Grande Western Railway Company, predecessors of the Denver Company, and (b) the Old Company and (c) the Trustee under its First Mortgage), which in effect guarantees the payment of interest upon the Old Company's existing First Mortgage Bonds or under formal guaranties stamped upon certain of the Old Company's First Mortgage Bonds.

The term "Contract B" refers to the above-mentioned agreement dated June 23, 1905.

The term "Old Bonds" refers to the existing First Mortgage Five Per Cent Thirty-Year Gold

Bonds of the present Western Pacific Railway Company.

The term "New Bonds" refers to new First Mortgage Five Per Cent. Bonds which it is proposed shall be issued by the Operating Company.

The term "New Mortgage" refers to the mortgage which is to be created to secure the New Bonds.

The term "Protective Committee" refers to the Committee mentioned in the annexed agreement, representing holders of Western Pacific Railway Company First Mortgage [1047] Five Per Cent. Thirty-Year Gold Bonds; which is acting under an agreement dated May 1, 1915.

The term "Protective Agreement" refers to the last-mentioned agreement of May 1, 1915.

The term "Plan and Agreement" refers to this Plan of Reorganization and the annexed Agreement, the same being taken together as a single instrument.

The term "Reorganization Committee" refers to the Committee constituted by the Plan and Agreement, as the same may be constituted at the time referred to.

The term "Depositary" refers to the depositary that shall be acting hereunder at the time referred to.

The term "Depositors" signifies holders at the time referred to of certificates of deposit issued under the Protective Agreement or under the Plan and Agreement and all holders of Old Bonds which shall be subject to the Plan and Agreement and the

term shall be construed to include not only persons acting in their own right, but also trustees, guardians, committees, agents and all persons acting in a representative or fiduciary capacity, and those represented by or claiming under them, and partnerships, associations, joint-stock companies and corporations as well as individuals.

The term "Deposited Bonds" refers to all Old Bonds that shall at the time referred to be subject to the Plan and Agreement.

The phrase "claims against the Denver Company" or any expression of like import, unless inconsistent with the context, shall be deemed to refer to and comprehend all claims, demands and choses in action and all rights of every description, susceptible of transfer (whether in law or in equity) as contemplated by the Plan and Agreement, against or enforceable against or with respect to The Denver and Rio Grande Railroad Company or any predecessor or successor corporation or any of the property or estate of said Company or of any such predecessor or successor corporation, which have arisen or exist or may arise or exist in favor of or be enforceable by or on behalf or for the benefit of holders, past, present or future, of Deposited Bonds or coupons, whether under or by virtue of Contract B or any guaranty or guaranties of payment of interest endorsed upon any of such Deposited Bonds or under or by virtue of any provision of the Mortgage securing the Old Bonds or otherwise by virtue of ownership of or any interest in the Deposited Bonds or coupons.

The term "Underwriting Syndicate" refers to a Syndicate which has been organized to purchase such of the New Bonds as shall not be purchased by Depositors, together with shares of stock in the Holding Company, as provided in subdivision (B) of Article IX of this Plan.

II.

The Reorganization Committee—Depositary.

Inasmuch as the Protective Committee already represents a very large majority of the Old Bonds—the only securities of the Old Company which are expected to participate in the benefits or execution of the Plan—that Committee is to be continued with its present membership as the Reorganization Committee which will be charged with the supervision and direction of the proceedings for the execution of the Plan and Agreement, with the powers more specifically set forth in the annexed Agreement. Pending the completion of the reorganization, if in its judgment occasion shall require, it may exercise, but only upon the affirmative vote of three fourths of all of its members, any of the powers which the Plan contemplates shall be exercised by the Holding Company or by the Operating Company; but any compromise or settlement of claims against the Denver Company made by the Reorganization Committee under the power last conferred, shall be made, and shall be, subject to the condition that such compromise or settlement shall be submitted to the Depositors as provided in the annexed Agreement and

shall not be disapproved in the manner therein provided by more than one-third in amount thereof.

The Reorganization Committee is to be composed of the following persons:

A. M. Hunt
James D. Phelan
George Whittell
David R. Forgan
I. de Bruyn
C. Ledyard Blair
Frederick H. Ecker
Alvin W. Krech
Starr J. Murphy
William A. Read
William Salomon
Richard B. Young

Members may be added to this Committee and substitutes for any of the members of the Committee who may die, resign or become incapacitated to act may be appointed—all as provided in the annexed Agreement.

The Reorganization Committee is empowered to delegate the execution of the Plan to a sub-committee or Board of Managers, which in its discretion may be appointed by the Reorganization Committee.

Subject to the power of the Reorganization Committee to make a different arrangement, The Equitable Trust Company of New York will act as Depositary under the Plan and Agreement.

III.

New Corporations—Foreclosure and Purchase of Property.

The reorganization of the old Company is to be effected, subject to the power of the Reorganization Committee, in its absolute discretion, to vary details of method, through the agency of:

(a) A new corporation or several corporations (called hereafter, whether eventually one or more, the "Operating Company") which when the reorganization is complete will be vested with the title to and will operate the Western Pacific property, (providing the Reorganization Committee shall be able to purchase or arrange for the purchase of the same at a proper price), and as well all additions thereto and extensions thereof. It is expected that the Operating Company will receive and expend

[1048]

the new moneys provided for in this plan except such as are required for expenses of foreclosure and reorganization and for the payment of the distributive shares of non-assenting bondholders. It will issue the New Bonds provided for in the plan and create the New Mortgage securing them.

(b) A corporation (called herein the "Holding Company") which upon completion of the reorganization will own (1) all of the stock of the Operating Company, except directors' qualifying shares, (2) the interest in any deficiency judgment against the Old Company apportionable to Deposited Bonds and (3) the claims against the Denver Company

arising under Contract B with respect to interest upon Deposited Bonds or under any guaranties endorsed on Deposited Bonds It will issue to the Reorganization Committee or its nominees its preferred and common stock to be exchanged for Deposited Bonds or sold with new bonds to an Underwriting Syndicate or disposed of otherwise as hereinafter provided.

The instrumentalities and methods to be employed to effect the reorganization are to be determined by the Reorganization Committee in its absolute discretion, provided that in substance the results contemplated by the Plan and Agreement shall be accomplished.

In effecting the purchase of the property of the old Company the Reorganization Committee will use, to such extent and in such manner as may be necessary and practicable, the Deposited Bonds and money to be provided by calls upon purchasers of new bonds, whether Depositors or members of the Underwriting Syndicate.

IV.

Securities and Obligations of Old Company.

The stock, bonds and other obligations of the Old Company are substantially the following and are to be refunded, paid and eliminated by foreclosure as indicated:

To be Refunded:	
First Mortgage 5% Gold Bonds	$50,000,000.00
Coupons appertaining to the same in default (as of March 1, 1916)	3,750,000.00
Paid or to be paid in cash as audited by the Receivers:	
Unsecured obligations of Old Company as heretofore ascertained by the Receivers (other than obligations owing to the Denver Company), to be paid by the Receivers pursuant to order of court, about (net)	163,625.54
Equipment obligations of Receivers of Old Company (authorized but not yet issued)	600,000.00
To be eliminated by Foreclosure:	
Second Mortgage 5% Bonds (owned by Denver Company and pledged under its Refunding and Adjustment Mortgages)	25,900,000.00
Claims for interest on Second Mortgage Bonds in default (owned by Denver Company and pledged under its Adjustment Mortgage) and unsecured debt (owned by Denver Company—and in small part by its subsidiary, the Utah Fuel Company—and in part pledged under the Denver Company's Adjustment Mortgage), as of date of appointment of Receivers, about	26,800,000.00
Capital stock (5/6 owned by Denver Company and pledged under its Refunding and Adjustment Mortgages)	75,000,000.00

In addition to the foregoing there are certain unliquidated tort claims against the Old Company of relatively small amounts which are the subject of pending actions. There may also be claims as yet unknown. Probably none of the claims remaining in existence (other than the $163,625.54 of claims above provided for) is entitled to preference in the receivership proceedings. It is expected that all remaining claims will be eliminated by foreclosure.

These claims are in substance those owned by the Denver Company as stated above. The Reorganization Committee will have power, to be exercised, if at all, in its absolute discretion to consent to or arrange for the payment, settlement or purchase of any such claims, other than claims belonging to the Denver Company or its subsidiaries. [1049]

V.

CASH REQUIREMENTS.

The estimated cash requirements of the Plan are the following:

Total amount estimated to be required	$18,600,000

It is expected that this amount will be applied as follows:

(a) To the purposes indicated below in this clause (a), in the amounts so estimated or in different proportions as the Reorganization Committee, prior to the completion of the reorganization, or the Board of Directors of the Holding Company, thereafter, may determine or approve; the unexpended balance if any to be employed as specified below in clause (b)		8,093,750
To the distributive shares of non-assenting bondholders, underwriting commission, expenses of foreclosure and reorganization, including court costs, compensation and allowances of the Receivers and their counsel, the Mortgage Trustee and its counsel, taxes on creation and issuance of new securities, compensation and expenses of the Protective and Reorganization committees, their depositaries and counsel, fees of engineering, accounting and other experts, engraving, printing and miscellaneous requirements	$2,000,000	
To betterments of existing road	2,579,750	
To acquisition of new passenger and freight equipment for Operating Company	3,514,000	
	$8,093,750	

(b) To the acquisition by purchase, construction or otherwise of extensions and feeders, including payment of interest during construction; the acquisition of additional new property other than extensions, including floating equipment; payment of the Receivers' car trust obligations; provision of working capital for the Operating Company; and supplying for any of the purposes mentioned in clause (a) any amount required therefor in excess of the amount there specified; (moneys to be applied in such amounts severally as the Reorganization Committee, prior to the completion of the reorganization, or the Board of Directors of the Holding Company, thereafter, may determine or approve); and, if the Board of Directors of the Holding Company and the Board of Directors of the Operating Company—or the Reorganization Committee prior to the completion of the reorganization—shall so determine, (in every case by vote of three-fourths of all members and subject to the approval and upon such conditions, if any, as may be imposed by the Railroad Commission of the State of California), to the protection of the claims against the Denver Company to be acquired as contemplated by the Plan and of the Operating Company's situation with respect to its traffic relations $10,506,250

Total $18,600,000*

*See Note, p. 7.

VI.

Provision For Cash Requirements.

Provision for meeting the cash requirements of the Plan has been made as follows:

It is estimated that on March 1, 1916, the Receivers should have on hand available for use by the Operating Company, in cash or its equivalent for the purposes of the Plan, not less than	$600,000
New Bonds of the Operating Company are to be sold either to Depositors or to an Underwriting Syndicate which has been formed and has underwritten the sale of $20,000,000 of New Bonds together with certain stock of the Holding Company, as set forth in Article IX of this Plan, realizing	18,000,000
Total to be provided	$18,600,000*

VII.

Securities To Be Issued By The New Companies.

Securities are to be issued by the Operating Company and the Holding Company, respectively, as follows:

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*The above statements of Cash Requirements and of the Provision made therefor are merely estimates and not to be deemed to limit the amount that may be raised or expended to effect the reorganization. The Reorganization Committee shall have power to accomplish the purposes proposed, if necessary, by somewhat increasing or diminishing the amount of bonds to be sold (but without varying the consideration or terms of sale) or by disposing of stock of the Holding Company freed for use by reason of the failure of holders of Old Bonds to become Depositors (see page 9). [1050]

By the Operating Company:

(Subject to the approval of the Railroad Commission of the State of California and any other public officials having jurisdiction.)

First Mortgage Gold Bonds (the New Bonds), authorized issue, $50,000,000

To be secured by first mortgage upon all of the existing railway properties of the Old Company and all property hereafter acquired by the Operating Company integrally connected therewith and all property acquired by means of the use of proceeds of the New Bonds or against which New Bonds shall be issued.

To be sold forthwith to the Depositors or to members of the Underwriting Syndicate, of said authorized issue, bonds of the principal amount of 20,000,000

To be dated March 1, 1916 (or otherwise as the Reorganization Committee may determine); to bear interest at the rate of 5% per annum, payable March 1 and September 1; to mature March 1, 1946, and to be redeemable, in whole or in part, at principal amount and accrued interest, after published notice, upon any interest payment date.

To be issued thereafter 30,000,000

for or against betterments, additions and extensions, under safeguards to be prescribed in the New Mortgage, at not exceeding the rate of $1,000, principal amount of bonds, for $1,000 of money actually invested in additional physical property subject to the New Mortgage or in securities subject to the New Mortgage representing the entire interest in physical property; to bear interest at a rate or rates not in any instance exceeding 6%; by their terms to be redeemable;—rates of interest, dates of maturity and redemption prices to be fixed by the Board of Directors of the Operating Company with the approval of the Board of Directors of the Holding Company, from time to time as bonds shall be issued.

Capital Stock (to be issued forthwith):

Preferred, 6% non-cumulative; preferred both as to dividends and in liquidation; to be redeemable at 105 and accrued dividends, if any, for the then current year and to be convertible into Common Stock at any time prior to any date fixed for redemption at the rate of dollar for dollar 27,500,000

Common 47,500,000

In its discretion and with the approval of the Railroad Commission of the State of California, the Reorganization Committee may cause the Operating Company to issue its obligations bearing interest at the rate of at least six per cent. per annum in place of the Preferred Stock of the Operating Company provided for in the Plan and, in its discretion and with the approval of said Commission, may cause obligations, junior to said obligations last mentioned, to be issued in place of such part as it may specify of the Common Stock of the Operating Company provided for in the Plan, and either of said issues or any part of either thereof may be fixed obligations or income obligations and may or may not have fixed dates of maturity and said obligations may be of such character otherwise as the Reorganization Committee may determine consistently herewith.

All of the shares of such stock, preferred and common, or such substituted obligations, will upon completion of the reorganization pass into the ownership of and be held by the Holding Company.

By the Holding Company:

Capital Stock (to be issued forthwith):

Preferred, 6% non-cumulative; preferred both as to dividends and in liquidation; to be redeemable at 105 and accrued dividends, if any, for the then current year and to be convertible into Common Stock at any time prior to any date fixed for redemption at the rate of dollar for dollar	27,500,000
Common	47,500,000

VIII.

Securities To Be Outstanding In Hands Of The Public.

It is expected that after the completion of the Reorganization, securities will be outstanding in the hands of Depositors and purchasers of New Bonds as follows:

First Mortgage bonds of the Operating Company (the New Bonds)	$20,000,000
Preferred Stock of the Holding Company	27,500,000
Common Stock of the Holding Company	47,500,000

except that Preferred Stock to the extent of $500 for every $1,000 of such Old Bonds as shall not become subject to the Plan and Agreement and Common Stock to the extent of $750 for every $1,000 of such Old Bonds, unless otherwise employed by the Reorganization Committee for the purposes of the reorganization, will be returned to the Treasury of the Holding Company. [1051]

IX.

Disposition Of New Securities.

(A) Exchange of Old Bonds for Stock of the Holding Company and Purchase of New Bonds by Depositors.

Depositors, including transferees of certificates of deposit, will be entitled to receive in exchange for their Old Bonds and their claims against the Denver Company (all whereof by virtue of becoming subject to the Plan and Agreement will pass to the Reorgan-

ization Committee to be used for the purposes of the reorganization as authorized by the Plan and Agreement), stock (preferred and common) in the Holding Company, either in connection with or without the purchase by them of First Mortgage Bonds of the Operating Company upon the following basis:

A Depositor will be entitled to purchase at 90 and accrued interest New Bonds equal in principal amount to 40 per cent. of the principal amount of his Deposited Bonds and if any Depositor shall so purchase New Bonds he will be entitled to receive, in addition to the New Bonds so purchased and in exchange for his Deposited Bonds, Preferred Stock of the Holding Company to an amount, par value, equal to 55% of the principal amount of his Deposited Bonds and Common Stock thereof to an amount, par value equal to 95% of the principal amount of such Deposited Bonds.

If a Depositor shall not exercise his said privilege to purchase New Bonds he will be entitled to receive, in exchange for his Deposited Bonds, Preferred Stock of the Holding Company of an amount, par value, equal to 50% of the principal amount of his Deposited Bonds and Common Stock thereof to an amount, par value, equal to 75% of the principal amount of such Deposited Bonds.

TABLE EXHIBITING PRIVILEGES AVAILABLE TO DEPOSITORS

Assumes as Basis a Deposit of $1,000 Principal Amount of Old Bonds.

In Event of	Consideration to be given by Depositor	Per Cent. of Holding of Old Bonds	Securities to be Received: New Bonds Principal Amount	Per Cent. of Holding of Old Bonds	Preferred Stock of Holding Company, Par Value	Per Cent. of Holding of Old Bonds	Common Stock of Holding Company, Par Value	Per Cent. of Holding of Old Bonds
Purchase of New Bonds	(a) Cash $360, and accrued interest upon $400 of New Bonds (b) $1,000 principal amount of Old Bonds and coupon of March 1, 1915, and subsequent coupons (c) Transfer of claims against Denver Company	36	$400	40	$550	55	$950	95
Exchange of Old Bonds for stock without purchase of New Bonds	(a) $1,000 principal amount of Old Bonds and coupon of March 1, 1915, and subsequent coupons (b) Transfer of claims against Denver Company	No cash to be paid.	None		$500	50	$750	75

Any Depositor desiring to avail himself of the privilege of purchasing New Bonds must signify his election so to do by executing and delivering to the Reorganization Committee or its nominees a contract of purchase in form prescribed by the Committee, on or prior to the 15th day of February, 1916, unless the time therefor shall be extended by the Reorganization Committee. In the event that a later date be fixed, Depositors will be notified as promptly as practicable, as provided in the annexed Agreement, of the action of the Reorganization Committee.

The cash payable on account of the purchase price of bonds so purchased is to be paid in instalments as follows:

An amount not exceeding 50% of such cash purchase price, after February 15, 1916, and prior to the completion of the reorganization, upon call by the Reorganization Committee. [1052]

The uncalled balance of such 50% (i. e. such part of such first 50% as shall not have been called by the Reorganization Committee) to the Operating Company, at any time upon call by its Board of Directors.

An amount not exceeding an additional 25% to the Operating Company, at any time after January 1st, 1917, upon call by its Board of Directors.

The entire balance of the cash purchase price to

the Operating Company, at any time after June 1st, 1917, upon call by its Board of Directors.

In final adjustment of the purchase-price, accrued interest upon bonds purchased will be charged and interest will be allowed upon instalments previously paid at the coupon-rate.

Any Depositor, upon any instalment-payment-date may anticipate payment of all, but not part, of the instalments of the purchase price of the New Bonds purchased by him then remaining unpaid.

Upon payment by any Depositor of the first instalment payable upon his contract to purchase New Bonds and the surrender of his certificate of deposit, duly endorsed, he will be entitled to receive a new certificate evidencing such payment and also his rights with respect to the New Bonds and the stock which he is to receive hereunder. Payment of further instalments will be receipted for by endorsement upon such certificate upon presentation thereof for the purpose. The bonds and certificates for stock to which a Depositor may be entitled will be delivered only upon payment in full of the amount payable upon his contract of purchase.

Every Depositor who shall elect, as herein provided, to purchase New Bonds and at the date fixed for the payment of the first instalment of the purchase price, shall pay the entire purchase price of the Bonds to be taken by him, will be entitled to borrow from the Underwriting Syndicate or lend-

ers to be provided by said Syndicate (through the agency of the Depositary, The Equtable Trust Company of New York, 37 Wall Street, New York City) any amount not exceeding 90 per cent. of the purchase price of the New Bonds to be taken by him (exclusive of accrued interest upon Bonds purchased); such loan to be repaid, with interest at the rate of six per cent. per annum, on or before one year from the date so fixed for the payment of such first instalment of the purchase price and to be secured by all of the Bonds and Certificates of Stock to which the Depositor shall be entitled hereunder upon the making of such payment in full—the Underwriting Syndicate or its representatives to possess upon default such power of sale, for account of the borrower, as is customary in cases of collateral loans by banks in New York City.

Any Depositor who shall elect to purchase New Bonds as provided herein and shall default in making any payment as required by the Plan and Agreement will, unless the Reorganization Committee shall otherwise determine, forfeit any and all payments that he may have already made and all right to which he would otherwise have been entitled to acquire securities, receive benefits or enforce rights hereunder; and in such event the Reorganization Committee in its discretion may cause all of the bonds, claims, shares of stock and benefits to which such Depositor otherwise would have been entitled

hereunder to be sold for his account to satisfy the amount remaining due from such defaulting depositor and all amounts chargeable hereunder against the securities, rights and benefits so sold. But the Reorganization Committee may, in general or in particular instances, enlarge or extend the time for making any of the payments required by the Plan and impose conditions in respect of any payments the time wherefor shall be so extended.

Unpaid coupons (appertaining to Old Bonds) which became due September 1, 1914, and theretofore will be paid in cash by the Trustee under the Mortgage securing the Old Bonds, The Equitable Trust Company of New York.

(B) Sale of New Bonds and Stock to Underwriting Syndicate.

Such of the New Bonds as shall not be purchased by Depositors are to be taken by an Underwriting Syndicate which has been formed for the purpose and has underwritten the sale, at 90 and accrued interest, of all of the $20,000,000 principal amount of New Bonds to be issued forthwith, and is to receive $1,000 principal amount of New Bonds, $125 par value of Preferred Stock and $500 par value of Common Stock of the Holding Company for each $900 of cash (and accrued interest upon $1,000 principal amount of New Bonds) paid by it. The securities received by an Underwriter in consideration of any given payment are to be the same in char-

acter and amount as those that will be forfeited by Desopitors who fail to exercise their privilege of purchasing New Bonds by payment of an equal amount. [1053]

TABLE EXHIBITING CONSIDERATION TO BE PAID BY UNDERWRITERS AND SECURITIES TO BE RECEIVED THEREFOR

Assuming Purchase of $400, Principal Amount, of New Bonds

	Securities to Be Received		
Cash to be paid.	New Bonds, principal amount	Preferred Stock in Holding Company, par value	Common Stock in Holding Company, par value.
$360 and accrued interest upon $400, principal amount, of New Bonds	$400	$50	$200

Assuming Purchase of $1,000, Principal Amount, of New Bonds.

$900 and accrued interest upon $1,000, principal amount, of New Bonds	$1,000	$125	$500

The Underwriting Syndicate, if the Plan shall be declared operative, is to be paid for its agreement to underwrite the sale of the entire $20,000,000, principal amount, of New Bonds and to loan monies to Depositors as above provided, a cash commission of two per cent, thereof (i. e., $400,000). The Equitable Trust Company of New York and Messrs. Blair & Co., William Salomon & Co., and E. H. Rollins & Sons, at the request of the Protective Committee having undertaken, by firm commitment, to form the syndicate above referred to (the subscribers and the amounts of their subscriptions severally to be satisfactory to the Protective Committee) and having discharged such engagement, are to be paid therefor, if the Plan shall be declared operative, a compensation of one-half of one per cent. of the

principal amount of bonds the sale whereof has been underwritten (i. e., $100,000).

The amounts payable by the Underwriting Syndicate will be subject to call upon ten days' notice at any time after February 15, 1916, by the Reorganization Committee and such amounts as are not so called prior to completion of the reorganization will be subject to call upon like notice by the Board of Directors of the Operating Company.

Upon delivery of bonds to the Underwriting Syndicate, accrued interest upon the bonds so delivered will be charged and interest will be allowed at the coupon-rate upon payments, if any, previously made upon account of the purchase price.

The Underwriting Syndicate may, on the date fixed for the making of the first payment to be made by it, or at any time thereafter, anticipate payment of all or any part of the purchase price of the securities to be taken by it.

X.

Comparative Table of Capitalization and Fixed Charges of Old Company and of the Combined New Companies at Completion of Reorganization.

The following table exhibits the indebtedness, stock and interest charges of the Old Company on the one hand and of the Operating Company and Holding Company (consolidated) on the other:

Obligations and Stock Outstanding.	Old Company.	New Company.
First Mortgage Bonds	$50,000,000	*$20,000,000
Second Mortgage Bonds	25,000,000	None
Unsecured debt (including notes, open accounts, traffic and car service balances and claims for interest in default, owing to the Denver Company as of date of appointment of Receivers), about	26,800,000	None
Miscellaneous claims as ascertained by Receivers (not including claims of considerable amount paid just prior to Receivership)	163,625.54	None
Capital Stock	75,000,000	75,000,000† Preferred 27,500,000† Common 47,500,000†
Interest Charges:		
First Mortgage Bond Interest	2,500,000	$1,000,000
Other interest (as of date of appointment of Receivers), about	$2,200,000†† (accruing, but in principal part never paid.)	None

*The Operating Company, when the proceeds of the New Bonds have been expended should possess physical property, securties and cash resources approximately of the value of $17,500,000, in addition to the property possessed by the Old Company prior to the Receivership, which should add materially to its earning capacity as compared with that of the Old Company.

†These amounts may be somewhat diminished as explained on p. 9.

††Does not include interest on several million dollars of intebtedness to the Denver Company and Utah Fuel Company upon which payment of interest was not regularly accrued upon the Western Pacific books prior to the Receivership.

[1054]

XI.

Claims Against The Denver Company To Be Transferred To The Holding Company.

The Articles of Incorporation of the Holding Company shall provide that the Board of Directors of the Holding Company shall have power to enforce against the Denver Company the claims against the latter company to be acquired by the Holding Company as herein provided or to compromise such claims or to enter into any arrangement in satisfaction thereof, but only upon the condition that their action shall be authorized or ratified by the vote of the holders of two-thirds of such shares of the capital stock of the Holding Company (preferred and common stock voting together) as shall be represented in person or by proxy at a special meeting of the stockholders to be called upon not less than thirty days' notice for the purpose of considering such settlement, compromise or other adjustment, which vote shall represent not less than a majority in amount of the outstanding capital stock of the Holding Company.

It shall be provided by some effectual means that the net proceeds realized by the Holding Company from the enforcement or compromise of claims against the Denver Company and all avails thereof in the form of securities or property shall be paid over or transferred to the Operating Company, and the Holding Company, in the discretion of its Board

of Directors, may transfer said claims to the Operating Company, which may if it shall so determine, cause the same to be subjected to the New Mortgage; provided that if such transfer be made no settlement, compromise or other adjustment of said claims shall be effective without the assent of the stockholders of the Holding Company as above required, or if the Holding Company be dissolved, then a like assent of the stockholders of the Operating Company; and provided, further, that if any expense or liability shall have been incurred by the Holding Company in realizing upon or protecting such claims, the payment or transfer shall be made only after such expense has been reimbursed and such liability discharged out of such proceeds or avails or discharged or assumed by the Operating Company.

XII.

Restrictions Upon The Sale Or Pledge Of Property And The Creation Of Indebtedness.

The Articles of Incorporation of the Holding Company shall provide that the Holding Company shall not (a) sell, pledge, or in any manner dispose of any part of the stock of the Operating Company, or (b) create any indebtedness of the Holding Company, other than such as the Board of Directors shall deem to be essential to the ordinary conduct of the business of the Company, unless such sale, pledge or other disposition of the stock of the Operating

Company or the creation of such indebtedness, as the case may be, shall be approved by the affirmative vote of the holders of two-thirds of such shares of the capital stock of the Holding Company as shall be represented in person or by proxy at a stockholders' meeting of that Company called upon not less than thirty days' notice for the purpose of passing upon the matter in question—which affirmative vote shall in no case be less than a majority in amount of all of the outstanding capital stock of the Holding Company.

The Articles of Incorporation of the Holding Company shall, however, provide that the Board of Directors may, pursuant to the affirmative vote of the holders of two-thirds of such shares of the capital stock of the Company as shall be represented in person or by proxy at a stockholders' meeting called upon not less than thirty days' notice, for the purpose of passing upon the question, (which affirmative vote shall be not less than a majority in amount of all of the outstanding capital stock of the Holding Company), but not otherwise, pledge the assets of the Company, or any thereof, for the purpose of raising money in order to protect the claims against the Denver Company to be acquired by the Holding Company as provided in the Plan from loss or impairment of value by reason of the foreclosure of any of the mortgages upon the property of the Denver Company or otherwise.

The Articles of Incorporation of the Holding Company and of the Operating Company shall be so formulated as to permit a sale of the property and assets of the Operating Company as an entirety, either for cash or partly for cash and partly upon credit, or in exchange for bonds or stock or both of any other corporation or corporations, provided (but not otherwise) such sale or disposition and the consideration to be received therefor, shall be approved both by the affirmative vote of holders of two-thirds in amount of the outstanding capital stock of the Operating Company and by the affirmative vote of holders of two-thirds of such shares of the capital stock of the Holding Company as shall be represented in person or by proxy at a stockholders' meeting called, upon not less than thirty days' notice, for the purpose of passing upon the question (which affirmative vote shall be not less than a majority in amount of all of the outstanding capital stock of the Holding Company).

XIII.

Distribution Of The Assets Of The Holding Company In Case Of Dissolution.

The Articles of Incorporation of the Holding Company shall provide that in the event of the dissolution or other liquidation of the Holding Company, no stockholder shall be entitled to have the assets of the Company converted into cash, or to

share in the same generally, but that if proper proceedings shall be taken for the purpose of dissolving or liquidating the Holding Company and if the Board of Directors of the Company shall determine that the assets of the Campany shall be distributed in kind and such decision shall be approved by the affirmative vote of a majority in amount of the stockholders of the Company at a meeting thereof duly called for the purpose of considering said matter or of considering the dissolution or liquidation of the Holding Company, the preferred stockholders of the Holding Company shall be entitled and required to receive amounts of Preferred Stock (or obligations issued in lieu of Preferred Stock as permitted hereby) of the Operating Company equal at par value to their respective holdings of the Preferred Stock of the Holding Company, and the common stockholders of the [1055] Holding Company shall be entitled and required to receive pro rata Common Stock of the Operating Company and such other securities and cash, if any, as may properly be apportionable to Common Stock of the Holding Company.

The Articles of Incorporation of the Operating Company shall provide that, in the event of the dissolution or other liquidation of the Operating Company, (subsequently to the dissolution or liquidation of the Holding Company), if the Board of Directors of the company shall provide by resolu-

tion approved by the affirmative vote of eighty per cent. in amount of the outstanding Preferred Stock and eighty per cent. in amount of the outstanding Common Stock of the Operating Company that the assets of the company shall be distributed in kind and for the apportionment of said assets, for the purposes of such distribution, as between the Preferred Stock and the Common Stock of the company, the provision for the distribution and apportionment of assets made by any resolution so adopted and approved shall be effective and binding upon all of the stockholders of the Operating Company.

XIV.

Boards Of Directors Of The Holding Company and Operating Company.

The first Board of Directors of the Holding Company shall be:

A. M. Hunt,	Frederick H. Ecker,
James D. Phelan,	Alvin W. Krech,
George Whittell,	Starr J. Murphy,
David R. Forgan,	William A. Read,
I. DeBruyn,	William Salomon,
C. Ledyard Blair,	Richard B. Young,

Their successors shall be elected at the annual meeting of the Stockholders of the Holding Company to occur during the year 1917, in accordance with the provisions regulating the holding of stockholders' meetings to be contained in the Articles of Association.

The first Board of Directors of the Operating Company shall be named by the Reorganization Committee, but members of said Board will at all times be subject to removal and their successors will be elected by the Holding Company, which will be substantially the sole stockholder of the Operating Company.

XV.

Holders Of Second Mortgage Bonds, Unsecured Creditors And Stockholders Of The Old Company.

No provision is made in the Plan for the allotment of any property or any of the securities or money provided by the Plan to holders of Second Mortgage Bonds, to unsecured creditors, or to stockholders of the Old Company.

XVI.

Non-Assenting Holders Of Old Bonds.

Bondholders who shall have withdrawn their bonds from the operation of the Protective Agreement and the holders of Old Bonds who shall not have deposited their bonds under the Protective Agreement or hereunder will not be entitled to participate in the Plan or the benefits thereof to any extent, and will receive only their distributive shares of any balance of the proceeds derived from the sale of the mortgaged property of the Old Company that may remain after the discharge of obligations

and liabilities entitled to prior payment under the terms of the foreclosure decree and orders of Court.

XVII.

Terms And Effect Of Participation

The Plan and Agreement having been prepared by, and adopted by the unanimous vote or concurrent action of the members of, the Protective Committee and filed with the depositary named in the Protective Agreement, the Plan and Agreement, after the the Protective Committee shall have published notice of its preparation, adoption and filing as required by the Protective Agreement, will be binding upon all holders of certificates of deposit issued pursuant to provisions of the Protective Agreement by the Equitable Trust Company of New York, depositary thereunder, or any of its agents who, within the time limited in the Protective Agreement, do not surrender their certificates of deposit, withdraw the amount of deposited bonds represented thereby and pay their pro rata shares of the indebtedness, compensation, expenses and liabilities of the Protective Committee as fixed by that Committee, all in compliance with the conditions and provisions of the Protective Agreement. All holders of certificates of deposit issued under the Protective Agreement who shall fail so to surrender their certificates of deposit, withdraw their bonds and pay their pro rata share of the indebted-

ness, compensation, expenses and liabilities of the Protective Committee, as provided in the Protective Agreement, shall be conclusively and finally deemed for all purposes to have assented to the Plan and Agreement and all the terms thereof, and, immediately upon the Plan and Agreement's being declared operative by the Reorganization Committee, such holders of certificates of deposit shall be irrevocably bound and concluded thereby.

Holders of Old Bonds who have not already deposited their bonds under the Protective Agreement and who desire to participate in the benefits of the Plan and Agreement must deposit their bonds, accompanied by all coupons maturing on or after March 1, 1915, with The Equitable Trust Company of New York (or some duly authorized agent thereof), as Depositary of the Reorganization Committee on or before February 7th, 1916, receiving therefor certificates of deposit in such form as shall be prescribed by the Reorganization Committee; and the holders of Old Bonds so depositing the same and all holders of certificates of deposit issued to evidence deposits thereof shall be conclusively deemed to be subject to and irrevocably bound by the Plan and Agreement.

Every holder of any of the certificates of deposit issued under the Protective Agreement who, by failure so to withdraw his bonds from the operation of the Protective [1056] Agreement as permitted

thereby, and every holder of Old Bonds, who by deposit of his bonds or coupons with the Reorganization Committee or otherwise as herein provided, shall become bound by the Plan and Agreement and every successor in interest of any such certificate holder or bondholder shall be deemed; if the Plan and Agreement shall be declared operative by the Reorganization Committee, irrevocably to have assigned and transferred to the Reorganization Committee all of the said bonds and coupons so deposited or left upon deposit and all of the claims against the Denver Company susceptible of assignment or transfer (whether in law or in equity) by such Depositor that shall have arisen or exist or that shall arise or exist in favor of such certificateholder or bondholder or any predecessor or successor in interest of either thereof; and the Reorganization Committee is hereby irrevocably authorized by every such certificate-holder and bondholder and every successor in interest of either thereof to transfer, whether directly or through the medium of mesne transfers, all such bonds and claims to any corporation or corporations utilized by it for the purpose, or in the course, of the reorganization, or to transfer a part of the same or an interest therein to one such corporation and another part or interest to another or others, and thereby to vest every such transferee with the full legal title to the bonds or claims or interest so transferred to it and the entire beneficial interest therein.

The Reorganization Committee, if it deem it desirable or convenient so to do, may require holders of certificates of deposit issued by the Protective Committee who shall not withdraw their bonds as aforesaid to present their said certificates of deposit to the Depositary hereunder or some agent thereof in order that there may be noted thereon the assent of the holders thereof to the Plan and Agreement and the said holders of such certificates of deposit may be further required to execute and deliver assignments, either to the Reorganization Committee or to its nominee or nominees, of all their claims against the Denver Company, but neither any such notation of assent nor any such assignment shall be necessary to give binding effect to any of the foregoing provisions of this Article or to the Plan and Agreement in any particular.

XVIII.

Failure To Declare Plan Operative—Abandonment Thereof.

If the Plan and Agreement either in its original form, or as it may be modified pursuant to the provisions of the annexed Agreement, shall not be declared operative prior to March 15, 1916, or in the event that the Reorganization Committee shall wholly abandon the plan of reorganization, the Old Bonds deposited, or the avails thereof then under the control of the Reorganization Committee, shall

be delivered to the Depositors in amounts representing either respective interests, upon surrender of their several certificates of deposit properly endorsed and payment of their respective shares of compensation, disbursements, expenses, and liabilities of the Reorganization Committee and of the Protective Committee, as fixed by the Reorganization Committee. In such case any moneys paid by a Depositor pursuant to any of the provisions of the Plan or the proceeds thereof remaining after deducting therefrom his share of the compensation, disbursements, expenses and liabilities of the Reorganization Committee and Protective Committee payable by said Depositor and not already reimbursed, shall be returned, but without interest, to the Depositor entitled thereto.

XIX.

Statements Contained In Plan.

This Plan has been adopted by the Protective Committee, acting under the Protective Agreement. The statements contained in the Plan have been compiled from sources believed to be reliable and accurate, but certain of them are necessarily approximate and none is to be construed as a representation or as an inducement to any action or to any omission to act upon the part of anyone. No error or misstatement of any description in the Plan shall constitute ground for the withdrawal of any

Depositor from the Plan and Agreement nor for any complaint with respect to the same or with respect to any consequences arising from having become a party thereto.

XX.

Agreement Of Reorganization.

In order to enable the Plan to be carried out and to give effect to the same the annexed Agreement of Reorganization has been prepared. Whenever the word "Plan" is used herein it shall be deemed to include said Agreement and the provisions thereof, and every depositor who shall assent to the Plan in any manner thereby will become a party to the Agreement, the provisions of which shall govern in any case of conflict between the Plan and the Agreement.

Dated, December 15, 1915. [1057]

AGREEMENT.

Agreement made as of December 15, 1915, between (a) A. M. Hunt, James D. Phelan, George Whittell, David R. Forgan, I. de Bruyn, C. Ledyard Blair, Frederick H. Ecker, Alvin W. Krech, Starr J. Murphy, William A. Read, William Salomon and Richard B. Young, as the Reorganization Committee provided for and named in the foregoing Plan of Reorganization, parties of the first part;

(b) Holders of Certificates of Deposit issued under a Protective Agreement, dated May 1, 1915,

which represent First Mortgage Five Per Cent. Thirty Year Gold Bonds of Western Pacific Railway Company issued under the First Mortgage of said Railway Company dated September 1, 1903, who shall become parties hereto in the manner set forth in the Plan of Reorganization to which this Agreement is annexed or as prescribed herein;

(c) Holders of such First Mortgage Five Per Cent. Thirty Year Gold Bonds who shall become parties hereto in the manner so set forth or prescribed;

Such holders of said certificates of deposit and said bonds constituting the parties of the second part; and

(d) Alvin W. Krech, C. Ledyard Blair, I. de Bruyn, Frederick H. Ecker, David R. Forgan, A. M. Hunt, Starr J. Murphy, James D. Phelan, William A. Read, William Salomon, George Whitrell and Richard B. Young, as the Committee acting under said Western Pacific Railway Company First Mortgage Bondholders' Protective Agreement dated May 1, 1915, parties of the third part:

Witnesseth:

The parties hereto for and in consideration of the conditions and promises hereinafter set forth and for the purpose of mutually assuring the carrying out the foregoing Plan of Reorganization (herein referred to as the "Plan") have mutually agreed and hereby do severally agree, each of the Depos-

itors and the Protective Committee agreeing with the Reorganization Committee and the Depositors agreeing with one another, but each of them agreeing for himself and not for any of the others, as follows:

First.—The terminology adopted in the Plan, as set forth in Article I thereof, is adopted also for the purposes of this Agreement.

Second.—The Plan is hereby adopted and approved and is to be taken as a part of this Agreement with the same effect as though it were embodied herein and the Plan and this Agreement shall be read as parts of one and the same instrument, but in case of conflict between the Plan and this Agreement the provisions of this Agreement shall control. No statement, recital, explanation, estimate, opinion, suggestion or anything else contained in the Plan or Agreement or in the Introductory Statement prefixed to the Plan or in any circular issued or which may hereafter be issued, whether by advertisement or otherwise by or on behalf of the Reorganization Committee, the Protective Committee, or by any of the members of said Committees or by any depositary, sub-depositary or agent of a depositary under the Plan and Agreement or the Protective Agreement or by the Western Pacific Railway Company (the Old Company) or by either or both of the Receivers of the Old Company, or by any other corporation, body or person, is intended or is

to be taken as a representation or warranty or as a condition of or inducement to any deposit under or assent to the Plan and Agreement and no omission, defect, error or misstatement therein shall constitute cause for any complaint or shall release any deposit under the Plan and Agreement or affect or release any assent thereto or anything done thereunder or in connection therewith, except by virtue of the written consent to such release of the Reorganization Committee.

Third.—Participation in the Plan in any respect whatsoever is dependent upon the holders of the certificates of deposit and bonds hereinbefore mentioned becoming parties to the Plan and Agreement in manner as follows:

The Plan and Agreement having been prepared by and adopted by the unanimous vote of the members of the Protective Committee and filed with the depositary named in the Protective Agreement, shall, after the Protective Committee shall have published notices of its preparation, adoption and filing as required by the Protective Agreement, be binding upon all holders of certificates of deposit issued pursuant to provisions of the Protective Agreement and all parties whose Old Bonds shall have become subject thereto, who, within the time limited in the Protective Agreement, shall not surrender their certificates of deposit, withdraw the amount of deposited bonds represented thereby and

pay their pro rata shares of the indebtedness, compensation, expenses and liabilities of the Protective Committee as fixed by said Committee, complying in all respects with the conditions and provisions of the Protective Agreement in that behalf; and all holders of certificates of deposit issued under the Protective Agreement and all parties whose Old Bonds shall have become subject thereto, who shall fail so to surrender their certificates of deposit, withdraw their bonds and pay their pro rata share of the indebtedness, compensation, expenses and liabilities of the Protective Committee and all of their successors in interest shall be conclusively and finally deemed for all purposes to have assented and become parties to the Plan and Agreement, and immediately upon the Plan and Agreements being declared operative by the Reorganization Committee, such holders of certificates of deposit and parties whose Old Bonds shall have become subject to the Protective Agreement shall be irrevocably bound and concluded thereby.

Holders of Old Bonds who have not already deposited their bonds under the Protective Agreement and who desire to participate in the benefits of the Plan and Agreement shall deposit their bonds, accompanied by all coupons maturing on or after March 1, 1915, with The Equitable Trust Company of New York (or some duly authorized agent thereof), as the Depositary under the Plan and Agree-

ment, on or before February 7th, 1916, receiving therefor certificates of deposit in such form as shall be prescribed by the Reorganization Committee; and the holders of Old Bonds so depositing the same and all holders of certificates of deposit issued to evidence such deposits shall be conclusively deemed to be subject to and irrevocably bound by and to have become parties to the Plan and Agreement.

The Reorganization Committee may in its discretion, permit the holders of Deposited Bonds to become parties to the Plan and Agreement without the actual deposit of their bonds, and all bondholders so becoming parties shall be embraced within the term "Depositors" whenever used in the Plan or in this Agreement. The Reorganization Committee may authorize the acceptance for deposit under the Plan and Agreement of Old Bonds without such of the interest coupons appertaining thereto as the Committee may specify, and also may authorize the acceptance for deposit under the Plan and Agreement, upon such terms and conditions as the Reorganization Committee in its absolute [1058] discretion may prescribe, of interest coupons without the bonds to which they appertain.

Every holder of any of the certificates of deposit issued under the Protective Agreement and every party whose Old Bonds or coupons shall have become subject thereto, who by failure to withdraw his bonds or coupons from the operation of the Pro-

tective Agreement as permitted thereby, and every holder of Old Bonds or coupons, who by deposit of his bonds or coupons or otherwise as herein provided, shall become a party to the Plan and Agreement and every successor in interest of any such Depositor shall be deemed, if the Plan and Agreement shall be declared operative by the Reorganization Committee, irrevocably to have assigned and transferred to the Reorganization Committee all of the bonds and coupons so deposited or left upon deposit and all of the claims against the Denver Company susceptible of assignment or transfer (whether in law or in equity) by such Depositor that shall have arisen or exist or shall arise or exist in favor of or be enforceable by or on behalf or for the benefit of such Depositor or any predecessor or successor in the interest thereof; and in such event the Reorganization Committee are hereby vested as trustees of an express trust with the legal title to all of the Deposited Bonds and coupons and all claims against the Denver Company deemed to be transfered as aforesaid; and the Reorganization Committee is hereby irrevocably authorized by every such Depositor to utilize all or any of such bonds and of the coupons appertaining thereto and other deposited coupons and any part of any amount payable upon any thereof in satisfying the purchase price to be paid for any of the property of the Old Company purchased by or at the instance of the Reor-

ganization Committee for the purposes of the reorganization and to transfer, whether directly or through the medium of any mesne transfers, all such bonds and coupons (or any interest therein or claims based thereon remaining after the same shall have been utilized in payment of such purchase price) and all such claims against the Denver Company to any corporation or corporations used by the Reorganization Committee for the purpose or in the course of the reorganization provided for in the Plan, or to transfer the same in part to one such corporation and in part to another or others, and thereby to vest every such transferee with the full legal title to the bonds or claims or interest in bonds or claims so transferred to it and the beneficial interest therein.

Certificates of Deposit issued under the Protective Agreement and representing Old Bonds which shall become subject to the Plan and Agreement as herein provided, shall entitle the holders thereof to the same rights and render them subject to the same obligations as if the Old Bonds represented thereby had been deposited under the Plan and Agreement and certificates of deposit had been issued therefor hereunder. The Reorganization Committee, if it deem it desirable or convenient so to do, may require holders of certificates of deposit issued under the Protective Agreement who shall not withdraw their bonds as aforesaid to present their said certificates

of deposit to the Depositary hereunder in order that there may be noted thereon the assent of the holders thereof to the Plan and Agreement and the said holders of such certificates of deposit may be further required to execute and deliver to said Depositary assignments, either to the Reorganization Committee or to its nominee or nominees, of all claims against the Denver Company arising or to arise as aforesaid.

Certificates of deposit issued for Deposited Bonds under the Protective Agreement or hereunder and all interests and rights represented thereby, shall be transferable, but only subject to the terms and conditions of the Plan and Agreement and in such manner as the Reorganization Committee shall prescribe or approve. Upon any such transfer all rights of the transferor evidenced by such certificates, and as well all amounts paid upon the purchase price of New Bonds purchased by virtue of the interest in Deposited Bonds represented by such certificate of deposit, shall pass to the transferee and the transferees and subsequent holders of any such certificate of deposit shall for all purposes be substituted in place of prior holders subject to this Agreement and the acts of the original Depositor shall be binding upon and be deemed the acts of every such transferee. By accepting or holding any certificate of deposit, every recipient or holder thereof (whether the same be issued in his name or otherwise) shall become thereby a party to the Plan and Agreement with the same force and effect as though an actual

subscriber thereof and shall thereby authorize the Reorganization Committee to affix his signature thereto.

The certificates of deposit and any interim, or other certificates or receipts issued by or for the Reorganization Committee or the Protective Committee or any depositary of either may be treated by the Reorganization Committee and the Depositary as negotiable instruments, and the bearer or, if registered, the registered holder for the time being, may be deemed by the Reorganization Committee and the Depositary to be the absolute owner thereof and of all of the rights of the original depositor and of every holder, and neither the Reorganization Committee nor the Depositary shall be affected by any notice to the contrary.

All Depositors agree to execute from time to time on demand of the Reorganization Committee any and all such powers of attorney as said Committee in its discretion shall deem necessary or advisable, and also to execute from time to time on demand of the Reorganization Committee any and all such transfers and assignments or writings required for vesting or evidencing the complete ownership of the Old Bonds represented by certificates of deposit and the claims against the Denver Company as the Reorganization Committee may determine.

Fourth.—February 7, 1916, shall be the limit of time within which bondholders shall have the right to deposit their Old Bonds and within which they

may become parties to the Plan and Agreement, but the Reorganization Committee in its descretion either generally or in special instances, may extend such time or renew the period or periods fixed or limited for such deposit, such extension of time to be upon such terms and conditions, if any, as the Reorganization Committee may see fit to prescribe. Holders of Old Bonds who do not deposit the same or become parties hereto in the manner herein provided within the periods respectively limited or fixed therefor, as aforesaid, and holders of certificates of deposit issued under the Protective Agreement who shall exercise their right of withdrawal as provided in the Protective Agreement, will not be entitled to deposit their bonds or to become parties to this Agreement or to share in the benefits of the Plan and Agreement and shall acquire no rights hereunder, except upon obtaining the express consent in writing to such deposit and participation of the Reorganization Committee, which may, in its absolute discretion, and upon such terms and conditions as it may see fit, withhold or give such consent.

Fifth.—The Reorganization Committee shall be the sole and final judge as to when and whether sufficient Old Bonds shall have become subject to the Plan and Agreement to and whether other conditions do warrant it in declaring the Plan operative and in attempting to carry the same into effect, and it shall have power whenever it shall deem proper

(notwithstanding anything that may have been done), to abandon the Plan or any part thereof. The Reorganization Committee by the affirmative vote of three-fourths of its members may modify the Plan in whole or in part (and even if such modification shall amount to the substitution of a new Plan therefor) and any such modification or any modi- [1059] fied plan may deal with and provide for any or all matters that under the Protective Agreement might have been dealt with or provided for in the Plan and Agreement. After any modification by a like vote the Reorganization Committee may restore to the Plan any abandoned part or parts thereof or discard any such modification and the Committee thereafter may seek to carry the Plan into effect as fully as if such part or parts had not been abandoned or such modification made. It may attempt to carry the Plan into effect rather than abandon or modify the same, even though it be manifest that in attempting to carry out the Plan it must depart from the original Plan or some part thereof. Any modification, when made by the Reorganization Committee as above provided, shall thereupon become and be part of the Plan and Agreement, but in case of any intentional modification of the Plan a statement of such modification shall be filed with the Depositary; and in case of any such intentional modification which shall alter the Plan in any substantial respect, a statement of such modification shall be filed with

the Depositary and notice of the fact of such filing shall be given as hereinafter provided in Article Fifteenth and within four weeks after the first publication of such notice, all Depositors may surrender their respective certificates of deposit, in negotiable form, to the Depositary and may withdraw their Deposited Bonds or the avails thereof then under the control of the Reorganization Committee, to the amounts properly apportionable to such certificates, respectively; provided, however, in every case of such withdrawal the Depositor shall make payment of his share of the compensation, disbursements, expenses and liabilities of the Reorganization Committee and the Protective Committee, as fixed by the Reorganization Committee. Every such Depositor so withdrawing shall thereupon, without any further act, be released from the Plan and Agreement and shall cease to have any rights hereunder, and the Deposited Bonds represented by the certificates of deposit so surrendered, or the avails thereof then under the control of the Reorganization Committee, as the case may be, shall thereupon be released therefrom, and the exercise of such right of withdrawal shall release and discharge the Reorganization Committee and the Depositary from all liability of every character to every such withdrawing Depositor, except so far as provision is hereinafter made in regard to cases where money has been paid in under the Plan. Every Depositor not so withdrawing with-

in such four weeks after the first publication of said notice shall be deemed to have assented to the proposed modification and whether or not otherwise objecting shall be bound thereby as fully and effectively as if he had actually assented thereto. Any modifications made as herein provided shall be part of the Plan and Agreement, and all provisions hereof concerning and references herein to the Plan shall apply to the Plan as so changed and modified. If, nevertheless, the Plan shall be modified and in consequence thereof Deposited Bonds shall be withdrawn as permitted hereby and thereafter the Plan shall again be modified so as to restore it to the form or so that it shall have substantially the effect of the Plan as it existed immediately prior to such first modification, the Reorganization Committee shall provide that all bonds that have been so withwithdrawn may again be deposited hereunder within some reasonable period to be prescribed by the Committee.

The Reorganization Committee may construe the Plan and Agreement and its construction thereof or action thereunder in good faith shall be final and conclusive. It may supply any defect or omission or reconcile any inconsistency in such manner and to such extent as shall be deemed by it expedient to carry out the Plan properly and effectively, and it shall be the sole judge of such expediency. This agreement is in all respects to be liberally construed

to enable the Reorganization Committee to carry into effect the Plan, whether in the form hereto attached or as changed or modified pursuant to the provisions hereof. The Reorganization Committee may at any time, and from time to time, file with the Depositary a statement or statements specifying the amount of securities which any company utilized in the reorganization may or shall issue for the purpose of carrying out the Plan and Agreement or specifying in detail the terms upon which any holders of claims against the Old Company not provided for in the Plan may become parties to the Plan and Agreement or specifying the amount of cash or securities which shall be deliverable to any person or corporation for the purpose of carrying out the Plan and Agreement, the amount of which is not now expressly specified therein, and any other statement expresing authority to do anything which is its opinion is expressly or impliedly authorized by the Plan; and such statement or statements shall, when filed and without further notice, be a part of the Plan and Agreement as if contained in the original Plan or in this Agreement.

In case the Reorganization Committee shall not prior to March 15, 1916, declare the Plan operative (either as originally filed or as the same shall be modified pursuant to the provisions hereof), or in case the Reorganization Committee shall abandon the entire plan of reorganization, the Deposited Bonds or the avails thereof then under the con-

trol of the Reorganization Committee shall be delivered to the several Depositors in amounts representing their respective interests hereunder, upon surrender of their several certificates of deposit in negotiable form, and payment of their respective shares of the compensation, disbursements, expenses and liabilities of the Reorganization Committee and of the Protective Committee, as fixed by the Reorganization Committee:

The Reorganization Committee may, whenever and upon such terms as it shall deem proper, accept from any Depositor the surrender of any certificate of deposit and, upon receipt thereof and payment of such Depositor's share of the compensation, disbursements, expenses and liabilities of the Reorganization Committee and of the Protective Committee, as fixed by the Reorganization Committee, it may surrender and deliver Deposited Bonds of the amount in such certificate stated (or the avails thereof then under its control) which thereupon shall be deemed to be released and discharged from and no longer to be entitled to any of the benefits of the Plan and Agreement.

In every case of withdrawal or release from the Plan and Agreement of Old Bonds or their avails, or of final abandonment of the entire plan, the Reorganization Committee shall apportion to the Deposited Bonds the shares of the compensation, disbursements, expenses and liabilities of the Reorganization Committee and of the Protective Committee, in the opinion of the Reorganization Com-

mittee fairly chargeable thereto, and any such apportionment made by the Reorganization Committee shall be binding upon all Depositors and shall be a charge upon the Deposited Bonds and the avails thereof. The word "liabilities" when used in this Agreement shall be deemed to include any sums due to any Syndicate or Syndicates organized as contemplated by the Plan and Agreement in repayment of sums theretofore paid or advanced by it or them for the purposes of the reorganization, and also all sums of money, securities or other property borrowed or owed or advanced by the Reorganization Committee and all sums as security for the payment of which the Reorganization Committee shall have pledged or charged securities or property under its control as authorized hereby. In case a Depositor, as a condition of the withdrawal of securities, shall be required to contribute toward any advances made or the repayment of any amounts invested in property or securities, he shall be entitled to receive from the Reorganization Committee a certificate evidencing his interest in such advances or investment. In any case of such withdrawal, release or abandonment of the entire plan moneys paid by any withdrawing [1060] Depositor pursuant to the provisions of the Plan and Agreement or the proceeds thereof remaining after deducting therefrom the share of compensation, disbursements, expenses and liabilities incurred by the Reorganization Committee and of the Protective Committee payable by such Depositor and not

already reimbursed, shall be returned, but without interest, to the Depositor entitled thereto. In every such case, any moneys actually collected by the Reorganization Committee on account of Deposited Bonds or coupons or claims against the Denver Company shall be accounted for by the Reorganization Committee. The Reorganization Committee shall not, however, be held responsible for loss of any money disbursed or expended by it for the purposes of the Plan and Agreement nor for any depreciation in value of any Old Bonds, property or securities, and Depositors shall have no claim for the return of any Old Bonds or any moneys except to the extent of their equitable shares of such bonds or moneys or the avails thereof at the time remaining in the hands of, or under the control of, the Reorganization Committee. Notwithstanding any provisions of this agreement to the contrary, the pecuniary liability of the Depositors shall in every case (except with respect to payment for New Bonds purchased by them) be confined to a charge upon the Deposited Bonds or their avails and the claims and other property and securities, if any, under the control of the Reorganization Committee and no liability in excess thereof shall be assessed against the Depositors, but the Reorganization Committee, its successors and assigns, shall have a lien upon the Deposited Bonds and their avails and the claims and other property and securities and the moneys, if any, under the control of the Reorganization Committee for its compen-

sation and the compensation of the Protective Committee and for all expenditures and advances made and liabilities incurred by it or by the Protective Committee.

Sixth.—Upon the consummation of the Plan, Depositors shall be entitled, upon compliance with all of the terms and conditions of the Plan and Agreement, including payment of such sums of money, if any, as may be required to be paid pursuant thereto, and upon surrender of their certificates of deposit in negotiable form, to receive the new securities to which they shall respectively be entitled under the Plan and Agreement, but only as and when the same shall be issued and ready for delivery.

Seventh.—Subject to the provisions in that behalf contained in the Plan, the times within which the cash payable by Depositors must be paid for New Bonds shall be fixed by the Reorganization Committee; and, enter generally or in special instances and on such terms and conditions, if any, as it may see fit, the Reorganization Committee may extend or may renew any period or periods so fixed or limited. The cash so payable by Depositors must be paid to the Depositary, or some duly authorized agent thereof, for account of the Reorganization Committee, and must be receipted for by the Depositary, or some such duly authorized agent on the certificates of deposit in respect of which such cash is paid, upon presentation of said certificates of deposit to the Depositary or such agent or on new

certificates of deposit to be issued in exchange for certificates so presented. All Depositors who shall elect to purchase New Bonds as permitted by the Plan and Agreement severally and respectively agree that prompt payment of the cash payable by them, respectively, on the terms of the Plan and Agreement, is an essential condition to their acquisition, respectively, of New Bonds or stock under the Plan, and that any such Depositor who shall fail to make prompt payment of any cash so payable, as provided in the Plan or in this Agreement, within any period fixed or limited for such payment in the Plan or this Agreement or by the Reorganization Committee, forthwith and without other notice or action shall cease to be entitled to receive any of the new securities provided for in the Plan or any benefits hereunder, and that so such Depositor shall be entitled to the return of any Deposited Bonds or the repayment of any cash theretofore paid by him; and that in such event the Reorganization Committee, in its discretion, without any proceedings either at law or in equity and without demand or notice, and in such manner and on such terms as it shall deem expedient, may at public or private sale or sales, for the account of such defaulting Depositor, dispose of any or all of the interests or rights to which such defaulting Depositor would otherwise have been entitled, including all of the New Bonds and all shares of stock in the Holding Company to which such Depositor would otherwise have been entitled and also

all Old Bonds and claims against the Denver Company, or the avails thereof, represented by his certificate of deposit, and may apply the proceeds of such sale or sales to payment of the costs and expenses thereof and of any proceeding looking thereto and to the satisfaction of the obligation of such defaulting Depositor hereunder and under his agreement to purchase New Bonds (paying the over-plus if any to such Depositor), and thereupon all interest and right of such Depositor in any of the securities or any property or rights so disposed of or any avails thereof shall cease and determine. At any public sale hereunder of any securities or of any such interests or rights, the Reorganization Committee or any other party hereto or anyone in any manner connected with said Committee or any such party may become the purchaser thereof for their or his own benefit without accountability. The Reorganization Committee, however, in its discretion, may waive such default, may accept payments of overdue instalments due from any Depositor at any time with or without penalty, and may also waive or limit any penalty prescribed either in the Plan or Agreement or in pursuance thereof.

Eighth.—If and when the Plan shall be declared operative by the Reorganization Committee, the Depositors, each for himself, hereby make, constitute and appoint, the parties of the first part and their successors, constituting the Reorganization Committee for the time being as herein provided, or a ma-

jority of them, the true and lawful attorneys of them and each of them for the purposes herein set forth, with full power and authority to act for and in the name, place and stead of each of them, and with full power of substitution, from time to time, and of revocation. The Depositors hereby irrevocably request the Reorganization Committee to endeavor to carry the Plan into practical operation in its entirety, or with changes therein as hereinbefore provided, or with such additions, exceptions and modifications as shall be adopted as herein provided, and the Depositors hereby agree that the Reorganization Committee shall be, and it hereby is, vested with all the rights, powers and authority necessary or proper to enable it to carry out the Plan and Agreement in its entirety, or with such additions, exceptions and modifications.

Ninth.—The Reorganization Committee is authorized in its discretion to demand, receive and collect all amounts that may at any time be due or owing or payable in respect of the Deposited Bonds, any claims against the Denver Company or other securities or claims acquired by the Reorganization Committee as permitted hereby and whether such sums be payable for principal, interest or otherwise; to elect or cause any trustee or trustees under the mortgage securing the Old Bonds or any other mortgage or trust indenture, if the foreclosure of such mortgage or indenture shall in its judgment be advisable for the purposes of the reorganization, to

elect to have the [1061] principal of the Old Bonds or of the obligations secured by any such other mortgage or trust indenture become due and payable and at pleasure revoke or withdraw such election or cause the same to be revoked or withdrawn; to request or instruct any such trustee or trustees to prosecute or foreclose or to take any other proceedings for the enforcement of the Old Mortgage or the Old Bonds or any such mortgage or trust indenture or any bonds or obligations secured thereby, or to exercise the powers or any of them conferred by the Old Mortgage or any such mortgage or indenture and generally to make any such requests and demands and give any such instructions upon or to any such trustee or trustees and to confirm and give to such trustee or trustees all such powers as in the judgment of the Reorganization Committee may be advantageous in carrying out the Plan; to enforce or cause to be enforced the claims against the Denver Company under Contract B or any guaranties endorsed upon Deposited Bonds or in favor of the Old Company; to institute or to become parties to or to dismiss or cause to be dismissed any legal proceedings; to compromise any litigation now or at any time existing or threatening, in whole or in part (except that claims against the Denver Company under Contract B or guaranties endorsed upon any of the Old Bonds shall not be compromised by virtue of such power to compromise litigation), with plenary power to enter into any agreement tending to or deemed by it in

its discretion likely to promote the consummation of the Plan and Agreement; to give all agreements or bonds of indemnity or other bonds, and therewith to charge the Deposited Bonds and their avails, any property purchased or new securities to be issued hereunder or any or any part of any thereof; to acquire, upon such terms and conditions and at such prices as it may deem fit, any property deem by it expedient for the purposes or requirements of the Plan; to do whatever in the judgment of the Reorganization Committee may be expedient to promote or procure the sale or purchase as an entirety, or sale or purchase at separate sales or in separate parcels, of any property of the Old Company and to sell and dispose of, upon such terms and for such consideration as the Reorganization Committee may deem fit, any portion of the property of the Old Company or of any property acquired by the Committee or in its behalf that it shall deem unnecessary for the purposes of the reorganization; to bid or to cause anyone else to bid or to refrain from bidding at any sale, either public or private, of any property whatever, whether owned or controlled by the Old Company or otherwise, to adjourn or consent to the adjournment of any sale or sales, and at, before or after any sale or purchase to arrange and agree for the resale of any portion of the property which it may decide to sell rather than to retain; to make any offer; to to cause or permit anyone else to offer, to purchase all or any portion of the property of the Old Company or any other property, and, as part of any such offer or otherwise, to offer

to pay and to pay, or to cause or permit to be offered or paid, any amounts in cash or otherwise to any bondholders, creditors or other person or persons; to hold any property purchased either in its name or in the name of any person or corporation approved by it, and to apply Old Bonds held by it hereunder or their avails in satisfaction of any bid or pursuant to any offer or contract, whether made by it or any other person or corporation approved by it, or towards obtaining funds for the satisfaction or performance thereof. The amount to be paid or offered or bid by the Reorganization Committee, or which it may cause to be paid or offered or bid, for any property shall be absolutely discretionary with it and in case of a sale to others of any property, the Reorganization Committee may receive out of the proceeds of such sale or otherwise any distributive shares payable on account of Deposited Bonds. The Reorganization Committee may enter into any agreement or arrangement for decrees or orders for facilitating or hastening the course of litigation or tending towards or deemed by the Committee likely to promote the consummation of the Plan; it may apply for or consent to the appointment or reappointment of any receiver or receivers of the Old Company or of any corporation in which the Depositors as such may be interested or against which it may hold demands, or of the property of any such corporation or the extension of any receivership, or it may apply for or consent to the removal of any receiver or receivers

and the substitution of one or more other receivers or the termination of any receivership and the delivery of the property subject thereto to its owners; it may consent to the issue and sale of receiver's certificates or other obligations and to the securing of any receiver's certificates so issued by such liens or charges upon all or any of the property of the Old Company and having such priorities as it may approve. It may lend money to the Receivers of the Old Company or to the Holding Company or the Operating Company and loan money in its discretion for any of the purposes of the Plan and Agreement.

The Reorganization Committee may also borrow and use such sums of money on such terms and subject to such conditions as in its discretion it may deem wise or necessary in order to carry out the Plan or to protect the interests of the Depositors and for that purpose and to secure such sums as may be so borrowed with interest it may pledge, hypothecate or otherwise create charges upon any or all of the Deposited Bonds or their avails, property purchased or the new securities to be created as contemplated by the Plan and all moneys paid by the Depositors or by any Underwriting Syndicate. In case of any such borrowing, whether upon pledge or not, the Reorganization Committee may give to the lender for the sum so borrowed the promissory note or notes of the Reorganization Committee signed on behalf of such Committee by its Chair-

man or otherwise as may be authorized by the Committee.

The Reorganization Committee shall have the sole control, discretion and management of the Plan and its execution. It may make such expenditures and incur such obligations and liabilities, and do such acts as in its absolute discretion it may deem judicious and proper in order to carry out fully and effectively the purposes of the Plan and of this Agreement, and it may, or the Protective Committee with its consent may, exercise any powers of the Protective Committee under the Protective Agreement. Statements in the Plan and Agreement of the intended arrangements or as to the methods to be employed in effecting the details of the proposed reorganization shall not limit the discretion of the Reorganization Committee, but may be modified or changed or departed from or entirely abandoned as often as the Committee shall deem advisable, it being intended that the Reorganization Committee shall have full discretion and power to use whatever means it shall deem most convenient and advisable for accomplishing the reorganization, the acquisition of any property, directly or indirectly, and the issue and disposition of the new securities and the other objects contemplated by the Plan and Agreement. Anything which anywhere in the Plan and Agreement it is provided the Reorganization Committee may do or allow to be done it may do or allow to be done by or through such agents or agencies as it may determine, or by or through others

with its approval or consent or acquiescence, or it may contract with any other person or corporation that any such thing shall be done or permitted to be done.

The Reorganization Committee in carrying out the Plan may organize or procure to be organized one or more companies or it may adopt or use any companies whether now existing or not. It may make or cause to be made consolidations, mergers, sales, purchases, leases, guaranties or other arrangements by or between any such companies, any of the companies mentioned in the Plan or any companies thereby permitted to be employed in connection with the reorganization; it may make or cause to be made conveyances and transfers of the property or securities acquired by it or with its appro- [1062] val, and may cause the ownership of all or any property by the Operating Company or the Holding Company to be either direct ownership or ownership through the ownership of bonds or stocks or both of any other company, and may cause the New Mortgage to be either a direct lien upon any particular property or a lien upon the bonds or stocks or both of any company owning such property; and all of the provisions of the Plan and Agreement shall equally apply to and in respect of any physical properties embraced in the reorganization and to and in respect of securities representing any such property, it being intended that for all purposes of the Plan and Agreement any such property and any securities representing such property may be treated

or accepted by the Reorganization Committee in its discretion as substantially identical. It may take or allow to be taken such other proceedings as it may deem proper for the purpose of the creation of the new securities provided for in the Plan and Agreement and the carrying out of any of the provisions thereof. The Reorganization Committee may pay the expense of listing certificates of deposit or any new securities to be issued under the Plan and Agreement upon the New York Stock Exchange or elsewhere, and any taxes, fees or charges payable in connection therewith, and as well any taxes, fees or charges imposed by any public authority wherever situated in respect of the authorization, creation, issue, transfer or distribution of all or any of the new securities or other securities under the control of the Reorganization Committee, as provided or permitted by the Plan and Agreement, and it may pay or discharge any taxes, fees or governmental charges payable in connection with the deposit, use, assignment or transfer of Old Bonds under or in pursuance of the Plan and Agreement.

The Reorganization Committee may prescribe or approve the form and terms of all charters and by-laws of the Operating Company and of the Holding Company and of any other corporations that shall be utilized in the reorganization, and all certificates of stock and bonds at any time to be issued and the New Mortgage and all other instruments to be executed, and may make contracts with regard to the form thereof. The Reorganization Committee may

create and provide for all necessary trusts and may appoint trustees thereunder. The Reorganization Committee may in its discretion set apart and hold in trust or permit or cause to be set apart and held in trust with any trust company or otherwise any part of the new securities to be issued and any cash which may be received from the Depositors or any syndicate or from sales of New Bonds or stock or otherwise as it may deem suitable for the purpose of securing the application thereof to any of the purposes of the Plan and Agreement.

It may make or cause to be made any underwriting agreement with any syndicate or otherwise which it may deem advisable to insure or promote the carrying out of the Plan and Agreement or any portion thereof, including not only any agreement or arrangement for the sale or the underwriting of the sale of New Bonds and of stock to be issued pursuant to the Plan and Agreement, but as well any agreement or arrangement for the purpose of obtaining money for the purposes of the Plan whereby the new stock to which holders of such Old Bonds who shall not be Depositors would have been entitled if they had become parties to the Plan and Agreement or any other new securities authorized by the Plan and Agreement and not otherwise appropriated or all such securities shall be sold or the sale thereof shall be underwritten, and they may provide for the payment to any such syndicate or any syndicate organized pursuant to the authority contained or as stated in the Plan and Agree-

ment of reasonable compensation and likewise for the payment of compensation to bankers or managers whom the Protective Committee has procured or the Reorganization Committee may procure to organize or with whom they may agree for the organization of any such syndicate; and for the performance of any agreement entered into by the Protective Committee or by it, the Reorganization Committee may charge the Deposited Bonds, the property purchased and the new securities to be issued hereunder.

The Reorganization Committee may dispose of or consent to the disposition of any of the new securities not required for delivery to Depositors or to the Underwriting Syndicate, or the securities of any company which shall be utilized in the reorganization not reserved under the Plan for specific uses; and it may use, or allow to be used, the proceeds thereof, if required for the purpose of carrying out the reorganization, in such manner as it may deem expedient and advisable for the purposes of the Plan.

The Reorganization Committee shall have power to make equitable provision for any case of lost or destroyed bonds, certificates of stock, certificates of deposit or other securities and to provide for and make such issues of scrip or convertible securities as it shall deem expedient properly to represent any fractional interest in the New Bonds or the stock to be issued under the Plan, and it may in its discretion settle for and adjust any such fractional interest in cash. In case it shall deem it ad-

visable for any reason it may issue or authorize the issue of temporary or interim certificates to represent new securities.

All moneys at any time held under the Plan and Agreement shall be subject to the order of the Reorganization Committee, which shall apply the same or cause or permit the same to be applied for any of the purposes of the Plan as from time to time may be determined by it; its determination as to the propriety and purpose of any such application shall be final, and nothing in the Plan shall be understood as limiting or requiring the application of specific moneys to specific purposes. The Reorganization Committee may, if in its judgment such course shall be in the interest of the Operating Company or the Holding Company, abandon any particular purpose or purposes for which money is appropriated in the Plan and, within the limitations and subject to the conditions expressly prescribed in Article V. of the Plan, may provide for the application of any of the moneys, to be raised as contemplated by the Plan, to any of the purposes mentioned in said Article V. and in such amounts or proportions, respectively, as may be determined by the Committee.

The Reorganization Committee may acquire, pay, compromise, settle, surrender or release any obligations or indebtedness of, or claims against, the Old Company, or any claims or demands against or liens or charges upon any property of the Old Company, or upon any other property which the Reorganization Committee may deem it ad-

visable for the Operating Company or the Holding Company to acquire, or any claims or demands whereby, or by reason whereof, any such property may be encumbered or the title thereto affected, or any Receiver's certificates or other obligations or liabilities incurred or which may be issued or incurred by the Receivers of the Old Company, and for such purpose may use any cash provided by the Plan or any new securities which it is provided in the Plan may be issued in the course of the reorganization and which are not otherwise appropriated in the Plan. It may surrender or cancel, or consent to the surrender or cancellation of or may adopt or consent to the adoption or renounce or consent to the renunciation of any agreement to which the Old Company is a party or the Receivers of the Old Company are parties. It may compromise, settle, surrender or release or consent to the compromise, settlement, surrender or release of any claims of the Old Company or of its Receivers (but claims against the Denver Company under Contract B or guaranties endorsed on Old Bonds acquired from the Depositors under the Plan and Agreement may be compromised or settled by the Reorganization Committee, if at all [1063] only by virtue of the power conferred and within the limitations prescribed in Article II. of the Plan and as provided hereinafter in this Article Ninth).

Generally the Reorganization Committee may make or ratify or permit to be made or ratified contracts with any person, syndicate, committee or

corporation in respect of any matter connected with the Plan and Agreement.

The reorganization Committee may employ counsel, depositaries, agents and all necessary assistants and may incur, agree with respect to and discharge any and all expenses and obligations which it deems reasonable for the purposes of the Plan or for carrying out or attempting to carry out the same, all expenses in connection with the preparation of the Plan and Agreement, the issue of certificates, all expenses of organizing the Operating Company and the Holding Company and any other company or companies utilized in connection with the reorganization, the issue and transfer of property and securities, legal expenses, expenses for advertising and printing, all expenses of or incident to the receivership of the Old Company and the foreclosure of the mortgage securing the Old Bonds, all expenses incurred hereunder or under the Protective Agreement the compensation and obligations and liabilities of the Protective Committee, and all other expenses in any manner connected with the Plan and Agreement or which the Committee may deem it expedient to incur or pay in undertaking to promote or in effecting any of the purposes thereof. The Committee shall be the sole judge of the propriety of any and all expenses and of the amount thereof.

The Reorganization Committee may proceed under the Plan and Agreement or any part thereof with or without judicial sale, and in case of judicial sale it may exercise any power either before or after sale. Any action contemplated in the Plan and

Agreement may be performed before or after reorganization, and any such action may be taken by the Reorganization Committee or by anyone approved by it at any time when it shall deem the reorganization advanced sufficiently to justify such course and as it may deem necessary the Reorganization Committee may defer or permit to be deferred the performance of any provision of the Plan or Agreement or may commit such performance to the Operating Company or the Holding Company or such other person, persons or corporation as it shall determine and may cause any such company to pay any indebtedness authorized or incurred by the Reorganization Committee or otherwise in furtherance of the Plan and to assume any obligations which in its judgment may be necessary or proper to carry out the Plan and Agreement; and pending the completion of the reorganization, if in its judgment occasion shall require, the Reorganization Committee notwithstanding any other provision of this Agreement, may exercise, but only upon the affirmative vote or concurrent action of three-fouths of all its members, any of the powers which by the terms of the Plan are to be vested in or may be exercised by the Holding Company or by the Operating Company.

In the event that any agreement or arrangement providing for compromise or settlement of claims against the Denver Company shall be made in the exercise of the power last conferred, the same shall be made, and shall be subject to, the condition that such compromise or settlement shall be submitted to

the Depositors, registered as such upon the books of the Depositary, and shall not be disapproved by more than one-third in amount thereof. In the event of the making of any such agreement or arrangement, a statement of the proposed compromise or settlement, setting forth the terms thereof, shall be filed with the Depositary and with each of its agents then authorized to accept deposits under the Plan and Agreement, which statement shall be subject to inspection by Depositors, and notice of the filing thereof shall be published as provided in Article Fifteenth hereof. Any Depositor desiring to disapprove such compromise or settlement may within four weeks from the date of the first publication of said notice, file with the Depositary or with any of its said authorized agents, a writing stating that he disapproves the same. Any Depositor who shall fail so to file such written disapproval within the time so limited shall be conclusively deemed to have consented to such compromise or settlement notwithstanding any objection thereto that he may make in any other manner; and such compromise or settlement shall be binding upon all the Depositors as fully as if every Depositor had expressly consented thereto unless more than one-third in amount of all of the Depositors, registered as such upon the books of the Depositary, shall in writing disapprove the same in the manner and within the period aforesaid. In case more than one-third in amount of said Depositors shall so disapprove such compromise or settlement, the same shall be without any force

whatsoever and shall not be consummated by the Reorganization Committee.

Tenth.—The Protective Committee and the Depositary under the Protective Agreement, upon notice from the Reorganization Committee that the Plan has become operative, will deliver to or hold subject to the order of the Reorganization Committee, and will assign, transfer and deliver as shall be directed by any such order, all of the Deposited Bonds and coupons subject to the Protective Agreement, the holders whereof or of certificates of deposit wherefor shall have become bound by the Plan and Agreement, all claims against the Denver Company that may have been subject to the Protective Agreement and all avails of any such bonds or claims and all other securities and benefits whatsoever subject to the control of the Protective Committee; and the Protective Committee, with respect to all such Deposited Bonds and coupons, claims, securities and benefits, shall at any time exercise any or all of its powers or rights under the Protective Agreement, as may be requested by the Reorganization Committee, for the purpose of carrying out any of the provisions of the Plan and Agreement or the intent or any of the purposes thereof.

Eleventh.—The Reorganization Committee undertakes in good faith to endeavor to execute the Plan, either in its original form or as the same shall be modified as provided herein, but neither the Reorganization Committee nor the Protective Committee assumes any personal responsibility for the execution thereof or for the result of any steps

taken or acts done for the purposes thereof. The Reorganization Committee may act by any sub-committee or Board of Managers or by other agents, and may delegate authority to any such sub-committee Board of Managers or agents to carry out the provisions of the Plan, and the members of any such sub-committee or Board of Managers or any such agent may be allowed reasonable compensation for services. Neither the Reorganization Committee nor the Protective Committee nor any member of either of said committees, nor the Depositary, shall be personally liable for any act or omission of any agent or employee selected by them, or any of them, nor for any action taken or not taken in good faith in the belief that any Deposited Bond or New Bond or certificate of stock or of deposit or other instrument or any signature is genuine or effective, nor for anything done or not done under the advice of counsel, nor for any error of judgment nor mistake of law or fact, nor for anything except its or his own individual wilful misconduct or bad faith, and neither the Reorganization Committee nor the Protective Committee nor any member of either of said committees nor the Depositary shall be personally liable for the acts or defaults of any other person or body.

The accounts of the Reorganization Committee are to be filed with the Board of Directors of the Holding Company. The accounts when approved by

[1064]

disinterested public accountants to be designated and employed by said Board of Directors shall be final, binding and conclusive upon all parties having

any interest therein, and upon such approval whenever given the Reorganization Committee shall be discharged and any liability upon its part shall cease. The acceptance of new securities by any Depositor shall estop the person accepting the same from questioning the conformity of such securities in any particular with any of the provisions of the Plan, and the acceptance of new securities by the holders of a majority in amount of the Depositors shall so estop all Depositors and constitute full ratification of all of the accounts, acts and proceedings of the Reorganization Committee and the Protective Committee and a release and discharge of the Reorganization Committee and the Protective Committee and all of the members of each thereof and the Depositary from all liability and accountability of every kind, character and description whatsoever.

Twelfth.—The Reorganization Committee, by vote of three-fourths of its members as the Committee shall then be constituted, may at any time increase the number of members constituting the Reorganization Committee and appoint additional members, and the member or members so elected shall have all the powers of, and, together with those herein named and their successors repectively, shall constitute the Reorganization Committee, with like force and effect as if they were specially named herein, and the Reorganization Committee may by like vote fill any vacancy, but need not necessarily do so, and the Committee as at any time constituted, notwithstanding any vacancy, shall have all the pow-

ers, rights, property and interests of the Committee as originally formed or theretofore existing. Any member of the Reorganization Committee may resign by giving notice of his resignation in writing to the chairman of the Reorganization Committee or to a majority of the other members. The Reorganization Committee may settle any account or transaction with any member who shall have resigned or be under other disability to act or with the representatives of any deceased member, and give or receive a full release and discharge with reference thereto. The Reorganization Committee may elect one of its members to be Chairman of the Committee, may appoint a Secretary, who need not be a member of the Committee, may prescribe regulations for its meetings and the convening thereof, and may keep a record of its acts and proceedings. Except as herein otherwise provided, the affirmative vote of a majority of the members of the Reorganization Committee, as at any time constituted, shall be necessary and sufficient for the passage of any resolution or the taking of any other action (but a member may vote by proxy—who may or may not be another member of the Committee—at any meeting of the Reorganization Committee), and such affirmative vote of the majority, except as aforesaid, shall be binding upon the Reorganization Committee and the Depositors. It shall not be necessary for the members of the Reorganization Committee formally to meet in order to take any action provided they agree on any matter and embody such

agreement in any form of writing signed by every member of the Reorganization Committee.

All members of the Reorganization Committee shall be entitled to compensation for their services.

The Reorganization Committee and any member thereof and the Depositary and any officer or director thereof and anyone connected with the Reorganization Committee or with any of the members thereof or with the Depositary or with the Operating Company or the Holding Company or with any other company mentioned or referred to herein (whether as member, incorporator, stockholder, director, officer or in any capacity) and any Depositor or any transferee of any Depositor and any partnership or corporation with which any person above mentioned may be connected in any manner may be or become pecuniarily interested, without accountability in respect thereof, in any contract, transaction, property or matter with which the Plan or Agreement or the Operating Company or the Holding Company or any other Company or any committee mentioned or referred to herein are concerned, including participation in any syndicate agreement whether or not mentioned in the Plan. Any such person or corporation may also become a Depositor under the Plan and Agreement, and in such event shall have the same rights, benefits and obligations hereunder and in respect of all Old Bonds deposited, all claims transferred, all property purchased, all securities of the Operating Company or the Holding Company to be issued or re-

ceived, and all payments to be made, as other Depositors in like case, and may buy and sell certificates of deposit and undeposited Old Bonds in the same manner and with the same rights as any one not a Depositor.

The Reorganization Committee may form or procure the formation of any syndicate or syndicates which it may deem necessary or advantageous for carrying out the purposes of the Plan or of this Agreement and any of the members of the Reorganization Committee may act as members or managers of any such syndicate or syndicates. The terms of any agreement forming and of all agreements with any such syndicate may be fixed by the Reorganization Committee, and as so fixed shall be binding and conclusive upon the Depositors. The syndicate managers, whether or not members of the Reorganization Committee may receive compensation as such syndicate managers, and syndicate managers who may be members of the Reorganization Committee may receive also compensation as members of the Reorganization Committee.

The Reorganization Committee may remove and in such event or in the event of its resignation or incapacity may appoint a successor to the Depositary. Any direction given by the Reorganization Committee, evidenced by a writing signed by the Chairman or certified by the Secretary thereof, shall be full and sufficient authority for any action of the Depositary or of any other custodian or of any committee or agent. The Depositary shall in-

cur no liability for anything done or permitted at the request or direction of the Reorganization Committee.

Thirteenth.—The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict the general powers herein conferred or intended so to be, and it is hereby declared that it is intended to confer on the Reorganization Committee in all respects any and all powers which the Reorganization Committee may deem necessary or expedient in or towards carrying out or promoting in any respect the purposes of the Plan and Agreement as now existing or as the same may be modified as herein provided, even though any such power be apparently of a character not now contemplated, and the Reorganization Committee may exercise any and every such power as fully and effectively as if the same were herein specified and as often as for any cause or reason it may deem expedient.

Fourteenth.—No right is conferred or created hereby nor is any trust, liability or obligation (except the agreements herein contained in favor of Depositors and of the Reorganization Committee, the Protective Committee and the Depositary) created by the Plan and Agreement or assumed hereunder by or for the Operating Company or the Holding Company, or in favor of any creditor or of any holder of any claim whatsoever against the Old Company or in favor of any other company now existing or to be formed hereafter or in favor of any person or corporation whatsoever, with respect

to any Deposited Bonds or coupons or any claims against the Denver Company or any moneys paid to or received by the Reorganization Committee or by the Depositary [1065] hereunder or with respect to any property acquired by purchase at any sale or otherwise acquired or with respect to any new securities to be issued under the Plan or with respect to any other matter or thing, but this Agreement shall be construed as strictly an agreement between the parties and as solely affecting and relating to the Reorganization Committee, the Protective Committee, the Depositary and Depositors hereunder. The Deposited Bonds and claims against the Denver Company and all property, securities, claims, demands and rights acquired pursuant to the Plan and Agreement shall remain in full force and effect for all purposes and shall not be deemed merged, satisfied or discharged, and no legal right or lien shall be deemed released or waived unless the same shall be specifically provided for by affirmative action of the Reorganization Committee as permitted hereby; and all such claims, demands and rights may be enforced by the Reorganization Committee or by anyone to whom the same may be assigned, as provided herein, with authority conferred by the Reorganization Committee for the enforcement thereof.

Fifteenth.—All calls for payments to be made under the Plan or for the surrender or presentation of certificates of deposit issued hereunder or under the Protective Agreement, all notices fixing or

limiting any period for the deposit or withdrawal of securities or for the taking of any action or for payments and all other calls and notices hereunder shall be inserted in at least two daily newspapers published in the City of New York and in at least one daily newspaper published in the City and County of San Francisco, twice in each week for two successive calendar weeks in each case on any days of the week. Any call or notice whatsoever when so published by the Committee shall be taken and considered as though personally served upon all parties to be bound thereby as of the respective dates of insertion thereof, and such publication shall be the only notice required to be given under any provision of the Plan and Agreement.

Sixteenth.—The Plan and this Agreement shall bind and benefit the several parties and their and each of their survivors, successors, executors, administrators and assigns.

A printed copy of this Agreement signed by the members of the Protective Committee or three-fourths of them and by the members of the Reorganization Committee or a majority of them and lodged with The Equitable Trust Company of New York shall be held and taken to be the original Agreement. This Agreement may, however, be executed in any number of counterparts with the same effect as if all of the parties executing the same had executed but one instrument.

In witness whereof, the undersigned members of the Protective Committee and of the Reorganization Committee have caused these presents to be

duly executed the day and year first above written and the parties of the second part have become parties hereto in the manner herein provided.

ALVIN W. KRECH,
Chairman.
C. LEDYARD BLAIR,
I. de BRUYN,
F. H. ECKER,
DAVID R. FORGAN,
A. M. HUNT,
STARR J. MURPHY,
JAMES D. PHELAN,
W. A. READ,
WILLIAM SALOMON,
GEORGE WHITTELL,
RICHARD B. YOUNG,
Protective Committee.
LYMAN RHOADES,
Secretary.
ALVIN W. KRECH,
A. M. HUNT,
JAMES D. PHELAN,
GEORGE WHITTELL,
DAVID R. FORGAN,
I. de BRUYN,
C. LEDYARD BLAIR,
F. H. ECKER,
STARR J. MURPHY,
W. A. READ,
WILLIAM SALOMON,
RICHARD B. YOUNG,
Reorganization Committee.

EXHIBIT B.

The Western Pacific Railroad Company

LOAN ACCOUNT WITH

THE RAILROAD CREDIT CORPORATION

Loan evidenced by note dated June 29, 1932—Face		$1,303,000.00
Credits—as detailed below		150,829.12
Unpaid balance November 30, 1939		$1,152,170.88
Loan evidenced by note dated March 25, 1933—Face		$1,293,439.00
(No principal credits to November 30, 1939)		
Total principal unpaid November 30, 1939		$2,445,609.88
Credits on Principal—June 29, 1932, Loan		
December 15, 1933—Credit for tax refunds:		
Western Pacific	$2,602.52	
Sacramento Northern	437.56	
Tidewater Southern	74.03	
		$3,114.11
March 7, 1934—Credit for tax refunds:		
Western Pacific	$2,602.52	
Sacramento Northern	437.56	
Tidewater Southern	74.03	
		$3,114.11
February 20, 1935—Credit for tax refunds:		
Western Pacific	$1,147.06	
Sacramento Northern	147.70	
Tidewater Southern	11.59	
		$1,306.35
May 24, 1935—Interest on advances—Standard Realty & Development Company		1,331.50
May 29, 1936—Payment on principal of advances—Standard Realty & Development Company		10,000.00
May 29, 1936—Interest on advances—Standard Realty & Development Company		5,366.06

July 29, 1936—Interest on advances—Standard Realty & Development Company	1,230.74
October 20, 1936—Interest on advances—Standard Realty & Development Company	1,244.26
February 6, 1937—Interest on advances—Standard Realty & Development Company	1,244.26
(Various—7/15/33 to 3/15/37)	
Distributions Nos. 1-5, 8-38, W. Pac.	109,733.33
Distributions Nos. 3-5, 8-38, Sac. Nor.	13,036.86
Distributions Nos. 3-5, 8-38, Deep Creek	107.54
	$150,829.12

[1067]

The Western Pacific Railroad Company (and subsidiaries)

FUND ACCOUNT

Western Pacific Railroad Company		
Original Fund contribution		$183,825.17
Less—Refunds for taxes		6,352.10
Net contribution		$177,473.07
Allocated income 1932-1938		9,187.15
Total credit		$186,660.32
Less—Distributions:		
1-5, 8-38 applied on principal of loan indebtedness	$109,733.33	
6, 7, 39-47, applied on loan interest	29,583.04	139,316.37
Undistributed book balance November 30, 1939		$ 47,343.85
Deep Creek Railroad Company		
Original Fund contribution		$ 188.69
Allocated income 1932-1938		9.76
Total credit		$ 198.45

Less—Distributions:		
1-2—Paid in Cash	$ 9.44	
3-5, 8-88—Applied on principal of W. Pac loan indebtedness	107.54	
6, 7, 39-47—Applied on W. Pac. loan interest	31.14	148.12
Undistributed book balance November 30, 1939		$ 50.33
Sacramento Northern Railroad Company		
Original Fund Contribution		$ 24,066.36
Less—Refunds for taxes		1,022.82
Net contribution		$ 23,043.54
Allocated income 1932-1938		1,192.88
Total credit		$ 24,236.42

[1068]

Less—Distributions:		
1, 2—Paid in cash	$ 1,203.31	
3-5, 8-38—Applied on principal of W. Pac. loan indebtedness	13,036.86	
6-7, 39-47—Applied on W. Pac. loan interest	3,849.04	$ 18,089.21
Undistributed book balance November 30, 1939		$ 6,147.21
Total undistributed book balance (3 roads)		$ 53,541.39

[1069]

EXHIBIT C

THE WESTERN PACIFIC RAILROAD COMPANY
STATEMENT SHOWING ORDINARY AND EXTRAORDINARY EXPENSES FOR MAINTENANCE DURING PERIOD IN WHICH IMPROVEMENT AND REHABILITATION PROGRAM WORK WAS IN PROGRESS
(Work executed in years 1927-1938 inclusive.)

OPERATING EXPENSES ONLY

	1927	1928	1929	1930	1931	1932
Maintenance of Way & Structures						
Ordinary Operating Expenses	$2,759,842	$2,413,377	$2,685,045	$2,072,441	$2,008,197	$1,388,095
Improvement & Rehabilitation Operating Expenses	324,218	931,336	488,025	537,421	110,339	56,246*
Total M. W. & S. Operating Expenses	$3,084,060	$3,344,713	$3,173,070	$2,609,862	$2,118,536	$1,331,849
Maintenance of Equipment						
Ordinary Operating Expenses	$2,586,035	$2,637,274	$2,674,881	$2,467,229	$2,214,256	$1,866,586
Improvement & Rehabilitation Operating Expenses	363,387	374,345	587,306	174,040	12,396	144
Total M. of E. Operating Expenses	$2,949,422	$3,011,619	$3,262,187	$2,641,269	$2,226,652	$1,866,730
Total Maintenance:						
Ordinary Operating Expenses	$5,345,877	$5,050,651	$5,359,926	$4,539,670	$4,222,453	$3,254,681
Improvement & Rehabilitation Operating Expenses	687,605	1,305,681	1,075,331	711,461	122,735	56,102*
Total Maintenance Operating Expenses	$6,033,482	$6,356,332	$6,435,257	$5,251,131	$4,345,188	$3,198,579

OPERATING EXPENSES ONLY

	1933	1934	1935	1936	1937	1938
Maintenance of Way & Structures						
Ordinary Operating Expenses	$1,693,971	$1,790,291	$2,016,133	$2,052,259	$2,514,324	$2,454,043
Improvement & Rehabilitation Operating Expenses	35,197*	107,874	353,036	1,057,541	1,112,890	1,137,111
Total M. W. & S. Operating Expenses	$1,658,774	$1,898,165	$2,369,169	$3,109,800	$3,627,214	$3,591,154
Maintenance of Equipment						
Ordinary Operating Expenses	$1,895,711	$1,852,951	$2,064,458	$2,327,298	$2,937,259	$2,377,072
Improvement & Rehabilitation Operating Expenses	—	54,000	83,000	527,379	732,227	200,502
Total M. of E. Operating Expenses	$1,895,711	$1,906,951	$2,147,458	$2,854,677	$3,669,486	$2,577,574
Total Maintenance						
Ordinary Operating Expenses	$3,589,682	$3,643,242	$4,080,591	$4,379,557	$5,451,583	$4,831,115
Improvement & Rehabilitation Operating Expenses	35,197*	161,874	436,036	1,584,920	1,845,117	1,337,613
Total Maintenance Operating Expenses	$3,554,485	$3,805,116	$4,516,627	$5,964,477	$7,296,700	$6,168,728

Note: (*) Denotes red figures.

Note: Extraordinary work executed during 1927-1932, inclusive, was characterized as the "Improvement Program." Such work executed

THE WESTERN PACIFIC RAILROAD COMPANY

STATEMENT SHOWING ORDINARY AND EXTRAORDINARY EXPENSES FOR MAINTENANCE DURING PERIOD IN WHICH IMPROVEMENT AND REHABILITATION PROGRAM WORK WAS IN PROGRESS

(Work executed in years 1927-1938 inclusive.)

OPERATING EXPENSES ONLY

	1927	1928	1929	1930	1931	1932
Maintenance of Way & Structures						
Ordinary Operating Expenses	$2,759,842	$2,413,377	$2,685,045	$2,072,441	$2,008,197	$1,388,095
Improvement & Rehabilitation Operating Expenses	324,218	931,336	488,025	587,421	110,339	56,246*
Total M. W. & S. Operating Expenses	$3,084,060	$3,344,713	$3,173,070	$2,609,862	$2,118,536	$1,331,849
Maintenance of Equipment						
Ordinary Operating Expenses	$2,586,035	$2,637,274	$2,674,881	$2,467,229	$2,214,256	$1,866,586
Improvement & Rehabilitation Operating Expenses	363,387	374,345	587,306	174,040	12,396	144
Total M. of E. Operating Expenses	$2,949,422	$3,011,619	$3,262,187	$2,641,269	$2,226,652	$1,866,730
Total Maintenance:						
Ordinary Operating Expenses	$5,345,877	$5,050,651	$5,359,926	$4,539,670	$4,222,453	$3,254,681
Improvement & Rehabilitation Operating Expenses	687,605	1,305,681	1,075,331	711,461	122,735	56,102*
Total Maintenance Operating Expenses	$6,033,482	$6,356,332	$6,435,257	$5,251,131	$4,345,188	$3,198,579

OPERATING EXPENSES ONLY

	1933	1934	1935	1936	1937	1938
Maintenance of Way & Structures						
Ordinary Operating Expenses	$1,693,971	$1,790,291	$2,016,133	$2,052,259	$2,514,324	$2,454,043
Improvement & Rehabilitation Operating Expenses	35,197*	107,874	353,036	1,057,541	1,112,890	1,137,111
Total M. W. & S. Operating Expenses	$1,658,774	$1,898,165	$2,369,169	$3,109,800	$3,627,214	$3,591,154
Maintenance of Equipment						
Ordinary Operating Expenses	$1,895,711	$1,852,951	$2,064,458	$2,327,298	$2,937,259	$2,377,072
Improvement & Rehabilitation Operating Expenses	—	54,000	83,000	527,379	732,227	200,502
Total M. of E. Operating Expenses	$1,895,711	$1,906,951	$2,147,458	$2,854,677	$3,669,486	$2,577,574
Total Maintenance						
Ordinary Operating Expenses	$3,589,682	$3,643,242	$4,080,591	$4,379,557	$5,451,583	$4,831,115
Improvement & Rehabilitation Operating Expenses	35,197*	161,874	436,036	1,584,920	1,845,117	1,337,613
Total Maintenance Operating Expenses	$3,554,485	$3,805,116	$4,516,627	$5,964,477	$7,296,700	$6,168,728

Note: (*) Denotes red figures.

Note: Extraordinary work executed during 1927-1932, inclusive, was characterized as the "Improvement Program." Such work executed during 1933-1935 inclusive, was not under a specific program. Work executed during 1936-1938 inclusive was characterized as the "Rehabilitation Program."

Office of President,
The Western Pacific R. R. Co.,
San Francisco, California,
December 18, 1939.

EXHIBIT D.

GRANTING CLAUSES OF FIRST MORTGAGE.

Granting clauses.

Grant and conveyance.

Now, therefore, this indenture Witnesseth, that, in order to secure the payment of all of said bonds (which are hereinafter called "First Mortgage Bonds") at any time issued and outstanding under this indenture according to their tenor, purport and effect, as well the interest as the principal thereof, and to secure the performance and observance of all of the covenants and conditions therein and herein contained and to declare the terms and conditions upon which the First Mortgage Bonds are to be executed, authenticated, delivered and received, the Company, in consideration of the premises and of the acceptance or purchase of said bonds by the holders thereof and of the sum of One hundred Dollars, lawful money of the United States of America, to it duly paid by the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, confirmed, mortgaged, pledged, assigned, transferred and set over, and by these presents doth grant, bargain, sell, alien, remise, release, convey, confirm, assign, mortgage, pledge, transfer and set over unto the Trustees, their successors in the trust and their assigns forever, all of the following described railways, franchises and other properties

(which collectively are hereinafter called the "trust estate"), to wit:

Property formerly of Western Pacific Railway Company of its receivers:

First.—All and singular the following described lines of railroad, terminals, lands, equipment, shares of stock and other real and personal property and interests and rights in property owned by the Company or to which it may be entitled, formerly the property of or belonging to Western Pacific Railway Company, a corporation of the State of California, or its receivers:

—Main line from San Francisco to Salt Lake City;

I.—A main line of railroad commencing in the City and County of San Francisco, running thence in and through said City and County to certain slips, piers and landing places upon San Francisco Bay in said City and County; thence by ferry and barge to the City of Oakland, in the County of Alameda; thence in and through said City of Oakland; thence in a southeasterly, easterly, northeasterly and northerly direction through the Counties of Alameda and San Joaquin, passing in and through the City of Stockton in said County of San Joaquin; thence in a general northerly direction through the County of Sacramento, passing in and through the City of Sacramento in said county; thence in a general northerly direction through the Counties of Sutter and Yuba, passing in and through the City of Marysville in said County of

Yuba; thence in a general northerly direction through the County of Butte, passing through the City of Oroville in said County; thence in a general northeasterly, easterly and southeasterly direction through the County of Plumas; thence in a general northerly and easterly direction through the County of Lassen to a point on the boundary line between the States of California and Nevada; thence in a general easterly and northeasterly direction through the Counties of Washoe, Humboldt, Lander, Eureka and Elko, in the State of Nevada, to a point on the boundary line between the States of Nevada and Utah; thence in a general easterly direction through the Counties of Tooele and Salt Lake, in the State of Utah, to and into Salt Lake City, in said State of Utah—said line of railroad being about 927.3 miles in length.

—branch line from Carbona to Tesla;

II.—A branch line of railroad, having its initial point and connection with said main line at or near Carbona in San Joaquin County, California, and extending thence in a southwesterly and westerly direction to a point near Tesla, Alameda County, California—being about 13 miles in length.

—terminals, telegraph lines, etc.;

II.—A branch line of railroad, having its initial in lands, easements therein and improvements thereon, including, among other things, yards, station and depot grounds, sheds, station houses, freight houses, warehouses, elevators, stock-yards, car-

houses, engine houses, oil tanks, water tanks, water supply, shops, hotels, boarding houses, hospitals, docks, wharves, piers, slips, telephone and telegraph lines and other structures and erections and the appurtenances of all and every of the foregoing, whether or not for use in connection with said or any lines of railroad.

—equipment;

IV.—All locomotives, motor cars, express cars, dining cars, freight cars, passenger cars, combination cars, work cars and other rolling stock; all ferries, tugs, barges, transfers, lighters, harbor craft and other floating equipment; all machinery, tools and appliances, all electrical generating and transmission and other electrical apparatus and all other equipment, apparatus, appliances and facilities.

—shares of stock;

V.—The following shares of stock in other corporations, which are hereby assigned to and simultaneously with the execution hereof are deposited with the Trustees:

995 shares of the par value of $100 each of the capital stock of The Salt Lake City Union Depot and Railroad Company, a Utah corporation, all of the other shares of stock wherein (except 9 shares held by directors) —to wit, 996 shares—are owned or controlled by The Denver and Rio Grande Railroad Company, a consolidated corporation existing under the laws of Colorado and Utah.

4000 shares of the par value of $100 each of the capital stock of Standard Realty and Development Company, a California Corporation, being all of the capital stock thereof except 5 shares held by directors.

—leases and agreements;

V—The estates, interests and rights of the Company under any and all leases, leaseholds, rights under leases or contracts, trackage agreements, traffic agreements, and operating agreements, and particularly the interests and rights of the Company heretofore possessed by Western Pacific Railway Company (but not including any of the claims or rights against, or with respect to the property of, The Denver and Rio Grande Railroad Company or any predecessor or successor corporation of, or which originally arose in favor of, holders of the First Mortgage Five Per Cent. Thirty-year Gold Bonds of said Western Pacific Railway Company or of coupons belonging thereto nor any of the proceeds or avails of any such claims or rights whether or not such proceeds or avails shall [1071] have been collected or obtained otherwise, in whole or in part, by the use of First Mortgage Bonds or the proceeds thereof unless the the same or any part thereof shall hereafter be subjected to the lien hereof by an instrument executed expressly for such purpose) under (1) an agreement, bearing date June 23, 1905, between The Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust

Company (The Equitable Trust Company of New York being successor thereto), as trustee under the First Mortgage of Western Pacific Railway Company, and (2) an agreement bearing date said last-mentioned day between Missouri Pacific Railway Company and The Denver and Rio Grande Railroad Company; provided, however, that any now existing interest or right of the Company under any lease, agreement or other instrument or contract, which by the terms of a decree of foreclosure and sale entered in a cause pending in the United States District Court for the Northern District of California, wherein The Equitable Trust Company of New York was plaintiff and Western Pacific Railway Company and others were defendants, the Company is entitled to renounce or disaffirm and which pursuant to the provisions of said decree it shall so renounce or disaffirm, shall not be deemed to have been assigned, mortgaged, pledged or otherwise encumbered by this indenture.

—other property.

VII.—All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause First of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled.

Special Master's deed.

The lines of railroad, terminals, lands, structures, equipment, shares of stock and other property, interests and rights hereinabove in this clause First of these granting clauses described, were formerly the properties, interests and rights of Western Pacific Railway Company or its receivers and were conveyed and assigned to the Company by deed dated July 1, 1916, wherein Francis Krull as Special Master appointed in and by said above mentioned decree of foreclosure and sale is named as party of the first part, said Western Pacific Railway Company as party of the second part, F. G. Drum and Warren Olney, Junior, as receivers of said Western Pacific Railway Company, as parties of the third part, The Equitable Trust Company, of New York, as trustee under the First Mortgage of said Western Pacific Railway Company executed to the Bowling Green Trust Company, trustee, as of date September 1, 1903, as party of the fourth part, Central Trust Company of New York, as trustee under the Second Mortgage of Western Pacific Railway Company executed to said Central Trust Company of New York, trustee, and dated July 1, 1908, as party of the fifth part, Franklin V. Spooner, Robert R. Pardow and John C. Rued, as parties of the sixth part, and the Company as party of the seventh part; which deed was executed and delivered to the Company before the execution of this indenture.

Other property presently owned.

Second.—All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or equitable) now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses.

After-acquired property.

Third.—Any and all property and facilities of any and every kind and description, including among other things lines of railroad, extensions and branches, telegraph and telephone lines, lines and instrumentalities of water transportation, terminal facilities, equipment, lands, buildings, machinery and tools, stocks, bonds, notes and other obligations and securities and any and all right, title and interest in any of such properties or facilities which may from time to time hereafter be acquired or constructed by or belong to the Company or any successor or purchasing corporation if

(a) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) or on account of the purchase, acqui-

sition or construction thereof or work thereon First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; or

(b) consisting of or, if securities, representing property or facilities constituting an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or

(c) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or

(d) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or any right, title or interest which the Company or any successor or purchasing corporation may hereafter acquire in or to any of the property of either of said companies or in or to any line of railroad or other property of any corporation which shall

then be or immediately prior thereto shall have been a subsidiary company, as the term "subsidiary company" is defined in Section 2 of Article Second hereof.

Property hereafter conveyed in trust.

Fourth.—Any and all lines of railroad and other property of whatsoever kind or description, which may include, among other things, stocks, bonds, notes and other obligations and securities and also claims, demands and choses in action of whatsoever kind, from time to time hereafter by delivery or by writing of any kind, for any of the purposes hereof, conveyed, assigned, transferred, mortgaged or pledged by the Company or by any successor or purchasing corporation or by any person or corporation on behalf of any of them or with the written consent of any of them to the Trustees, who are hereby authorized to receive any such property at any and all times as and for additional security hereunder and also when and as hereinafter provided as substituted security hereunder and, except as hereinafter otherwise expressly provided and except with respect to anything which by or under any other of the provisions of this indenture is mortgaged or pledged or agreed to be mortgaged or pledged or to be subjected to the lien hereof as security hereunder, any such conveyance, assignment, transfer, mortgage or pledge may be made subject to any conditions, reservations, limitations and provisions which shall be set forth in an instru-

ment in writing then to be executed by the Company or the person or corporation making such conveyance, assignment, transfer, mortgage or pledge respecting the use, management and disposi- [1072] tion of the property constituting such additional security and the proceeds thereof.

Appurtenances, etc.

Franchises.

Replacements.

Fifth.—All rights of way and other easements; all tunnels, roadbeds, main tracks, double tracks and other additional tracks, spurs, side tracks, turnouts, switches, turntables; all superstructures, bridges, viaducts, stringers, ties, rails, frogs and bolts; all fences, telegraph and telephone lines, poles, wires, block signals and instruments; all terminal facilities; all wharves, docks, slips, piers, floats, loading and unloading apparatus and landings; all steamships, tugs, ferries, barges, lighters and other floating equipment; all passenger stations, freight houses, warehouses, elevators, power houses, coal houses, oil tanks, car houses, engine houses, machine shops and other shops and structures; all water stations, water tanks and water supplies; all locomotives, tenders, motor cars, express cars, postal cars, dining cars, baggage cars, passenger cars, combination cars, work cars, freight cars and other rolling stock and equipment; all machinery, apparatus, tools, implements, appliances, furniture, material and supplies; all land used or designed for

way-grounds, terminals, yards, stations, depots, warehouses or other structures or facilities; all other property of every description and all rights and interests in or with respect to the use of property; provided that the foregoing or any thereof, whether now owned by the Company or at any time hereafter acquired by it or any grantee, successor or purchasing corporation, shall be appurtenant to or used or held for use as, or as a part or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches, telegraph or telephone lines, lines of water transportation, terminal facilities or other properties now or at any time hereafter subject to the lien of this indenture—whether the same exclusively appertain to or be used as parts of or in or for the maintenance or operation of lines of railway or other properties subject to the lien hereof or appertain to or be so used as parts of or in or for the maintenance or operation of such lines of railroad or other properties in common with lines of railroad or property not subject to the lien hereof; also all corporate and other rights, franchises, privileges and immunities now appertaining or hereafter to appertain to or used or held for use in or for the maintenance or operation of any such lines of railroad or other property now or at any time hereafter subject to the lien of this indenture, whether the Company now owns or it or any successor or purchasing corporation hereafter shall acquire any such rights, franchises, privileges or immunities;

also any and all replacements, renewals, improvements and betterments of and additions to any such lines of railroad or any property or rights of whatsoever description now or at any time hereafter subject to the lien of this indenture, whensoever and by whomsoever such replacements, renewals, improvements, betterments or additions may be made.

Estates.
Rents.

Sixth.—All and singular the estates, rights, titles, interests, possession, claims and demands, whatsoever, as well at law as in equity, of the Company and of any successor or purchasing corporation of, in or to any of the lines of railroad, extensions, branches, telegraph and telephone lines, lines of water transportation, terminal facilities, equipment, lands and other properties, hereditaments, appurtenances, rights, franchises, privileges and immunities hereby conveyed, assigned, mortgaged or pledged or intended to be conveyed, assigned, mortgaged or pledged or now or at any time hereafter subject to the lien of this indenture and every part and parcel thereof, and all and singular the rents, issues, tolls, profits and other income of all and every part of the property of whatsoever kind or description hereby conveyed, assigned, mortgaged or pledged or intended to be conveyed, assigned, mortgaged or pledged or now or at any time hereafter subject to the lien of this indenture.

Company may acquire property free of lien hereof.

But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests therein, equipment, stocks, bonds or other securities or other property, rights, franchises, immunities or privileges provided the same shall not be lines of railroad, extensions, or branches or interests therein, equipment, stocks, bonds or other securities, or other property, rights, franchises, immunities or privileges (a) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; or (b) consisting of, or if securities representing, property or facilities constituting an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or

represented by securities subject to the lien hereof; or (c) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or (d) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or of any right, title or interest which the Company or any successor or purchasing corporation may acquire in or to any of the property of either of the companies above named or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company as the term subsidiary company is defined in Section 2 of Article Second hereof; and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture.

Habendum.

To Have and to Hold the premises, railways, properties, securities, rights, franchises, estates and appurtenances hereby conveyed or assigned or intended to be conveyed or assigned unto the Trustees, their successors in the trust and assigns forever:

Subject, However, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture.

Grant in trust.

But in Trust Nevertheless for the equal and proportionate benefit and security of all present and future holders of the First Mortgage Bonds and coupons and for the enforcement of the payment of said bonds and coupons when payable and the performance and observance of and compliance with the covenants and conditions of this indenture, without prefer- [1073] ence, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in the issue, sale or negotiation thereof, or the purpose of its issue, so that each and every bond hereby secured shall have the

same right, lien and privilege under and by virtue of this indenture and, subject to the terms hereof, be equally and proportionately secured hereby, as if all of the First Mortgage Bonds had been made, executed, authenticated, delivered and negotiated simultaneously with the execution and delivery of this indenture, it being intended that the lien and security of this indenture shall take effect from the date of the execution and delivery hereof without regard to the time of the actual issue, sale or negotiation of said bonds and as though upon said date all of said bonds were actually authenticated, issued, sold and delivered and were in the hands of holders in due course. [1074]

EXHIBIT E
GRANTING CLAUSES OF GENERAL AND REFUNDING MORTGAGE

Now, Therefore, This Indenture Witnesseth:

That in order to secure the payment of all of the General and Refunding Bonds at any time issued and outstanding under this indenture according to their tenor, purport and effect, as well the interest as the principal thereof, and to secure the performance and observance of all the covenants and conditions therein and herein contained, and to declare the terms and conditions upon which the General and Refunding Bonds are to be issued, received and held, and for and in consideration of the premises and of the acceptance or purchase of the General and Refunding Bonds by the holders

thereof, and of the sum of One Hundred dollars ($100), lawful money of the United States of America to the Company duly paid by the Trustee at or before the ensealing and delivery of this indenture, the receipt whereof is hereby acknowledged, the Company has executed and delivered this indenture and has granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents does grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the Trustee, its successors in the trust and its and their assigns, all of the Company's right, title and interest in and to:

First: All and singular the following described lines of railroad and other property and all other lines of railroad at the time of the execution of this indenture owned by the Company and all right, title and interest of the Company in and to any other lines of railroad in or to which at said date the Company has any right, title or interest:

A. The following lines of railroad are now constructed and operated:

I.—A main line of railroad commencing in the City and County of San Francisco, running thence in and through said City and County to certain slips, piers and landing places upon San Francisco Bay in said City and County; thence by ferry and barge to the City of Oakland, in the County of Alameda; thence in and through said City of Oakland; thence in a southeasterly,

easterly, northeasterly and northerly direction through the Counties of Alameda and San Joaquin, passing in and through the City of Stockton in said County of San Joaquin; thence in a general northerly direction through the County of Sacramento, passing in and through the City of Sacramento in said County; thence in a general northerly direction through the Counties of Sutter and Yuba, passing in and through the City of Marysville in said County of Yuba; thence in a general northerly direction through the County of Butte, passing through the City of Oroville in said County; thence in a general northeasterly, easterly and southeasterly direction through the County of Plumas; thence in a general northerly and easterly direction through the County of Lassen to a point on the boundary line between the States of California and Nevada; thence in a general easterly and northeasterly direction through the Counties of Washoe, Pershing, Humboldt, Lander, Eureka and Elko, in the State of Nevada, to a point on the boundary line between the States of Nevada and Utah; thence in a general easterly direction through the Counties of Tooele and Salt Lake, in the State of Utah, to and into Salt Lake City, in said State of Utah—said line of railroad being about 929.9 miles in length.

II.

Branch—Niles to San Jose

A branch line of railroad, having its initial point and connection with said main line at or near Niles in Alameda County, California and extending thence in a southerly direction to and into the City of San Jose in Santa Clara County, California, being about 23.9 miles in length.

Branch—Carbona to Moy

A branch line of railroad having its initial point and connection with said main line at or near Carbona in San Joaquin County, California, and extending thence in a southwesterly direction to a point near Moy, San Joaquin County, California, being about 4.4 miles in length.

Branch—North of Stockton to Stockton

A branch line of railroad having its initial point and connection with said main line at or near Stockton, San Joaquin County, California and extending thence in a westerly, southerly and easterly direction to a point in the City of Stockton, San Joaquin County, California, being about 5.9 miles in length.

Branch—Terminous Junction to Terminous

A branch line of railroad having its initial point and connection with said main line at or near Terminous Junction, San Joaquin County,

California and extending thence in a westerly direction to a point at Terminous, San Joaquin County, California, being about 7.9 miles in length.

Branch—Glannvale to Bradford Winery

A branch line of railroad having its initial point and connection with said main line at or near Glannvale, Sacramento County, California and extending thence in an easterly direction to a point at Bradford Winery, Sacramento County, California, being about 1.6 miles in length.

Branch—Adelaide to Hutchinson's Mill

A branch line of railroad having its initial point and connection with said main line at or near Adelaide, Butte County, California and extending thence in a southwesterly direction to the former site of Hutchinson's Mill, Butte County, California, being about 1.0 mile in length.

Branch—Land to Bidwell Bar

A branch line of railroad having its initial point and connection with said main line at or near Land, Butte County, California, and extending thence in an easterly direction to a point at or near Bidwell Bar, Butte County, California, being about 2.0 miles in length.

Branch—Spanish Creek Spur

A branch line of railroad having its initial point and connection with said main line at or

near Gray's Flat, Plumas County, California, and extending thence in a northerly direction to a point at Spanish Creek Lumber Company's mill, Plumas County, California, being about 0.6 miles in length.

Branch—Keddie to Bieber

A branch line of railroad having its initial point and connection with said main lines at or near Keddie, Plumas County, California, and extending thence in a northerly, northeasterly, northwesterly and northerly direction through Plumas County, California, passing in and through the Towns of [1075] Crescent Mills and Greenville in the said County of Plumas; thence in an easterly, northerly, northwesterly, northeasterly and northerly direction through Lassen County, California, passing in and through the Town of Westwood in the said County of Lassen, to a point near Bieber, Lassen County, California, being about 111.2 miles in length.

Branch—Blairsden to Davies Mill

A branch line of railroad having its initial point and connection with said main line at or near Blairsden, Plumas County, California, and extending thence in a southerly direction to a point at Davies Mill, Plumas County, California, being about 1.0 mile in length.

Branch—Gulling Junction to Gulling

A branch line of railroad having its initial point and connection with said main line at or

near Gulling Junction, Plumas County, California, and extending thence in a general northwesterly direction to a point at Gulling, Plumas County, California, being about 3.0 miles in length.

Branch—Calpine Junction to Calpine

A branch line of railroad having its initial point and connection with said main line at or near Calpine Junction, Plumas County, California, and extending thence in a general southwesterly direction to Calpine in Sierra County, California, being about 12.6 miles in length.

Branch—Hawley to Loyalton

A branch line of railroad having its initial point and connection with said main line at or near Hawley, Plumas County, California, and extending thence in a general southeasterly direction to Loyalton, Sierra County, California, being about 13.0 miles in length.

Branch—Reno Junction to Reno

A branch line of railroad having its initial point and connection with said main line at or near Reno Junction, Lassen County, California, and extending thence in a southeasterly direction through the Counties of Lassen and Sierra to a point on the boundary line between the States of California and Nevada; thence in a southeasterly and southerly direction to the City of Reno in Washoe County, Nevada, being about 33.1 miles in length.

Branch—Gerlach to Connection with Pacific Portland Cement Company's Railroad

A branch line of railroad having its initial point and connection with said main line at or near Gerlach, Washoe County, Nevada, and extending thence in a southeasterly direction to a connection with the railroad of the Pacific Portland Cement Company, Washoe County, Nevada, being about 0.6 miles in length.

Branch—Wells to Connection with O. S. L. R. R.

A branch line of railroad having its initial point and connection with said main line at or near Wells, Elko County, Nevada, and extending thence in a northeasterly direction to a connection with the Oregon Short Line Railroad in Elko County, Nevada, being about 1.2 miles in length.

Branch—Ellerbeck to Dolomite and Flux

A branch line of railroad having its initial point and connection with said main line at or near Ellerbeck, Tooele County, Utah, and extending thence in a southwesterly direction to a junction point; thence westerly to Dolomite, Tooele County, Utah, and also from said junction point southeasterly to Flux, Tooele County, Utah, being about 5.8 miles in length.

Branch—Burmester to Warner

A branch line of railroad having its initial point and connection with said main line at or

near Burmester, Tooele County, Utah, and extending thence in a southeasterly direction to Warner, Tooele County, Utah, being about 15.5 miles in length.

B. The following lines of railroad in which the Company owns an undivided one-half interest:

1. Tracks Owned Jointly with Southern Pacific Company in Oakland, Alameda County, California—Total length—3.92 Miles.
2. Track Owned Jointly with Southern Pacific Company near Niles, Alameda County, California—Total length—0.24 Miles.
3. Tracks Owned Jointly with Southern Pacific Company in San Jose, Santa Clara County, California — Total length — 0.36 Miles.
4. Track Owned Jointly with California Fruit Exchange at Graeagle—Total length—0.01 Miles.
5. Track Owned Jointly with Southern Pacific Company at Reno, Washoe County, Nevada—Total length—0.17 Miles.
6. Track Owned Jointly with Oregon Short Line Railroad in Salt Lake City, Salt Lake County, Utah—Total length—0.30 Miles.

C. The following lines of railroad in which the Company owns an undivided one-third interest:

Tracks Owned Jointly with Southern Pacific Company and Sacramento Northern Railway

in Sacramento County, California — Total length—0.13 Miles.

Second: All property and rights, of every name and nature, owned by the Company at the date of the execution and delivery of this indenture or thereafter acquired by it, held or acquired for use or used upon or in connection with, or appertaining to, every of the lines of railroad which, or any right, title or interest in which, shall at any time be subject to this indenture, to wit:

(a) all lands, rights of way, roadbeds, station and depot grounds, all tunnels, spurs, tracks, turnouts, switches, sidings and turntables, all superstructures, bridges, stringers, ties, rails, frogs, chairs, bolts, tie plates, splices, signals and signal apparatus, interlocking devices and other railroad appurtenances, all telegraph, telephone and electric power transmission lines, including all wires, cables, poles, conduits, ducts, subways, power plants, turbines, flumes, pipes, generators, motors, switchboards and other instruments, all stations or facilities for wireless communication and signalling, all terminals and terminal property and facilities, all station houses, warehouses, elevators, freight houses, engine houses, car houses, tower houses, yard buildings, water stations, water tanks, water supply, water power sites, fuel stations, fuel tanks, fuel supply, machine shops and other structures, all engines, tenders, cars and other rolling stock and equipment, wharves, docks,

[1076]

piers and landings, steamers and steamships, fer-

ries, boats, barges and tugs and other floating and air equipment, all machinery, tools, implements and other railroad appliances, apparatus and facilities, materials and supplies, and all other physical property, held or acquired for use or used upon or in connection with, or appertaining to, any of said lines of railroad; and

(b) all corporate rights, privileges immunities and franchises, powers, licenses, easements, leases of lines of railroad or other property, leasehold rights, trackage, terminal and traffic rights, privileges and contracts, and all other contracts and rights, and all renewals and extensions thereof, held or acquired for use or used upon or in connection with, or appertaining to, any of said lines of railroad or which the Company has, or may have, the right to exercise in respect of any of said lines of railroad.

Third: Any and all extensions, additions, improvements and betterments, to or upon or in connection with any and all lines of railroad, premises and property which, or any right, title or interest in which, shall at any time be subject to this indenture; and all tolls, revenues, earnings, income, rents, issues and profits of such lines of railroad, premises and property and every thereof, and all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in equity as in law, of the Company of, in and to such lines of railroad, premises and property and every part and parcel thereof and of, in and to the ap-

purtenances and franchises appertaining or hereafter to appertain thereto.

Fourth: The following shares of capital stock now owned by the Company:

Company	Number of Shares
The Salt Lake City Union Depot and Railroad Co.	1,000
Deep Creek Railroad Company	4,500
Sacramento Northern Railway	10,000
Standard Realty & Development Co.	4,005
Tidewater Southern Railway Company	1,147,968
Alameda Belt Line	4,130
Central California Traction Co., Common	967⅔
Central California Traction Co., Preferred	2,642⅔
Western Pacific California R. R. Co.	2,750
Railway Express Agency, Inc.	2

Fifth: The following bonds and other obligations now owned by the Company:

Description	Principal Amount
Sacramento Northern Railroad	
Class A Twenty Year Gold Bonds	$1,904,838.20
Class B Twenty Year Gold Bonds	902,407.05
Class C Twenty Year Gold Bonds	1,203,162.94
Class D Twenty Year Gold Bonds	1,203,067.16
Central California Traction Company First Mortgage 5% Bonds	316,000.00
Sacramento Northern Railway (notes)	2,926,476.72
Deep Creek Railroad Company (notes)	45,000.00
Standard Realty and Development Company (notes)	251,273.07

[1077]

Sixth: Any and all lines of railroad, extensions, branches, terminal facilities, additional track, real property, yards, structures and facilities of every kind, rolling stock and other equipment, additions, improvements and betterments, and all stocks,

bonds and other obligations, and any and all other property of every kind and description (notwithstanding the same is not now particularly described in this indenture) which from time to time shall be constructed or acquired by the Company, in respect of the construction or acquisition whereof General and Refunding Bonds shall be authenticated and delivered or deposited moneys paid out under this indenture.

Seventh: Any and all property of every kind and description, including shares of stock, bonds and other obligations, whether owned by the Company at the date of the execution and delivery of this indenture or thereafter acquired by it, which by any provision of this indenture the Company is required to convey, mortgage, pledge, assign or transfer to the Trustee hereunder.

Eighth: Any and all property of every kind and description, including shares of stock, bonds and other obligations, which from time to time after the date of the execution and delivery of this indenture by delivery or by writing of any kind shall have been conveyed, mortgaged, pledged, assigned or transferred by the Company, or by any one in its behalf, to the Trustee for the purposes hereof, which is hereby authorized to receive at any and all times any property as and for additional security for the payment of the General and Refunding Bonds issued or to be issued under this indenture and to hold and apply any and all such property subject to the terms hereof.

But the Company may, except as otherwise herein expressly provided, by the use of its credit, or in any other manner, unless General and Refunding Bonds shall be authenticated and delivered or deposited moneys paid out hereunder to provide for, or to reimburse the Company for, the acquisition or construction thereof, construct or acquire free from the lien hereof lines of railroad, branches or extensions, or other property or interests in any of the same, of whatsoever name or nature, including shares of stock, bonds and other obligations, but excepting rolling stock and equipment for use or used upon or in connection with, and appurtenances to, the lines of railroad and property now or hereafter subject to this indenture; and unless General and Refunding Bonds shall be authenticated and delivered or deposited moneys paid out hereunder to provide for, or to reimburse the Company for, the acquisition or construction thereof, the Company may purchase and acquire rolling stock or equipment (including floating and air equipment) free from the lien hereof by lease or conditional sale under any form of equipment trust, or may purchase rolling stock or equipment and issue obligations therefor secured by mortgage or pledge of such rolling stock or equipment; provided, however, that, when and as and to the extent that the title to or any interest, legal or equitable, in rolling stock or equipment, however acquired, for use or used upon or in connection with the lines of railroad

[1077] and property now or hereafter subject to this indenture, shall vest in the Company or in any successor company operating said lines of railroad and property free in whole or in part from such trust, mortgage or pledge, then the rolling stock or equipment or such interest therein as it becomes vested in the Company or such successor company shall become subject to the lien of this indenture.

To Have and to Hold the railroads, premises, properties, real and personal, rights, franchises, estates and appurtenances, hereby conveyed and assigned, or intended to be conveyed or assigned (hereinafter sometimes called the "trust estate"), unto the Trustee, its successors in trust and its and their assigns forever;

Subject, However, in so far, but only in so far (in extent, degree of priority or otherwise), as in law the same respectively may attach to any part or parts of the trust estate, to existing liens and charges of record upon and against any part or parts of the trust estate, and specifically, but without prejudice to such general provision, to the following mortgage and deed of trust: the First Mortgage, dated June 26, 1916, made by The Western Pacific Railroad Company to First Federal Trust Company and Henry E. Cooper, as Trustees; and

Subject, as to any property hereafter acquired by the Company and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition by the Company or created in such acquisition;

In Trust, Nevertheless, for the common and equal use, benefit and security of all and singular the person or persons, firm or firms, bodies politic or corporate, who shall from time to time be holders of any of the General and Refunding Bonds or coupons and without preference of any of said bonds over any other or others of said bonds by reason of priority in the time of issue or negotiation thereof or otherwise howsoever, subject to the terms, provisions and stipulations in the General and Refunding Bonds and in this indenture contained, and for the uses and purposes and upon and subject to the terms, conditions, provisos and agreements hereinafter expressed and declared. [1078]

EXHIBIT F.

(Schedule in process of preparation showing reproduction cost new, less depreciation of equipment subject to certain equipment trusts.)

(Eliminated From This Stipulation by Agreement of the Parties) [1079]

EXHIBIT I.

The Western Pacific Railroad Company
Office of President
Mills Building, 220 Montgomery St.
San Francisco

Charles Elsey
President

March 26, 1937

Irving Trust Company,
Trustee under General and Refunding Mortgage of The Western Pacific Railroad Company, dated January 1, 1932,
1 Wall Street,
New York, N. Y.

Dear Sirs:

Among other collateral securing the Western Pacific General and Refunding Mortgage which you now have in your possession as successor Trustee thereunder, are $270,000 face amount of Central California Traction Company First Mortgage bonds.

These bonds by their terms matured April 1, 1936, and at that time all bonds in the hands of the general public were redeemed, leaving outstanding only $810,000 face amount of such bonds owned by the three parent companies of Central California Traction Company, viz., Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company and The Western Pacific Railroad Company, in equal amounts of $270,000 each.

The three parent companies and Central California Traction Company contracted, by agreement dated April 1, 1936, that during the period subsequent to the maturity of said bonds during which the owners thereof forebore to collect the principal of the bonds of said issue owned by them, interest thereon shall be paid to the owners upon the dates and at the same rate as is specified in said bonds for payment prior to maturity.

The Western Pacific Railroad Company entered into such agreement with the authorization of the Federal Court having jurisdiction of its reorganization proceeding, upon the joint petition of its Reorganization Trustees and itself for such authority. I enclose herewith, for your information, copy of such petition to the Federal Court, dated March 27, 1936, and the order of the court pursuant thereto. You no doubt have received with the files of your predecessor as Trustee under the General and Refunding Mortgage, copies of the pleadings in said reorganization proceeding, but I enclose these copies for ready reference. They are self-explanatory and indicate the reason for such arrange-
[1113] ment. Central California Traction Company is a "feeder" railroad and does not operate at a profit, and the three parent companies must make advances to it of such funds as are necessary to meet Traction Company's expenses in excess of Traction Company's available funds. Traction Company did not have funds available with which to pay on April 1, 1936, the principal of the bonds

held by the three parent companies, and The Western Pacific Railroad Company, Debtor, at least could not practicably advance from its cash $270,000, its proportion of the amount necessary to pay at maturity the principal of the outstanding Traction Company bonds held by the three parent companies. The arrangement was also desired by Traction Company, Southern Pacific Company and The Atchison, Topeka and Santa Fe Railway Company.

The interest payment of October 1, 1936, on the Western Pacific holding of Traction bonds was deposited with the then Trustee, The Chase National Bank of the City of New York, on October 8, 1936.

I am writing you to ascertain if you will cooperate, as pledgee of these bonds, on behalf of the Western Pacific, with the other two parent companies and the Traction Company in obtaining a release from the lien of Traction Company's First Mortgage, dated September 1, 1906, of certain property consisting of railway track, including track crossings, overhead transmission and trolley wires, poles and fixtures appertaining thereto. No land is involved, as the tracks and accessories are in city streets, and the underlying land is used under a franchise. The property has been conveyed by Traction Company to Stockton Electric Railroad Company but the lien of the Traction Company's First Mortgage has not yet been released. The pertinent facts affecting this transaction are as follows:

Until 1927, Central California Traction Company was an independent electric railroad, operating a freight and passenger railway between Stockton, San Joaquin County, and Sacramento, Sacramento County, California (with a mileage in excess of 52 miles).

On July 3, 1925, Southern Pacific Company entered into an agreement with Herbert Fleishhacker, of San Francisco, the then owner of all of the outstanding capital stock of Central California Traction Company and of more than 70% of the First Mortgage bonds of Traction Company, for the purchase and sale of said stock and bonds to Southern Pacific Company on the terms specified therein. Thereupon, the Southern Pacific Company applied to the Interstate Commerce Commission (Finance Docket No. 5008) for authority to acquire control of Central California Traction Company by such acquisition of its capital stock, etc. The Atchison, Topeka and Santa Fe Railway Company and The Western Pacific Railroad Company (and its subsidiaries Sacramento Northern Railway and Tidewater Southern Railway Company), all intervened in the proceeding before the Interstate Commerce Commission, opposing the merger of [1114] the Traction Company's line with that of Southern Pacific (the Santa Fe petitioning to itself acquire control of the Traction Company if the Interstate Commerce Commission found the public interest would be served by a merger of the Traction Company's line with a larger railway system capable of

efficiently maintaining and operating the property). The Western Pacific also filed an independent petition to construct a line of railroad in the event that the line of the Traction Company by any means became other than an independent line free of control by any interstate railroad company.

The Interstate Commerce Commission gave its decision on August 5, 1927, authorizing the Southern Pacific Company to acquire control of Central California Traction Company by purchase of stock and bonds, as set forth in the agreement with Mr. Fleishhacker (of July 3, 1925)

> "Provided, however, and the authority herein granted is upon the express condition, that, within 60 days from and after the date hereof, the Southern Pacific Company shall admit the Western Pacific Railroad Company and the Atchison, Topeka & Santa Fe Railway Company, or either of them, as those carriers respectively may thereto consent, to participation equally with said Southern Pacific Company in joint control of said Central California Traction Company upon payment of proportionate shares of the cost of the securities to be acquired; the division of said capital stock of said Central California Traction Company among said Southern Pacific Company, Western Pacific Railroad Company, and Atchison, Topeka & Santa Fe Railway Company to be in equal one-third shares, or, if either of the two carriers last named elect not to participate in such

joint control of said Central California Traction Company, then the division of said stock between the other of said carriers and said Southern Pacific Company to be in equal one-half shares; and said bonds to be divided among, or between, the carriers joining in control of said Central California Traction Company as among, or between, the participants in such joint control may be agreed, or, failing such agreement, then, as nearly as may be according to the division of capital stock herein required."

Both Santa Fe and Western Pacific indicated their intention to participate equally with Southern Pacific Company in joint control of Traction Company upon payment of proportionate shares, etc.

The three trunk lines, however (Southern Pacific, Santa Fe and Western Pacific), while they agreed in principle on the proposition of jointly acquiring control of the Traction Company, were unable to reach an agreement with respect to the value to be assigned in the transaction of the $2,200,000 of Pacific Electric Railway bonds involved in the contract of July 3, 1925 between Southern Pacific and Fleishhacker, above [1115] mentioned (the contract under which Southern Pacific derived its right to acquire control of Traction Company, subject to Interstate Commerce Commission authorization).

It was, therefore, considered advisable that the Southern Pacific and Fleishhacker enter into a

new contract whereunder the point of controversy would be eliminated. Such an agreement was made under date of October 31, 1927, the new contract providing that Fleishhacker would sell to the Southern Pacific, as of December 31, 1927, all the outstanding stock and bonds of Traction Company for a cash sum ($2,650,000), Fleishhacker guaranteeing that Traction Company on that date would have no indebtedness of any character except the principal amount of the outstanding bonds and a proportionate amount of property tax liability, Fleishhacker also agreeing to cure, within a stated time, any defects or encumbrances affecting lands or right of way of the Traction Company. In consideration of the guaranties thus personally assumed by Fleishhacker the Southern Pacific agreed that the Traction Company, prior to the consummation of the transfer of the stock and delivery of the bonds, would convey to Fleishhacker the title to all its electric railway properties in the City of Stockton (with certain exceptions and reservations), Fleishhacker in turn to sell such properties to the Stockton Electric Railroad Company in consideration of the delivery to him of $100,000 of Pacific Electric Railway First Refunding and Mortgage Bonds.

The Western Pacific and Santa Fe concurrently executed an instrument in writing on October 31, 1927, annexed to said agreement of October 31, 1927 between Fleishhacker and Southern Pacific, signifying their intention to participate equally with the

Southern Pacific in joint control of the Traction Company by payment of one-third each of the cash purchase price, and the Southern Pacific Company endorsed on said instrument of the Western Pacific and Santa Fe its approval and agreement therewith. This instrument signifying intention to participate also contained agreements on the part of the Southern Pacific. A copy of the agreement of July 3, 1925, and of the partially superseding agreement of October 31, 1927, and of the annexed instrument of intention to participate, are enclosed herewith.

Said instrument, signifying intention to participate, among other things, provided

> "Southern Company, Atchison Company and Western Company hereby agree that, as soon as all the outstanding bonds of the Traction Company have been delivered to the Atchison company, Western Company and/or Southern Company, the properties agreed to be sold to Stockton Electric Railroad Company by Herbert Fleishhacker under the foregoing agreement, shall be released from the lien of the existing bond issue."

The three trunk lines thereupon applied to the Interstate Commerce Commission for modification of the order of [1116] August 5, 1927, in Finance Docket No. 5008, in the light of their inability to agree on value under the agreement of July 3, 1925, and submitted the partially superseding new agreement of October 31, 1927 and its annexed instru-

ment signifying intention and requested authorization and approval of the Interstate Commerce Commission to the purchase on the terms stated in the agreement of October 31, 1927, the Southern Pacific agreeing that immediately upon acquisition of the carrier's stock and bonds, it would admit the Western Pacific and Santa Fe to participation equally with the Southern Pacific upon payment by each of those carriers of one-third of the cash price ($2,650,000) or such lesser sum as should represent the ultimate cost to the Southern Pacific of acquiring Traction Company's securities.

The Interstate Commerce Commission, by its supplemental Report and Order of November 28, 1927, in Finance Docket No. 5008, recited the provisions of the modifying agreement of October 31, 1927, and approved the terms and conditions so proposed by the three trunk lines for the acquisition of control of Traction Company, and held them just and reasonable in the premises, and authorized the consummation of control on such basis.

The Supplemental Report of the Interstate Commerce Commission recited the proposed conveyance to Fleishhacker by Traction Company of title to all its electric railway properties in the City of Stockton (with certain exceptions and reservations) and the intended sale by Fleishhacker in turn of such properties to the Stockton Electric Railroad Company, and that such transfer by Traction Company was in consideration of the guaranties personally assumed by Fleishhacker, and the consideration for

Fleishhacker's sale thereof to Stockton Electric Railroad Company was the delivery to him of $100,000 of Pacific Electric Railway First Refunding and Mortgage Bonds.

Traction Company did convey the electric railway properties in the City of Stockton to Fleishhacker as provided in the agreement of October 31, 1927, and Mr. Fleishhacker sold such lines to Stockton Electric Railroad Company, but the interests conveyed were not released from Traction Company's First Mortgage. As provided in said agreement of October 31, 1927, an *undivided one-half interest* in certain trackage in the City of Stockton was conveyed to Fleishhacker and by him conveyed to Stockton Electric Railroad Company, where such lines were used jointly by Traction Company and Stockton Electric Railroad Company (including certain trackage on Weber Avenue between Sacramento and El Dorado Streets, the property now under consideration). [1117]

In February, 1933, Traction Company itself discontinued its passenger operations in the City of Stockton, which rendered the one-half interest retained by it in such trackage useless to it, and subsequently, on October 23, 1934, also conveyed its remaining one-half interest therein to Stockton Electric Railroad Company. Neither the one-half interest in said trackage conveyed in 1927, nor the one-half interest conveyed on October 23, 1934, has been released from Traction Company's First Mortgage. Had Traction Company not made the

transfer of the remaining one-half interest in this trackage to Stockton Electric Railroad in 1934, it would have been under the obligation of sharing the expense of maintaining a non-profitable facility or of sharing in the expense of dismantling and removing the trackage and all other equipment, and of restoring the street from which removal had been made, at a cost that would have exceeded its share of the salvage value of all trackage and other property removed. It, therefore, conveyed its remaining one-half interest to Stockton Electric Railroad Company *free of cost*; the consideration moving to Traction Company in the transaction lying in the fact that by such conveyance it was spared expense in the amount of about $6,000 by which its share of the cost of removal and restoration would have exceeded its share of the salvage value realized for all trackage and other property in the trackage in question.

Stockton Electric Railroad Company now requests the release from the lien of Traction Company's First Mortgage of the whole of the track on Weber Avenue, between Sacramento and El Dorado Streets, in the City of Stockton. By the terms of the instrument of October 31, 1927, signifying intention to participate equally in control of Traction Company, both Western Pacific and Santa Fe (along with Southern Pacific Company) stand obligated to see that the Traction Company trackage conveyed pursuant thereto to Stockton Electric Railroad Company is released from the

Traction Company mortgage lien "as soon as all the outstanding bonds of Traction Company have been delivered to" the three trunk lines. This has now occurred, as all publicly owned bonds were redeemed on their maturity on April 1, 1936.

The three parent companies (the Western Pacific, of course, functioning through its Reorganization Trustees) are desirous that this release of trackage from the Traction Company First Mortgage be effected, and caused the Traction Company officers to communicate with its First Mortgage Trustee, for such purpose. Copies of the relevant correspondence are enclosed, which present the complete picture.

The successor Trustee under Traction Company's First Mortgage, Wells Fargo Bank and Union Trust Co. of San Francisco, has outlined certain requirements as a con- [1118] dition to its execution of release of said property from the Traction Company's Mortgage, in view of the fact that no monetary consideration was received by Traction Company on the conveyance, and, therefore, technically Article IV (copy of which is annexed to the correspondence) of the Traction Company Mortgage can not be exactly complied with. However, real and valuable considerations accrued to Traction Company both in 1927 on the conveyance of one-half thereof, when its liens and encumbrances were contracted to be cleared by Fleishhacker (which was done) and its indebtedness was paid, and in 1934 on the conveyance of the remain-

ing one-half thereof when it saved a considerable sum by ceasing to own an interest in the trackage in question.

The Traction Company Mortgage Trustee requests that the three parent companies furnish it a formal request for reconveyance, and that all of the outstanding bonds of Traction Company be presented to its bank correspondent in New York for appropriate endorsement thereon relative to this release (reconveyance). It has notice that the Western Pacific Holdings of Traction Company bonds are pledged under the Western Pacific General and Refunding Mortgage, of which you are successor Trustee. As the letter of January 27, 1937, from the Traction Company's Mortgage Trustee, to Mr. Hayden, Vice-President of the Traction Company, indicates, if the Western Pacific's General and Refunding Mortgage Trustee informs the Wells Fargo Bank that it has no objection to urge to the reconveyance, but that it cannot either request the reconveyance or present the bonds held by it for endorsement, then the Wells Fargo Bank requests as a condition of making the conveyance that it be furnished full indemnity by Santa Fe and Southern Pacific or either of them.

Article Six of the Western Pacific General and Refunding Mortgage, the article dealing with pledged securities, contains no prohibition of the co-operation being requested of you. The last paragraph of Section 5 of Article Six provides: (page 118)

"Subject only to the actual exercise by the Company of rights in respect thereof conferred by this indenture, the Trustee shall have, and may exercise, all the rights of owner in respect of any bonds, obligations or stock or certificates of interest therein, held by the Trustee under this indenture or in any manner whatsoever on the trusts hereof."

Section 6 of Article Six also provides: (page 120)

"The Trustee, with the consent of the Company, [1119] at any time may vote upon any shares of stock that shall be held by the Trustee hereunder, and the Trustee may take such other action as in its discretion it shall deem advisable, to protect its interest and the interests of the holders of the General and Refunding Bonds in respect of any bonds, obligations or stock subject to the lien hereof; * * *"

Section 7 of Article Six provides: (page 122)

"Nothing herein contained shall prevent (1) the renewal or extension, on any terms, of any bond or obligation secured by mortgage upon the property of any controlled company of the Company *or of any other* bond or obligation pledged or assigned hereunder; * * *"

Article Six permits the Trustee (and the Company when not in default) to exercise broad discretion and co-operation as to the companies whose

securities are pledged under the General and Refunding Mortgage, such as participation in reorganizations of such companies, whether "controlled companies" or not, exchange of obligations for substitute obligations, co-operation in merger or consolidation of non-controlled companies, cancellation of obligations of "controlled companies", extension of maturity of obligations, etc., etc.—the spirit of the article being flexible enough to meet unpredictable contingencies affecting the companies whose securities are so pledged under the General and Refunding Mortgage.

I believe a study of these papers will indicate clearly that the Western Pacific assumed a contractual obligation to co-operate to procure the release from Traction Company's mortgage of the one-half interest in this trackage, etc., specified in the agreement of October 31, 1927, and that the conveyance of the other one-half interest was for the *benefit* of the Traction Company (and consequently of its bondholders and its stockholders), and conserved its resources and saved its money,—and that under these circumstances there can be no possible damage or claim by anyone, Traction Company bondholder or otherwise, by releasing the whole of this trackage from the lien of the Traction Company's Mortgage. The General and Refunding Mortgage is a first lien on the Western Pacific's holding of Traction Company capital stock, which, except for directors' qualifying shares, is physically pledged with you as Trustee. The only other stock-

holders (subject to directors' qualifying shares) are the two other parent companies, Southern Pacific and Santa Fe,—each [1120] of the three parent companies having identical stockholdings. That the requested co-operation is not only harmless but desirable is further indicated by the willingness of the other two bondholders (Southern Pacific and Santa Fe) whose Traction bonds are in their own possession, and who presumably are diligent to protect their property and rights, to facilitate the requested release and reconveyance, and to present their Traction bonds for the requested endorsement.

The order of said Federal Court of August 2, 1935, accepting jurisdiction of the reorganization proceeding, enjoined all persons and corporations holding collateral therefore pledged by the debtor as security for its obligations from selling, converting or otherwise disposing of such collateral, or any part thereof, until further order of said court. The proposed presentation for endorsement of the Traction Company bonds, held in pledge by you could not be construed as a sale, conversion, or disposition thereof. I feel reasonably certain the Court would specifically authorized you to make such a presentation for endorsement under these circumstances, if petitioned to do so.

Parity has existed between the three parent companies from the beginning, and has been scrupulously maintained throughout the years of joint ownership. The United States District Court here which has jurisdiction of the Western Pacific

reorganization proceeding made a special order permitting the Western Pacific Reorganization Trustees to make such advances and payments as might be necessary to protect Debtor's interest therein or to meet its contractual pro rata obligation as to Traction Company (and other affiliates with similar situation).

It would in my opinion be not only unfair and unjust to Southern Pacific and/or Santa Fe to compel them to furnish indemnity in this matter because the Western Pacific is unable to co-operate, but would also be most unfortunate and establish a precedent with possibly far-reaching consequences to the future owner of the Western Pacific's Traction Company holdings—for one of the three owners to abandon its participation and parity in all Traction Company dealings—especially as the interest the Western Pacific and Santa Fe acquired in Traction Company was solely because the Interstate Commerce Commission compelled the Southern Pacific to permit the participation.

For this reason I have addressed you very fully in the premises, and I would appreciate receiving from you advice as to whether you are willing to present the Traction Company bonds pledged with you for endorsement, as requested by the Traction Company mortgage Trustee.

Very truly yours,

HPT:PB CHARLES ELSEY

Encls. [1121]

EXHIBIT J

Standard Realty and Development Company
General Balance Sheet, as of October 31, 1939

ASSETS

Investments:			
Real Estate and Improvements		$812,996.60	
Capital Stock Indian Valley RR. Co. (750 Shares Common Stock)	$ 69,480.00		
Reserve for Revaluation of Capital Stock—Indian Valley RR. Co.	68,480.00	1,000.00	
Capital Stock—Tidewater Southern Ry. Co.		11,287.40	
Total			$825,284.00
Current Assets:			
Cash in Hands of Treasurer		12,003.77	
Individuals and Companies		701.09	
Van Noy Interstate Company		110,000.00	
Notes Receivable—C. C. Rummer		400.00	
Prepaid Insurance Premiums		367.88	
Prepaid Taxes		309.77	
Total			$123,782.51
Grand Total			$949,066.51

LIABILITIES

Capital:		
Capital Stock	$500,000.00	
Less Capital Stock in Treasury	99,500.00	
Total		$400,500.00
Current Liabilities:		
Audited Accounts Payable	$ 6,179.67	
Loans and Notes Payable	724,583.93	
Estimated Liabilities Crossings & Culverts	6,300.00	
Total		$737,063.60
Unadjusted Credits:		
None.		

[1122]

Profit and Loss:		
Profit and Loss—Reserve for Revaluation of Capital Stock of the Indian Valley RR. Company	$ 1,875.00	
Profit and Loss Balance December 31, 19.3	183,678.28*	
Balance Transferred from Income	6,693.81*	
Profit and Loss Balance January 1st to Oct. 31st, 1939		188,497.03*
Grand Total		$949,066.51

* Denotes red figures.

[1123]

EXHIBIT K

HIGH, LOW AND TOTAL SALES
DEBTOR'S FIRST MORTGAGE 5% BONDS
SIX MONTHS PERIODS 1923-1929

	First Six Months			Last Six Months		
Year	High	Low	Sales 000	High	Low	Sales 000
1923	85	78½	871	83½	78	706
1924	90	79½	1,701	93¼	88½	2,342
1925	96	90¼	2,209	97⅞	92½	1,335
1926	100⅞	95⅞	1,915	100	98	936
1927	100⅛	99⅛	949	101	98⅛	928
1928	101	98½	1,301	101	97	834
1929	100	95	636	99	94½	701

[1124]

EXHIBIT K

Sheet 2

HIGH, LOW, AND TOTAL SALES DEBTOR'S FIRST MORTGAGE 5% BONDS FOR EACH MONTH 1930-1939

1930

Month	High	Low	Sales 000
Jan	99	98	88
Feb	98¼	97	96
Mar	98¾	97⅞	624
Apr	99	98¼	310
May	98½	96	154
Jun	97⅛	95½	108
Jul	98½	96½	146
Aug	99¾	98	285
Sep	99⅝	98¾	425
Oct	99½	95½	140
Nov	97¾	90⅞	184
Dec	95¼	86⅞	239

1931

High	Low	Sales 000
97	92½	191
95	92	159
95	88⅞	130
90	75	132
83¼	74¾	142
76½	68¼	204
81	76	155
76½	65	95
65	57	143
63	53	132
60¾	48½	112
49½	30	224

1932

High	Low	Sales 000
46	28	206
47	39	204
49	35¼	204
36	30	99
30⅞	23	161
31	21⅞	191
35	26	125
52¾	33	555
44½	36	404
37	29⅜	139
34	30	178
30⅝	23½	259

1933

High	Low	Sales 000
29⅜	24	258
28¾	22	136
26⅞	23¾	15
29⅞	20½	279
29	27¼	593
44½	36½	645
58	43	911
51	31	1,440
42½	36	383
38½	33	200
33½	28	306
38	31¼	519

1934

Jan	39	30	1,384
Feb	46¾	32¼	2,135
Mar	42	34¼	1,194
Apr	40½	37½	921
May	38	34⅜	790
Jun	39⅜	36⅛	277
Jul	40½	34⅛	482
Aug	40	34⅛	230
Sep	40	34⅛	161
Oct	38	33⅜	261
Nov	37	33½	162
Dec	36	31	241

1935

37	31½	203
34	29	178
33	26	199
29¾	25	132
29½	27	105
34½	27½	325
34	31⅝	244
35	30½	178
31	28⅝	146
29	26	213
35	27½	848
38⅛	32¼	523

1936

43⅛	35¾	1,110
44	37	954
38¼	34	546
40¼	34	531
36	32⅛	441
36	33⅞	356
36	32½	309
36⅛	34	403
38¾	35	720
39⅞	36	515
36¼	33½	308
38	32¾	736

1937

40¼	35½	653
40¾	35½	601
40½	35⅝	598
37	34	513
35¼	32½	342
33½	28⅛	405
32½	29	267
32¼	29⅜	172
29¾	24	367
25½	16½	642
19¾	17	237
20	17⅝	572

1938

Month	High	Low	Sales 000
Jan	21	17	189
Feb	20½	18¾	123
Mar	20	15¼	222
Apr	17⅝	16	86
May	20	15¼	161
Jun	20	16	197

1939

High	Low	Sales 000
23½	18⅛	131
20	18	110
20	16	185
16½	13¾	70
15½	13¼	113
15¾	14	252

HIGH, LOW, AND TOTAL SALES
DEBTOR'S FIRST MORTGAGE 5% BONDS
FOR EACH MONTH 1930-1939

Month	1930 High	1930 Low	1930 Sales 000	1931 High	1931 Low	1931 Sales 000	1932 High	1932 Low	1932 Sales 000	1933 High	1933 Low	1933 Sales 000
Jan	99	98	88	97	92½	191	46	28	206	29⅜	24	258
Feb	98¼	97	96	95	92	159	47	39	204	28¾	22	136
Mar	98¾	97⅞	624	95	88⅞	130	49	35¼	204	26⅞	23¾	15
Apr	99	98¼	310	90	75	132	36	30	99	29⅞	20½	279
May	98½	96	154	83¼	74¾	142	30⅞	23	161	29	27¼	593
Jun	97⅛	95½	108	76½	68¼	204	31	21⅞	191	44½	36½	645
Jul	98½	96½	146	81	76	155	35	26	125	58	43	911
Aug	99¾	98	285	76½	65	95	52¾	33	555	51	31	1,440
Sep	99⅝	98¾	425	65	57	143	44½	36	404	42½	36	383
Oct	99½	95½	140	63	53	132	37	29⅜	139	38½	33	200
Nov	97¾	90⅞	184	60¾	48½	112	34	30	178	33½	28	306
Dec	95¼	86⅞	289	49½	30	224	30⅝	23½	259	38	31¼	519

Month	1934 High	1934 Low	1934 Sales 000	1935 High	1935 Low	1935 Sales 000	1936 High	1936 Low	1936 Sales 000	1937 High	1937 Low	1937 Sales 000
Jan	39	30	1,384	37	31½	203	43⅛	35¾	1,110	40¼	35½	653
Feb	46¾	32¼	2,135	34	29	178	44	37	954	40¾	35½	601
Mar	42	34¼	1,194	33	26	199	38¼	34	546	40½	35⅝	598
Apr	40½	37½	921	29¾	25	132	40¼	34	531	37	34	513
May	38	34⅜	790	29½	27	105	36	32⅛	441	35¼	32½	342
Jun	39⅜	36⅛	277	34½	27½	325	36	33⅞	356	33½	28⅛	405
Jul	40½	34⅛	482	34	31½	244	36	32½	309	32½	29	267
Aug	40	34⅛	230	35	30½	178	36⅛	34	403	32¼	29⅜	172
Sep	40	34⅛	161	31	28⅜	146	38¾	35	720	29¾	24	367
Oct	38	33¾	261	29	26	213	39⅞	36	515	25½	16½	642
Nov	37	33½	162	35	27½	848	36¼	33½	308	19¾	17	237
Dec	36	31	241	38⅛	32¾	523	38	32¾	736	20	17⅝	572

Month	1938 High	1938 Low	1938 Sales 000	1939 High	1939 Low	1939 Sales 000
Jan	21	17	189	23½	18⅛	131
Feb	20½	18¾	123	20	18	110
Mar	20	15¼	222	20	16	185
Apr	17⅝	16	86	16½	13¾	70
May	20	15¼	161	15½	13¼	113
Jun	20	16	197	15¾	14	252
Jul	20¼	17	211	18	15	49
Aug	26	18⅞	149	18	16¼	176
Sep	24¼	19	154	24	16	545
Oct	24½	20	283	22	20	195
Nov	26¾	21	363	21¼	18¾	244
Dec	23½	20	542	.....	.....	.....

EXHIBIT L

TOTAL OPERATING REVENUES OF THE WESTERN PACIFIC RAILROAD SYSTEM (‡) AND CLASS I RAILROADS OF THE UNITED STATES (†)

(Revenues shown in Thousands)

	Assumed "Normal" Period			
	Class I Railroads of United States (†)		The Western Pacific System	
	Revenues (000)	% of Assumed Normal Period	Revenues (000)	% of Assumed Normal Period
1923	$6,289,580	101.92%	$14,415	88.72%
1924	5,921,496	95.96	14,669	90.28
1925	6,122,509	99.22	15,899	97.85
1926	6,382,939	103.44	17,951	110.48
1927	6,136,300	99.44	18,306	112.67
5-Yr. Av.	$6,170,565	100.00%	$16,248	100.00%

After Assumed "Normal" Period

	Class I Railroads of United States (†)		The Western Pacific Railroad System (‡)				
	Revenues	% of Assumed Normal Period	W. P. Excel. N. C. E. Revenues	% of Assumed Normal Period	Add: for N. C. E. (*)	W. P. Incl. N. C. E. Revenues	% of Assumed Normal Period
	(000)		(000)		(000)	(000)	
1928	$6,111,735	99.04%	$19,422	119.53	$ —	$ —	— %
1929	6,279,521	101.76	20,097	123.69	—	—	—
1930	5,281,197	85.58	18,810	115.82	—	—	—
1931	4,188,343	67.87	14,688	90.40	165	14,853	91.41
1932	3,126,760	[illegible]	11,018	67.81	1,233	12,251	75.40
1933	3,095,404	50.16	10,711	65.92	1,491	12,202	75.10
1934	3,271,566	53.02	11,660	71.76	2,119	13,779	84.80
1935	3,451,929	55.94	12,117	74.58	2,290	14,407	88.67
1936	4,052,734	65.68	13,395	82.44	3,152	16,547	101.84
1937	4,166,069	67.52	14,492	89.19	3,426	17,918	110.28
1938	3,565,491	57.78	12,963	79.78	3,094	16,057	98.82

Source:—Class I revenues 1923-1937 taken from I. C. C. Statistics of Railways, and 1938 revenues taken from Bureau of Railway Economics statements.

‡The Western Pacific Railroad System is comprised of
The Western Pacific R. R. Co.,
Sacramento Northern Railway,
Tidewater Southern Railway Co.,
Deep Creek Railroad Company.

†Excludes Switching and Terminal Companies.

*Northern California Extension (NCE) placed in freight service Nov. 10, 1931.

EXHIBIT M

United States District Court
No. 26591
In re:
WESTERN PAC. R. R. CO.
INST. FIRST MORTGAGE BONDHOLDERS
COMMITTEE EXHIBIT NO. 1

NET RAILWAY OPERATING INCOME
THE WESTERN PACIFIC RAILROAD SYSTEM (A)
AND
CLASS I RAILROADS OF THE UNITED STATES (B)

	Assumed "Normal" Period			
	Class I Railroads of United States		Western Pacific System As Reported	
Year	Net Railway Operating Income	% of Assumed Normal Period	Net Railway Operating Income	% of Assumed Normal Period
	(000)		(000)	
1923	$ 961,955	90.11%	$3,064	85.90%
1924	973,837	91.22	3,024	84.78
1925	1,121,076	105.01	4,384	122.90
1926	1,213,090	113.63	4,727	132.52
1927	1,067,985	100.04	2,637	73.93
5-Yr Aver	$1,067,589	100.00%	$3,567	100.00%

After Assumed "Normal" Period

Year	Class I Railroads of United States		Western Pacific System As Reported	
	Net Railway Operating Income	% of Assumed Normal Period	Net Railway Operating Income	% of Assumed Normal Period
	(000)		(000)	
1928	$1,172,864	109.86%	$2,853	79.98%
1929	1,251,698	117.25	2,420	67.84
1930	868,879	81.39	1,569	43.99
1931	525,628	49.24	*71* (C)	—
1932	326,298	30.56	360	10.09
1933	474,296	44.43	805	22.57
1934	462,652	43.34	1,222	34.26
1935	499,819	46.82	933	26.16
1936	667,347	62.51	*3*	—
1937	590,204	55.28	*1,030*	—
1938	372,845	34.92	*1,307*	—

Assumed "Normal" Period

Year	Class I Railroads of United States		Western Pacific System Excluding Effect of Program Operating Expenses in 1927	
	Net Railway Operating Income	% of Assumed Normal Period	Net Railway Operating Income	% of Assumed Normal Period
	(000)		(000)	
1923	$ 961,955	90.11%	$3,064	82.70%
1924	973,837	91.22	3,024	81.62
1925	1,121,076	105.01	4,384	118.33
1926	1,213,090	113.63	4,727	127.58
1927	1,067,985	100.04	3,324	89.72
5-Y Aver	$1,067,589	100.00%	$3,705	100.00%

After Assumed "Normal" Period				
	Class I Railroads of United States		Western Pacific System Excluding Effect of Program Operating Expenses—Note D	
Year	Net Railway Operating Income	% of Assumed Normal Period	Net Railway Operating Income	% of Assumed Normal Period
	(000)		(000)	
1928	$1,172,864	109.86%	$4,159	112.25%
1929	1,251,698	117.25	3,495	94.33
1930	868,879	81.39	2,280	61.54
1931	525,628	49.24	.52 (C)	1.40
1932	326,298	30.56	304	8.21
1933	474,296	44.43	770	20.78
1934	462,652	43.34	1,384	37.35
1935	499,819	46.82	1,369	36.95
1936	667,347	62.51	1,582	42.70
1937	590,204	55.28	815	22.00
1938	372,845	34.92	31	.84

Source:—Class I Railroads' Net Railway Operating Income figures for 1923-1937 taken from I. C. C. Statistics of Railways, and 1938 figures taken from I. C. C. Statement No. M-125 for December, 1938, (issued subject to revision), being statement of selected income and balance sheet items.

General Notes:—Prior to January 1, 1936, rentals from lease of Western Pacific owned refrigerator cars to the Pacific Fruit Express Company have been credited to Hire of Equipment, but effective January 1, 1936, such rentals were credited to Non-Operating Income.

Italics denote red.

Note A:—The Western Pacific Railroad System is comprised of the following:

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

Note B:—Excludes switching and terminal companies.

Note C:—Northern California Extension (increasing miles of road operated by 111.81 miles) placed in freight service November 10, 1931.

Note D.—Extraordinary work executed during 1927-1932, inclusive, was characterized as the "Improvement Program". Such work executed during 1933-1935, inclusive, was not under a specific program. Work executed during 1936-1938, inclusive, was characterized as the "Rehabilitation Program".

Office of the President,
The Western Pacific RR Co.,
San Francisco, California,
January 4th, 1939.

.....
Counsel for Trustees.

.....
Counsel for Institutional Bondholders Committee.

.....
Counsel for The Western Pacific Railroad Corporation.

[Endorsed]: Filed 1/22/1940. Walter B. Maling, Clerk. By C. W. C., Deputy Clerk. [1127]

EXHIBIT N

MEMORANDUM OF CORRECTIONS AND CHANGES IN "STIPULATION AS TO FACTS NOT IN DISPUTE".

[Note: This Exhibit has been omitted because corrections listed therein have been made in the "Stipulation as to Facts Not in Dispute" and to set out here would be needless duplication.]

Wednesday, December 20, 1939.

Before Hon. A. F. St. Sure, District Judge.

26591—In re Western Pac. R. R. Co. Dr.

PRE-TRIAL CONFERENCE

The parties being present as heretofore the pre-trial conference was resumed.

Robert T. Swain, Esq. advised the court that the various counsel had agreed on a stipulation as to the facts not in dispute and presented the said stipulation to the Court. Ordered said stipulation filed & made a part of the record.

After hearing the attorneys It is ordered that this case be set for January 22nd, 1940, for hearing, on objections to plan of reorganization certified to the court by the Interstate Commerce Commission.

[1134]

[Title of District Court and Cause.]

ORDER FIXING A DATE FOR HEARING PARTIES IN INTEREST IN SUPPORT OF OR IN OPPOSITION TO OBJECTIONS FILED HEREIN TO THE PLAN OF REORGANIZATION CERTIFIED BY THE INTERSTATE COMMERCE COMMISSION; FIXING A DATE FOR HEARING ON PETITIONS FOR ALLOWANCE OF COMPENSATION OR EXPENSES FILED HEREIN; AND PROVIDING FOR THE GIVING OF DUE NOTICE TO ALL

PARTIES IN INTEREST OF SAID HEARING ON SUCH OBJECTIONS TO THE PLAN OF REORGANIZATION AND OF SAID HEARING ON SAID PETITIONS.

This Court having made and entered its order of November 8, 1939, fixing the time within which objections to the Plan of Reorganization certified to this Court by the Interstate Commerce Commission may be filed herein and fixing the time within which petitions for allowance of compensation and expenses may be filed herein, and [1135]

It Appearing that objections to such Plan of Reorganization and claims for equitable treatment have been filed herein by various parties in interest pursuant to said order of November 8, 1939, and

It Further Appearing that petitions for allowance of compensation for services rendered or expenses (including reasonable attorneys' fees) incurred have been filed herein by various parties pursuant to said order,

Now, Therefore, it is hereby

Ordered:

1. That the hour of 10:00 A. M., on Monday, January 22, 1940, is hereby fixed as the time, and the court room of this Court in the United States Post Office and Court House Building in the City and County of San Francisco, State of California, as the place, for hearing all parties in interest in support of, or in opposition to, any and all objections to said Plan of Reorganization and any and all claims for equitable treatment and any and all

petitions for allowance of compensation and expenses (including reasonable attorneys' fees) that have been filed herein pursuant to said order of November 8, 1939, provided, however, that such hearing may be adjourned from time to time without further notice, if the Court shall so direct.

2. That T. M. Schumacher and Sidney M. Ehrman, the Trustees of the properties of the Debtor herein, shall forthwith give notice of the entry of this order and of the provisions hereof (a) by mailing a copy of this order by registered mail, postage prepaid, to the Debtor, the Interstate Commerce Commission, The Western Pacific Railroad Corporation, each and every party whose appearance has been filed herein [1136] or who is a party of record in this reorganization proceeding, each and every other party to whom notices have heretofore been given, and each and every trustee named in any mortgage or other instrument securing any of the Debtor's bonds, notes, or other obligations, including obligations of guaranty, and (b) by publishing a notice substantially in the form of Schedule A hereto in The Wall Street Journal (Pacific Coast Edition) and The Recorder, two newspapers of general circulation published in the City and County of San Francisco, State of California, and in The New York Times and The New York Sun, two newspapers of general circulation published in New York City, New York, such publications to be made once in each of such four newspapers not later than January 3, 1940.

Said Trustees shall file in these proceedings proper proof of the serving of copies of this order and of the publication of said notice as above directed.

Dated, December 21, 1939.

A. F. ST. SURE,
Judge, United States District Court for the Northern District of California, Southern Division. [1137]

SCHEDULE A.

(Form of Notice.)

[Title of District Court and Cause.]

To Holders of Securities of the Western Pacific Railroad Company and All Parties in Interest in the Above Entitled Proceedings:

Pursuant to an order of the Court entered December 21, 1939, in the above entitled proceeding, notice is hereby given that:

The hour of 10:00 A. M., on Monday, January 22, 1940, has been fixed as the time, and the court room of the Honorable A. F. St. Sure, Judge, of the above entitled court, in the United States Post Office and Court House Building, in the City and County of San Francisco, State of California, as the place, for hearing all parties in interest in support of, or in opposition to, any and all objections

to the Plan of Reorganization certified to the Court by the Interstate Commerce [1138] Commission and any and all claims for equitable treatment that have been filed herein pursuant to the Court's order of November 8, 1939, and any and all petitions for allowance of compensation and expenses (including reasonable attorneys' fees) that have been filed herein pursuant to said order, provided, however, that such hearing may be adjourned from time to time without further notice.

By order of the Court.

Dated: December 21, 1939.

T. M. SCHUMACHER
SIDNEY M. EHRMAN
Trustees of the properties of The Western Pacific Railroad Company.

[Endorsed]: Filed Dec. 21, 1939. [1139]

[Title of District Court and Cause.]

ORDER

It Appearing that objections to the Plan of Reorganization certified to this Court by the Interstate Commerce Commission and claims for equitable treatment were filed herein by various parties pursuant to the Court's order of November 8, 1939, fixing the time within which objections to said Plan of Reorganization may be filed; and

It Further Appearing that thereafter, pursuant to Rule 16 of the Rules of Civil procedure for the District Courts of the United States, this Court directed the attorneys for the parties in interest to appear before it on December 18, 1939, at 10 o'clock A. M. for a Pre-Trial Conference [1140] to consider the following objectives:

(1) The simplification of the issues;

(2) The ascertainment of what material facts exist without substantial controversy and what material facts are actually and in good faith controverted;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The determination of such other matters as may aid in the expedition and disposition of the cause;

And It Further Appearing that at the time so appointed such Pre-Trial Conference was held and that, in the course thereof, there was filed with the Court a written Stipulation as to the facts not in dispute, signed by the attorneys for the Debtor, the Institutional First Mortgage Bondholders' Committee, Samuel Armstrong and Crocker First National Bank of San Francisco, Trustees under the Indenture securing the Debtor's First Mortgage Bonds, The Western Pacific Railroad Corporation, A. C. James Co., Irving Trust Company, Trustee under the Indenture securing the Debtor's General

and Refunding Mortgage Bonds, Reconstruction Finance Corporation, Railroad Credit Corporation, and The Western Realty Company, subject to the provision of said Stipulation that "any party may call witnesses and offer any proof for the purpose of proving such additional facts as such party may see fit, free from the objection that such additional facts tend to limit, control or qualify facts herein set forth";

Now, Therefore, the Court having by its Order of December 21, 1939, fixed January 22, 1940, as the date for hearing all parties in interest in support of, or in opposition to, objections to said Plan of Reorganization and claims for equitable treatment and provided for the giving of due notice to all parties in interest of said hearing, [1141]

It Is Hereby Ordered, pursuant to and in conformity with said Rule 16 of said Civil Rules of Procedure, that the issues for trial at said hearing on January 22, 1940, shall be the issues raised and presented by said objections to said Plan of Reorganization and by said claims for equitable treatment.

Dated December 29, 1939.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Dec. 29, 1939. [1142]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY
INTRODUCED ON
MONDAY, JANUARY 22, 1940 [1143]

Counsel Appearing:

For T. M. Schumacher and Sidney M. Ehrman:
Sidney M. Ehrman, Esq.,
Allan P. Matthew, Esq.,
John O. Moran, Esq.

For The Western Pacific Railroad Company:
F. C. Nicodemus, Jr., Esq., of Pierce & Greer,
40 Wall Street, New York.
C. W. Dooling, Esq., Mills Building,
San Francisco.

For Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees of First Mortgage:
Donald M. Gregory, Esq., of Messrs. Chickering & Gregory; Milbank, Tweed, Hope & Webb, by
Orville Wood, Esq., 15 Broad Street, New York.

For Institutional First Mortgage Bondholders Committee:
Herbert Clark, Esq. of Morrison, Hohfeld, Foerster, Shuman & Clark, and
Cravath deGersdorff, Swaine & Wood, by
Littleton Groom, Esq., and
Robert T. Swaine, Esq.,
15 Broad Street, New York.

For Irving Trust Company, Trustee, General and Refunding Mortgage:
Felix T. Smith, Esq., of Pillsbury, Madison & Sutro, and
Davies, Auerbach, Cornell & Hardy,
By H. C. McCollum, Esq.,
1 Wall Street, New York. [1146]

For A. C. James Co.:
Garret W. McEnerney, Esq., and
Andrew F. Burke, Esq., and
Whitman, Ransom, Coulson & Goetz,
by Horace E. Whiteside, Esq., and
Robert E. Coulson, Esq.,
40 Wall Street, New York.

For The Western Pacific Railroad Corporation:
M. C. Sloss, Esq., and E. D. Turner, Jr.,
of Sloss, Turner & Finney.

For Reconstruction Finance Corporation:
James S. Moore, Jr., Esq.,
of Messrs. Brobeck, Phleger & Harrison,
San Francisco, and
Cassius M. Clay, Esq., of Washington, D. C.

For Railroad Credit Corporation:
Edward G. Buckland, Esq.

For The Western Realty Company:
Leroy R. Goodrich, Esq., Oakland, California.

The Court: Gentlemen, I am going to request the Court to call the roll of attorneys this morning, so that the record may show who is here.

The Clerk: Who is appearing for the Trustees?

The Court: The Trustees: Who is appearing for Mr. Schumacher and Mr. Ehrman? Allan P. Matthew and John O. Moran?

Mr. Matthew: Yes, Your Honor.

The Clerk: Is Mr. Ehrman here?

Mr. Matthew: He is.

The Clerk: Western Pacific Railroad Company?

Mr. Nicodemus: F. C. Nicodemus, Jr. and C. W. Dooling.

The Clerk: Crocker First National Bank of San Francisco?

Mr. Wood: Orville W. Wood and Donald M. Gregory.

The Clerk: Institutional First Mortgage Bondholders Committee?

Mr. Swaine: Herbert W. Clark, Littleton Groom and Robert T. Swaine. [1147]

The Clerk: Irving Trust Company?

Mr. Smith: Felix T. Smith and H. C. McCollum.

The Clerk: A. C. James Company?

Mr. Coulson: Robert E. Coulson, Horace E. Whiteside, and Andrew F. Burke.

The Clerk: Western Pacific Railroad Corporation?

Mr. Sloss: M. C. Sloss and E. D. Turner, Jr.

The Clerk: Reconstruction Finance Corporation?

Mr. Clay: C. M. Clay, and James S. Moore.

The Clerk: Railroad Credit Corporation?

Mr. Buckland: Edward G. Buckland.

The Clerk: Western Realty Company?

Mr. Goodrich: Leroy R. Goodrich.

The Clerk: That is all, your Honor.

The Court: You may proceed, gentlemen.

Mr. Nicodemus: Mr. Elsey, please?

CHARLES ELSEY,

Called by the Debtor; Sworn.

The Clerk: State your name to the Court, please.

The Witness: Charles Elsey.

Mr. Nicodemus: Q. Mr. Elsey, are you President of the Western Pacific Railroad Company?

A. Yes, sir.

Q. And you have testified in these proceedings when the case was pending in the Interstate Commerce Commission? A. Yes, sir.

Q. How long have you been connected with the Western Pacific Railroad Company?

A. Since 1907.

Q. 1907. At the Pre-trial Conference in December, Mr. Elsey, a stipulation of facts was signed by counsel representing all of the parties to the proceeding. Did you, before that stipulation was signed, arrange to have it checked for accuracy by the or-
[1148] ganization of the Western Pacific Railroad Company? A. Yes, sir.

Q. Will you state what the checking process was?

(Testimony of Charles Elsey.)

A. We were provided with a draft of the stipulation, which we checked. It was then put in final form and filed, with the understanding that it would be checked at a later date.

Q. That is, you checked the preliminary draft of the stipulation? A. Yes, sir.

Q. Then, after the stipulation was signed and filed, you re-checked it? A. Yes, sir.

Q. What was the result of the re-check?

A. The re-check—a few minor corrections were found, and we have a memorandum to present here of the corrections.

Q. I understand that the stipulation was turned over to the various departments and the figures used in the stipulation were checked against your corporate records; is that correct? A. Yes, sir.

Q. And your organization were instructed to check the entire stipulation for accuracy?

A. Yes, sir.

Q. Now, you say you have a memorandum of certain corrections that were made after the original stipulation was filed? A. Yes, sir.

Q. Are you now prepared to adopt the stipulation of fact as part of your evidence to be certified back to the Interstate Commerce Commission?

A. Yes, sir.

Q. Subject to the corrections set forth in the memorandum that you just mentioned?

A. That is correct.

(Testimony of Charles Elsey.)

Mr. Nicodemus: If the Court please, we would like to offer the stipulation in evidence as part of Mr. Elsey's testimony, and also the memorandum of corrections which he now submits to the Court.

The Court: Is there any objection? So ordered. That will be Petitioner's Exhibit 1.

(The documents referred to were marked "Petitioner's Exhibit [1149] 1."

Mr. Nicodemus: Q. Did you, at our request, Mr. Elsey, have photostatic copies made of the tabulated statement showing the existing capitalization of the Debtor company as of January 1, 1939, and the revised capitalizations proposed by the Interstate Commerce Commission in its plan, and the revised capitalizations proposed by certain of the parties to this proceeding?

A. Yes, I had that statement checked.

Q. You had that checked by the same process?

A. Yes, sir.

Q. Have you a photostatic copy of that available? A. Yes, sir.

Mr. Nicodemus: I should like to offer the tabulated statement referred to by the witness. We have copies available for disposition to counsel. I may say, that was done originally by a process that cannot be used in evidence, because it is not durable, so we had it photostated.

The Clerk: Petitioner's Exhibit No. 2.

The Court: Petitioner's Exhibit No. 2?

(Testimony of Charles Elsey.)

The Clerk: Yes, your Honor.

The Court: Have you got an extra one?

Mr. Nicodemus: Yes, indeed, I have an extra one for the Court.

(The document referred to was marked "Petitioner's Exhibit 2.")

Mr. Nicodemus: I will have occasion, your Honor, to refer to this very frequently, and I think maybe this larger copy will be more useful to the Court.

Q. Mr. Elsey, at the time of the oral argument before the Interstate Commerce Commission in January, Commissioner Meyer inquired about the paired track operation in Nevada; that is the joint operation of the Southern Pacific and Western Pacific over the paired track. There was nothing in the record at that time on that subject, and I therefore would like to supplement the record by inquiring what the character of that operation is. Will you [1150] make a brief statement?

A. The tracks of the Southern Pacific and Western Pacific in Nevada are paired for a distance of approximately 178 miles. The Southern Pacific and Western Pacific use the Western Pacific tracks for all eastbound traffic, and the Southern Pacific and Western Pacific use the Southern Pacific tracks for all westbound business.

Q. How are the expenses of operation divided?

A. The expenses of operation are diveded on a car-mile basis.

Q. Will you explain precisely what you mean by "car-mile basis"?

(Testimony of Charles Elsey.)

A. The expenses are divided as to number of cars of the two companies operating over the paired track.

Q. Can you give us approximately how the costs have been divided over a reasonable period of time as between the two companies?

A. As a general proposition, about 75-25.

Q. Can you break that up by years?

A. Yes, sir.

Q. Between 1924 and 1939? A. Yes, sir.

Q. Will you read that rapidly into the record?

A. Would you like all of the years?

Q. Yes.

A. The year 1924, Southern Pacific 77.17; Western Pacific 22.83. 1925, Southern Pacific 77.40; Western Pacific 22.60. 1926, Southern Pacific 77; Western Pacific 23. 1927, Southern Pacific 77.03; Western Pacific 22.97. 1928, Southern Pacific 77.48; Western Pacific 22.52. 1929, Southern Pacific 75.92; Western Pacific 24.08. 1930, Southern Pacific 73.20; Western Pacific 26.80. 1931, Southern Pacific 72.61; Western Pacific 27.39. 1933, Southern Pacific 72.29; Western Pacific 27.71. 1934, Southern Pacific 72.78; Western Pacific 27.22. 1935, Southern Pacific 71.43; Western Pacific 28.57. 1936, Southern Pacific 72.39; Western Pacific 27.61. 1937, Southern Pacific 72.46; Western Pacific 27.54. [1151] 1938, Southern Pacific 72.69; Western Pacific 27.31. 1939, Southern Pacific 72.78; Western Pacific 27.22.

Mr. Nicodemus: Q. Now, Mr. Elsey, from the figures, as I understand them, the Southern Pa-

(Testimony of Charles Elsey.)

cific started out with approximately 77 per cent. of the business against 22 per cent. for the Western Pacific, and over that 15-year period, the percentage of the Southern Pacific has progressively decreased, and the percentage of the Western Pacific has progressively increased, is that correct?

A. Yes, sir.

Q. But even to-day, the Southern Pacific is moving approximately three cars to one car of the Western Pacific? A. Yes, sir.

Q. Mr. Elsey, the Commission's plan that is under consideration here to-day provides for mandatory capital fund of $500,000. Do you think it necessary, year in and year out, to spend $500,000 on capital account? A. Yes, sir.

Q. You do? A. What is that?

Q. You do? A. Yes, sir.

Q. That is based on your past experience?

A. Yes, sir.

Q. What is the present condition of the Western Pacific with reference to its ability to efficiently handle the traffic tendered to it, or to handle a substantially increased traffic?

A. The physical condition of the property is better than it has ever been in its history.

Q. Better than it has ever been in its history?

A. Yes, sir.

Mr. Nicodemus: That is all I require from Mr. Elsey.

(Testimony of Charles Elsey.)

Mr. Swaine: May I ask a question on cross-examination?

Mr. Nicodemus: You certainly may.

Cross Examination

Mr. Swaine: Q. Mr. Elsey, paragraph 157 of the Stipulation says: "Annexed hereto as Exhibit L is a schedule showing ratios of annual gross revenues of Debtor and its subsidiaries for the [1152] years 1923 to 1938, inclusive, and annual gross revenues of Class 1 carriers of the United States for the same years, with their respective average gross revenues for the years 1923 to 1937, inclusive and" —and this is the language I particularly want to call your attention to—"and showing the effect of the construction of the Northern California extension, as prepared by officers of the Debtor's Trustees;" and so forth.

That exhibit, your remember, do you? You remember the exhibit that is referred—this is Exhibit L. A. Yes, sir.

Q. That was prepared under your supervision?

A. That is correct.

Q. Now, that does not attempt separately to state gross revenues arising from the Northern California extension, does it?

A. It shows the revenues separately.

Q. Shows what?

A. It shows the revenues separately.

Q. It shows gross receipts?

(Testimony of Charles Elsey.)

A. Yes, sir.

Q. What are those receipts that are there shown? How did you arrive at that figure?

A. The auditor prepared the figures.

Q. Yes, but you say "add for Northern California extension." How did you arrive at the figure which you there added for Northern California extension?

A. The auditor simply took all of the waybills showing the cars that went over the Northern California extension and computed the revenues on those particular cars.

Q. Did you take the entire revenue on a car that was on the Northern California extension, or did your pro-rate it in some way?

A. As I understand it, he took the entire revenues; not only the revenues that were added on that particular car while it was on the Northern California extension, but also the main line of the system.

Q. That is what I wanted to get at. So that if the car went 20 miles on the Northern California extension, and had gone all the way from Salt Lake City down to the junction point, the entire [1153] revenue from that car, on these figures, is under that "add for Northern California extension"?

A. That is correct.

Q. I just wanted to make that clear, because I was afraid there was a little misdescription. Now, the stipulation, in the next succeeding paragraph,

(Testimony of Charles Elsey.)

says: "A schedule is being prepared showing ratios of annual net operating income of Debtor and its subsidiaries for the years 1923 to 1938, inclusive, and the annual net railway operating income of Class 1 carriers of the United States for the same period, with their respective average net railway operating income for the years 1923 to 1937, inclusive." You have previously had some language pointed out to you referring to showing the effect, of construction of the Northern California extension, as prepared by officers, and now have you prepared a study of the annual net railway operating income of the Debtor and its subsidiaries for the year 1923 to 1938, inclusive, and also a statement of the annual net railway operating income of the Class 1 carriers of the United States for the same years, with their respective average net railway operating income for the years 1923 to 1937, inclusive? A. Yes, sir.

Q. Not giving any effect to Northern California extension? A. That is true.

Q. Is it true that the reason you could not literally do so, as stated in the stipulation, is that there is no way of separately determining what the net railway operating income of the Northern California extension is without going into very elaborate accounting? A. That is correct.

Q. I show you a document marked Exhibit M, and ask you whether that is a correct statement of the annual net railway operating income of the Debtor and its subsidiaries for the years 1923 to

(Testimony of Charles Elsey.)

1938, inclusive, and also a correct statement of the annual net railway operating income of Class 1 carriers of the United States [1154] for the same years, with their respective average net railway operating income for the years 1923 to 1937, inclusive? A. Yes, sir.

Q. And does that exhibit also state the percentages of the later period and earlier period in each case, that is, in the case of Western Pacific and in the case of all Class 1 carriers?

A. That is correct.

Mr. Nicodeums: I would like to offer this study in lieu of the study that was contemplated by the stipulation, that exact study having become impossible because of the accounting difficulty that Mr. Elsey has testified to.

Mr. Coulson: May I ask a question on the schedule?

Mr. Nicodemus: Yes.

Mr. Coulson: Q. Mr. Elsey, in this document marked Exhibit M, that you have been looking at, this comparison—it is characterized as a comparison of net railway operating income. Is the net operating income, as shown for Class 1 carriers, generaliy on a comparable basis with the net railway operating income of Western Pacific System?

A. We have been figuring on that, Mr. Coulson, for the last three or four days, but we have not as yet completed that study.

(Testimony of Charles Elsey.)

Q. You testified, as to Exhibit L, which covers "Gross Revenues of the Western Pacific in comparison with the Gross Revenues of Class 1 Carriers." Now, those were, I take it, on a comparable basis, from the testimony you gave here?

A. Yes, sir.

Q. What different factor goes into this Exhibit M, so-called, which Mr. Swaine has tendered, that does not exist as to the others which have been the subject of your present study?

A. Well, there is a matter of hire of equipment, and also of joint facility rents. There is a question there as to whether they are on a comparable basis; as I said before, we have not completed [1155] that study yet.

Q. Can you explain to the Court just how this item of joint facility rents and equipment rents affects the comparability of the figures?

A. So far as joint facility rents and so far as the matter of Class 1 railroads are concerned, they are payable to one another, and what we are figuring on is as to whether those that wash themselves out, so far as the Class 1 railroads of the United States are concerned, where, so far as the Western Pacific figures are concerned, they are included in that figure that arrives at net railroad operating income. And the same way for per diem. The per diem paid between various Class 1 carriers would have a tendency to wash itself out, while they are still shown in the figures of the Western Pacific,

(Testimony of Charles Elsey.)

but, as I said before, we have not completed our study on it, and as to just whether or not that is a correct statement on it, I am not prepared to state at this time.

Q. Then you are not prepared to state with any definiteness to the Court that the Class 1 carrier figures are comparable to Western Pacific figures as to this net railway operating income item?

A. Yes, sir.

Mr. Swaine: Q. Now, just one second, you have stated to the Court, and you do state to the Court, that those figures are the net operating income as stated in the reports of the Class 1 carriers to the Interstate Commerce Commission? A. Yes.

Q. Your only question is whether there may not be some different equipment situations in the different roads than there are in your road, and some joint facility rentals, and one thing and another? In other words, the operating situation of those railroads, may be slightly different from yours. Nevertheless, the income is that stated to the Interstate Commerce Commission for all the Class 1 roads, isn't it? A. Yes, sir.

Mr. Coulson: Q. Mr. Elsey, is the problem which you are still [1156] studying one connected merely with differences in situation between the railroads, as Mr. Swaine has indicated, or the basic question of whether, in the consolidation of all the Class 1 railroads, these inter-company items of equipment rent and joint facility rents, have been eliminated? Which is the question?

(Testimony of Charles Elsey.)

A. The question is whether they are on a comparable basis.

Mr. Coulson: Your Honor, I object to the admission of this schedule at this time, and until we know whether the figures are comparable. We don't regard this comparison of net operating railway income as significant for any issue before the Court in the sense that the movement of gross traffic on this railroad, in COMPARISON to other railroads of the country, is significant, but we do object to this statement of any railway operating income going into the record until it is quite clear that the comparison is based on comparable figures. You could get a comparison of net revenues from railway operations which would leave out equipment rents and joint facility rents, and we would be glad to see that admitted without our objection, but we do object to this statement in its present form.

Mr. Swaine: Your Honor, if this is not to be admitted, then the schedule, Exhibit M, should come out—Exhibit L—I should say—was attached to the stipulation at Mr. Coulson's request, as showing the ratio of Western Pacific's gross revenues and gross revenues of Class 1 carriers, and there is the same possibility of discrepancy there. Oh, yes, you have got questions of equipment that may be among—

The Court (Interrupting): I suppose those discrepancies will be slight, and as you said, Colonel, not significant anyway.

(Testimony of Charles Elsey.)

Mr. Coulson: The whole exhibit, to us, looks significant.

The Court: Why take up time arguing about it? Let the objection be overruled. [1157]

Mr. Coulson: With Mr. Elsey's explanation on the record.

Mr. Swaine: You may call it the same exhibit.

The Court: Do I understand that you are now making a study of some kind, Mr. Elsey?

The Witness: Yes, we are making a study now.

Q. Do you propose to prepare another exhibit to be introduced in evidence?

A. Well, that remains to be seen, depending upon what the result of this study is, Judge.

Q. Well, if you can throw any further light upon the situation, please do it, will you.

A. Yes, sir.

Mr. Swaine: Q. Mr. Elsey, in paragraph 93 of the stipulation of facts, there is a provision—

The Court (interrupting): Just one minute; the Clerk seems in a quandry; he doesn't know what to call this exhibit M. Intervenor'? Petitioner's? Who offered it?

Mr. Swaine: I take it we are all intervenors, here, aren't we, except the Debtor, so it would be Institutional Bondholders Committee Exhibit 1.

The Court: Now, is that true as to the other exhibit? I have them marked already, Petitioner's Exhibit 1 and Petitioner's Exhibit No. 2.

(Testimony of Charles Elsey.)

Mrs. Swaine: Those are Debtor's exhibits. I take it that everybody but the debtor is an intervenor here, and there are numerous intervenors, and it may be that there will be exhibits offered by other intervenors, so I suggest that this be the Institutional Bondholders Committee Exhibit No. 1. It is, I think, described as Exhibit M in the stipulation, with the modification which I brought out in the examination of Mr. Elsey.

The Court: We will call it Committee's Exhibit No. 1 and Committee's Exhibit No. 2.

The Clerk: Yes, your Honor. [1158]

(The documents referred to were marked Committee's Exhibits Nos. 1 and 2.)

Mr. Wood: Q. Mr. Elsey, paragraph 93 of the

Mr. Swaine: Those are Debtor's exhibits. I take stipulation recites that a schedule is being prepared relating to equipment, and that when that schedule has been identified by the signature of counsel for the Debtor's Trustees, for the first mortgage trustees, and for the refunding mortgage trustee, it may be filed with the Court, and when so filed, shall constitute part of this stipulation, as Exhibit G. I have in my hand a document which purports to be Exhibit G to the stipulation, which has been signed by Mr. Matthew, for the Debtor's Trustees, and by counsel for the respective Mortgage Trustees; was that document prepared in your office under your supervision?

A. Yes, sir, prepared in the accounting department of our office.

(Testimony of Charles Elsey.)

Q. Are you prepared to state that the facts and data contained in that document are correct, according to the records of Western Pacific?

A. Yes, sir.

Mr. Wood: I should like to offer this as Exhibit G to the stipulation, your Honor.

The Court: Exhibit G to the stipulation?

Mr. Wood: I may say that other copies of this are available and will be distributed later.

The Court: Who is offering this?

Mr. Wood: This is First Mortgage Trustees', your Honor; it is a part of the stipulation.

The Court: Very well.

(The document was marked "Exhibit G of the First Mortgage Trustees to the Stipulation.")

Mr. Wood: In paragraph 127 of the stipulation, it is recited that a schedule is being prepared relating to certain items in the Debtor's miscellaneous physical property account, and that [1159] when that schedule has been identified in a similar manner, it may be filed with the Court, and, when so filed, shall constitute a part of the stipulation as Exhibit H.

Q. I show you a document marked Exhibit H, with schedules and maps annexed, which has been signed by Mr. Matthew, and by counsel for the mortgage trustees; was that prepared in your office under your supervision?

A. It was prepared in the office of our Chief Engineer.

(Testimony of Charles Elsey.)

Q. Are you prepared to say that the data and facts contained in that document are correct according to the records?

A. I have been advised of that by our chief engineer, yes, sir.

Q. So far as you, personally, know, everything in there is correct? A. Yes, sir.

Mr. Wood: I offer this as Exhibit H to the stipulation, First Mortgage Trustees'.

The Clerk: First Mortgage Trustees' Exhibit H to the stipulation.

(The document was marked "First Mortgage Trustees' Exhibit H to the stipulation.")

Mr. Wood: Q. Mr. Elsey, I would like to ask you a question regarding two parcels which are shown on Map B annexed to Exhibit H. To refresh your recollection, I will show you the map. They are marked "Parcel 253-A and Parcel 261-A," in the area between Illinois street on the east, Iowa street on the west, Army street on the north, and Tulare on the south. You are familiar with the circumstances under which those parcels were required, and the purpose for which they were acquired?

A. Yes, sir.

Q. Schedule B, sheet 1 of the exhibit, and Schedule D, sheet 2 of the exhibit, shows that these parcels were purchased in 1932, one from M. L. and J. A. Bergero, and the other from Robert and Gertrude Ellis, and that they were not financed with deposits of [1160] cash under the First Mortgage. Mr. Elsey,

(Testimony of Charles Elsey.)

at the time these parcels were acquired in 1932, for what purpose was the land owned by the railroad company in that adjacent area being held by the railroad company? A. That is, in 1932?

Q. In 1932. For what purpose were they held, the lands in that immediate area?

A. Held for industrial purposes.

Q. Had your Engineering Department, about that time, prepared maps or drawings showing a projected lay-out for industrial tracks in that area?

A. We worked out several track lay-outs to serve that particular district.

Q. Now, at the time that you acquired these parcels in 1932, for what purpose were they intended to be used? A. For industrial purposes.

Q. You mean for the same purpose as the other land in the same vicinity, adjacent?

A. In that particular area, yes sir.

Mr. Wood: Thank you.

Mr. McCollum: At my request, have you prepared, or had prepared, certain exhibits, showing complete figures for the year 1939, eleven months actual, plus an estimate for December, showing various facts to which I will later refer?

A. You mean as to gross operating revenues of the Western Pacific System?

Q. That and various other items to which I will call your specific attention in a moment.

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. And have those statements been prepared, and to the best of your knowledge are they correct?

A. Yes, sir.

Q. I show you a statement entitled "Combined Railway Operating Revenues," which has the heading at the top, "1-a", Exhibit 1 of the papers to which I have referred.

A. You refer to the statement headed "Combined Railway Operating Revenues"?

Q. Yes. A. Yes.

Mr. McCollum: May I have that marked as Irving Trust Company [1161] Exhibit 1-A?

The Clerk: 1-A.

(The document was marked "Irving Trust Company Exhibit 1-A.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT NO. 1-A.

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECTARY.

1. (a)—Combined Railway Operating Revenues
The Western Pacific Railroad Company
– Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company
(All Inter-Company Items Eliminated.)

Period January 1 to November 30, 1939 and estimate for the month of December, 1939.

Period	Freight	Passenger	Other	Total
Jan. 1 to Nov. 30, 1939	$15,467,873	$ 958,584	$440,355	$16,866,812
Dec. 1939 Est.	1,348,300	53,700	30,600	1,432,600
Total Year	$16,816,173	$1,012,284	$470,955	$18,299,412

[Endorsed]: United States District Court. No. 26519 Western Pac. R. R. Co., Irving Trust Co., Exhibit No. 1-A. Filed 4-22-1940. Walter B. Maling, Clerk.

Mr. Swaine: May we have copies of those? We haven't seen them.

Mr. McCollum: I will give them to you later. Do you want to see them before they go in?

Mr. Swaine: Yes, I would like to see whether I have any objecteion to their going in.

(Testimony of Charles Elsey.)

The Court: What did you mark them?

The Clerk: He asked to have it marked Irving Trust Company's Exhibit 1-A.

The Court: 1-A? Is that to be a part of the stipulation of facts?

Mr. McCollum: No, sir, this is a court exhibit.

The Court: I was wondering why you asked to have it marked 1-A.

Mr. McCollum: Really, because it is a part of various answers to the question on my memorandum, which is called "1", and it also has a heading "1-A".

The Court: Very well.

Mr. McCollum: Q. Have you also a copy of a statement listed as "1-B", entitled "Combined Income Available for Interest Charges"?

A. Yes, sir.

Mr. McCollum: I should like to have that introduced as Irving Trust Company's Exhibit 1-B.

Mr. Swaine: May I ask, Mr. McCollum, what you are doing? Merely taking the ten months attached to the stipulation and carrying it through 1939 by adding November actual and an estimate for December?

Mr. McCollum: Yes.

Mr. Swaine: I have no objection to that. [1162]

(The document was marked "Irving Trust Company's Exhibit 1-B.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT NO. 1-B

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (b)—Combined Income Available for Interest Charges
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company
(All Inter-Company Items Eliminated)

Period January 1 to November 30, 1939 and estimate for the month of December, 1939.

January 1 to November 30, 1939	$1,354,828
December 1939—Estimated	49,631
Total Year	$1,404,459

[Endorsed]: United States District Court. No. 26591. In re Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-B. Filed 1/22/1940. Walter B. Maling, Clerk. By [illegible], Deputy Clerk.

Mr. McCollum: Q. The next statement is marked "1-C," "Combined Income Available for Interest Charges," and so forth. A. Yes sir.

Q. Is that one of the statements to which you have referred? A. Yes.

Mr. McCollum: I would like to have that introduced as Irving Trust Company's Exhibit 1-C.

(The document was marked "Irving Trust Company's Exhibit 1-C.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT NO. 1-C

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (c)—Combined Income Available for Interest Charges Adjusted to Exclude Charge to Income for Amortization of Discount on First Mortgage Bonds of The Western Pacific Railroad Company.

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company
(All Inter-Company Items Eliminated)

Period January 1 to November 30, 1939 and estimate for the month of December 1939.

January 1 to November 30, 1939	$1,478,946
December 1939—Estimated	60,914
Total Year	$1,539,860

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-C. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. Likewise, there is a statement marked 1-D, "Gross Revenues Accruing to Western Pacific Railroad Company from freight originated and terminated on and passing over the Northern California Extension." Is that one of the statements to which you refer? A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. McCollum: May I have that marked as Irving Trust Company Exhibit 1-D?

(The document was marked "Irving Trust Company's Exhibit 1-D.")

IRVING TRUST CO. EXHIBIT NO. 1-D

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (d)—Gross Revenues Accruing to The Western Pacific Railroad Company from Freight Originated and Terminated On and Passing Over the Northern California Extension:

Period January 1 to November 30, 1939	$3,194,007
Month of December 1939—Estimated	284,563
Total Year	$3,478,570

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-D. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. The next statement is marked "1-E," "Income Available for Interest Charges, Tidewater Southern Railroad Company." Is that one of the statements to which you have referred? A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. McCollum: I would like to have that marked as Irving Trust Company Exhibit 1-E.

(The document was marked "Irving Trust Company's Exhibit 1-E.")

IRVING TRUST CO. EXHIBIT NO. 1-E

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (e)—Income Available for Interest Charges

Tidewater Southern Railway Company

Period January 1 to November 30, 1939 and estimate for the month of December, 1939.

January 1 to November 30, 1939		$152,832
December 1939—Estimated	Deficit	— 5,800
Total Year		$147,032

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-E. Filed 1/22/1940. Walter B. Maling, Clerk. By [Illegible], Deputy Clerk.

Mr. McCollum: Q. Next is a statement marked "1-F," "Western Pacific Railroad Company, Proportion of Revenues from Traffic Interchange with Tidewater Southern Railroad Company." Is that one of the statements to which you have referred?

A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. McCollum: May I ask that that be marked as Irving Trust Company's Exhibit 1-F?

(The document was marked "Irving Trust Company's Exhibit 1-F.") [1163]

IRVING TRUST CO. EXHIBIT NO. 1-F

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (f)—The Western Pacific Railroad Company Proportion of Revenues from Traffic Interchanged with Tidewater Southern Railway Company.

Period January 1 to November 30, 1939	$572,590
Month of December 1939—Estimated	14,618
Total Year	$587,208

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-F. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. The next statement is marked "1-G", "Railway Operating Income, Central California Traction Company." Is that one of the statements to which you have referred?

A. Yes, sir.

Mr. McCollum: May I have that marked Irving Trust Company's Exhibit 1-G?

(The document was marked "Irving Trust Company's Exhibit 1-G.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT NO. 1-G.

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (g)—Railway Operating Income
Central California Traction Company

Period January 1 to November 30, 1939 and estimate for the month of December, 1939.

January 1 to November 30, 1939		$34,837
December 1939—estimated	Deficit	—4,385
Total Year		$30,452

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-G. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. The next is 1-H, "Income and Profit and Loss Deficit of Central California Traction Company," and so forth. Is that one of the statements to which you have referred?

A. Yes, sir.

Mr. McCollum: I should like to have that marked Irving Trust Company's Exhibit 1-H.

(The document was marked "Irving Trust Company's Exhibit 1-H.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT NO. 1-H

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. L. DROIT, SECRETARY.

1. (h)—Income and Profit and Loss Deficit of Central California Traction Company to be absorbed by Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company and The Western Pacific Railroad Company

Period January 1 to November 30, 1939 and estimate for the month of December 1939.

January 1 to November 30, 1939	$12,425
December 1939—Estimated	6,285
Total Year	$18,710
The Western Pacific Railroad Company's Proportion	6,237

Advances Made to Central California Traction Company by Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company and The Western Pacific Railroad Company

Period January 1 to December 31, 1939	$56,250
The Western Pacific Railroad Company's Proportion	18,750

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-H. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. The next is marked 1-I, "Western Pacific Railroad Company, Proportion

(Testimony of Charles Elsey.)

of Revenues from Traffic Interchange with Central California Traction Company." Is that one of the statements to which you have referred?

A. Yes, sir.

Mr. McCollum: I should like to have that marked Irving Trust Company's Exhibit 1-I.

(The document was marked "Irving Trust Company's Exhibit 1-I.")

IRVING TRUST CO. EXHIBIT NO. 1-I

The Western Pacific Railroad Company

INFORMATION REQUESTED BY PILLSBURY, MADISON AND SUTRO IN THEIR LETTER DATED DECEMBER 20, 1939 ADDRESSED TO MR. C. E. DROIT, SECRETARY.

1. (i)—The Western Pacific Railroad Company Proportion of Revenues from Traffic Interchanged with Central California Traction Company

Period January 1 to November 30, 1939	$263,014
Month of December 1939—Estimated	5,470
Total Year	$268,484

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 1-I. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. The next is marked 1-J, "Railway Operating Income, Alameda Belt Line." Is that one of the statements to which you have referred? A. Yes, sir.

Mr. McCollum: I should like to have that marked Irving Trust Company's Exhibit 1-J.

(Testimony of Charles Elsey.)

(The document was marked "Irving Trust Company's Exhibit 1-J.")

Mr. McCollum: Q. Next is marked 1-K, "Income and Profit and Loss Deficit of Alameda Belt Line," and so forth. Is that one of the statements to which you have referred? A. Yes, sir.

Mr. McCollum: I should like to have that marked Irving Trust Company's Exhibit 1-K. [1164]

(The document was marked "Irving Trust Company's Exhibit 1-K.")

Mr. McCollum: Q. The next is marked "1-L," "Income of Standard Realty & Development Company." Is that one of the statements to which you have referred? A. Yes, sir.

Mr. McCollum: I should like to have that marked Irving Trust Company Exhibit 1-L.

(The document was marked "Irving Trust Company's Exhibit 1-L.")

Q. What was the average revenue car received by the Debtor on traffic delivered to or received from Alameda Belt Line in 1935, '36, '37 and '38, listed in paragraph 151 of the stipulation, if you know?

A. I only have the averages of 1935 and 1938.

Q. And what were those?

A. The revenue in 1935 was approximately $62 a car, and in 1938, $74 a car.

Q. Those are averages? A. Yes.

Q. What would this indicate as the approximate total revenues of the Debtor from traffic delivered

(Testimony of Charles Elsey.)

to or received from the Belt Line in the years 1935 and 1938?

A. $315,365 in 1935, and $331,240 in 1938.

Q. Will you please describe the nature of the operations of the Alameda Belt Line and its usefulness to the Debtor?

A. The Alameda Belt Line is a switching line which furnishes the sole access for Western Pacific to the industrial district of Alameda. The Debtor acquired participation at the request of the City of Alameda in 1926, and numerous industries have since located in the Alameda Industrial section on the faith of having services through the Alameda Belt Line over the Western Pacific and Santa Fe, as well as over the Southern Pacific, which had previously been the only line having direct connection with any part of the District. In addition to the traffic which the Western Pacific derives directly from the Alameda Belt Line, it had acquired considerable good will, which is valuable to the entire system in obtaining traffic. [1165]

Q. Have you had prepared in your office a statement showing the Interstate Commerce valuation of the Alameda Belt Line property as of December 31, 1935, and also as of December 31, 1938, and also the balance sheets of the Alameda Belt Line as of said dates? A. Yes, sir.

Q. And is that statement, to the best of your belief, correct? A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. McCollum: I offer in evidence that statement as Irving Trust Company's Exhibit 2.

(The document was marked "Irving Trust Company's Exhibit 2.")

IRVING TRUST CO. EXHIBIT No. 2

Alameda Belt Line

STATEMENT OF VALUATION

AS OF DECEMBER 31, 1935 AND DECEMBER 31, 1938

	As of Dec. 31, 1935	As of Dec. 31, 1938
Interstate Commerce Commission's final value, for rate making purposes, as of December 31, 1928, of property owned and used for Common Carrier purposes and property owned but not used, excluding working capital	$720,500.00	$720,500.00
Additions and Betterments subsequent to December 31, 1928	247,411.49	264,550.54
Total Interstate Commerce Commission valuation adjusted by subsequent Additions and Betterments	$967,911.49	$985,050.54
Non-operating physical property, not included in above investment, as shown by books	$156,540.32	$156,500.38

Copies of General Balance Sheets of Alameda Belt Line as of December 31, 1935 and December 31, 1938 follow.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 2. Filed 1/22/1940. Walter B. Maling, Clerk. By [Illegible], Deputy Clerk.

(Testimony of Charles Elsey.)

Mr. McCollum: Q. As I understand it, there was no I.C.C. valuation as to those dates for Central California Traction Company, is that correct?

A. No, sir, there was not.

Q. But you have had prepared the balance sheets of the Central California Traction Company as of December 31, 1935, and December 31, 1938?

A. Yes, sir.

Q. Is that statement true and correct to the best of your knowledge? A. Yes, sir.

Mr. McCollum: I offer the statement in evidence as Irving Trust Company Exhibit 3.

(The document was marked "Irving Trust Company Exhibit 3.")

Mr. McCollum: Q. Can you state in general what you consider to be the prospects for continued earnings of the Central California Traction Corporation?

A. The territory which the Central California Traction serves is a rich grape-growing and wine-producing territory, and I see no reason why the earnings since 1933 should not continue, although the results of any one particular year depend on the size and quality of the crop, and also the general market conditions.

Q. Is it your best judgment that the benefit derived by the Debtor from retaining its participation in the Alameda Belt Line and the [1166] Central California Traction Company is greater than any loss through having to make advances to those companies? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. How much of the traffic which originates or terminates on the Debtor's Northern California Extension is now traffic which it would not have except for the existence of the extension?

A. Practically all.

Q. Have you had prepared in your office an exhibit showing the amount of cash and receivables in the hands of the Debtor's Trustees on March 4, 1936? A. Yes, sir.

Q. Is that statement true and correct, to the best of your belief? A. Yes, sir.

Mr. McCollum: I offer that statement in evidence as Irving Trust Company's Exhibit 4.

(The document was marked "Irving Trust Company's Exhibit 4.")

IRVING TRUST CO. EXHIBIT No. 4

The Western Pacific Railroad Company

CASH AND ACCOUNTS RECEIVABLE AS OF MARCH 4th, 1936

CASH

E. C. Bates, Treasurer	$1,532,858.84
M. J. Curry, Assistant Treasurer	5,382.14
G. K. Daggett, Petty Cash	7,500.00
Remittances in Transit	93,839.53*
Total Cash	$1,639,580.51

(Testimony of Charles Elsey.)

ACCOUNTS RECEIVABLE

Traffic and Car Service Balances Receivable	$ 245,585.30
Agents and Conductors	138,245.55*
Dining Car Conductors, Hotel Managers	149.30
Individuals and Companies	409,620.52
Railway Express Agency, Inc.	4,236.09
Foreign Roads Freight Claim Settlements	20,264.20
United States Government	114,313.59
Accrued Interest on Railway Express Agency, Inc. Advances	577.38
Total Accounts Receivable	$ 932,991.93
Total Cash and Receivables	$2,572,572.44

(*) Figures shown here are amounts as of March 1, 1936. Actual figures as of March 4th, 1936, for these two items not now available as records have been destroyed.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 4. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: Q. Have you had prepared in your office a statement of equipment acquired between August 1, 1935 and December 31, 1939, showing the number of units remaining in service, and their ledger value as of December 31, 1939, and the Western Pacific Railroad Company's equity as of December 31, 1939 in such of the equipment as was acquired under Equipment Trust Agreements and Conditional Sales Contracts? A. Yes, sir.

Q. Is that statement true and correct, to the best of your belief? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Now, this statement is designed, is it not, to show the equipment or equity in equipment which was acquired during the course of the reorganization proceedings, by the Debtor's Trustees, either with cash or under equipment trust or similar agreements entered into after the inception of the reorganization proceeding? A. Yes, sir.

Q. And that shows, generally speaking, does it not, that the ledger value of the units acquired other than under equipment [1167] trusts was $432,842, approximately? A. Yes, sir.

Q. And that the ledger value of the equity acquired under equipment trusts and similar agreements was $1,059,368? A. Yes, sir.

Mr. McCollum: I offer in evidence the statement which has been referred to, as Irving Trust Company Exhibit 5.

(The document was marked "Irving Trust Company's Exhibit 5.")

(Testimony of Charles Elsey.)

IRVING TRUST CO. EXHIBIT No. 5

The Western Pacific Railroad Company

STATEMENT OF EQUIPMENT ACQUIRED BETWEEN AUGUST 1, 1935 AND DECEMBER 31, 1939, SHOWING NUMBER OF UNITS REMAINING IN SERVICE AND THEIR LEDGER VALUE AS OF DECEMBER 31, 1939, AND THE WESTERN PACIFIC RAILROAD COMPANY'S EQUITY AS OF DECEMBER 31, 1939 IN SUCH OF THE EQUIPMENT AS WAS ACQUIRED UNDER EQUIPMENT TRUST AGREEMENTS AND CONDITIONAL SALES CONTRACTS.

The number of Units in Service December 31, 1939, Acquired by the Use of Free Funds between August 1, 1935, and December 31, 1939, and the Ledger Value of Such Units as of December 31, 1939.

	No. of Units as of December 31, 1939	Ledger Value as of December 31, 1939
Steam Locomotives	10	$341,617.19
Freight Train Cars	24	48,295.78
Passenger Train Cars	None	
Floating Equipment	None	
Work Equipment	30	42,929.69
Total	64	$432,842.66

(Testimony of Charles Elsey.)

The Number of Units in Service December 31, 1939, Acquired Under Equipment Trusts and Conditional Sales Contracts Between August 1, 1935, and December 31, 1939, Their Ledger Value and The Western Pacific Railroad Company's Equity Therein as of December 31, 1939

	No. of Units as of December 31, 1939	Ledger Value as of December 31, 1939
Steam Locomotives	14*	$2,203,252.86
Freight Train Cars	350	869,964.98
Passenger Train Cars	3	116,654.98
Floating Equipment	None	
Work Equipment	1	72,367.93
Total	368	$3,262,240.75
Outstanding Principal December 31, 1939		2,202,871.99
The Western Pacific Railroad Company's Equity as of December 31, 1939		$1,059,368.76

The Number of Units in Service December 31, 1939 Acquired with Proceeds of Sale of $3,000,000 Principal Amount of Trustees' Certificates dated April 1, 1936 And the Ledger Value of Such Units as of December 31, 1939

	No. of Units as of December 31, 1939	Ledger Value as of December 31, 1939
Freight Train Cars	100	$ 232,912.00

(*) Includes 3 Diesel switching locomotives

[Endorsed]: United States District Court, No. 26591. Western Pac. R. R. Co., Irving Trust Co. Exhibit No. 5. Filed 1/22/1940. Walter B. Maling, Clerk.

(Testimony of Charles Elsey.)

The Court: We will take a brief recess at this time.

(After recess:)

Mr. McCollum: If the Court please, I have no further questions of Mr. Elsey.

I have just a few exhibits which I would like to introduce through Mr. Curry.

The Court: Does counsel wish to ask Mr. Elsey any question?

Mr. Wood: I should like to ask one question.

Q. On the Irving Trust Company Exhibit 5, Mr. Elsey——

A. Will you talk a little louder, please?

Q. On Irving Trust Company Exhibit 5, which has just been offered by Mr. McCollum, in the first heading the legend is "Number of Units in Service, December 31, 1939, acquired by the use of free funds between August 1, 1935 and December 1, 1939, and the ledger value of such units as of December 1, 1939."

Do the words "free funds" there refer to revenues of the railroad company during the trusteeship—revenues from operations?

A. My No. 5 is not the statement that you are speaking of.

Q. Perhaps I have it marked wrong. It is the statement of equipment acquired between August 1, 1935 and December 31, 1939, showing the number of units remaining in service and their ledger value as of December 31, 1939. Is that the one that you have in your hand?

(Testimony of Charles Elsey.)

A. The first portion of the statement has the amount of $432,842.66?

Q. Yes.

A. Yes; that is the amount of equipment acquired by the use of free funds between August 1, 1935 and December 31, 1939. [1168]

Q. My question has to do with the meaning of the words "free funds." That represents the revenues from the operations of the railroad during the trusteeship? A. Yes, sir.

Q. It does not represent the sale of any unmortgaged assets?

A. In a broad sense it means any funds other than derived from the sale of securities.

Q. It is the income of the trustees during the trusteeship? A. Yes, sir.

Q. During that period was any interest paid on the first mortgage bonds? A. No, sir.

The Court: Anything further of Mr. Elsey?

Mr. McCollum: If the Court please, if I could call Mr. Curry for a moment, I could put in a few remaining Irving Trust Company exhibits.

M. J. CURRY,

Called by the Irving Trust Company; Sworn.

The Clerk: Will you state your name to the Court, please?

A. M. J. Curry.

Direct Examination

Mr. McCollum: If the Court please, there is in the Interstate Commerce Commission record one of the later listing statements for first mortgage bonds as of some date at the end of 1931, I think, and I would like to introduce through this witness certain earlier listing statements of the same character.

Q. Mr. Curry, have you with you copies of certain listing statements which you supplied from your file to my partner, Mr. Judd?

A. I have.

Q. And are those listing statements relating to first mortgage bonds and dated July 16, 1925——

A. Yes. [1169]

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT No. 6

Francis E. Fitch (Inc.) 138 Pearl St. New York.

A—6800

COMMITTEE ON STOCK LIST, NEW YORK STOCK EXCHANGE

The Western Pacific Railroad Company:
(Organized under the laws of California)

First Mortgage Five Per Cent. Bonds, Series A.
Due March 1, 1946.

Additional Listing, Series A Bonds	$ 4,000,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	28,180,000
Series B, 6% Bonds	3,000,000
Total Listing applied for:	
Series A	28,180,000
Series B	3,000,000

This additional issue:

Indenture authorized by stockholders. July 13,1946
Authorized by Board of Directors Dec. 15, 1924.
Approved by Interstate Commerce Commission by its order March 17, 1925, I.C.C. Docket No. 4681, and by California Railroad Commission by its order April 7, 1925, Application No. 14758. No other authority necessary.

(Testimony of M. J. Curry.)

New York, July 16, 1925.

Referring to its previous applications, especially to A-4667, dated May 10, 1922, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby applies for the listing on the New York Stock Exchange of $4,000,000 additional (of a total authorized issue of $50,000,000) of its First Mortgage 5% Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M23297 to M27296, both inclusive, for $1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of distribution and sale to the public, making the total amount of Series A Bonds issued and applied for $28,180,000. The bonds of Series A and Series B rank equally under the mortgage.

All of the bonds secured by the mortgage previously issued have been listed, pursuant to action on the following applications:

A-4747, dated Mar. 13, 1917 ($20,000,000) Series A,
A-5478, dated June 30, 1921 ($4,180,000) Series A,
A-5667, dated May 10, 1922 ($3,000,000) Series B.

Authority for Issue

The issuance of said $4,000,000 Series A Bonds of the Railroad Company, covered by this application, was authorized by resolution of the Board of Direc-

(Testimony of M. J. Curry.)

tors of the Railroad Company adopted December 15, 1924, and their authentication was authorized by a further resolution adopted by the Board of Directors on June 1, 1925. No action by the stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, hereinafter mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale of said $4,000,000 Series A Bonds at not less than ninety per cent. of their face amount and accrued interest and for the purposes hereinafter stated were approved by order of the California Railroad Commission dated April 7, 1925, on application No. 14,758, and by order of the Interstate Commerce Commission dated March 17, 1925, in Finance Docket No. 4681. No further authority is required.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (of San Francisco, California), and Henry E. Cooper (37 Wall Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of $4,000,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

(Testimony of M. J. Curry.)

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them, may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of $1,000, and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000, and $10,000, or multiples of $10,000. Coupon bonds for $1,000, $500, and

(Testimony of M. J. Curry.)

$100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the Sinking Fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the Sinking Fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

(Testimony of M. J. Curry.)

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed: In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trus-

(Testimony of M. J. Curry.)

tees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the mortgage.

(Testimony of M. J. Curry.)

Sale and Purpose of Issue

The Railroad Company has sold said bonds for cash at the price of 94¼% of their face amount together with accrued interest thereon and the proceeds are to be applied to reimburse the Railroad Company for capital expenditures and for the cost of certain proposed construction, completion, extension and improvement of facilities; all of such expenditures made or proposed to be made having been of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of March 17, 1925 was based.

Changes in Capitalization

Since the previous application A-5667, dated May 10, 1922, there has been no change in the amount of capital stock or funded debt of the Railroad Company authorized and outstanding except the issuance of the $4,000,000 of Series A bonds covered by this application and the purchase of $119,900 face amount of the Series A bonds and $50,000 face amount of the Series B bonds for the sinking fund (making the total amount so purchased $1,086,200 face amount), and the creation of an Equipment Trust Agreement and Lease between the Railroad Company and The Equitable Trust Company of

(Testimony of M. J. Curry.)

New York, as Trustee, dated March 1, 1923, securing an issue of 5½% Equipment Trust Certificates, Series B, of the aggregate face amount of $5,600,000, of which $750,000 aggregate principal amount have been paid off, and also a certain Equipment Trust Agreement and Lease between the Railroad Company and The Equitable Trust Company of New York, as Trustee, dated March 15, 1924, securing an issue of 5½% Equipment Trust Certificates, Series C, of the aggregate face amount of $3,105,000, of which $207,000 aggregate principal amount have been paid off.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications No. A-5478, dated June 30, 1921, and A-5667, dated May 10, 1922.

Since December 31, 1921, the following important changes in mileage have occurred:

Completion of the Belt Line within the city of San Jose, Calif., operation commenced May 1, 1922.

Branch line Bidwell Junction to Bidwell Bar, Calif., 2.02 miles, operation commenced May 15, 1922.

Completion of 39.16 miles additional main line yard, industry and side tracks, the operation of which commenced on various dates between December 31, 1921 and 1924.

(Testimony of M. J. Curry.)

Completion of 4.26 miles additional branch line sidings and spurs. The operation of which commenced on various dates between December 31, 1921 and 1924.

Abandonment of 2.81 miles of branch line from Bridge E to Loyalton, Calif., 1.99 miles December 1922 and .82 miles December, 1923.

Acquisition of joint interest with other carriers in 2.39 miles of yard tracks and sidings, operation of which commenced on various dates between December 31, 1921 and 1924.

Since December 31, 1921 the Railroad Company has made the following net additions to equipment:

		Subject to Equipment Trusts	
	Units	Series B	Series C
Locomotives:			
Mallett (80,000 pounds tractive power)	5		5
Mikado, heavy type (60,300 pounds tractive power)	11	6	5
Total	16		
Passenger train cars:			
Motor coaches	2		
Coaches	20		20
Baggage	20		20
Diners	8		8
Total	50		
Freight train cars:			
Automobile	300	100	200
Refrigerator	2,775	2,000	775
Flat	78		
Logging	200	100	100
Total	3,353		

(Testimony of M. J. Curry.)

Less cars destroyed and converted:			
Box	26		
Box combination ventilated	2		
Stock	32		
Coal	90		
	150		
Total	3,203		
Cabooses	10	—	—
Construction and maintenance equipment:			
Locomotive cranes	3	—	—
Jordan spreader	1	—	1
Water and outfit cars	20	—	—
Lidgerwood	1	—	—
Total	25		
Less cars destroyed and converted:			
Ballast spreaders	2		
Total	23		
Floating equipment:			
Tug boat	1	—	—

Total units added December 31, 1921 to December 31, 1924 3,303

*Leased to Pacific Fruit Express Company.

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478 and A-5667, for a description of the property subject to the lien of the mortgage prior to December 31, 1921. The property on which the mortgage constitutes a first lien includes the following:

(Testimony of M. J. Curry.)

Mileage:

Main line mileage, San Francisco to Salt Lake City	926.41 miles
Branch lines, main track	115.98 miles
Second main track	6.06 miles
Yard tracks and sidings	251.96 miles
Total track miles	1,300.41 miles

Equipment:

Locomotives	139
Passenger cars	8
Freight cars	5,873
Service cars	329
Floating equipment	5
Total	6,354

The foregoing does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series B and Series C, as follows:

Locomotives	16
Passenger cars	48
Freight cars	3,275

Securities:

1,000 shares Capital Stock (50% of outstanding) of the Salt Lake City, Union Depot & Railroad Company, operating the passenger terminal, at Salt Lake City, leased to the Railroad Company and the Denver and Rio Grande Western Railroad Company;

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles;

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company

Deposited Cash in the hands of Mortgage Trustees, as of July, 1925, including unwithdrawn proceeds of $4,000,000 bonds covered by this application, $4,405,430.17.

(Testimony of M. J. Curry.)

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the Mortgage; additional lines of railroad, branches and extensions, equipment and securities.

From January 1, 1922, to December 31, 1924, inclusive, the Railroad Company has expended for road and equipment (including the above described additional equipment) the following amounts:

Road and structures	$4,933,452.07
Equipment	11,284,889.42
General expense	6,737.07
Total	$16,225,078.56

Dividends

All of the authorized Capital Stock consisting of $47,500,000 par value of Common Stock and $27,500,000 par value of Preferred Stock is issued and outstanding, and all of such stock except Directors' qualifying shares of Comnion Stock is held by The Western Pacific Railroad Corporation, a Delaware corporation.

The following dividends have been paid on the Preferred and Common Stocks:

(Testimony of M. J. Curry.)

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount Paid
1917	7½%	$2,062,500
1918	None	
1919	3%	825,000
1920	7%	1,925,000
1921	6%	1,650,000
1922	6%	1,650,000
1923	6%	1,650,000
1924	6%	1,650,000
1925	4.588%	1,253,450

DIVIDENDS—COMMON STOCK

1925	5%	$2,375,000

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

CONSOLIDATED INCOME ACCOUNT OF THE WESTERN PACIFIC RAILROAD AND SUBSIDIARY COMPANIES YEAR ENDED DECEMBER 31, 1924

	The Western Pacific Railroad Co.	Tidewater Southern Railway Co.	Deep Creek Railroad Co.	Standard Realty and Development Co.	Western Refrigerator Line	Total	Eliminations	Consolidated Total
Freight revenue	$10,974,251.95	$208,107.19	$62,897.78			$11,245,256.92		$11,245,256.92
Passenger revenue	2,082,199.76	18,947.94	5,507.93			2,106,655.63		2,106,655.63
Mail and express revenue	517,813.64	2,916.28	2,041.69			522,771.61		522,771.61
Miscellaneous revenue	796,201.61	1,644.27	694.44			798,540.32		798,540.32
Total revenue	$14,370,466.96	$231,615.68	$71,141.84			$14,673,224.48		$14,673,224.48
Expenses operating	11,477,664.53	186,514.38	40,026.59	4,006.84		11,708,212.34	$7,169.38	11,701,042.96
Taxes	877,172.89	15,161.39	5,220.00	11,063.21		908,617.49		908,617.49
Uncollectible railway revenues	6,911.48					6,911.48		6,911.48
Operating income	$2,008,718.06	$29,939.91	$25,895.25	*$15,070.05*		$2,049,483.17	*$7,169.38*	$2,056,652.55
Other income:								
Rental of property	245,005.74	6,553.51		10,652.01		262,211.26	3,276.00	258,935.26
Hire of equipment, receipts	1,707,898.31		10.00			1,707,908.31	13,014.43	1,694,893.88
Dividend income	180.00					180.00		180.00
Income from funded securities	46,829.84					46,829.84		46,829.84
Income from unfunded securities and accounts	139,565.06	1,114.18	245.22	3,768.35		144,692.81	8,849.57	135,843.24
Miscellaneous income	10,003.00	57.24	528.00			10,588.24		10,588.24
Gross income	$4,158,200.01	$37,664.84	$26,678.47	*$649.69*		$4,221,893.63	$17,970.62	$4,203,923.01
Income deductions:								
Interest on funded debt, First Mortgage Bonds	1,369,371.16	16,641.66				1,386,012.82		1,386,012.82
Interest on funded debt, Equipment notes	393,749.96					393,749.96		393,749.96
Rental of leased property	139,777.08	3,276.00				143,053.08	3,276.00	139,777.08
Hire of equipment, payments	786,225.82		5,835.05			792,060.87	5,845.05	786,215.82
Miscellaneous deductions	20,639.36	6,187.92	2,804.22			29,631.50	8,849.57	20,781.93
Amortization of discount on funded								

	The Western Pacific Railroad Co.	Tidewater Southern Railway Co.	Deep Creek Railroad Co.	Standard Realty and Development Co.	Western Refrigerator Line	Total	Eliminations	Consolidated Total
Freight revenue	$10,974,251.95	$208,107.19	$62,897.78			$11,245,256.92		$11,245,256.92
Passenger revenue	2,082,199.76	18,947.94	5,507.93			2,106,655.63		2,106,655.63
Mail and express revenue	517,813.64	2,916.28	2,041.69			522,771.61		522,771.61
Miscellaneous revenue	796,201.61	1,644.27	694.44			798,540.32		798,540.32
Total revenue	$14,370,466.96	$231,615.68	$71,141.84			$14,673,224.48		$14,673,224.48
Expenses operating	11,477,664.53	186,514.38	40,026.59	4,006.84		11,708,212.34	$7,169.38	11,701,042.96
Taxes	877,172.89	15,161.39	5,220.00	11,063.21		908,617.49		908,617.49
Uncollectible railway revenues	6,911.48					6,911.48		6,911.48
Operating income	$2,008,718.06	$29,939.91	$25,895.25	*$15,070.05*		$2,049,483.17	*$7,169.38*	$2,056,652.55
Other income:								
Rental of property	245,005.74	6,553.51		10,652.01		262,211.26	3,276.00	258,935.26
Hire of equipment, receipts	1,707,898.31		10.00			1,707,908.31	13,014.43	1,694,893.88
Dividend income	180.00					180.00		180.00
Income from funded securities	46,829.84					46,829.84		46,829.84
Income from unfunded securities and accounts	139,565.06	1,114.18	245.22	3,768.35		144,692.81	8,849.57	135,843.24
Miscellaneous income	10,003.00	57.24	528.00			10,588.24		10,588.24
Gross income	$4,158,200.01	$37,664.84	$26,678.47	*$649.69*		$4,221,893.63	$17,970.62	$4,203,923.01
Income deductions:								
Interest on funded debt, First Mortgage Bonds	1,369,371.16	16,641.66				1,386,012.82		1,386,012.82
Interest on funded debt, Equipment notes	393,749.96					393,749.96		393,749.96
Rental of leased property	139,777.08	3,276.00				143,053.08	3,276.00	139,777.08
Hire of equipment, payments	786,225.82		5,835.05			792,060.87	5,845.05	786,215.82
Miscellaneous deductions	20,639.36	6,187.92	2,804.22			29,631.50	8,849.57	20,781.93
Amortization of discount on funded debt	119,171.95	2,345.34				121,517.29		121,517.29
Total deductions	$2,828,935.33	$28,450.92	$8,639.27			$2,866,025.52	$17,970.62	$2,848,054.90
Net income	$1,329,264.68	$9,213.92	$18,039.20	*$649.69*	Not in Operation	$1,355,868.11		$1,355,868.11

THE WESTERN PACIFIC RAILROAD AND SUBSIDIARY COMPANIES
SUMMARY OF SURPLUS ACCOUNT CHANGES, DECEMBER 31, 1921 TO DECEMBER 31, 1924

	The Western Pacific Railroad Co.	Tidewater Southern Railway Company	Deep Creek Railroad Company	Standard Realty and Development Company	Western Refrigerator Line	Total
Net income	$4,254,405.37	*$620.52	$11,850 78	$2,487.39	*$7,892.17	$4,260,230.85
Add: Net miscellaneous credits	136,786.16	711,027.21	1,824.15	91,754.34	.....	941,391.86
Total	$4,391,191.53	$710,406.60	$13,674.93	$94,241.73	*$7,892.17	$5,201,622.71
Deduct:						
Net miscellaneous debits	20,829.75	.....	26.37	.....	170.69	21,026.81
Dividends on Preferred Stock	4,950,000.00	.....	.....	.....	.....	4,950,000.00
Total deductions	4,970,829.75	.....	26.37	.....	170.69	4,971,026.81
Surplus	*579,638.22	$710,406.69	$13,648.56	$94,241.73	*$8,062.86	$230,595.90
Surplus credit balance, December 31, 1921	$5,582,112.08					
Surplus credit balance, December 31, 1924	5,812,707.98					
Increase	$230,595.90					

ANALYSIS OF SURPLUS ACCOUNTS DECEMBER 31, 1921 TO DECEMBER 31, 1924

THE WESTERN PACIFIC RAILROAD COMPANY

	Year ending Dec. 31, 1922	Year ending Dec. 31, 1923	Year ending Dec. 31, 1924	Total
Net income for the year	$1,105,345.18	$1,819,795.51	$1,329,264.68	$4,254,405.37
Add: Net miscellaneous credits		2,259.60	134,526.56	136,786.16
Total	$1,105,345.18	$1,822,055.11	$1,463,791.24	$4,391,191.53
Deduct:				
Net miscellaneous debits	20,829.75			20,829.75
Dividends on Preferred Stock	1,650,000.00	1,650,000.00	1,650,000.00	4,950,000.00
Total deductions	$1,670,829.75	$1,650,000.00	$1,650,000.00	$4,970,829.75
Surplus	*$565,484.57	$172,055.11	*$186,208.76	*$579,638.22
Surplus credit balance, December 31, 1921	$5,733,082.25			
Surplus credit balance, December 31, 1924	5,153,444.03			
Decrease	$579,638.22			

TIDEWATER SOUTHERN RAILWAY COMPANY

Net income for the year	*$14,882.68	$5,048.24	$9,213.92	$620.52
Add: Net miscellaneous credits	2,571.62	625,853.14	82,602.45	711,027.21
Total	*$12,311.06	$630,901.38	$91,816.37	$710,406.69
Deduct:				
Net miscellaneous debits				
Total deductions				
Surplus	*$12,311.06	$630,901.38	$91,816.37	$710,406.69
Surplus debit balance, December 31, 1921	$166,022.14			
Surplus credit balance, December 31, 1924	544,384.55			
Increase	$710,406.69			

DEEP CREEK RAILROAD COMPANY

Net income for the year	*$18,434.31	$12,245.89	$18,039.20	$11,850.78
Add: Net miscellaneous credits	40.26	1,783.89		1,824.15
Total	*$18,394.05	$14,029.78	$18,039.20	$13,674.93
Deduct:				
Net miscellaneous debits			$26.37	$26.37
Total deductions				

	Dec. 31, 1922	Dec. 31, 1923	Dec. 31, 1924	Total
Net income for the year	$1,105,345.18	$1,819,795.51	$1,329,264.68	$4,254,405.37
Add: Net miscellaneous credits		2,259.60	134,526.56	136,786.16
Total	$1,105,345.18	$1,822,055.11	$1,463,791.24	$4,391,191.53
Deduct:				
Net miscellaneous debits	20,829.75			20,829.75
Dividends on Preferred Stock	1,650,000.00	1,650,000.00	1,650,000.00	4,950,000.00
Total deductions	$1,670,829.75	$1,650,000.00	$1,650,000.00	$4,970,829.75
Surplus	*$565,484.57	$172,055.11	*$186,208.76	*$579,638.22
Surplus credit balance, December 31, 1921	$5,733,082.25			
Surplus credit balance, December 31, 1924	5,153,444.03			
Decrease	$579,638.22			

TIDEWATER SOUTHERN RAILWAY COMPANY

Net income for the year	*$14,882.68	$5,048.24	$9,213.92	$620.52
Add: Net miscellaneous credits	2,571.62	625,853.14	82,602.45	711,027.21
Total	*$12,311.06	$630,901.38	$91,816.37	$710,406.69
Deduct:				
Net miscellaneous debits				
Total deductions				
Surplus	*$12,311.06	$630,901.38	$91,816.37	$710,406.69
Surplus debit balance, December 31, 1921	$166,022.14			
Surplus credit balance, December 31, 1924	544,384.55			
Increase	$710,406.69			

DEEP CREEK RAILROAD COMPANY

Net income for the year	*$18,434.31	$12,245.89	$18,039.20	$11,850.78
Add: Net miscellaneous credits	40.26	1,783.89		1,824.15
Total	*$18,394.05	$14,029.78	$18,039.20	$13,674.93
Deduct:				
Net miscellaneous debits			$26.37	$26.37
Total deductions			$26.37	$26.37
Surplus	*$18,394.05	$14,029.78	$18,012.83	$13,648.56
Surplus credit balance, December 31, 1921	$3,617.79			
Surplus credit balance, December 31, 1924	17,266.35			
Increase	$13,648.56			

*Denotes red figures.

STANDARD REALTY AND DEVELOPMENT COMPANY

	Year Ending Dec. 31, 1922	Year Ending Dec. 31, 1923	Year Ending Dec. 31, 1924	Total
Net income for the year	$25.93	$3,111.15	*$649.69	$2,487.39
Add: Net miscellaneous credits	48,606.77	43,110.36	37.21	91,754.34
Total	$48,632.70	$46,221.51	*$612.48	$94,241.73
Deduct:				
Net miscellaneous debits				
Total deductions				
Surplus	$48,632.70	$46,221.51	*$612.48	$94,241.73
Surplus credit balance, December 31, 1921	$11,434.18			
Surplus credit balance, December 31, 1924	105,675.91			
Increase	$94,241.73			

WESTERN REFRIGERATOR LINE

Net income for the year		*$7,892.17		*$7,892.17
Add: Net miscellaneous credits				
Total		*$7,892.17		*$7,892.17
Deduct:				
Net miscellaneous debits			$170.69	$170.69
Total deduction			$170.69	$170.69
Surplus		*$7,892.17	*$170.69	*$8,062.86
Surplus, December 31, 1921	None			
Surplus debit balance, December 31, 1924	$8,062.86			
Decrease	$8,062.86			

*Denotes red figures.

CONSOLIDATED GENERAL BALANCE SHEET DECEMBER 31, 1924

ASSETS

	The Western Pacific Railroad Company	Tidewater Southern Railway Co.	Deep Creek Railroad Co.	Standard Realty and Development Company	Western Refrigerator Line	Total	Eliminations	Consolidated Total
Investments:								
Investment in railroad and equipment	$114,150,982.51	$2,452,995.34	$518,956.76			$117,122,934.60		$117,122,934.60
Investment in real estate and improvements				$674,112.65		674,112.65		674,112.65
Sinking funds	50,112.27	350.45				50,462.72		50,462.72
Deposits in lieu of mortgaged property sold	2,699.00					2,699.00		2,699.00
Miscellaneous physical property	372,370.88	40,755.75				413,126.63		413,126.63
Investments in affiliated companies	2,160,561.79			127,965.00		2,288,526.79	$2,288,526.79	
Other investments	141,967.14			75,000.00		216,967.14		216,967.14
Total investments	$116,878,693.59	$2,494,101.54	$518,956.75	$877,077.65		$120,768,829.53	$2,288,526.79	$118,480,302.74
Current assets:								
Cash	752,387.49	167,446.16	10,906.88	1,540.86	$6,991.32	939,272.71		939,272.71
Deposits of mortgage trust funds	3,568,000.00					3,568,000.00		3,568,000.00
Deposits of equipment trust funds	46,695.92					46,695.92		46,695.92
Special deposits	24,770.34	1,250.00				26,020.34		26,020.34
Traffic and car service balances receivable	436,083.00		5,372.31			441,455.31	28,719.37	412,735.94
Net balance receivable from agents and conductors	137,433.52		146.87			137,580.39		137,580.39
Miscellaneous accounts receivable	1,199,354.82	16,581.38	673.26	20,934.88		1,237,544.34	108,063.55	1,129,480.79
Material and supplies	1,879,870.92	38,204.71	2,496.96			1,920,572.59		1,920,572.59
Interest and dividends receivable	2,483.25					2,483.25		2,483.25
Other current assets	20,585.10					20,585.10		20,585.10
Total current assets	$8,067,664.36	$223,482.25	$19,596.28	$22,475.74	$6,991.32	$8,340,209.95	$136,782.92	$8,203,427.03
Deferred assets:								
Working fund advances	3,568.60					3,568.60		3,568.60
Total deferred assets	$3,568.60					$3,568.60		$3,568.60
Unadjusted debits:								
Rents and insurance premiums paid in advance	39,913.37	517.79	89.60			40,520.76		40,520.76
Discount on funded debt	2,214,041.65	38,039.65				2,252,081.30		2,252,081.30
Other unadjusted debits	660,433.58	4,864.66	2,563.55		85,000.00	752,861.79	85,000.00	667,861.79
Total unadjusted debits	$2,914,388.60	$43,422.10	$2,653.15		$85,000.00	$3,045,463.85	$85,000.00	$2,960,463.85
Total assets	$127,864,315.15	$2,761,005.89	$541,206.18	$899,553.39	$91,991.32	$132,158,071.93	$2,510,309.71	$129,647,762.22
Excess of par over book value of Capital Stock and bonds of Affiliated companies							$178,214.28	$178,214.28
							$2,688,523.99	$129,469,547.94

							$2,688,523.99	$129,469,547.94

LIABILITIES

Capital Stock:								
Common	$47,500,000.90	$1,176,482.00	$450,000.00	$400,500.00	$100,000.00	$49,626,982.00	$2,098,468.00	$47,528,514.00
Preferred	27,500,000.00					27,500,000.00		27,500,000.00
Premium on Capital Stock		498,045.00				498,045.00		498,045.00
Total Stock	$75,000,000.00	$1,674,527.00	$450,000.00	$400,500.00	$100,000.00	$77,625,027.00	$2,098,468.00	$75,526,559.00
Long term debt:								
Funded debt (First Mortgage Gold Bonds)	26,827,300.00	313,000.00				27,140,300.00	157,000.00	26,983,300.00
Funded debt (Equipment Trust Certificates)	8,123,000.00					8,123,000.00		8,123,000.00
Total long term debt	$34,950,800.00	$313,000.00				$35,263,300.00	$157,000.00	$35,106,300.00
Debt to affiliated companies:								
Open accounts	554,887.50					554,887.50		554,887.50
Total debt to affiliated companies	$554,887.50					$554,887.50		$554,887.50
Current liabilities:								
Loans and bills payable			45,000.00	351,273.07		396,273.07	296,273.07	100,000.00
Traffic and car service balance payable	343,375.24					343,375.24	*6,574.22	349,949.46
Audited accounts and wages payable	870,270.45	73,733.08	22,206.31	18,849.13	54.18	985,113.15	108,063.55	877,049.60
Miscellaneous accounts payable	104,558.60	122,697.34	21.39			227,277.33	35,293.59	191,983.74
Interest matured unpaid	24,770.34	1,250.60				26,020.34		26,020.34
Unmatured interest accrued	566,129.18	4,859.37	601.00			571,589.55		571,589.55
Unmatured rents accrued	5,241.66					5,241.66		5,241.66
Other current liabilities	24,629.55					24,629.55		24,629.55
Total current liabilities	$1,938,975.02	$202,539.79	$67,828.78	$370,122.20	$54.18	$2,579,519.89	$433,055.99	$2,146,463.90
Deferred liabilities:								
Other deferred liabilities	17,510.30					17,510.30		17,510.30
Total deferred liabilities	$17,510.30					$17,510.30		$17,510.30
Unadjusted credits:								
Tax liability	143,715.18	*282.78	119.25			143,551.65		143,551.65
Accrued depreciation—equipment	2,545,737.70	22,427.39	4,914.83			2,573,079.92		2,573,079.92
Other unadjusted credits	385,198.20	4,409.94	1,077.05	23,255.28		413,940.47		413,940.47
Surplus investment equipment, and other property purchased	7,174,547.22					7,174,547.22		7,174,547.22
Total unadjusted credits	$10,249,198.30	$26,554.55	$6,111.13	$23,255.28		$10,305,119.26		$10,305,119.26
Surplus:								
Additions to property through income and surplus	3,413,305.66	1,301.93	1,446.54			3,416,054.13		3,416,054.13
Funded debt retired through income and surplus	299,887.73					299,887.73		299,887.73
Sinking fund reserves	50,112.27	156,765.95				206,878.22		206,878.22
Profit and loss balance	1,390,138.37	386,316.67	15,819.81	105,675.91	*8,062.86	1,889,887.90		1,889,887.90
Total surplus	$5,153,444.03	$544,384.55	$17,266.35	$105,675.91	*8,062.86	$5,812,707.98		$5,812,707.98
Total liabilities	$127,864,315.15	$2,761,005.89	$541,206.18	$899,553.39	$91,991.32	$132,158,071.93	$2,688,523.99	$129,469,547.94

*Denotes red figures.

(Testimony of M. J. Curry.)

THE WESTERN PACIFIC RAILROAD COMPANY CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING AND AMOUNT OWNED BY THE WESTERN PACIFIC RAILROAD COMPANY.

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	$1,176,482.00	99.57+%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Standard Realty Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES, DECEMBER 31, 1924

	Book value	Par value	Excess of par and book value
The Western Pacific Railroad Co.:			
Capital Stock:			
Standard Realty and Development Company	$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Railway Company	1,223,848.94	1,147,968.00	*75,880.94*
Standard Realty & Development Co.:			
First Mortgage Bonds:			
Tidewater Southern Railway Company	127,965.00	157,000.00	29,035.00
Total	$1,527,253.72	$1,705,468.00	$178,214.28

(Testimony of M. J. Curry.)

THE WESTERN PACIFIC RAILROAD AND SUBSIDIARY COMPANIES STATEMENT OF FUNDED DEBT AS OF DECEMBER 31, 1924.

The Western Pacific Railroad Company First Mortgage Gold Bonds maturing March 1, 1946:		
Issued June 26, 1916		$19,730,000.00
Issued May 31, 1921		4,117,300.00
Issued February 15, 1922		2,980,000.00
Total outstanding		$26,827,300.00
The Western Pacific Railroad Company 5½% Equipment Trust Certificates:		
Total amount issued February 21, 1923	$3,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937 inclusive	$375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding December 31, 1924		$5,225,000.00
The Western Pacific Railroad Company 5½% Equipment Trust Certificates Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938 inclusive	207,000.00	
Total amount outstanding December 31, 1924		$2,898,000.00
Tidewater Southern Railway Company First Mortgage Thirty-Year 5% Gold Bonds maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding December 31, 1924		$313,000.00

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written out of capital account by charges to operating expenses.

(Testimony of M. J. Curry.)

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued Depreciation Equipment," at a general rate of 2¼% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company agrees with the New York Stock Exchange as follows:

Not to dispose of an integral asset or its stock interest in any constituent, subsidiary, owned or controlled company, or allow any of said constituent, subsidiary, owned or controlled companies to dispose of an integral asset or stock interest in other companies unless for retirement and cancellation, without notice to the Stock Exchange.

To publish statement of earnings monthly and annually.

To publish once in each year and submit to the stockholders, at least fifteen days in advance of the annual meeting of the Corporation, a statement of its financial condition, a consolidated income account covering the previous fiscal year; and a consolidated balance sheet showing assets and liabilities at the end of the year; or an income account and balance sheet of the parent company and all constituent, subsidiary, owned or controlled companies, subject to I. C. C. regulations.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the

(Testimony of M. J. Curry.)

Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, other than its transfer office or agency in said city, where all listed securities shall be registered.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to make any change in listed securities or of a trustee of its bonds or other securities, without the approval of the Committee on Stock List, and not to select as a trustee an officer or director of the Company.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its listed securities, so as to afford the holders of its listed securities a proper period within which to record their interests, and that all such rights to subscribe or to receive allotments and all other such rights and benefits shall be transferable; and shall be transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To notify the Stock Exchange of the issuance of additional amounts of listed securities, and make immediate application for the listing thereof.

(Testimony of M. J. Curry.)

To publish promptly to holders of listed bonds and stocks any action in respect to interest on bonds, dividends on shares, or allotment of rights for subscription to securities, notices thereof to be sent to the Stock Exchange, and to give to the Stock Exchange at least ten days' notice in advance of the closing of the transfer books or extensions, or the taking of a record of holders for any purpose.

To redeem Preferred Stock in accordance with the requirements.

To notify the Stock Exchange if deposited collateral is changed or removed.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 31, 1926, are: A. W. Krech, John B. Dennis, Frederick H. Ecker, Andrew M. Hunt, G. W. Murray, and A. R. Baldwin of New York, N. Y., C. M. Levey, William Fries, F. H. Angelotti, J. G. Hooper, Campbell McGregor and

(Testimony of M. J. Curry.)

Wellington T. Smith, of San Francisco, California, John L. Nagle of Sacramento, California, Thomas F. Baxter, of Stockton, California, and C. M. Nibley of Salt Lake City, Utah.

The Executive Committee is: A. W. Krech, J. P. Dennis, F. H. Ecker, A. M. Hunt, G. W. Murray, A. R. Baldwin and C. M. Levey.

The Officers of the Railroad Company are: Chairman of the Board, A. W. Krech, President, C. M. Levey, Vice-Presidents, F. W. M. Cutcheon, A. R. Baldwin, E. W. Mason, and Charles Elsey; Secretary, W. G. Bruen; Treasurer, Charles Elsey; Assistant Secretary and Assistant Treasurer, S. C. Matthews.

The bonds may be transferred and registered at The Equitable Trust Company of New York, 37 Wall Street, New York, N. Y.

The agent for the payment of interest is The Equitable Trust Company of New York.

The places for the payment of the principal are at the office of The Equitable Trust Company of New York, or of the First Federal Trust Company of San Francisco, California.

THE WESTERN PACIFIC RAILROAD COMPANY,
By S. C. MATTHEWS,
Assistant Secretary.

This Committee recommends that the above-mentioned $4,000,000 additional First Mortgage Five per Cent. Bonds, Series A, due March 1, 1946, Nos.

(Testimony of M. J. Curry.)

M-23,297 to M-27,296, inclusive, for $1,000 each (and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of distribution and sale to the public, in accordance with the terms of this application, making the total amount of Series A Bonds authorized to be listed $28,180,000.

ROBERT GIBSON,
Chairman.

Adopted by the Governing Committee, August 26, 1925.

HARRISON S. MARTIN,
First Assistant Secretary.

Mr. McCollum: I should like to offer the statement of September 30, 1926 as Irving Trust Company Exhibit 7.

(The document was marked "Irving Trust Company's Exhibit 7.")

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT No. 7

Francis E. Fitch (Inc.), 138 Pearl St., New York

A-7277

Committee On Stock List,
New York Stock Exchange

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by the Western Pacific Railroad Corporation of Delaware)

First Mortgage Five Per Cent. Gold Bonds,
Series A, Due March 1, 1946

Additional listing, Series A Bonds	$ 2,600,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	28,180,000
Series B, 6% Bonds	3,000,000
Total listing applied for:	
Series A	30,780,000
Series B	3,000,000

This additional issue:

Indenture authorized by stockholders July 13, 1916.

Authorized by Board of Directors Mar. 1, 1926 and July 6, 1926.

Approved by Interstate Commerce Commission by its order June 15, 1926.

I. C. C. Finance Docket No. 5503, and by California Railroad Commission by its decision No. 17,046, July 2, 1926. No other authority necessary.

CAPITAL SECURITIES

Stock: Classes:	Par value	Number of Shares: Authorized by Charter	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Preferred	$100	275,000	275,000	No	275,000
Common	100	475,000	475,000	No	475,000

Mortgage Bonds: First Mortgage, due Mar. 1, 1946.	Interest Rate	Amount Authorized	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
		Total amount of First Mortgage Bonds authorized under Mortgage			
Series "A"	5%	$50,000,000	$30,780,000	$28,180,000	$27,774,400
Series "B"	6%		3,000,000	3,000,000	2,950,000
Equipment Trust Obligations:					
Titles and dates of maturity:					
*Equipment Trust Ctfs.	5½%	$5,600,000	$5,600,000	No	$4,475,000
†Equipment Trust Ctf. (Series "C")	5½%	3,105,000	3,105,000	No	2,691,000

*Certificates in amount of $375,000 payable March 1st of each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

†Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

(Testimony of M. J. Curry.)

New York, September 30, 1926.

Referring to its previous applications, especially to A-6800, dated July 16, 1925, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of $2,600,000 additional (of a total authorized issue of $50,000,000) of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M 27327 to M. 29926 both inclusive, for $1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance and distribution for sale to the public, making the total amount of Series A Bonds issued and applied for $30,780,000. There are also $3,000,000 Series B Bonds issued and listed. The Bonds of Series A and Series B rank equally under the Mortgage.

Authority for and Purpose of Issue

The issuance of said $2,600,000 Series A Bonds of the Railroad Company, covered by this application, was authorized by resolutions of the Board of Directors of the Railroad Company adopted March 1, 1926 and July 6, 1926, and their authentication was authorized by a further resolution adopted by the Board of Directors on August 2, 1926. No action by the stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, herein-

(Testimony of M. J. Curry.)

after mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale of said $2,600,000 Series A Bonds at not less than ninety-two per cent. of their face amount and accrued interest and for the purposes hereinafter stated were approved by decision No. 17,046 of the California Railroad Commission dated July 2, 1926, and by order of the Interstate Commerce Commission, dated June 15, 1926, in Finance Docket No. 5503. No further authority is required.

The Railroad Company has contracted for the sale of said bonds for cash at the price of 99¾% of their face amount together with accrued interest thereon and the proceeds are to be applied to reimburse the Railroad Company for capital expenditures and for the cost of certain proposed construction, completion, extension and improvement of facilities; all of such expenditures made or proposed to be made having been of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of June 15, 1926, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June

(Testimony of M. J. Curry.)

26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company) (of San Francisco, California), and Henry E. Cooper (37 Wall Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of $2,600,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them, may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing

(Testimony of M. J. Curry.)

authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of $1,000, and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000, or multiples of $10,000. Coupon bonds for $1,000, $500 and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are re-

(Testimony of M. J. Curry.).

deemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise, whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall

(Testimony of M. J. Curry.)

have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in

(Testimony of M. J. Curry.)

amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Changes in Capitalization

Since December 31, 1924 (the date as of which the consolidated balance sheet contained in said previous application A-6800 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except

First: The issuance of the $4,000,000 of Series A 5% Bonds covered by said application A-6800, and

Second: The purchase of $72,000 face amount of the Series "A" 5% Bonds, and $30,000 face amount of the Series "B" 6% Bonds for the sinking fund (making the total amount so purchased $455,600); and

Third: The retirement of $750,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B" and $207,000 (face amount) of its 5½% Equipment Trust Cetificates, Series "C."

Properties

The properties of the Railroad Company are described in the original application for listing of Series "A" Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications No. A-5478, dated

(Testimony of M. J. Curry.)

June 30, 1921; A-5667, dated May 10, 1922; and A-6800, dated July 16, 1925.

Since December 31, 1924, the following important changes in mileage have occurred:

Completion of 20.98 miles additional main line yard, industry and side tracks, the operation of which commenced on various dates between December 31, 1924, and June 30, 1926.

Completion of .29 miles additional branch line spur and connecting tracks, the operation of which commenced on various dates in year 1925.

Abandonment of 2.94 miles of second main track at Arnold's Loop, between Arnold and Proctor, Nevada, November 5, 1925.

Acquisition of joint interest with other carriers in .90 miles of yard tracks, operation of which commenced on various dates in year 1925.

Since December 31, 1924, the Railroad Company has made the following net additions to equipment:

Locomotives:	
Mikado, heavy type (60,300 pounds tractive power)	5
Passenger train cars:	
Combination coach and baggage car	1
Freight train cars:	
Box	12
Stock	76
Total	88

(Testimony of M. J. Curry.)

Less cars destroyed and converted:		
Automobile	2	
Box	13	
Flat	6	
Stock	47	
Clay	9	
Tank	1	
Refrigerator	4	
	—	82
Total		6
Construction and maintenance equipment:		
Outfit car		1
Supply car		1
Total		2
Less cars destroyed:		
Outfit car		1
Total		1
Total units added December 31, 1924, to June 30, 1926		13

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, and A-6800, for a description of the property subject to the lien of the Mortgage prior to December 31, 1924. The property on which the Mortgage constitutes a first lien includes the following:

Mileage:

	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	115.98
Second main track	3.12
Yard tracks and sidings, etc.	273.23
Total track miles	1,318.74

(Testimony of M. J. Curry.)

Equipment:

Locomotives	144
Passenger cars	9
Freight cars	5,885
Service cars	329
Floating equipment	5
Total	6,372

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series B and C, as follows:

Locomotives	16
Passenger cars	48
Freight cars	3,269
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the the passenger terminal at Salt Lake City, leased to the Railroad Company and the Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 165.65 miles of main line of railroad in California.

(Testimony of M. J. Curry.)

$5,196,204.46 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of June 30, 1926 ..... $42,941.46

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the Mortgage, additional lines of railroad, branches and extension, equipment and securities.

From January 1, 1925, to June 30, 1926, inclusive, the Railroad Company has expended for road and equipment (including the above described additional equipment) the following amounts:

Road and structures and general expenses	$1,975,622.53
Equipment	593,608.61
Total	$2,569,231.14

Dividends

All of the authorized Capital Stock, consisting of $47,500,000 par value of Common Stock and $27,500,000 par value of Preferred Stock, is issued and outstanding, and all of such stock except Directors' qualifying shares of Common Stock is held by The

(Testimony of M. J. Curry.)

Western Pacific Railroad Corporation, a Delaware corporation.

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926 (to June 30)	3%	825,000

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

Financial Statements

The Western Pacific Railroad Company and Subsidiary Companies

CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1925, AND SIX MONTHS ENDED JUNE 30, 1926

	Year ended Dec. 31, 1925	Six months ended June 30, 1926
Freight revenue	$12,804,916.70	$5,902,145.91
Passenger revenue	2,065,039.75	1,041,508.13
Mail and express revenue	435,048.91	186,885.03
Miscellaneous revenue	859,807.82	305,270.32
Total revenue	$16,164,813.18	$7,435,809.39

(Testimony of M. J. Curry.)

	Year ended Dec. 31, 1925	Six months ended June 30, 1926
Expenses operating	$11,748,035.00	$5,858,371.17
Taxes	1,027,204.67	657,003.87
Uncollectible railway revenues	1,637.88	899.89
Operating income	$3,367,935.68	$919,534.46
Other income:		
Rental of property	446,787.44	239,528.23
Hire of equipment, receipts	1,760,866.47	773,048.49
Dividend income		7,645.00
Income from funded securities	2,236.60	1,249.25
Income from unfunded securities and accounts	122,133.19	43,608.76
Miscellaneous income	2,796.88	7,322.00
Gross income	$5,722,756.26	$1,991,936.19
Income deductions:		
Interest on funded debt, First Mortgage Bonds	$1,483,567.33	$763,884.20
Interest on funded debt, Equipment Notes	428,628.71	200,502.50
Interest on funded debt, advances	24,473.58	49,823.22
Rental of leased property	192,223.34	87,786.93
Hire of equipment, payments	902,549.85	336,715.94
Miscellaneous deductions	27,086.34	19,475.57
Amortization of discount on funded debt	126,258.83	65,245.17
Total deductions	$3,184,787.98	$1,523,433.53
Net income	$2,537,968.28	$468,502.66*

*Corresponding figure for the six months ended June 30, 1925, was $339,188.88.

(Testimony of M. J. Curry.)

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31, 1924 TO JUNE 30, 1926

	Year ending Dec. 31, 1925	Six months ending June 30, 1926	Consolidated Total
Net income	$2,537,968.28	$468,502.66	$3,006,470.94
Add: Net miscellaneous credits	1,500,172.06	1,945.92	1,502,117.98
Total	$4,038,140.34	$470,448.58	$4,508,588.92
Deduct:			
Net miscellaneous debits		10,848.78	10,848.78
Dividends on Preferred Stock	2,078,450.00	825,000.00	2,903,450.00
Dividends on Common Stock	2,374,970.00		2,374,970.00
Total deductions	$4,453,420.00	$835,848.78	$5,289,268.78
Surplus, decrease	$415,279.66*	$365,400.20*	$780,679.86*
Surplus credit balance, December 31, 1924	$5,812,707.98		
Surplus credit balance, June 30, 1926	5,032,028.12		
Decrease	$780,679.86		

*Denotes italic figures.

CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31, 1925, AND JUNE 30, 1926

ASSETS

	Dec. 31, 1925		June 30, 1926	
Investments:				
Investment in railroad and equipment	$123,909,185.74		$125,094,418.04	
Investment in real estate and improvements	673,872.69		657,081.97	
Sinking funds	50,239.96		244.96	
Deposits in lieu of mortgaged property sold	2,327.50		6,216.00	
Miscellaneous physical property	647,014.22		652,821.82	
Other investments	405,238.20		472,238.20	
Total investments		$125,687,878.31		$126,883,020.99
Current assets:				
Cash	$2,390,058.97		$1,913,742.07	
Deposits of mortgage trust funds	221,350.91		40,941.46	
Deposits of equipment trust funds	46,695.92		46,695.92	
Special deposits	121,593.96		117,128.96	
Traffic and car service balances receivable	436,894.86		516,172.96	
Net balances receivable from agents and conductors	216,494.06		175,949.00	
Miscellaneous accounts receivable	1,157,013.20		1,065,067.20	
Material and supplies	2,005,141.93		2,114,466.81	
Interest and dividends receivable	3,942.79		5,719.33	
Other current assets	13,038.28		6,345.34	
Total current assets		$6,612,224.88		$6,002,229.05
Deferred assets:				
Working fund advances	$3,184.11		$2,858.38	
Total deferred assets		$3,184.11		2,858.38
Unadjusted debits:				
Rents and insurance premiums paid in advance	$44,089.02		$54,988.05	
Discount on funded debt	2,363,716.06		2,296,028.70	
Other unadjusted debits	843,216.82		909,579.25	
Total unadjusted debits		$3,251,021.90		3,260,596.00
Total assets		$135,554,309.20		$136,148,704,42
Excess of par value over book value of Capital Stock and bonds of subsidiary companies		1,381,659.83		1,381,659.83
		$134,172,649.37		$134,767,044.59

LIABILITIES

	Dec. 31, 1925		June 30, 1926	
Capital Stock:				
Common	$47,528,514.00		$47,528,814.00	
Preferred	27,500,000.00		27,500,000.00	
Premium on Capital Stock	498,045.00		498,238.00	
Total stock		$75,526,559.00		$75,527,052.00
Long term debt:				
Funded debt (First Mortgage Gold Bonds)	$31,089,968.68		$31,038,567.68	
Funded debt (Equipment Trust Certificates)	7,541,000.00		7,166,000.00	
Funded debt (Notes payable)	53,333.33		53,333.33	
Total long term debt		$38,684,302.01		38,257,902.01
Debt to affiliated companies:				
Open accounts	$1,524,473.58		$2,425,000.00	
Total debt to affiliated companies		$1,524,473.58		2,425,000.00
Current liabilities:				
Loans and notes payable	$9,965.65		$118,965.65	
Traffic and car service balances payable	475,163.92		374,790.97	
Audited accounts and wages payable	911,443.20		943,773.27	
Miscellaneous accounts payable	206,727.69		116,410.93	
Interest matured unpaid	21,666.53		17,201.53	
Unmatured interest accrued	629,473.08		621,741.44	
Unmatured rents accrued	5,149.98		10,049.96	
Other current liabilities	45,749.04		80,181.50	
Total current liabilities		$2,305,339.09		2,283,115.25
Deferred liabilities:				
Other deferred liabilities	$17,767.35		$15,479.60	
Total deferred liabilities		$17,767.35		15,479.60
Unadjusted credits:				
Tax liability	$150,469.31		$339,566.21	
Accrued depreciation—equipment	3,108,337.35		3,394,469.44	
Other unadjusted credits	285,289.03		319,757.53	
Surplus—Investment, equipment and other property purchased	7,172,684.33		7,172,674.43	
Total unadjusted credits		$10,716,780.02		11,226,467.61
Surplus:				
Additions to property through income and surplus	$3,986,409.62		$4,360,964.68	
Funded debt retired through income and surplus	349,861.73		399,856.73	
Sinking fund reserves	233,655.46		190,657.96	
Profit and loss balance	827,501.51		80,548.80	

LIABILITIES

	Dec. 31, 1925		June 30, 1926	
Capital Stock:				
Common	$47,528,514.00		$47,528,814.00	
Preferred	27,500,000.00		27,500,000.00	
Premium on Capital Stock	498,045.00		498,238.00	
Total stock		$75,526,559.00		$75,527,052.00
Long term debt:				
Funded debt (First Mortgage Gold Bonds)	$31,089,968.68		$31,038,567.68	
Funded debt (Equipment Trust Certificates)	7,541,000.00		7,166,000.00	
Funded debt (Notes payable)	53,333.33		53,333.33	
Total long term debt		$38,684,302.01		38,257,902.01
Debt to affiliated companies:				
Open accounts	$1,524,473.58		$2,425,000.00	
Total debt to affiliated companies		$1,524,473.58		2,425,000.00
Current liabilities:				
Loans and notes payable	$9,965.65		$118,965.65	
Traffic and car service balances payable	475,163.92		374,790.97	
Audited accounts and wages payable	911,443.20		943,773.27	
Miscellaneous accounts payable	206,727.69		116,410.93	
Interest matured unpaid	21,666.53		17,201.53	
Unmatured interest accrued	629,473.08		621,741.44	
Unmatured rents accrued	5,149.98		10,049.96	
Other current liabilities	45,749.04		80,181.50	
Total current liabilities		$2,305,339.09		2,283,115.25
Deferred liabilities:				
Other deferred liabilities	$17,767.35		$15,479.60	
Total deferred liabilities		$17,767.35		15,479.60
Unadjusted credits:				
Tax liability	$150,469.31		$339,566.21	
Accrued depreciation—equipment	3,108,337.35		3,394,469.44	
Other unadjusted credits	285,289.03		319,757.53	
Surplus—Investment, equipment and other property purchased	7,172,684.33		7,172,674.43	
Total unadjusted credits		$10,716,780.02		11,226,467.61
Surplus:				
Additions to property through income and surplus	$3,986,409.62		$4,360,964.63	
Funded debt retired through income and surplus	349,861.73		399,856.73	
Sinking fund reserves	233,655.46		190,657.96	
Profit and loss balance	827,501.51		80,548.80	
Total surplus		$5,397,428.32		5,032,028.12
Total liabilities		$134,172,649.37		$134,767,044.59

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company

CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING AND AMOUNT OWNED BY THE WESTERN PACIFIC RAILROAD COMPANY

Issuing Company	Par Value Capital Stock Outstanding	Percentage Owned by Western Pacific	Par Value Owned by Western Pacific
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES, JUNE 30, 1926

	Book Value	Par Value	Excess of Par over Book Value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Railway Company	1,223,848.94	1,147,968.00	75,880.94*
First Mortgage Bonds:			
Sacramento Northern Railroad	3,963,723.91	5,196,204.46	1,232,480.55*
Total	$5,363,012.63	$6,744,672.46	$1,381,659.83

The Western Pacific Railroad Company and Subsidiary Companies

STATEMENT OF FUNDED DEBT AS OF JUNE 30, 1926

The Western Pacific Railroad Company First Mortgage Gold Bonds maturing March 1, 1946:	
Issued June 26, 1916, Series A, 5%	$19,668,600.00
Issued May 31, 1921, Series A, 5%	4,105,800.00
Issued February 15, 1922, Series B, 6%	2,950,000.00
Issued April 24, 1925, Series, A, 5%	4,000,000.00
Total amount outstanding June 30, 1926	$30,724,400.00

*Denotes red figures.

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company 5½% Equipment Trust Certificates, Series "B":

Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937 inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding June 30, 1926		$4,475,000.00

The Western Pacific Railroad Company 5½% Equipment Trust Certificates, Series "C":

Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938 inclusive	207,000.00	
Total amount outstanding June 30, 1926		$2,691,000.00

Tidewater Southern Railway Company First Mortgage Thirty-Year Five per Cent. Gold Bonds maturing April 15, 1942, issued April 15, 1912:

Total amount outstanding June 30, 1926	$286,000.00

Sacramento Northern Railroad First Mortgage Twenty Year Five per Cent. Gold Bonds issued July 1, 1918 and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary of Railroad Company) the successor in ownership of all the property of the Sacramento Northern Railroad:

Total amount outstanding June 30, 1926	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,196,204.46	
		$28,168.68

Amount of note of Bisbee Investment Company dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on June 30, 1926 $53,333.33

(Testimony of M. J. Curry.)

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 2¼% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company agrees with the New York Stock Exchange as follows:

Not to dispose of an integral assets or its stock interest in any constituent, subsidiary, owned or controlled company, or allow any of said constituent, subsidiary, owned or controlled companies to dispose of an integral asset or stock interest in other companies unless for retirement and cancellation, without notice to the Stock Exchange.

To publish statement of earnings monthly and annually.

To publish once in each year and submit to the stockholders, at least fifteen days in advance of the annual meeting of the Corporation, a statement of its financial condition, a consolidated income account covering the previous fiscal year; and a consolidated balance sheet showing assets and liabilities at the end of the year; or an income account

(Testimony of M. J. Curry.)

and balance sheet of the parent company and all constituent, subsidiary, owner or controlled companies, subject to I. C. C. regulations.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, other than its transfer office or agency in said city, where all listed securities shall be registered.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to make any change in listed securities or of a trustee of its bonds or other securities, without the approval of the Committee on Stock List, and not to select as a trustee an officer or director of the Company.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its listed securities, so as to afford the holders of its listed securities a proper period within which to record their interests, and that all such rights to subscribe or to receive allotments and all other such rights and benefits shall be transferable; and shall be transferable, payable and deliv-

(Testimony of M. J. Curry.)

erable in the Borough of Manhattan, City of New York.

To notify the Stock Exchange of the issuance of additional amounts of listed securities, and make immediate application for the listing thereof.

To publish promptly to holders of listed bonds and stocks any action in respect to interest on bonds, dividends on shares, or allotment of rights for subscription to securities, notices thereof to be sent to the Stock Exchange, and to give to the Stock Exchange at least ten days' notice in advance of the closing of the transfer books or extensions, or the taking of a record of holders for any purpose.

To redeem Preferred Stock in accordance with the requirements.

To notify the Stock Exchange if deposited collateral is changed or removed.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 30, 1927, are: Arthur Curtiss

(Testimony of M. J. Curry.)

James, Thomas M. Schumacher, Alvin W. Krech and Winthrop W. Aldrich, of New York, N. Y.; C. M. Levey, William Fries, J. G. Hooper, Campbell McGregor, R. R. Pardow, Wellington T. Smith, F. M. Angellotti and A. R. Baldwin, of San Francisco, California; John L. Nagle, of Sacramento, California; Thomas F. Baxter, of Stockton, California; Andrew M. Hunt, of San Francisco, California; Hale Holden and James E. Gorman, of Chicago, Illinois; L. W. Baldwin, of St. Louis, Missouri; and C. M. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, A. W. Krech, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and C. M. Levey, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Executive Committee, Thomas M. Schumacher; Chairman of the Board, A. W. Krech; President, C. M. Levey; Vice-Presidents, F. W. M. Cutcheon, E. W. Mason, and Charles Elsey; Secretary, W. G. Bruen; Treasurer, Charles Elsey; Assistant Secretary and Assistant Treasurer, S. C. Matthews.

The bonds may be transferred and registered at The Equitable Trust Company of New York, 37 Wall Street, New York, N. Y.

The Agent for the payment of interest is The Equitable Trust Company of New York.

The places for the payment of the principal are at the office of The Equitable Trust Company of

(Testimony of M. J. Curry:)

New York, or of the Crocker First Federal Trust Company of San Francisco, California.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By S. C. MATTHEWS,
Assistant Secretary.

This Committee recommends that the above-mentioned $2,600,000 First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, Nos. M27327 to M29926, inclusive, for $1,000 each (and registered bonds issued in exchange for coupon bonds) be added to the list, on official notice of issuance and distribution for sale to the public, in accordance with the terms of this application, making the total amounts authorized to be listed

$30,780,000 Series A Bonds, and
3,000,000 Series B Bonds.

ROBERT GIBSON,
Chairman.

Adopted by the Governing Committee, October 15, 1926.

E. V. D. COX,
Secretary.

[Endorsed]: United States District Court. No. 26591 Western Pac. R. R. Co. vs. Irving Trust Co. Exhibit No. 7 Filed 1/22/1940. Walter B. Maling, Clerk

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Mr. McCollum: I should like to offer the statement of October 31, 1927 as Irving Trust Company Exhibit 8.

(The document was marked "Irving Trust Company's Exhibit 8.")

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 8

Francis E. Fitch (Inc.), 138 Pearl St., New York.

A-7722

COMMITTEE ON STOCK LIST,
NEW YORK STOCK EXCHANGE

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by The Western Pacific Railroad Corporation of Delaware)
First Mortgage Five Per Cent. Gold Bonds,
Series A, Due March 1, 1946

Additional listing, Series A Bonds	$2,950,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	30,780,000
Series B, 6% Bonds	3,000,000
(All this issue surrendered for cancellation or redeemed as of September 1, 1927.—See infra)	
Total listing applied for:	
Series A	33,730,000

This additional issue:

Indenture authorized by Stockholders July 13, 1916

Authorized by Board of Directors Mar. 2, 1927

Approved by Interstate Commerce Commission by its orders Mar. 29, 1927 and Sept. 2, 1927

I. C. C. Finance Docket No. 6183. No other authority necessary.

CAPITAL SECURITIES

STOCK	Par Value	Number of Shares: Authorized by Charter	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Classes:					
Preferred	$100	275,000	275,000	None	275,000
Common	100	475,000	475,000	None	475,000

BONDS	Interest Rate	Amount Authorized	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Mortgage Bonds:		Total amount of First Mortgage Bonds authorized under Mortgage			
First Mortgage, due Mar. 1, 1946.					
Series "A"	5%	$50,000,000	$33,730,000	$30,780,000	$33,274,300
Series "B"	6%		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
*Equipment Trust Certificates	5½%	5,600,000	5,600,000	None	4,100,000
†Equipment Trust Certificates (Series C)	5½%	3,105,000	3,105,000	None	2,484,000

*Certificates in amount of $375,000 payable March 1st of each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

†Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

(Testimony of M. J. Curry.)

New York, October 31, 1927.

Referring to its previous applications, especially to A-7277, dated September 30, 1926, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of $2,950,000 additional (of a total authorized issue of $50,000,000) of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M. 29942 to M-32877, both inclusive, for $1,000 each, of Nos. D-1074 to D-1103, both inclusive, for $500 each, and of Nos. C-5375 to C-5394, both inclusive for $100 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance and distribution for sale to the public, making the total amount of Series A Bonds issued and applied for $33,730,000. The $3,000,000 Series B Bonds issued and listed have all been surrendered to the Trustees under the mortgage for cancellation or redeemed, all as of September 1, 1927. (See Infra).

Authority

The issuance of said $2,950,000 Series A Bonds of the Railroad Company, covered by this application, was authorized by resolutions of the Board of Directors of the Railroad Company adopted March 2, 1927, and their authentication was authorized by a further resolution adopted by the Board of Directors on May 10, 1927. No action by the

(Testimony of M. J. Curry.)

stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, hereinafter mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale and/or exchange of said $2,950,000 Series A Bonds at not less than ninety-nine and one-half per cent. of their face amount and accrued interest and for the purposes hereinafter stated were approved by orders of the Interstate Commerce Commission, dated March 29, 1927 and September 2, 1927, in Finance Docket No. 6183. No further authority is required.

All of said outstanding Series B Six per Cent. Bonds were duly called for redemption as of September 1, 1927. Under the authorization therefor given by the aforesaid resolutions of the Board of Directors of Railroad Company and the aforesaid orders of the Interstate Commerce Commission, holders of $271,500 face amount of said Series B Bonds elected to receive in lieu of the redemption price of such bonds, Series A Five per Cent. Bonds of said new $2,950,000 issue of the same face amount ($271,500) together with a cash premium of three per cent. and accordingly $271,500 face amount of said Series A Bonds were, on September 1, 1927, delivered to effectuate said exchange, and the said $271,500 face amount of said Series B Six per Cent. Bonds received in exchange therefor were thereupon delivered by Railroad Company to the Trustees

(Testimony of M. J. Curry.)

under its First Mortgage of June 26, 1916, for cancellation, and were cancelled.

Purpose of Issue

The purpose of the issue of said bonds was to provide for the substitution of the same for all of the Series B Six per Cent. Bonds of the Railroad Company outstanding, the same then being of the aggregate face amount of $2,950,000.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company) of San Francisco, California, and Henry E. Cooper (37 Wall Street, New York City), Trustees. The Bonds covered by this application are an additional issue of Series A Bonds of $2,950,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of Ameri-

(Testimony of M. J. Curry.)

ca of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, Territory, Municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The Bonds are in coupon form of the denominations of $1,000, and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000, or multiples of $10,000. Coupon bonds for $1,000, $500 and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

(Testimony of M. J. Curry.)

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of

(Testimony of M. J. Curry.)

bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, howver, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in

(Testimony of M. J. Curry.)

the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustee may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for

(Testimony of M. J. Curry.)

each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount, either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since June 30, 1926 (the date as of which the consolidated balance sheet contained in said previous application A-7277 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except

First: The issuance of the $2,600,000 of Series A 5% Bonds covered by said application A-7277, and

(Testimony of M. J. Curry.)

Second: The purchase of $50,100 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased $505,700); and

Third: The retirement by surrender and cancellation, and by redemption as aforesaid of $2,950,000 face amount of Series B Six per Cent. Bonds on September 1, 1927, being all of the Series "B" Six per Cent. Bonds outstanding on said date; and

Fourth: The retirement of $375,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B" and $207,000 (face amount) of its 5½% Equipment Trust Certificates Series "C."

Properties

The properties of the Railroad Company are described in the original application for listing of Series "A" Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925, and A-7277, dated September 30, 1926.

Since June 30, 1926, the following important changes in mileage have occurred:

Completion of 9.53 miles additional main line yard, industry and side tracks, the operation of which commenced on various dates between July 1, 1926 and June 30, 1927.

(Testimony of M. J. Curry.)

Completion of .57 miles additional branch line side and spur tracks, the operation of which commenced on various dates between July 1, 1926 and June 30, 1927.

Acquisition of joint interest with other carriers in .04 miles of yard tracks, operation of which commenced on various dates between July 1, 1926 and June 30, 1927.

Since June 30, 1926, the Railroad Company has made the following net additions to equipment:

Freight train cars:		
Stock		1
Refrigerator		4
Other freight train		100
Caboose		8
Construction and maintenance equipment:		
Officer's car		1
Dump cars		30
Outfit cars		4
Spreader car		1
Total		149
Less cars destroyed and converted:		
Automobile	3	
Box	15	
Flat	5	
Stock	8	
Coal	1	
Refrigerator	6	
Caboose	1	
Construction and maintenance equipment		
Outfit car	1	
Total		35
Total units added June 30, 1926, to June 30, 1927		114

(Testimony of M. J. Curry.)

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800 and A-7277, for a description of the property subject to the lien of the Mortgage prior to July 1, 1926. The property on which the Mortgage constitutes a first lien includes the following:

	Miles
Mileage:	
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	115.98
Second main track	3.12
Yard tracks and sidings, etc.	283.33
Total track miles	1,328.84
Equipment:	
Locomotives	144
Passenger cars	9
Freight cars	5,962
Service cars	371
Floating equipment	5
Total	6,491

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series B and Series C, as follows:

Locomotives	16
Passenger cars	48
Freight cars	3,264
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and the Denver and Rio Grande Western Railroad Company.

(Testimony of M. J. Curry.)

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 165.65 miles of main line of railroad in California.

$5,196,204.46 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of June 30, 1927	$438,652.70

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the Mortgage, additional lines of railroad, branches and extension, equipment and securities.

From July 1, 1926 to June 30, 1927, inclusive, the Railroad Company has expended for road and equipment (including the above described additional equipment) the following amounts:

Road and structures and general expenses	$966,922.84
Equipment	503,175.05
Total	$1,470,097.89

(Testimony of M. J. Curry.)

Dividends

All of the authorized Capital Stock, consisting of $47,500,000 par value of Common Stock and $27,500,000 par value of Preferred Stock, is issued and outstanding, and all of such stock except Directors' qualifying shares of Common Stock is held by The Western Pacific Railroad Corporation, a Delaware corporation.

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927 (to June 30)	1½%	412,500

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

Financial Statements

There follow statements:

(1) The Western Pacific Railroad Company and subsidiary companies Consolidated Income Account for year ending December 31, 1926 and six months ended June 30, 1927;

(Testimony of M. J. Curry.)

(2) The Western Pacific Railroad Company and subsidiary companies Analysis of Surplus Account Changes, December 31, 1925 to June 30, 1927;

(3) The Western Pacific Railroad Company and subsidiary companies Consolidated General Balance Sheet, December 31, 1926 and June 30, 1927;

(4) Capital Stock of subsidiary companies outstanding and amount owned by The Western Pacific Railroad Company;

(5) Excess of par over book value of stocks and bonds of affiliated companies of The Western Pacific Railroad Company as of June 30, 1927.

THE WESTERN PACIFIC RAIROAD COMPANY AND SUBSIDIARY COMPANIES CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1926, AND SIX MONTHS ENDED JUNE 30, 1927.

	Year Ended Dec. 31, 1926	Six Months Ended June 30, 1927
Freight revenue	$14,259,753.89	$6,097,064.76
Passenger revenue	2,258,931.38	952,048.11
Mail and express revenue	431,612.73	200,851.97
Miscellaneous revenue	1,006,792.29	303,958.87
Total revenue	$17,957,090.29	$7,553,923.71
Expenses operating	$12,640,421.80	$6,681,825.66
Taxes	1,432,108.68	816,088.87
Uncollectible railway revenues	1,707.69	558.59
Operating income	$3,882,852.12	$55,450.39

(Testimony of M. J. Curry.)

Other income:		
Rental of property	$529,199.25	$276,232.53
Hire of equipment, receipts	1,625,908.13	670,728.63
Dividend income	7,720.00	230.00
Income from funded securities	5,034.95	9,246.49
Income from unfunded securities and accounts	91,649.33	43,009.57
Miscellaneous income	345.79	146.45
Gross income	$6,142,709.57	$1,055,044.26
Income deductions:		
Interest on funded debt, First Mortgage Bonds	$1,563,625.52	$855,276.27
Interest on funded debt, Equipment Notes	396,618.91	182,878.40
Interest on funded debt, advances	114,507.64	27,027.85
Rental of leased property	212,263.56	99,517.05
Hire of equipment, payments	1,011,393.63	373,617.23
Miscellaneous deductions	29,196.15	14,518.16
Amortization of discount on funded debt	130,159.18	64,557.15
Total deductions	$3,457,764.59	$1,617,392.11
Net income	$2,684,944.98	†*$562,347.85

(†) Denotes red figures.

*Corresponding figure for the six months ended June 30th, 1926, was $468,502.66.

THE WESTERN PACIFIC RAIROAD COMPANY AND SUBSIDIARY COMPANIES ANALYSIS OF SURPLUS ACCOUNT CHANGES —DECEMBER 31, 1925, TO JUNE 30, 1927.

	Year Ending Dec. 31, 1926	Six Months Ending June 30, 1927	Consolidated Total
Net income	$2,684,944.98	$562,347.85†	$2,122,597.13
Add: Net miscellaneous credits	15,292.88	1,337.04	16,629.92
Total	$2,700,237.86	$561,010.81†	$2,139,227.05

(†) Denotes red figures.

(Testimony of M. J. Curry.)

Deduct:			
Net miscellaneous debits	$462.57	$19,051.83	$19,514.40
Dividends on Preferred Stock	1,650,000.00	412,500.00	2,062,500.00
Total deductions	$1,650,462.57	$431,551.83	$2,082,014.40
Surplus—Increase	$1,049,775.29	*$992,562.64	$57,212.65
Surplus credit balance— June 30, 1927	$5,454,640.97		
Surplus credit balance— December 31, 1925	5,397,428.32		
Increase	$57,212.65		

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31, 1926, AND JUNE 30, 1927.

ASSETS

	Dec. 31, 1926	June 30, 1927
Investments:		
Investment in railroad and equipment	$125,492,900.55	$126,772,948.32
Investment in real estate and improvements	897,236.08	891,895.84
Sinking funds	50,532.26	5,635.26
Deposits in lieu of mortgage property sold	*98,252.51	26,938.95
Miscellaneous physical property	726,223.34	939,969.03
Other investments	709,498.75	734,498.75
Total investments	$127,974,643.49	$129,371,886.15
Current assets:		
Cash	$2,608,865.56	$1,427,490.68
Deposits of mortgage trust funds	768,452.63	438,652.70
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	121,624.46	154,222.96

* Denotes red figures.

(Testimony of M. J. Curry.)

Traffic and car service balances receivable	395,775.41	427,209.33
Net balances receivable from agents and conductors	163,160.97	187,418.22
Miscellaneous accounts receivable	1,202,273.94	1,097,780.53
Material and supplies	2,118,382.19	2,691,212.70
Interest and dividends receivable	10,569.49	17,684.40
Other current assets	414.74	414.74
Total current assets	$7,436,215.31	$6,488,782.18
Deferred assets:		
Working fund advances	$3,597.71	$3,113.80
Total deferred assets	$3,597.71	$3,113.80
Unadjusted debits:		
Rents and insurance premiums paid in advance	$50,250.57	31,652.95
Discount on funded debt	2,235,734.05	2,167,249.44
Other unadjusted debits	836,648.26	841,787.03
Total unadjusted debits	$3,122,632.88	$3,040,689.42
Total assets	$138,537,089.39	$138,904,471.55
Excess of par value over book value of Capital Stock and bonds of subsidiary companies	1,381,659.83	1,381,659.83
	$137,455,429.56	$137,522,811.72

LIABILITIES

	Dec. 31, 1926	June 30, 1927
Capital Stock:		
Common	$47,528,814.00	$47,528,814.00
Preferred	27,500,000.00	27,500,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	$75,527,052.00	$75,527,052.00

(Testimony of M. J. Curry.)

Long term debt:		
Funded debt (First Mortgage Gold Bonds)	$33,612,068.68	$33,561,968.68
Funded debt (Equipment Trust Certificates)	6,959,000.00	6,584,000.00
Funded debt (notes payable)	50,000.00	50,000.00
Total long term debt	$40,621,068.68	$40,195,968.68
Debt to affiliated companies:		
Open accounts	1,125,000.00	1,185,172.39
Total debt to affiliated companies	$1,125,000.00	$1,185,172.39
Current liabilities:		
Loans and notes payable	$145,000.00	$145,000.00
Traffic and car service balances payable	307,920.48	403,589.24
Audited accounts and wages payable	713,655.31	1,849,609.59
Miscellaneous accounts payable	221,027.85	111,655.78
Interest matured unpaid	21,709.53	46,795.53
Unmatured interest accrued	628,709.47	656,416.05
Unmatured rents accrued	5,049.98	9,962.46
Other current liabilities	56,644.61	111,227.12
Total current liabilities	$2,099,717.23	$3,304,255.77
Deferred liabilities:		
Other deferred liabilities	68,614.69	18,003.09
Total deferred liabilities	$68,614.69	$18,003.09
Unadjusted credits:		
Tax liability	$167,657.51	$289,292.37
Accrued depreciation—Equipment	3,651,852.44	4,046,467.18
Other unadjusted credits	264,588.97	330,402.48
Surplus—Investment, equipment and other property purchased	7,172,674.43	7,171,556.79
Total unadjusted credits	$11,266,773.35	$11,837,718.82

Surplus:		
Additions to property through income and surplus	4,572,467.65	4,943,662.58
Funded debt retired through income and surplus	399,856.73	449,928.73
Sinking fund reserves	260,447.76	222,548.26
Profit and loss balance	1,214,431.47	*161,498.60
Total surplus	$6,447,203.61	$5,454,640.97
Total liabilities	$137,155,429.56	$137,522,811.72

THE WESTERN PACIFIC RAILROAD COMPANY CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING AND AMOUNT OWNED BY THE WESTERN PACIFIC RAILROAD COMPANY.

	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Issuing company:			
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES AS OF JUNE 30, 1927

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Railway Company	1,223,848.94	1,147,968.00	*75,880.94

*Denotes red figures.

(Testimony of M. J. Curry.)

First Mortgage Bonds:			
Sacramento Northern Railroad	3,963,723.91	5,196,204.46	1,232,480.55
Total	$5,363,012.63	$6,744,672.46	$1,381,659.83

THE WESTERN PACIFIC RAIROAD COMPANY AND SUBSIDIARY COMPANIES. STATEMENT OF FUNDED DEBT AS OF JUNE 30, 1927.

The Western Pacific Railroad Company First Mortgage Gold Bonds maturing March 1, 1946:		
Issued June 26, 1916, Series A, 5%		$19,628,300.00
Issued May 31, 1921, Series A, 5%		4,096,000.00
Issued February 15, 1922, Series B, 6		2,950,000.00
Issued April 24, 1925, Series A, 5%		4,000,000.00
Issued December 1 and 31, 1926 Series A, 5%		2,600,000.00
Total amount outstanding June 30, 1927		$33,274,300.00
The Western Pacific Railroad Company 5½% Equipment Trust Certificates Series "B":		
Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937 inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding June 30, 1927		4,100,000.00
The Western Pacific Railroad Company 5½% Equipment Trust Certificates, Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938 inclusive	207,000.00	
Total amount outstanding June 30, 1927		2,484,000.00

(Testimony of M. J. Curry.)

Tidewater Southern Railway Company, First Mortgage Thirty-Year Five Per Cent Gold Bonds, maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding June 30, 1927		259,500.00
Sacramento Northern Railroad First Mortgage Twenty-Year Five Per Cent Gold Bonds issued July 1, 1918, and mafuring July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary of Railroad Company) the successor in ownership of all the property of the Sacramento Northern Railroad:		
Total amount outstanding June 30, 1927	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,196,204.46	
		28,168.68
Amount of note of Bisbee Investment Company, dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage; which must be paid by Sacramento Northern Railway, outstanding on June 30, 1927		50,000.00

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding

(Testimony of M. J. Curry.)

amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company agrees with the New York Stock Exchange as follows:

Not to dispose of an integral asset or its stock interest in any constituent, subsidiary, owned or controlled company, or allow any of said constituent, subsidiary, owned or controlled companies to dispose of an integral asset or stock interest in other companies unless for retirement and cancellation, without notice to the Stock Exchange.

To publish statement of earnings monthly.

To publish once in each year and submit to the stockholders, at least fifteen days in advance of the annual meeting of the Corporation, a statement of its financial condition; a consolidated income account covering the previous fiscal year; and a consolidated balance sheet showing assets and liabilities at the end of the year; or an income account and balance sheet of the parent company and all constituent, subsidiary, owned or controlled companies, subject to I. C. C. regulations.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with inter-

(Testimony of M. J. Curry.)

est or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, other than its transfer office or agency in said city, where all listed securities shall be registered.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to make any change in listed securities or of a trustee of its bonds or other securities, without the approval of the Committee on Stock List, and not to select as a trustee an officer or director of the Company.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its listed securities, so as to afford the holders of its listed securities a proper period within which to record their interests, and that all such rights to subscribe or to receive allotments and all other such rights and benefits shall be transferable; and shall be transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To notify the Stock Exchange of the issuance of additional amounts of listed securities, and make immediate application for the listing thereof.

To publish promptly to holders of listed bonds and stocks any action in respect to interest on bonds, dividends on shares, or allotment of rights

(Testimony of M. J. Curry.)

for subscription to securities, notices thereof to be sent to the Stock Exchange, and to give to the Stock Exchange at least ten days' notice in advance of the closing of the transfer books or extensions, or the taking of a record of holders for any purpose.

To redeem Preferred Stock in accordance with the requirements.

To notify the Stock Exchange if deposited collateral is changed or removed.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 28, 1928 are: Arthur Curtiss James, Thomas M. Schumacher, Alvin W. Krech and Winthrop W. Aldrich, of New York, N. Y.; C. M. Levey, William Fries, J. G. Hooper, Campbell MeGregor, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angellotti, of San Francisco, California; John L. Nagle, of Sacramento, California; Charles Elsey of Oakland, California; Hale Holden and James

(Testimony of M. J. Curry.)

E. Gorman, of Chicago, Illinois; L. W. Baldwin, of St. Louis, Missouri; and C. M. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, A. W. Krech, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Vice-Presidents, Charles Elsey, E. W. Mason, Eugene Fox and M. J. Curry; Secretary, W. G. Bruen; Treasurer, Charles Elsey; Assistant Secretary and Assistant Treasurer, M. J. Curry.

The bonds may be transferred and registered at The Equitable Trust Company of New York, 37 Wall Street, New York, N. Y.

The Agent for the payment of interest is The Equitable Trust Company of New York.

The places for the payment of the principal are at the office of The Equitable Trust Company of New York, or of the Crocker First Federal Trust Company of San Francisco, California.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By M. J. CURRY,
Vice-President

This Committee recommends that the above-mentioned $2,950,000 First Mortgage Five per Cent.

(Testimony of M. J. Curry.)

Gold Bonds, Series A, due March 1, 1946, included in Nos. M-29942 to M-32877 for $1,000 each; D-1074 to D-1103 for $500 each and C-5375 to C-5394 for $100 each (and coupon bonds of one denomination issued in exchange for coupon bonds of other denominations and registered bonds issued in exchange for coupon bonds), be added to the list on official notice of issuance and distribution and sale to the public, in accordance with the terms of this application making the total amount authorized to be listed $33,730,000.

ROBERT GIBSON,
Chairman.

Adopted by the Governing Committee, November 10, 1927.

E. V. D. COX,
Secretary.

[Endorsed]: United States District Court. No. 26591 Western Pac. R. R. Co. vs. Irving Trust Co. Exhibit No. 8 Filed 1/22/1940 Walter B. Maling, Clerk

Mr. McCollum: And the statement of May 16, 1929, as Irving Trust Company Exhibit 9.

(The document was marked "Irving Trust Company's Exhibit 9.")

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 9

Francis E. Fitch (Inc.), 138 Pearl St., New York.

A-8696

COMMITTEE ON STOCK LIST,
NEW YORK STOCK EXCHANGE

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by the Western Pacific Railroad Corporation of Delaware)
First Mortgage Five Per Cent. Gold Bonds,
Series A, Due March 1, 1946

Additional listing, Series A Bonds	$5,000,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	38,730,000
Series B, 6% Bonds	3,000,000*

*All this issue surrendered for cancellation or redeemed as of September 1, 1927.

Total listing applied for:	
Series A	38,730,000
This additional issue:	
Indenture authorized by stockholders,	July 13, 1916
Authorized by Board of Directors	May 21, 1928
Approved by Interstate Commerce Commission by its order	Dec. 21, 1928

I. C. C. Finance Docket No. 7055.

No other authority necessary.

CAPITAL SECURITIES

	Par value	Number of shares: Authorized by Charter	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Stock					
Classes:					
Preferred	$100	400,000	283,000	None	275,000
Common	100	600,000	475,000	None	475,000

	Interest rate	Amount authorized*	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Mortgage Bonds					
First Mortgage, due Mar. 1, 1946:					
Series "A"	5%	$50,000,000	$39,302,800	$33,730,000	$38,174,300
Series "B"	6%	50,000,000	3,000,000	3,000,000	None
Equipment Trust obligations:					
Titles and dates of maturity					
†Equipment Trust Certificates	5½%	5,600,000	5,600,000	No	3,350,000
‡Equipment Trust Ctfs. (Series C)	5½%	3,105,000	3,105,000	No	2,070,000

*Total amount of First Mortgage Bonds authorized under Mortgage.

†Certificates in amount of $375,000 payable March 1st of each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

‡Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

(Testimony of M. J. Curry.)

New York, N. Y., May 16, 1929.

Referring to its previous applications, especially to A-7722, dated October 31, 1927, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Exchange of $5,000,000 additional (of a total authorized issue of $50,000,000) of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-32966 to M-37965 both inclusive, for $1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance and distribution for sale to the public, making the total amount of Series A Bonds issued and applied for $38,730,000.

Authority

The issuance of said $5,000,000 Series A Bonds of the Railroad Company, covered by this application, was authorized by resolutions of the Board of Directors of the Railroad Company adopted May 21, 1928, and their authentication was authorized by a resolution adopted by the Executive Committee on April 26, 1929. No action by the stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, hereinafter mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale of said $5,000,000 Series

(Testimony of M. J. Curry.)

A Bonds at not less than 97½% of their face amount and accrued interest and for the purposes hereinafter stated was approved by order of the Interstate Commerce Commission, dated December 21, 1928, in Finance Docket No. 7055. No further authority is required. The Railroad Company has sold and delivered said bonds on April 26, 1929, for cash at the price of 97½% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Purpose of Issue

The purpose of the issue of said bonds was to provide proceeds to be applied to the reimbursement of the Railroad Company for expenditures and for the cost of certain proposed construction, completion, extension and improvement of facilities and for the acquisition of equipment; all of such expenditures made or proposed to be made having been of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above-mentioned order of December 31, 1928, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June

(Testimony of M. J. Curry.)

26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (37 Wall Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of $5,000,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other

(Testimony of M. J. Curry.)

taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of $1,000, and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000, or multiples of $10,000. Coupon bonds for $1,000, $500 and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A bonds are redeemable through the sinking fund at par and

(Testimony of M. J. Curry.)

accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks, in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, Cal., one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall

(Testimony of M. J. Curry.)

have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in Section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a ma-

(Testimony of M. J. Curry.)

jority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of $1,000 principal amount of bonds for each $1,000 of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each $1,000 principal amount of bonds so sold for each $1,000 principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount,

(Testimony of M. J. Curry.)

either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since June 30, 1927 (the date as of which the consolidated balance sheet contained in said previous application A-7722 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding, except,

First: The issuance of the $2,950,000 of Series A 5% Bonds covered by said application A-7722, and

Second: The purchase of $100,000 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased $605,700); and

Third: The retirement of $750,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B," and $414,000 (face amount) of its 5½% Equipment Trust Certificates Series "C;" and

Fourth: The increase in authorized capital stock stated in the Railroad Company's Articles of Incorporation from $75,000,000, divided into 275,000 shares of preferred stock and 475,000 shares of common stock, to $100,000,000 divided into 400,000 shares of preferred stock

(Testimony of M. J. Curry.)

and 600,000 shares of common stock, all of the par value of $100 each, by proceedings duly had in accordance with the laws of California on November 15, 1927. None of said authorized increase of $25,000,000 capital stock has been issued, and none thereof is as yet outstanding. Under date of November 21, 1928, Finance Docket 7183, 8,000 additional shares of the preferred stock were authorized to be issued by the Interstate Commerce Commission, but such authorization has not as yet been exercised. By the same order the Interstate Commerce Commission authorized the issue of $572,800 additional of Railroad Company's First Mortgage 5% Bonds, but such authorization has not as yet been exercised; and

Fifth: The issuance of the $5,000,000 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series "A" Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925; A-7277, dated September 30, 1926, and A-7722, dated October 31, 1927.

Since June 30, 1927, the following important changes in mileage have occurred:

(Testimony of M. J. Curry.)

Completion of Terminus Branch, 7.92 miles, operation commenced January 4, 1928.

Completion of Connecting Track with Oregon Short Line R. R. at Wells, Nev., 1.18 miles, operation commenced December 7, 1928.

Completion of 20.21 miles additional main line yard, industry and side tracks the operation of which commenced on various dates between July 1, 1927 and December 31, 1928.

Completion of 4.07 miles additional branch line side and spur tracks, the operation of which commenced on various dates between July 1, 1927 and December 31, 1928.

Acquisition of joint interest with other carriers in .64 miles of yard tracks, operation of which commenced on various dates between July 1, 1927 and December 31, 1928.

Abandonment of .39 miles Second Main Track at Williams Loop M. P. 294.14, California, August 29, 1927.

'Since June 30, 1927, the Railroad Company has made the following changes in equipment:

(Testimony of M. J. Curry.)

ADDITIONS

Locomotives, switching	4
Freight train cars:	
Stock	202
Flat	2
Caboose	9
Passenger train cars:	
Cafe coaches	4
Construction and maintenance equipment:	
Dump cars	10
Tender cars	2
Locomotive crane	1
Spreader cars	2
Emergency tool car	1
Ditcher flat car	2
Floating equipment: Car float	1
Total additions	240

RETIREMENTS

Freight train cars destroyed and converted:	
Automobile	4
Box	236
Flat	26
Stock	3
Coal	7
Refrigerator	9
Caboose	2
Construction and maintenance equipment:	
Outfit cars	2
Tender flat car	1
Ditcher flat car	2
Total deductions	292
Net total units retired July 1, 1927 to December 31, 1928	52

(Testimony of M. J. Curry.)

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800, A-7277 and A-7722 for a description of the property subject to the lien of the Mortgage prior to July 1, 1927. The property on which the Mortgage constitutes a first lien includes the following:

	Miles
Mileage:	
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	307.61
Total track miles	1,361.83
Equipment:	
Locomotives	148
Passenger cars	13
Freight cars	5,894
Service cars	391
Floating equipment	6
Total	6,452

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series B and Series C, as follows:

Locomotives	16
Passenger cars	48
Freight cars	3,251
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad

(Testimony of M. J. Curry.)

Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and the Denver and Rio Grande Western Railroad Company

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 251.27 miles of main line of railroad in California

$5,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad

Deposited cash in the hands of Mortgage Trustees, as of December 31, 1928—$51,465.58.

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the Mortgage, additional lines of railroad, branches and extension, equipment and securities.

From July 1, 1927 to December 31, 1928, inclusive, the Railroad Company has expended for road

(Testimony of M. J. Curry.)

and equipment (including the above described equipment) the following amounts:

Road and structures and general expenses	$3,695,108.56
Equipment	574,320.36
Total	$4,269,428.92

Dividends

All of the issued and outstanding Capital Stock, consisting of $47,500,000 par value of Common Stock and $27,500,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation; $25,000,000 of the authorized capital stock of the Company, consisting of $12,500,000 of Common Stock and $12,500,000 of Preferred Stock is not yet issued or outstanding.

The following dividends have been paid on the Preferred and Common Stocks since 1922:

PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928		None

COMMON STOCK

Year	Rate	Amount paid
1925	5%	$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

(Testimony of M. J. Curry.)

FINANCIAL STATEMENTS

The Western Pacific Railroad Company

Capital Stock of Subsidiary Companies Outstanding and Amount Owned by The Western Pacific Railroad Company

Issuing Company	Par value Capital Stock outstanding	Percentage Owned by Western Pacific	Par value Owned by Western Pacific
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00
Western Pacific California Railroad Company (subscribed but not issued)	27,500.00	100%	27,500.00

OWNED BY SACRAMENTO NORTHERN RAILWAY

	Par Value Capital Stock outstanding	Percentage owned by Sacramento Northern	Par value owned by Sacramento Northern
West Side Railroad	$35,000.00	100%	$35,000.00

OWNED BY STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by S. R. & D. Co.	Par value owned by S. R. & D. Co.
Tidewater Southern Railway Company	$1,176,782.00	.01%	$95.00

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES AS OF DECEMBER 31, 1928

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	-$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Railway Co.	1,223,848.94	1,147,968.00	*75,880.94

*Denotes red figures.

(Testimony of M. J. Curry.)

	Book value	Par value	Excess of par over book value
First Mortgage Bonds:			
Sacramento Northern Railroad	3,975,456.13	5,213,475.35	1,238,019.22
Total	$5,374,744.85	$6,761,943.35	$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Railway Company	57.00	95.00	38.00
Grand total	$5,424,801.85	$6,797,038.35	$1,372,236.50

THE WESTERN PACIFIC RAILROAD COMPANY AND SUSIDIARY COMPANIES STATEMENT OF FUNDED DEBT AS OF DECEMBER 31, 1928.

The Western Pacific Railroad Company First Mortgage Gold Bonds maturing March 1, 1946:		
Issued June 26, 1916, Series A, 5%		$19,628,300.00
Issued May 31, 1921, Series A, 5%		4,096,000.00
Issued April 24, 1925, Series A, 5%		3,950,000.00
Issued December 1 and 31, 1926, Series A, 5%		2,600,000.00
Issued September 1 and October 18, 1927, Series A, 5%		2,950,000.00
Total amount outstanding December 31, 1928		$33,224,300.00
The Western Pacific Railroad Company 5½% Equipment Trust Certificates, Series "B":		
Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937 inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding December 31, 1928		$3,725,000.00

*Denotes red figures.

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company 5½% Equipment Trust Certificates, Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938 inclusive	207,000.00	
Total amount outstanding December 31, 1928		$2,070,000.00
Tidewater Southern Railway Company First Mortgage Thirty-Year Five Per Cent. Gold Bonds maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding December 31, 1928		201,000.00
Sacramento Northern Railroad First Mortgage Twenty Year Five Per Cent. Gold Bonds issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary of Railroad Company) the successor in ownership of all the property of the Sacramento Northern Railroad:		
Total amount outstanding December 31, 1928	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,213,475.35	
		10,897.79
Amount of note of Bisbee Investment Company date January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on December 31, 1928		65,000.00

(Testimony of M. J. Curry.)

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1927, AND YEAR ENDED DECEMBER 31, 1928.

	Year ended Dec. 31, 1927	Year ended Dec. 31, 1928
Freight revenue	$14,764,612.09	$15,974,136.62
Passenger revenue	2,062,207.84	1,870,789.89
Mail and express revenue	428,939.77	476,943.11
Miscellaneous revenue	1,054,808.43	1,099,981.29
Total revenue	$18,310,568.13	$19,421,850.91
Expenses—Operating	$14,525,620.22	$15,602,657.24
Taxes	1,660,794.02	1,312,850.80
Uncollectible railway revenues	805.64	889.85
Operating income	$2,123,348.25	$2,505,453.02
Other income:		
Rental of property	$545,258.52	$605,940.13
Hire of equipment, receipts	1,404,529.80	1,335,765.29
Dividend income	305.00	7,725.00
Income from funded securities	18,039.58	39,168.39
Income from unfunded securities and accounts	71,057.23	115,067.72
Miscellaneous income	250.46	412.65
Gross income	$4,162,788.84	$4,609,532.20
Income deductions:		
Interest on funded debt, First Mortgage Bonds	$1,682,571.15	$1,675,917.28
Interest on funded debt, Equipment Notes	362,989.61	332,598.75
Interest on funded debt, advances	106,293.44	294,821.63
Rental of leased property	200,309.27	222,956.94
Hire of equipment, payments	1,140,605.65	1,265,994.06

(Testimony of M. J. Curry.)

Miscellaneous deductions	26,680.93	40,692.37
Amortization of discount on funded debt	128,060.82	124,441.73
Total deductions	$3,647,510.87	$3,957,422.76
Net income	$515,277.97	$652,109.44
Earned per share on Common Stock	.....	.....

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES ANALYSIS OF SURPLUS ACCOUNT CHANGES —DECEMBER 31, 1926, TO DECEMBER 31, 1928.

	Year ending Dec. 31, 1927	Year ending Dec. 31, 1928	Consolidated total
Net income	$515,277.97	$652,109.44	$1,167,387.41
Add: Net miscellaneous credits	1,850.72	72,164.32	74,015.04
Total	$517,128.69	$724,273.76	$1,241,402.45
Deduct:			
Net miscellaneous debits	$165,528.29	$12,264.59	$177,792.88
Dividends on Preferred Stock	412,500.00	None	412,500.00
Total deductions	$578,028.29	$12,264.59	$590,292.88
Surplus—Increase	$60,899.60*	$712,009.17	$651,109.57

Surplus credit balance— December 31, 1928	$7,168,949.18
Surplus credit balance— December 31, 1926	†6,517,839.61
Increase	$651,109.57

*Denotes italic figures.

†Includes West Side R.R. Co. not included in combined statements, application A-7722.

(Testimony of M. J. Curry.)

CONSOLIDATED GENERAL BALANCE SHEET DECEMBER 31, 1927, AND DECEMBER 31, 1928

ASSETS

	Dec. 31, 1927	Dec. 31, 1928
Investments:		
Investment in railroad and equipment	$128,605,893.38	$134,075,252.17
Investment in real estate and improvements	876,598.27	1,050,431.10
Sinking funds	50,331.40	50,687.38
Deposits in lieu of mortgaged property sold	5,008.60	13,134.59
Miscellaneous physical property	959,211.25	1,411,492.00
Other investments	991,791.26	1,623,064.83
Total investments	$131,488,834.16	$138,224,062.07
Current assets:		
Cash	$1,539,970.68	$2,030,070.21
Deposits of mortgage trust funds	410,475.35	40,841.46
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	146,911.11	156,215.94
Traffic and car service balances receivable	465,546.93	706,522.76
Net balances receivable from agents and conductors	187,459.11	210,984.33
Miscellaneous accounts receivable	1,198,490.51	1,320,103.13
Material and supplies	2,770,653.06	3,134,174.82
Interest and dividends receivable	12,157.92	12,246.65
Other current assets	164.74	14.74
Total current assets	$6,778,525.33	$7,657,869.96
Deferred assets:		
Working fund advances	6,787.81	5,382.39
Total deferred assets	$6,787.81	$5,382.39

(Testimony of M. J. Curry.)

	Dec. 31, 1927	Dec. 31, 1928
Unadjusted debits:		
Rents and insurance premiums paid in advance	$41,765.24	$49,415.96
Discount on funded debt	2,057,345.41	1,927,374.82
Other unadjusted debits	949,796.22	830,464.85
Total unadjusted debits	$3,048,906.87	$2,807,254.73
Total assets	$141,323,054.17	$148,694,569.15
Excess of par value over book value of capital stock and bonds of subsidiary companies	1,366,659.83	1,372,236.50
	$139,956,394.34	$147,322,332.65

LIABILITIES

Capital stock:		
Common	$47,528,814.00	$47,528,719.00
Preferred	27,500,000.00	27,500,000.00
Premium on capital stock	498,238.00	498,238.00
Total stock	$75,527,052.00	$75,526,957.00
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	$33,580,135.35	$33,501,197.79
Funded debt (Equipment Trust Certificates)	6,377,000.00	5,795,000.00
Total long term debt	$39,957,135.35	$39,296,197.79
Debt to affiliated companies: Open accounts	3,064,029.85	8,526,646.43
Total debt to affiliated companies	$3,064,029.85	$8,526,646.43
Current liabilities:		
Loans and notes payable	140,000.00	1,034,260.00
Traffic and car service balances payable	383,086.90	582,701.67
Audited accounts and wages payable	1,027,064.58	1,205,613.01
Miscellaneous accounts payable	293,380.45	247,345.27

(Testimony of M. J. Curry.)

	Dec. 31, 1927	Dec. 31, 1928
Interest matured unpaid	16,019.28	14,009.78
Funded debt matured unpaid		11,100.00
Unmatured interest accrued	628,343.95	665,549.21
Unmatured rents accrued	4,962.48	4,883.32
Other current liabilities	78,283.53	84,442.93
Total current liabilities	$2,571,141.17	$3,849,905.19
Deferred liabilities: Other deferred liabilities	87,980.97	26,913.19
Total deferred liabilities	$87,980.97	$26,913.19
Unadjusted credits:		
Tax liability	284,325.74	277,018.09
Accrued depreciation—Equipment	4,427,232.79	5,244,744.98
Other unadjusted credits	408,999.67	233,444.01
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	$12,292,114.99	$12,926,763.87
Surplus:		
Additions to property through income and surplus	$5,156,941.92	$5,786,743.36
Funded debt retired through income and surplus	449,928.73	499,928.73
Sinking fund reserves	284,788.57	319,102.88
Profit and loss balance	565,280.79	563,174.21
Total surplus	$6,456,940.01	$7,168,949.18
Total liabilities	$139,956,394.34	$147,322,332.65

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

(Testimony of M. J. Curry.)

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company agrees with the New York Stock Exchange as follows:

Not to dispose of an integral asset or its stock interest in any constituent, subsidiary, owned or controlled company, or allow any of said constituent, subsidiary, owned or controlled companies to dispose of an integral asset or stock interest in other companies unless for retirement and cancellation, without notice to the Stock Exchange.

To publish statement of earnings monthly.

To publish once in each year and submit to the stockholders, at least fifteen days in advance of the annual meeting of the Corporation, a statement of its financial condition, a consolidated income account covering the previous fiscal year; and a consolidated balance sheet showing assets and liabilities at the end of the year; or an income account and balance sheet of the parent company and all constituent, subsidiary, owned or controlled companies, subject to I. C. C. regulations.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable,

and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, other than its transfer office or agency in said city, where all listed securities shall be registered.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to make any change in listed securities or of a trustee of its bonds or other securities, without the approval of the Committee on Stock List, and not to select as a trustee an officer or director of the Company.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted its securities, or of any other rights or benefits pertaining to ownership in its listed securities, so as to afford the holders of its listed securities a proper period within which to record their interests, and that all such rights to subscribe or to receive allotments and all other such rights and benefits shall be transferable; and shall be transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To notify the Stock Exchange of the issuance of additional amounts of listed securities, and make immediate application for the listing thereof.

To publish promptly to holders of listed bonds and stocks any action in respect to interest on bonds, dividends on shares, or allotment of rights for sub-

(Testimony of M. J. Curry.)

scription to securities, notices thereof to be sent to the Stock Exchange, and to give to the Stock Exchange at least ten days' notice in advance of the closing of the transfer books or extensions, or the taking of a record of holders for any purpose.

To redeem Preferred Stock in accordance with the requirements.

To notify the Stock Exchange if deposited collateral is changed or removed.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, Cal.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, Cal.

The names and addresses of the Directors, whose terms expire March 26, 1930, are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Ennis, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angellotti, of San Francisco, Cal.; John L. Nagle, of Sacramento, Cal.; Charles Elsey, of Oakland, Cal.; Frederic E. Williamson and James E. Gorman, of

(Testimony of M. J. Curry.)

Chicago, Ill.; L. W. Baldwin, of St. Louis, Mo.; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich, and Thomas M. Schumacher, Chairman; and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Vice-Presidents, Charles Elsey, E. W. Mason and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretary, Thomas J. Byrne.

The bonds may be transferred and registered at The Equitable Trust Company of New York, 37 Wall Street, New York, N. Y.

The Agents for the payment of interest are The Equitable Trust Company of New York, and Crocker First Federal Trust Company of San Francisco, Cal.

The place for the payment of the principal is at the office of The Equitable Trust Company of New York.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By M. J. CURRY,
Vice-President.

This Committee recommends that the above-mentioned $5,000,000 First Mortgage 5% Gold Bonds,

(Testimony of M. J. Curry.)

Series A, due March 1, 1946; included in Nos. M-32966 to M-37965, for $1,000 each, (and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of issuance for sale and distribution, in accordance with the terms of this application, making the total amount authorized to be listed $38,730,000.

ROBERT GIBSON,
Chairman.

Adopted by the Governing Committee, June 12, 1929.

ASHBEL GREEN,
Secretary.

[Endorsed]: United States District Court, No. 26591. Western Pac. R. R. Co., vs. Irving Trust Co. Exhibit No. 9. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: And the statement of July 1, 1930 as Irving Trust Company Exhibit 10.

(The document was marked "Irving Trust Company's Exhibit 10.")

CLERK'S COPY.

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING ~~INTERNATIONAL~~ BONDHOLDERS COMMITTEE, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 26, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED: DECEMBER 30, 1941. JANUARY 17, 1942. FEBRUARY 28, 1942. MARCH 30, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES, CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME IV

Page 1433 to 1925

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 10

Francis E. Fitch (Inc.), 138 Pearl St., New York.

COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGE

A-9504

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by The Western Pacific Railroad Corporation of Delaware)

First Mortgage Five Per Cent Gold Bonds,
Series A, due March 1, 1946

Additional listing, Series A Bonds	$572,800
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	39,302,800
Series B, 6% Bonds	3,000,000*
Total listing applied for:	
Series A	39,302,800
This additional issue:	
Indenture authorized by stockholders	July 13, 1916
Authorized by Board of Directors	Sept. 4, 1928
Approved by Interstate Commerce Commission by its order	Nov. 21, 1928
I. C. C. Finance Docket No. 7123.	
No other authority necessary.	

*All this issue surrendered for cancellation or redeemed as of September 1, 1927.

CAPITAL SECURITIES

STOCKS	Par Value	Number of Shares: Authorized by Charter	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Classes:					
Preferred	$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000

BONDS	Interest Rate	Amount Authorized	Authorized for Issuance	Previously Listed or Authorized to be Listed	Outstanding
Mortgage Bonds:					
First Mortgage, due March 1, 1946:					
Series "A"	5%	$50,000,000*	$39,302,800	$38,730,000	$38,697,100
Series "B"	6%		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equipment Trust Certificates	5½%	5,600,000	5,600,000	None	2,975,000
‡Equipment Trust Certificates (Series C)	5½%	3,105,000	3,105,000	None	1,863,000
**Equipment Trust Certificates (Series D)	5%	1,095,000	1,095,000	None	1,022,000

*Total amount of First Mortgage Bonds authorized under Mortgage.

†Certificates in amount of $375,000 payable March 1st of each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

‡Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

**Certificates in amount of $73,000 payable November 1st of each year from 1929 to 1943, inclusive.

(Testimony of M. J. Curry.)

New York, July 1st, 1930.

Referring to its previous applications, especially to A-8696, dated May 16, 1929, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of $572,800 additional (of a total authorized issue of $50,000,000) of its First Mortgage Five per cent Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-37976 to M-38547 both inclusive, for $1,000 each, of No. D-1104 for $500 and Nos. C-5395 to C-5397, both inclusive, for $100 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance and distribution for sale to the public, making the total amount of Series A Bonds issued and applied for $39,302,800.

Authority

The issuance of said $572,800, Series A Bonds of the Railroad Company, covered by this application, was authorized by resolutions of the Board of Directors of the Railroad Company adopted Sept. 4, 1928 and their authentication was authorized by a resolution adopted by the Board of Directors on March 31, 1930. The purpose of said issuance (as more fully hereinafter described) was to finance the acquisition by Sacramento Northern Railway, a subsidiary of Railroad Company, of the lines of railroad of San Francisco-Sacramento Railroad Company, the expenditure in such acquisition amount-

(Testimony of M. J. Curry.)

ing to more than $1,000,000, and therefore, pursuant to sub-paragraph seventh of Section 2 of Article Second of the First Mortgage of Railroad Company, dated June 26, 1916, hereinafter mentioned, a majority in amount of such portion of the capital stock of Railroad Company as was present in person or represented by proxy at a meeting of the stockholders of Railroad Company called for such purpose consented to the authentication and delivery of First Mortgage bonds and/or the payment of deposited cash therefrom with respect to the acquisition by Sacramento Northern Railway of said lines of railroad of said San Francisco-Sacramento Railroad Company, such meeting being held on August 6, 1928, at the principal office of the Railroad Company in San Francisco, California; a tally of the ballots cast by all stockholders present at said meeting disclosed that no share of stock had been voted against said consent and that the number of shares of stock voted for said consent was 275,000 shares of preferred stock and 474,994 shares of common stock of Railroad Company, being more than 99% of all of the capital stock of Railroad Company then issued and outstanding. The issuance and sale of said $572,800 Series A Bonds at not less than ninety nine per cent of their face amount and accrued interest and for the purposes hereinafter stated was approved by order of the Interstate Commerce Commission, dated November 21, 1928, in Finance

(Testimony of M. J. Curry.)

Docket No. 7123. No further authority is required. The Railroad Company has sold and delivered said bonds on April 23, 1930 for cash at the price of 99% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of Counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor, of that firm, being Counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said bonds was to provide proceeds to be applied to the reimbursement of the Railroad Company for cash advances to Sacramento Northern Railway heretofore made to enable Sacramento Northern Railway to effect the purchase of the properties of San Francisco-Sacramento Railroad Company; Sacramento Northern Railway being a subsidiary of Railroad Company within the meaning of that term as defined in said First Mortgage, and the purchase by it of said properties of San Francisco-Sacramento Railroad Company having been an expenditure of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and hav-

(Testimony of M. J. Curry.)

ing been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of November 21st, 1928, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of $572,800 principal amount, all bearing interest at the rate of five per cent per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to in-

(Testimony of M. J. Curry.)

come derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of $1,000 and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000, or multiples of $10,000. Coupon bonds for $1,000, $500 and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied

(Testimony of M. J. Curry.)

to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date, at par and accrued interest, on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been

(Testimony of M. J. Curry.)

redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five percent in amount of the

(Testimony of M. J. Curry.)

bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Rail-

(Testimony of M. J. Curry.)

road Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount, either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since December 31, 1928 (the date as of which the consolidated balance sheet contained in said previous application A-8696 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

First: The issuance of the $5,000,000 of Series A 5% Bonds covered by said application A-8696; and

Second: The purchase of $100,000 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased $655,700); and

(Testimony of M. J. Curry.)

Third: The issuance of $1,095,000 face amount of Equipment Trust Certificates, Series "D"; and

Fourth: The retirement of $750,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B", $207,000 (face amount) of its 5½% Equipment Trust Certificates Series "C" and $73,000 (face amount) of its 5% Equipment Trust Certificates, Series "D"; and

Fifth: The issuance of 8,000 additional shares of the Preferred Stock; and

Sixth: The issuance of the $572,800 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925, A-7277, dated September 30, 1926; A-7722 dated October 31, 1927 and A-8696, dated May 16, 1929.

Since December 31, 1928, the following important changes in mileage have occurred:

Completion of 4.63 miles additional main line yard, industry and side tracks the operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

(Testimony of M. J. Curry.)

Completion of .50 miles additional branch line side and spur tracks, the operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

Acquisition of joint interest with other carriers in .42 miles of yard tracks, operation of which commenced on various dates between Jan. 1, 1929 and December 31, 1929.

Since December 31, 1928, the Railroad Company has made the following changes in equipment:

Additions:	
Locomotives, freight	5
Freight train cars:	
Automobile box	250
Flat	50
Tank	50
Caboose	5
Total additions	360
Retirements:	
Freight train cars destroyed and converted:	
Automobile	1
Box	4
Flat	9
Coal	1
Refrigerator	10
Caboose	1
Construction and maintenance equipment:	
Outfit cars	1
Total deductions	27
Net total units added January 1, 1929 to December 31, 1929	333

(Testimony of M. J. Curry.)

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800, A-7277, and A-7722 and A-8696 for a description of the property subject to the lien of the Mortgage prior to January 1, 1929. The property on which the Mortgage constitutes a first lien includes the following:

Mileage:	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	312.74
Total track miles	1,366.96

Equipment:	
Locomotives	148
Passenger cars	13
Freight cars	5,880
Service cars	394
Floating equipment	6
Total	6,441

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives	21
Passenger cars	48
Freight cars	3,590
Service cars	1

(Testimony of M. J. Curry.)

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.

$5,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of December 31, 1929 ..... $45,341.46

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad,

(Testimony of M. J. Curry.)

branches and extensions, equipment and securities.

From January 1, 1929 to December 31, 1929, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts:

Road and structures and general expenses	$1,245,692.59
Equipment	189,714.57
Total	$1,435,407.16

Capital Stock

All of the issued and outstanding Capital Stock, consisting of $47,500,000 par value of Common Stock and $28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. $24,200,000 of the authorized capital stock of the Company, consisting of $12,500,000 of Common Stock and $11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928	—	None
1929	—	None

(Testimony of M. J. Curry.)

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

FINANCIAL STATEMENTS

Certified by D. C. De Graff, General Auditor of the Company

CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING AND AMOUNT OWNED BY THE WESTERN PACIFIC RAILROAD COMPANY

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Company	400,500.00	100%	400,500.00
Western Refrigerator Line	15,000.00	100%	15,000.00
Western Pacific California Railroad Company (Subscribed but not issued)	27,500.00	100%	27,500.00

OWNED BY SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Ry.	Par value owned by Sacramento Northern Ry.
West Side Railroad	$35,000.00	100%	$35,000.00

OWNED BY STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by Standard R. & D. Co.	Par value owned by Standard R. & D. Co.
Tidewater Southern Railway Company	$1,176,782.00	.18%	$2,115.00

(Testimony of M. J. Curry.)

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES AS OF DECEMBER 31, 1929

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Railway Co.	1,223,848.94	1,147,968.00	*75,880.94
First Mortgage Bonds:			
Sacramento Northern Railroad	3,975,456.13	5,213,475.35	1,238,019.22
Total	$5,374,744.85	$6,761,943.35	$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Railway Co.	1,572.00	2,115.00	543.00
Grand total	$5,426,316.85	$6,799,058.35	$1,372,741.50

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES

STATEMENT OF FUNDED DEBT AS OF DECEMBER 31, 1929

The Western Pacific Railroad Company, First Mortgage Gold Bonds maturing March 1, 1946:	
Issued June 26, 1916, Series A, 5%	$19,605,600.00
Issued May 31, 1921, Series A, 5%	4,086,000.00
Issued April 24, 1925, Series A, 5%	3,933,000.00
Issued December 1 and 31, 1926, Series A, 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series A, 5%	2,950,000.00
Issued April 26, 1929, Series A, 5%	5,000,000.00
Total amount outstanding December 31, 1929	$38,174,300.00

*Denotes red figures.

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "B":		
Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937, inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding December 31, 1929		3,350,000.00
The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938, inclusive	207,000.00	
Total amount outstanding December 31, 1929		1,863,000.00
The Western Pacific Railroad Company, 5% Equipment Trust Certificates, Series "D":		
Total amount issued June 3, 1929	$1,095,000.00	
Par value maturing serially on the first day of November in each year from 1929 to 1943, inclusive	73,000.00	
Total amount outstanding December 31, 1929		1,022,000.00
Tidewater Southern Railway Company, First Mortgage Thirty-Year Five Per Cent. Gold Bonds, maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding December 31, 1929		169,000.00
Sacramento Northern Railroad, First Mortgage Twenty Year Five Per Cent. Gold Bonds, issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary		

(Testimony of M. J. Curry.)

of Railroad Company), the successor in ownership of all the property of the Sacramento Northern Railroad:

Total amount outstanding December 31, 1929	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,213,475.35	
		10,897.79
Amount of note of Bisbee Investment Company, dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on December 31, 1929		60,000.00

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES

CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1928, AND YEAR ENDED DECEMBER 31, 1929

	Year ended Dec. 31, 1928	Year ended Dec. 31, 1929
Freight revenue	$15,974,136.62	$16,358,102.72
Passenger revenue	1,870,789.89	2,187,700.11
Mail and express revenue	476,943.11	560,197.38
Miscellaneous revenue	1,099,981.29	990,618.68
Total revenue	$19,421,850.91	$20,096,618.89
Expenses operating	$15,602,657.24	$16,782,912.77
Taxes	1,312,850.80	1,467,522.66
Uncollectible railway revenues	889.85	1,325.25
Operating income	$2,505,453.02	$1,894,858.21

(Testimony of M. J. Curry.)

Other income:		
Rental of property	605,940.13	660,107.01
Hire of equipment, receipts	1,335,765.29	1,418,910.88
Dividend income	7,725.00	185.00
Income from funded securities	39,168.39	22,715.42
Income from unfunded securities and accounts	115,067.72	96,683.08
Miscellaneous income	412.65	328.67
Gross income	$4,609,532.20	$4,093,788.27
Income deductions:		
Interest on funded debt, First Mortgage Bonds	$1,675,917.28	$1,843,664.61
Interest on funded debt, Equipment Notes	332,598.75	322,826.61
Interest on funded debt, advances	294,821.63	297,926.30
Rental of leased property	222,956.94	232,674.53
Hire of equipment, payments	1,265,994.06	1,171,681.44
Miscellaneous deductions	40,692.37	79,980.86
Amortization of discount on funded debt	124,441.73	130,972.48
Total deductions	$3,957,422.76	$4,079,696.83
Net income	$652,109.44	$14,091.44
Earned per share on Common Stock		

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31, 1928 TO DECEMBER 31, 1929

	Year ending Dec. 31, 1929
Net income	$14,091.44
Add: Net miscellaneous credits	66,187.10
Total	$80,278.54
Deduct:	
Net miscellaneous debits	$30,099.27
Dividends on Preferred Stock	None
Total deductions	$30,099.27
Surplus—Increase	$50,179.27
Surplus credit balance—December 31, 1929	$7,219,128.45
Surplus credit balance—December 31, 1928	$7,168,949.18
Increase	$50,179.27

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES

CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31, 1928 AND DECEMBER 31, 1929

ASSETS

	Dec. 31, 1928	Dec. 31, 1929
Investments:		
Investment in railroad and equipment	$134,075,252.17	$137,832,688.69
Investment in real estate and improvements	1,050,431.10	1,085,363.12
Sinking Funds	50,687.36	50,233.92
Deposits in lieu of mortgaged property sold	13,134.59	4,850.00
Miscellaneous physical property	1,411,492.00	1,915,076.95
Other investments	1,623,064.83	1,544,750.30
Total investments	$138,224,062.07	$142,432,964.98

(Testimony of M. J. Curry.)

Current assets:		
Cash	2,030,070.21	1,596,289.57
Deposits of mortgage trust funds	40,841.46	40,841.46
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,215.94	156,864.60
Loans and notes receivable		9,709.70
Traffic and car service balances receivable	706,522.76	523,332.58
Net balances receivable from agents and conductors	210,984.33	222,549.91
Miscellaneous accounts receivable	1,320,103.13	1,289,034.69
Material and supplies	3,134,174.82	3,129,323.72
Interest and dividends receivable	12,248.65	11,330.25
Other current assets	14.74	89.74
Total current assets	$7,657,869.96	$7,026,062.14
Deferred assets:		
Working fund advances	$5,382.39	$5,665.59
Total deferred assets	$5,382.39	$5,665.59
Unadjusted debits:		
Rents and insurance premiums paid in advance	$49,415.06	$49,302.29
Discount on funded debt	1,927,374.82	1,958,634.10
Other unadjusted debits	830,464.85	733,376.05
Total unadjusted debits	$2,807,254.73	$2,741,312.44
Total assets	$148,694,569.15	$152,206,005.15
Excess of par value over book value of capital stock and bonds of subsidiary companies	1,372,236.50	1,372,741.50
Total assets	$147,322,332.65	$150,833,263.65

(Testimony of M. J. Curry.)

LIABILITIES

	Dec. 31, 1928	Dec. 31, 1929
Capital Stock:		
Common	$47,528,719.00	$47,526,699.00
Preferred	27,500,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	$75,526,957.00	$76,324,937.00
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	$33,501,197.79	$38,414,197.79
Funded debt (Equipment Trust Certificates)	5,795,000.00	6,235,000.00
Total long term debt	$39,296,197.79	$44,649,197.79
Debt to affiliated companies:		
Open accounts	$8,526,646.43	$4,838,739.75
Total debt to affiliated companies	$8,526,646.43	$4,838,739.75
Current liabilities:		
Loans and notes payable	$1,034,260.00	$1,014,647.24
Traffic and car service balances payable	582,701.67	629,875.95
Audited accounts and wages payable	1,205,613.01	1,309,584.46
Miscellaneous accounts payable	247,345.27	252,739.51
Interest matured unpaid	14,009.78	15,077.72
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	665,549.21	720,035.60
Unmatured rents accrued	4,883.32	4,804.16
Other current liabilities	84,442.93	82,280.45
Total current liabilities	$3,849,905.19	$4,040,145.09
Deferred liabilities:		
Other deferred liabilities	$26,913.19	$16,483.28
Total deferred liabilities	$26,913.19	$16,483.28

(Testimony of M. J. Curry.)

Unadjusted credits:		
Tax liability	$277,018.09	$220,629.25
Accrued depreciation—Equipment	5,244,744.98	6,070,695.76
Other unadjusted credits	233,444.01	281,750.49
Surplus — Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	$12,926,763.87	$13,744,632.29
Surplus:		
Additions to property through income and surplus	$5,786,743.36	$6,758,472.14
Funded debt retired through income and surplus	499,928.73	549,884.98
Sinking fund reserves	319,102.88	353,651.42
Profit and loss balance	563,174.21	*442,880.09
Total surplus	$7,168,949.18	$7,219,128.45
Total liabilities	$147,322,332.65	$150,833,263.65

*Denotes italic figures.

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

(Testimony of M. J. Curry.)

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to I. C. C. regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock; or, in lieu thereof, eliminating all intercompany transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(Testimony of M. J. Curry.)

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

Such statements shall disclose fully the nature and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to I. C. C. regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Sur-

(Testimony of M. J. Curry.)

plus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to add to the number of its transfer agencies, nor to make any change of a transfer agency or of a

(Testimony of M. J. Curry.)

trustee of its bonds or other securities without prior notice to the Committee on Stock List, and not to make any change in its listed securities, nor to add to the number of the registrars of its stock, nor to change a registrar of its stock, without the prior approval of the Committee on Stock List; nor to select an officer or director of the company as a trustee of its mortgages or other listed securities, unless such officer or director be a co-trustee for an issue having a corporate trustee.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange a certified copy of amended Charter, or Resolutions of Directors in the nature of amendments, as soon

(Testimony of M. J. Curry.)

as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931 are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Ennis, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angellotti, of San Francisco, California; John L. Nagle, of Sacramento, California; Charles Elsey of Oakland, California; Frederic E. Williamson and James E. Gorman, of Chicago, Illinois; L. W. Baldwin, of

(Testimony of M. J. Curry.)

St. Louis, Missouri; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James, Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretary, Thomas J. Byrne.

The bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

THE WESTERN PACIFIC RAILROAD COMPANY,
By M. J. CURRY,
Vice-President.

(Testimony of M. J. Curry.)

This Committee recommends that the above-mentioned $572,800 First Mortgage Five Per Cent. Gold Bonds, Series A, due March 1, 1946, included in numbers M-37976 to M-38547 for $1,000 each, D-1104 for $500, and C-5395 to C-5397 for $100 each (and registered bonds issued in exchange for coupon bonds), be added to the list on official notice of issuance for sale and distribution, in accordance with the terms of this application, making the total amount authorized to be listed $39,302,800.

FRANK ALTSCHUL,
Chairman.

Adopted by the Governing Commitee, August 6, 1930.

ASHBEL GREEN,
Secretary.

[Endorsed]: United States District Court, No. 26951. Western Pac. R. R. Co. v. Irving Trust Co. Exhibit No. 10. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: And the statement of September 30, 1930, as Irving Trust Company Exhibit 11.

(The document was marked "Irving Trust Company's Exhibit 11".)

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 11

Francis E. Fitch (Inc.), 138 Pearl St., New York.

A-9601

COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGE

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by The Western Pacific Railroad Corporation of Delaware)

First Mortgage Five Per Cent. Gold Bonds, Series A, Due March 1, 1946

Additional listing, Series A Bonds:

Amount applied for	$ 5,000,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	44,302,800
Series B, 6% Bonds	3,000,000*
Total listing applied for:	
Series A	44,302,800
This additional issue:	
Indenture authorized by stockholders	July 13, 1916
Authorized by Board of Directors	July 29, 1930
Approved by Interstate Commerce Commission by its order (I. C. C. Finance Docket No. 8414)	Aug. 21, 1930

No other authority necessary.

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*All this issue surrendered for cancellation or redeemed as of September 1, 1927.

CAPITAL SECURITIES

STOCKS	Par value	Number of shares: Authorized by charter	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Classes:					
Preferred	$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000

BONDS	Interest Rate	Amount authorized	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Mortgage Bonds:					
First Mortgage, due Mar. 1, 1946:					
Series "A"	5%	$50,000,000*	$44,302,800	$39,302,800	$43,697,100
Series "B"	6%		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equip. Trust. Ctfs.	5½%	5,600,000	5,600,000	None	2,975,000
††Equip. Tr. Ctfs. (Ser. "C")	5½%	3,105,000	3,105,000	None	1,863,000
**Equip. Tr. Ctfs. (Ser. "D")	5%	1,095,000	1,095,000	None	1,022,000

*Total amount of First Mortgage Bonds authorized under Mortgage.

†Certificates in amount of $375,000 payable March 1st each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

††Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

**Certificates in amount of $73,000 payable November 1st of each year from 1929 to 1943, inclusive.

(Testimony of M. J. Curry.)

New York, September 30, 1930.

Referring to its previous application, especially to A-9504, dated July 1, 1930, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of $5,000,000 additional (of a total authorized issue of $50,000,000) of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-38551 to M-43550 both inclusive, for $1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of sale and distribution, making the total amount of Series A Bonds issued and applied for $44,302,800.

Authority

The issuance of said $5,000,000 Series A Bonds of the Railroad Company, covered by this application was authorized by resolutions of the Board of Directors of the Railroad Company adopted July 29, 1930, and their authentication was authorized by a resolution adopted by the Executive Committee on September 24, 1930. No action by the stockholders of the Railroad Company is required by the provisions of the First Mortgage of the Railroad Company, dated June 26, 1916, hereinafter mentioned, or by any laws or regulations applicable to the issuance and sale of any bonds secured by said First Mortgage. The issuance and sale of said $5,000,000

(Testimony of M. J. Curry.)

Series A Bonds at not less than 97½% of their face amount and accrued interest and for the purposes hereinafter stated was approved by order of the Interstate Commerce Commission, dated August 21, 1930, in Finance Docket No. 8414. No further authority is required. The Railroad Company has sold and delivered said bonds on September 24, 1930, for cash at the price of 97½% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor, of that firm, being counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said bonds was to provide proceeds to be applied to the reimbursement of the Railroad Company for expenditures for its own capital purposes and for expenditures on account of capital purposes of Sacramento Northern Railway, a subsidiary of Railroad Company, within the meaning of that term as defined in said First Mortgage; all of such expenditures having been of a character with respect to which bonds may be issued

(Testimony of M. J. Curry.)

and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of August 21, 1930, was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The bonds covered by this application are an additional issue of Series A Bonds of $5,000,000 principal amount, all bearing interest at the rate of five per cent per annum, dated June 26, 1916, and maturing March 1, 1946.

The principal of the bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the City and County of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental

(Testimony of M. J. Curry.)

charge (except the Federal Income Tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any State, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The bonds are in coupon form of the denominations of $1,000 and $500 and $100, and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000 or multiples of $10,000. Coupon bonds for $1,000, $500 and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

(Testimony of M. J. Curry.)

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual interest payment date at par and accrued interest on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of

(Testimony of M. J. Curry.)

bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other obligations, to the extent specified in section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the bonds or in the Mort-

(Testimony of M. J. Curry.)

gage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The mortgage provides that the holders of a majority in amount of the bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issuance of additional bonds to pay, or reimburse the Railroad Company for, the cost of the construction or purchase of extensions to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for

(Testimony of M. J. Curry.)

each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount; either upon surrender of the outstanding series for cancellation or upon redemption thereof. The mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

Changes in Capitalization

Since December 31, 1929 (the date as of which the consolidated balance sheet contained in said previous application A-9504 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

First: The issuance of the $572,800 of Series A 5% Bonds covered by said application A-9405, and

Second: The purchase of $50,000 face amount

(Testimony of M. J. Curry.)

of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased $655,700); and

Third: The retirement of $375,000 (face amount) of its 5½% Equipment Trust Certificates, Series "B";

Fourth: The issuance of the $5,000,000 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925; A-7277, dated September 30, 1926; A-7722, dated October 31, 1927; A-8696, dated May 16, 1929; and A-9504, dated July 1, 1930.

Since December 31, 1929, the following important changes in mileage have occurred.

Completion of 3.68 miles additional main line, yard, industry and side tracks the operation of which commenced on various dates between January 1, 1930 and June 30, 1930.

Completion of .10 miles additional branch line, side and spur tracks, the operation of which commenced on various dates between January 1, 1930 and June 30, 1930.

(Testimony of M. J. Curry.)

Acquisition of joint interest with other carriers in .26 miles of industry tracks, operation of which commenced on various dates between January 1, 1930 and June 30, 1930

Since December 31, 1928, the Railroad Company has made the following changes in equipment:

Additions:	
Construction and maintenance equipment:	
Water cars	9
Flat cars for gopher shovels	2
Total additions	11
Retirements:	
Locomotives—Freight	2
Freight train cars destroyed and converted:	
Box	1
Refrigerator	1
Construction and maintenance equipment:	
Steam shovel	1
Total deductions	5
Net total units added January 1, 1930 to June 30, 1930	6

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800, A-7277, A-7722, A-8696 and A-9504 for a description of the property subject to the lien of the Mortgage prior to January 1, 1930. The property on which the Mortgage constitutes a first lien includes the following:

(Testimony of M. J. Curry.)

Mileage:	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	316.52
Total track miles	1,370.74

Equipment:	
Locomotives	146
Passenger cars	13
Freight cars	5,879
Service cars	404
Floating equipment	6
Total	6,448

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives	21
Passenger cars	48
Freight cars	3,589
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company, organized to acquire and hold real estate in connection with the construction of the Railroad Company.

(Testimony of M. J. Curry.)

10,000 shares of the Capital Stock (entire issue of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.

$1,372,733.95 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated December 29, 1928 due March 1, 1943 with interest at rate of 5¾% per annum.

3,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of June 30, 1930—$45,781.85.

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad, branches and extensions, equipment and securities.

From January 1, 1930 to June 30, 1930, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts.

Road and structures and general expenses	$889,198.90
Equipment	71,673.70
Total	$960,872.60

(Testimony of M. J. Curry.)

Capital Stock

All of the issued and outstanding Capital Stock, consisting of $47,500,000 par value of Common Stock and $28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. $24,200,000 of the authorized Capital Stock of the Company, consisting of $12,500,000 of Common Stock and $11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928	—	None
1929	—	None
1930	—	None

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	$2,374,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

(Testimony of M. J. Curry.)

Financial Statements

Certified by D. C. DeGraff, General Auditor of the Company

CAPITAL STOCK OF SUBSIDIARY COMPANIES OUTSTANDING AND AMOUNT OWNED BY THE WESTERN PACIFIC RAILROAD COMPANY

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Development Co.	400,500.00	100%	400,500.00
Western Pacific California Railroad Company (subscribed but not issued)	27,500.00	100%	27,500.00

OWNED BY SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Railway	Par value owned by Sacramento Northern Railway
West Side Railroad	$35,000.00	100%	$35,000.00

OWNED BY STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by S. R. & Dev. Co.	Par value owned by S. R. & Dev. Co.
Tidewater Southern Railway Company	$1,176,782.00	0.24%	$2,783.00

(Testimony of M. J. Curry.)

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES AS OF JUNE 30, 1930

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Co.	$175,439.78	$400,500.00	$225,060.22
Tidewater Southern Ry. Company	1,223,848.94	1,147,968.00	*75,880.94*
First Mortgage Bonds:			
Sacramento Northern R.R.	3,975,456.13	5,213,475.35	1,238,019.22
Total	$5,374,744.85	$6,761,943.35	$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00*
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Ry. Company	2,073.00	2,783.00	710.00
Grand total	$5,426,817.85	$6,799,726.35	$1,372,908.50

*Denotes italic figures.

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES STATEMENT OF FUNDED DEBT AS OF JUNE 30, 1930.

The Western Pacific Railroad Company, First Mortgage Gold Bonds maturing March 1, 1946:	
Issued June 26, 1916, Series "A", 5%	$19,570,300.00
Issued May 31, 1921, Series "A", 5%	4,078,000.00
Issued April 24, 1925, Series "A", 5%	3,926,000.00
Issued December 1 and 31, 1926, Series "A", 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series "A", 5%	2,950,000.00
Issued April 26, 1929, Series "A", 5%	5,000,000.00
Issued April 23, 1930, Series "A", 5%	572,800.00
Total amount outstanding June 30, 1930	$38,697,100.00

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "B":		
Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937, inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding June 30, 1930		2,975,000.00
The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938, inclusive	207,000.00	
Total amount outstanding June 30, 1930		1,863,000.00
The Western Pacific Railroad Company 5% Equipment Trust Certificates, Series "D":		
Total amount issued June 3, 1929	$1,095,000.00	
Par value maturing serially on the first day of November in each year from 1929 to 1943, inclusive	73,000.00	
Total amount outstanding June 30, 1930		1,022,000.00
Tidewater Southern Railway Company, First Mortgage Thirty-year Five per Cent. Gold Bonds, maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding June 30, 1930		169,000.00
Sacramento Northern Railroad, First Mortgage Twenty-Year Five per Cent. Gold Bonds, issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary		

(Testimony of M. J. Curry.)

of Railroad Company), the successor in ownership of all the property of the Sacramento Northern Railroad: Total amount outstanding June 30, 1930	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,213,475.35	10,897.79
Amount of note of Bisbee Investment Company dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on June 30, 1930		60,000.00

CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1929, AND SIX MONTHS ENDED JUNE 30, 1930

	Year ended Dec. 31, 1929	Six months ended June 30, 1930
Freight revenue	$16,358,102.72	$6,272,731.30
Passenger revenue	2,187,700.11	865,556.17
Mail and express revenue	560,197.38	257,776.26
Miscellaneous revenue	990,618.68	307,625.73
Total revenue	$20,096,618.89	$7,703,689.46
Expenses operating	$16,732,912.77	$8,112,051.28
Taxes	1,467,522.66	680,561.91
Uncollectible railway revenues	1,325.25	226.26
Operating income	$1,894,858.21	*$1,089,149.99

(Testimony of M. J. Curry.)

Other Income:		
Rental of property	$660,107.01	$325,923.81
Hire of equipment, receipts	1,418,910.88	546,815.88
Dividend income	185.00	
Income from funded securities	22,715.42	11,637.50
Miscellaneous income	328.67	877.62
Income from unfunded securities and accounts	96,683.08	27,996.80
Gross income	$4,093,788.27	*$175,898.38
Income deductions:		
Interest on funded debt, First Mortgage Bonds	1,843,664.61	964,854.38
Interest on funded debt, Equipment Notes	322,826.61	162,032.50
Interest on funded debt, advances	297,926.30	149,146.96
Rental of leased property	232,674.53	136,020.56
Hire of equipment, payments	1,171,651.44	482,462.87
Miscellaneous deductions	79,980.86	138,200.25
Amortization of discount on funded debt	130,972.48	66,699.07
Total deductions	$4,079,696.83	$2,099,416.59
Net income	$14,091.44	†*$2,275,314.97

†Corresponding figure for the six months June 30, 1929, was $656,914.37.

*Denotes red figures.

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31, 1928, TO JUNE 30, 1930

	Year ending Dec. 31, 1929	Six months ending June 30, 1930	Consolidated total
Net income	$14,091.44	*$2,275,314.97	*$2,261,223.53
Add: Net miscellaneous credits	66,187.10	3,452.28	69,639.38
Total	$80,278.54	*$2,271,862.69	*$2,191,584.15

(Testimony of M. J. Curry.)

Deduct:			
Net miscellaneous debits	30,099.27	10,529.83	40,629.10
Dividends on Preferred Stock			
Total deductions	$30,099.27	$10,529.83	$40,629.10
Surplus—Increase	50,179.27	*2,282,392.52	*2,232,213.25

Surplus credit balance—June 30, 1930	$4,936,735.93
Surplus credit balance—December 31, 1928	7,168,949.18
Increase	*2,232,213.25

CONSOLIDATED GENERAL BALANCE SHEET DECEMBER 31, 1929, AND JUNE 30, 1930

ASSETS

	Dec. 31, 1929	June 30, 1930
Investments:		
Investment in railroad and equipment	$137,832,688.69	$139,576,389.68
Investment in real estate and improvements	1,085,363.12	1,090,302.00
Sinking funds	50,235.92	8,244.42
Deposits in lieu of mortgaged property sold	4,850.00	5,500.00
Miscellaneous physical property	1,915,076.95	2,451,646.19
Other investments	1,544,750.30	1,653,865.26
Total investments	$142,432,964.98	$144,785,947.55
Current assets:		
Cash	1,596,289.57	1,142,337.43
Deposits of mortgage trust funds	40,841.46	40,906.85
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,864.60	154,368.93
Loans and notes receivable	9,709.70	9,592.70
Traffic and car service balances receivable	523,332.58	395,739.19

(Testimony of M. J. Curry.)

	Dec. 31, 1929	June 30, 1930
Net balances receivable from agents and conductors	222,549.91	169,333.20
Miscellaneous accounts receivable	1,289,034.69	1,114,472.86
Material and supplies	3,129,323.72	2,974,180.20
Interest and dividends receivable	11,330.25	11,362.39
Other current assets	89.74	89.74
Total current assets	$7,026,062.14	$6,059,079.41
Deferred assets:		
Working fund advances	5,665.59	4,788.72
Total deferred assets	$5,665.59	$4,788.72
Unadjusted debits:		
Rents and insurance premiums paid in advance	49,302.29	26,925.31
Discount on funded debt	1,958,634.10	1,895,222.61
Other unadjusted debits	733,376.05	798,803.96
Total unadjusted debits	$2,741,312.44	$2,720,951.88
Total assets	$152,206,005.15	$153,570,767.56
Excess of par value over book value of capital stock and bonds of subsidiary companies	1,372,741.50	1,372,908.50
	$150,833,263.65	$152,197,859.06

LIABILITIES

Capital Stock:		
Common	$47,526,699.00	$47,526,031.00
Preferred	28,300,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	$76,324,937.00	$76,324,269.00

(Testimony of M. J. Curry.)

	Dec. 31, 1929	June 30, 1930
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	$38,414,197.79	$38,936,997.79
Fund debt (Equipment Trust Certificates)	6,235,000.00	5,860,000.00
Total long term debt	$44,649,197.79	$44,796,997.79
Debt to affiliated companies:		
Open accounts	$4,838,739.75	$7,847,502.84
Total debt to affiliated companies	$4,838,739.75	$7,847,502.84
Current liabilities:		
Loans and notes payable	$1,014,647.24	$986,260.00
Traffic and car service balances payable	629,875.95	457,324.43
Audited accounts and wages payable	1,309,584.46	1,509,561.11
Miscellaneous accounts payable	252,739.51	73,721.73
Interest matured unpaid	15,077.72	12,582.05
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	720,035.60	712,798.14
Unmatured rents accrued	4,804.16	14,526.00
Other current liabilities	82,280.45	93,415.12
Total current liabilities	$4,040,145.09	$3,871,288.58
Deferred liabilities:		
Other deferred liabilities	$16,483.28	$31,838.67
Total deferred liabilities	$16,483.28	$31,838.67
Unadjusted credits:		
Tax liability	$220,629.25	$324,845.48
Accrued depreciation—Equipment	6,070,695.76	6,501,081.91
Other unadjusted credits	281,750.49	391,742.07
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	$13,744,632.29	$14,389,226.25

(Testimony of M. J. Curry.)

Surplus:		
Additions to property through income and surplus	$6,758,472.14	$7,157,105.51
Funded debt retired through income and surplus	549,884.98	599,313.98
Sinking fund reserves	353,651.42	324,657.42
Profit and loss balance	*442,880.09	*3,144,340.98
Total surplus	$7,219,128.45	$4,936,735.93
Total liabilities	$150,833,263.65	$152,197,859.06

Policy as to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

(Testimony of M. J. Curry.)

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to Interstate Commerce Commission regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock; or, in lieu thereof, eliminating all intercompany transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

(Testimony of M. J. Curry.)

Such statements shall disclose fully the nature and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to Interstate Commerce Commission's regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Surplus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a reg-

(Testimony of M. J. Curry.)

istry office in the Borough of Manhattan, City of New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

To notify the Stock Exchange thirty days in advance of the effective date of any change in the authorized amounts of listed securities.

Not to add to the number of its transfer agencies, nor to make any change of a transfer agency or of a trustee of its bonds or other securities without prior notice to the Committee on Stock List, and not to make any change in its listed securities, nor to add to the number of the registrars of its stock, nor to change a registrar of its stock, without the prior approval of the Committee on Stock List; nor to select an officer or director of the company as a trustee of its mortgages or other listed securities, unless such officer or director be a co-trustee for an issue having a corporate trustee.

(Testimony of M. J. Curry.)

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted, its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange a certified copy of amended Charter, or Resolutions of Directors in the nature of amendments, as soon as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

(Testimony of M. J. Carry.)

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building; San Francisco, California.

The annual meeting of stock holders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931, are: Arthur Curtiss James, Thomas M. Shumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Fmfis. Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin and F. M. Angellotti of San Francisco, Calif.; John L. Naglé, of Sacramento, Calif.; Charles Elsey, of Oakland, Calif.; Frederick E. Williamson and James E. Gorman, of Chicago, Ill.; L. W. Baldwin, of St. Louis, Mo.; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-

(Testimony of M. J. Curry.)

President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretary, Thomas J. Byrne.

The bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

THE WESTERN PACIFIC RAILROAD COMPANY
By M. J. CURRY,
Vice-President.

This Committee recommends that the above-mentioned $5,000,000 First Mortgage 5% Gold Bonds, Series A, due March 1, 1946, included in numbers M-38551 to M-43550, for $1,000 each (and coupon bonds of one denomination issued in exchange for coupon bonds of another denomination and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of sale and distribution, in accordance with the terms of this

(Testimony of M. J. Curry.)

application, making the total amount authorized to be listed $44,302,800.

FRANK ALTSCHUL,
Chairman.

Adopted by the Governing Committee, October 29, 1930.

ASHBEL GREEN,
Secretary.

[Endorsed]: United States District Court. No. 26591 Western Pac. R. R. Co. Irving Trust Co. Exhibit No. 11. Filed 1/22/40. Walter B. Maling, Clerk.

Mr. McCollum: And the statement of February 20, 1931 as Irving Trust Company Exhibit 12.

(The document was marked "Irving Trust Company's Exhibit 12.")

(Testimony of M. J. Curry.)

IRVING TRUST CO. EXHIBIT NO. 12

Francis E. Fitch (Inc.), 138 Pearl St., New York
A-9702

COMMITTEE ON STOCK LIST
NEW YORK STOCK EXCHANGE

The Western Pacific Railroad Company
(Organized under the laws of California)
(Controlled by stock ownership by The Western Pacific Railroad Corporation of Delaware)

First Mortgage Five per Cent. Gold Bonds,
Series A, Due March 1, 1946

Additional listing, Series A Bonds	$5,000,000
Authorized First Mortgage Bonds	50,000,000
Amount issued:	
Series A, 5% Bonds	45,302,800
Series B, 6% Bonds	3,000,000*
Total listing applied for:	
Series A	49,302,800
This additional issue:	
Indenture authorized by stockholders	July 13, 1916
Authorized by Board of Directors	Sept. 2, 1930
Authorized by stockholders	Sept. 22, 1930
Approved by Interstate Commerce Commission by its order (I. C. C. Finance Docket No. 8473)	Oct. 6, 1930

No other authority necessary.

*All this issue surrendered for cancellation or redeemed as of September 1, 1927.

CAPITAL SECURITIES

STOCK	Par value	Number of shares: Authorized by charter	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Classes:					
Preferred	$100	400,000	283,000	None	283,000
Common	100	600,000	475,000	None	475,000

BONDS	Interest Rate	Amount authorized	Authorized for issuance	Previously listed or authorized to be listed	Outstanding
Mortgage Bonds:					
First Mortgage, due March 1, 1946:					
Series "A"	5%	$50,000,000*	$49,302,800	$44,302,800	$44,645,100
Series "B"	6%		3,000,000	3,000,000	None
Equipment Trust Obligations:					
Titles and dates of maturity:					
†Equipment Trust Certificates	5½%	5,600,000	5,600,000	None	2,975,000
‡Equipment Trust Certificates (Series "C")	5½%	3,105,000	3,105,000	None	1,656,000
§Equipment Trust Certificates (Series "D")	5%	1,095,000	1,095,000	None	949,000

*Total amount of First Mortgage Bonds under Mortgage.

†Certificates in amount of $375,000 payable March 1st of each year from 1924 to 1937, inclusive, and $350,000 March 1, 1938.

‡Certificates in amount of $207,000 payable December 1st of each year from 1924 to 1938, inclusive.

§Certificates in amount of $73,000 payable November 1st of each year from 1929 to 1943, inclusive.

(Testimony of M. J. Curry.)

New York, February 20, 1931.

Referring to its previous applications, especially to A-9601, dated September 30, 1930, The Western Pacific Railroad Company (hereinafter called the "Railroad Company") hereby makes application for the listing on the New York Stock Exchange of $5,000,000 additional of its First Mortgage Five per Cent. Gold Bonds, Series A, due March 1, 1946, consisting of Nos. M-43551 to M-48550 both inclusive, for $1,000 each (and such fully registered bonds as may be issued in exchange for coupon bonds), on official notice of issuance, sale and distribution, making the total amount of Series A Bonds issued or to be issued and for which application is made, $49,302,800 (of a total authorized issue of $50,000,000).

Authority

The issuance of said $5,000,000 Series A Bonds of the Railroad Company covered by this application was authorized by resolutions of the Board of Directors of the Railroad Company adopted September 2, 1930, and their authentication was authorized by a resolution adopted by the Executive Committee on February 11, 1931. The purpose of said issuance (as more fully hereinafter described) is to finance in part the construction and/or acquisition by Railroad Company of its "Northern California Extension," the expenditure in such construction and/or acquisition, amounting to more than $1,000,000, and therefore, pursuant to sub-

(Testimony of M. J. Curry.)

paragraph Seventh of subdivision D of Section 2 of Article Second of the First Mortgage of Railroad Company, dated June 26, 1916, hereinafter mentioned, a majority in amount of such portion of the Capital Stock of Railroad Company as was present in person or represented by proxy at a meeting of stockholders of Railroad Company called for such purpose, consented to the authentication and delivery of First Mortgage Bonds and/or the payment of deposited cash therefrom with respect to the construction and/or acquisition by Railroad Company of said new line of railroad, its so-called "Northern California Extension," such meeting being held on September 22, 1930, at the principal office of Railroad Company in San Francisco, California; a tally of the ballots cast by all stockholders present at said meeting disclosed that no share of stock had been voted against said consent and that the number of shares of stock voted for said consent was 283,000 shares of Preferred Stock and 474,984 shares of Common Stock of Railroad Company, being more than 99% of all of the Capital Stock of Railroad Company then issued and outstanding. The issuance and sale of said $5,000,000 Series A Bonds at not less than 97.5% of their face amount and accrued interest, and for the purposes hereinafter stated, was approved by order of the Interstate Commerce Commission dated October 6, 1930 in

(Testimony of M. J. Curry.)

Finance Docket No. 8473. No further authority is required. The Railroad Company has sold and delivered $1,000,000 of said bonds, on February 11, 1931, for cash at the price of 97.5% of their face amount, together with accrued interest thereon, and the proceeds have been applied to the purposes for which the bonds were issued.

Opinion of Counsel

The opinion of Counsel as to the legality and validity of the issue was rendered by Mr. John B. Marsh, a member of the firm of Taylor, Blanc, Capron & Marsh, 43 Exchange Place, New York, N. Y., Mr. Carl Taylor of that firm being counsel to the Board of Directors of the Railroad Company.

Purpose of Issue

The purpose of the issue of said Bonds is to provide proceeds to finance in part the construction and/or acquisition by Railroad Company of its "Northern California Extension," a new line of railroad, to begin at a point on the existing main line of Railroad Company at or near Keddie, Plumas County, California, and to extend approximately 112 miles in a general northerly direction to a connection at or near Bieber, Lassen County, California, with a line of railroad of Great Northern Railway Company now under construction from Klamath Falls, Oregon, southerly to said Bieber; also including a line of railroad to be jointly acquired and/or constructed and owned by Railroad

(Testimony of M. J. Curry.)

Company and said Great Northern Railway Company extending from a point on the said line of Great Northern Railway Company (now under construction) in the vicinity of Lookout, Modoc County, California, westerly to a connection with the McCloud River Railroad at or near Hambone, Siskiyou County, California, approximately 36 miles in length: liabilities or expenditures on account of such construction and/or acquisition of said new line of railroad being of a character with respect to which bonds may be issued and the proceeds of bonds paid out under the terms of Section 2 of Article Second of said First Mortgage, and having been set forth in detail in the application of the Railroad Company to the Interstate Commerce Commission upon which the above mentioned order of October 6, 1930 was based.

Description

The First Mortgage Bonds are secured by the Railroad Company's First Mortgage, dated June 26, 1916, to First Federal Trust Company (now Crocker First Federal Trust Company of San Francisco, California), and Henry E. Cooper (18 Pine Street, New York City), Trustees. The Bonds covered by this application are an additional issue of Series A Bonds of $5,000,000 principal amount, all bearing interest at the rate of five per cent. per annum, dated June 26, 1916, and maturing March 1, 1946.

(Testimony of M. J. Curry.)

The principal of the Bonds is payable at the office or agency of the Railroad Company in the Borough of Manhattan, City of New York, N. Y., and the interest thereon is payable at its said office or agency, or at the option of the holder at its office or agency in the city and county of San Francisco, semi-annually, on March 1st and September 1st. Both principal of and interest upon each bond are payable in gold coin of the United States of America of or equal to the standard of weight and fineness as it existed June 26, 1916, without deduction for any tax, assessment or other governmental charge (except the Federal income tax imposed by the Act of Congress approved October 3, 1913, with respect to income derived from interest paid thereon), which the Railroad Company or the Trustees under the mortgage securing the Bonds, or either of them may be required to pay thereon or to retain therefrom under any present or future law or ordinance of the United States of America, or of any state, territory, municipality, or other taxing authority therein; and the Railroad Company assumes the payment of all such taxes, assessments and charges with the exception aforesaid.

The Bonds are in coupon form of the denominations of $1,000 and $500 and $100 and are registerable as to principal only. Coupon bonds for $1,000 are interchangeable with registered bonds of the denominations of $1,000, $5,000 and $10,000 or multiples of $10,000. Coupon bonds for $1,000, $500

(Testimony of M. J. Curry.)

and $100 are also interchangeable in equal principal amounts. For any such exchange and for any transfer of registered bonds or of coupon bonds registered as to principal, the Company, at its option, may require the payment of a sum sufficient to reimburse it for any stamp tax or other governmental charge and except in case of coupon bonds registered as to principal an additional amount not exceeding $1 for each new bond issued upon such exchange or transfer.

Sinking Fund

The Mortgage securing the bonds provides for the creation of a sinking fund, to be especially applied to the purchase or redemption of bonds, and requires the Railroad Company for that purpose to pay, out of any income lawfully applicable thereto, after payment of operating expenses of every description, taxes and interest upon the bonds, the sum of $50,000 on January 1st of each year, commencing with the year 1919. Series A Bonds are redeemable through the sinking fund at par and accrued interest on at least sixty days' previous published notice, as described under redemption. All bonds purchased or redeemed by the sinking fund are to be cancelled and delivered to the Railroad Company. These provisions have been fully complied with.

Redemption

The Railroad Company may redeem all or any part of said Series A Bonds on any semi-annual

(Testimony of M. J. Curry.)

interest payment date at par and accrued interest on notice published once in each calendar week for eight successive weeks in two newspapers of general circulation published in the Borough of Manhattan, New York, N. Y., and one newspaper of general circulation published in San Francisco, California, one such publication to be not less than sixty nor more than ninety days before the date of redemption. The Company may elect to redeem the bonds of one or more series. Serial numbers of bonds drawn by lot for redemption are required to be stated in publications of notice of redemption.

All bonds redeemed are to be cancelled or indelibly stamped with a statement that they have been redeemed. In the case, however, of bonds hereafter refunded with, or exchanged for, or the payment, redemption or retirement otherwise whereof shall be provided for by means of, refunding bonds or other obligations of the Railroad Company issued under a mortgage or other instrument providing that bonds redeemed pursuant to the provisions of the First Mortgage, notwithstanding that they shall have been cancelled or marked "Cancelled," shall be deposited with the Trustees under such new mortgage or other instrument, as security for such refunding bonds or other obligations, the bonds so redeemed and deposited shall be deemed to remain alive and unextinguished in the hands of the Trustees under such new mortgage or other instrument for the security of such refunding bonds or other

(Testimony of M. J. Curry.)

obligations, to the extent specified in Section 2 of Article Third of the Mortgage.

Default

The Mortgage provides that in case of default in the payment of interest continuing for the period of three months or default in the payment of principal, or in the observance or performance of any covenants, conditions or agreements on the part of the Railroad Company in the Bonds or in the Mortgage contained continuing for the period of three months after written notice from the Trustees, or in case an order be made for the appointment of a Receiver, the Trustees may, and upon the written request of the holders of twenty-five per cent. in amount of the bonds then outstanding shall, by notice in writing, declare the principal of all of the outstanding bonds to be due and payable immediately. The Mortgage provides that the holders of a majority in amount of the Bonds then outstanding may waive any default that shall have happened and its consequences upon the remedying of such default. It gives the holders of a majority in amount of bonds outstanding the right to direct and to control the action of the Trustees, and the exercise of the remedies provided by the Mortgage.

Additional Bonds

The Mortgage provides, subject to the limitation that the aggregate amount of bonds outstanding shall not exceed fifty million dollars, for the issu-

(Testimony of M. J. Curry.)

nce of additional bonds to pay, or reimburse the Railroad Company for the cost of the construction or purchase of extension to or additional lines of railroad and for the betterment, improvement and equipment of the railroads and other property owned by the Railroad Company or its subsidiary companies and subject to the lien of the Mortgage, or securities representing the same, at the rate of one thousand dollars principal amount of bonds for each one thousand dollars of authorized expenditures for the purposes aforesaid, or liabilities incurred therefor. The Mortgage also provides for the issuance of bonds sold for cash, against the deposit of the net cash proceeds with the Mortgage Trustees, subject to being withdrawn by the Railroad Company for the purposes above stated to the extent of the net proceeds of each one thousand dollars principal amount of bonds so sold for each one thousand dollars principal amount of bonds which might have been authenticated against such expenditures or liabilities.

The Mortgage also provides that bonds of any series outstanding may be replaced by bonds of another series to a like aggregate principal amount, either upon surrender of the outstanding series for cancellation or upon redemption thereof. The Mortgage further provides for the issuance of new bonds to replace bonds mutilated, lost or destroyed, upon proper proof and satisfactory indemnity.

(Testimony of M. J. Curry.)

Changes in Capitalization

Since June 30, 1930 (the date as of which the consolidated balance sheet contained in said previous application A-9601 was made) there has been no change in the amount of Capital Stock or funded debt of the Railroad Company authorized and outstanding except:

First. The issuance of the $5,000,000 of Series A 5% Bonds covered by said Application A-9601, and

Second. The purchase of $52,000 face amount of the Series "A" 5% Bonds, for the sinking fund (making the total amount so purchased $707,700); and

Third. The retirement of $207,000 (face amount) of its 5½% Equipment Trust Certificates, Series "C" and $73,000 (face amount) of its 5% Equipment Trust Certificates, Series "D."

Fourth. The issuance of $1,000,000 of the $5,000,000 of Series A 5% Bonds, listing of which is herein applied for.

Properties

The properties of the Railroad Company are described in the original application for listing of Series A Bonds, No. A-4747, dated March 13, 1917, and in the subsequent applications Nos. A-5478, dated June 30, 1921; A-5667, dated May 10, 1922; A-6800, dated July 16, 1925; A-7277, dated September 30, 1926; A-7722, dated October 31, 1927; A-8696, dated May 16, 1929; A-9504, dated July 1, 1930, and A-9601, dated September 30, 1930.

(Testimony of M. J. Curry.)

Since June 30, 1930, the following important changes in mileage have occurred:

Completion of 7.71 miles additional main line, yard, industry and side tracks the operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Completion of .29 miles additional branch line side and spur tracks, the operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Acquisition of joint interest with other carriers in .15 miles of industry tracks, operation of which commenced on various dates between July 1, 1930 and December 31, 1930.

Since June 30, 1930, the Railroad Company has made the following changes in equipment:

Additions:	
Freight train cars: Flat car	1
Total additions	1
Retirements:	
Freight train cars destroyed and converted:	
Box	1
Refrigerator	5
Flat cars	3
Construction and maintenance equipment:	
Outfit cars	4
Total deductions	13
Net total units retired July 1, 1930, to December 31, 1930	12

Lien

Reference is made to the previous listing applications, Nos. A-4747, A-5478, A-5667, A-6800,

(Testimony of M. J. Curry.)

A-7277, A-7722, A-8696, A-9504 and A-9601 for a description of the property subject to the lien of the Mortgage prior to July 1, 1930. The property on which the Mortgage constitutes a first lien includes the following:

Mileage:	Miles
Main line mileage, San Francisco to Salt Lake City	926.41
Branch lines, main track	125.08
Second main track	2.73
Yard tracks and sidings, etc.	323.46
Total track miles	1,377.68

Equipment:	
Locomotives	146
Passenger cars	13
Freight cars	5,877
Service cars	400
Floating equipment	6
Total	6,442

The foregoing equipment does not include additional unmortgaged equipment covered by Equipment Trust Agreements, Series "B," Series "C" and Series "D," as follows:

Locomotives	21
Passenger cars	48
Freight cars	3,583
Service cars	1

Securities:

1,000 shares Capital Stock (50% of outstanding) of The Salt Lake City Union Depot and Railroad Company, operating the passenger terminal at Salt Lake City, leased to the Railroad Company and The Denver and Rio Grande Western Railroad Company.

4,500 shares of the Capital Stock (entire issue) of the Deep Creek Railroad Company, operating a line of railroad in Western Utah, 46 miles.

(Testimony of M. J. Curry.)

4,005 shares of the Capital Stock (entire issue) of Standard Realty and Development Company organized to acquire and hold real estate in connection with the construction of the Railroad Company.

10,000 shares of the Capital Stock (entire issue) of Sacramento Northern Railway, operating 258.98 miles of main line of railroad in California.

$1,372,733.95 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated December 29, 1928, due on or before March 1, 1943, with interest at rate of 5¾% per annum.

1,553,742.77 Face amount Promissory Note of Sacramento Northern Railway payable to The Western Pacific Railroad Company dated September 2, 1930, due on or before March 1, 1945, with interest at rate of 5¼% per annum.

5,213,475.35 par value First Mortgage 5% Twenty-Year Gold Bonds and Bond Participation Certificates of Sacramento Northern Railroad.

Deposited cash in the hands of Mortgage Trustees, as of December 31, 1930, $53,697.45.

The First Mortgage contains a provision subjecting to its lien after acquired property purchased with bonds or their proceeds and property directly appurtenant to or forming an integral part of the mortgaged railroad, or securities representing the same, also additional securities of subsidiary companies as defined in the First Mortgage, but the First Mortgage permits the Railroad Company to acquire with free funds, free from the lien of the First Mortgage, additional lines of railroad, branches and extension, equipment and securities.

From July 1, 1930 to December 31, 1930, inclusive, the Railroad Company has expended for road and equipment (including the above described equipment) the following amounts:

(Testimony of M. J. Curry,)

Road and structures and general expenses	$2,507,136.93
Equipment	50,540.86
Total	$2,557,677.79

Capital Stock

All of the issued and outstanding Capital Stock, consisting of $47,500,000 par value of Common Stock and $28,300,000 par value of Preferred Stock, except Directors' qualifying shares of Common Stock, is held by The Western Pacific Railroad Corporation, a Delaware corporation. $24,200,000 of the authorized Capital Stock of the Company, consisting of $12,500,000 of Common Stock and $11,700,000 of Preferred Stock is not yet issued or outstanding.

Dividends

The following dividends have been paid on the Preferred and Common Stocks since 1922:

DIVIDENDS—PREFERRED STOCK

Year	Rate	Amount paid
1923	6%	$1,650,000
1924	6%	1,650,000
1925	7.558%	2,078,450
1926	6%	1,650,000
1927	1½%	412,500
1928		None
1929		None
1930		None

DIVIDENDS—COMMON STOCK

Year	Rate	Amount paid
1925	5%	2,375,970

Prior to 1925, Railroad Company paid no dividends on its Common Stock.

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company
Financial Statements

Certified by D. C. DeGraff, General Auditor of the Company.

Capital Stock of Subsidiary Companies Outstanding and Amount owned by

THE WESTERN PACIFIC RAILROAD COMPANY

Issuing Company	Par value Capital Stock outstanding	Percentage owned by Western Pacific	Par value owned by Western Pacific
Tidewater Southern Railway Company	$1,176,782.00	97.55%	$1,147,968.00
Deep Creek Railroad Company	450,000.00	100%	450,000.00
Sacramento Northern Railway	1,000,000.00	100%	1,000,000.00
Standard Realty and Develment Co.	400,500.00	100%	400,500.00
Western Pacific California Railroad Company (subscribed but not issued)	27,500.00	100%	27,500.00

SACRAMENTO NORTHERN RAILWAY

	Par value Capital Stock outstanding	Percentage owned by Sacramento Northern Ry.	Par value owned by Sacramento Northern Ry.
West Side Railroad	$35,000.00	100%	$35,000.00

STANDARD REALTY & DEVELOPMENT COMPANY

	Par value Capital Stock outstanding	Percentage owned by S. R. & Dev. Co.	Par value owned by S. R. & Dev. Co.
Tidewater Southern Railway Company	$1,178,782.00	.50%	$5,883.00

(Testimony of M. J. Curry.)

EXCESS OF PAR OVER BOOK VALUE OF STOCKS AND BONDS OF AFFILIATED COMPANIES AS OF DECEMBER 31, 1930

	Book value	Par value	Excess of par over book value
The Western Pacific Railroad Company:			
Capital Stock:			
Standard Realty & Development Company	$175,439 78	$400,500.00	$225,060.22
Tidewater Southern Ry. Company	1,223,848.94	1,147,968.00	*75,880.94
First Mortgage Bonds:			
Sacramento Northern R.R.	3,975,456.13	5,213,475.34	1,238,019.22
Total	$5,374,744.85	$6,761,943.35	$1,387,198.50
Sacramento Northern Railway:			
Capital Stock:			
West Side Railroad	50,000.00	35,000.00	*15,000.00
Standard Realty & Development Co.:			
Capital Stock:			
Tidewater Southern Ry. Company	4,398.00	3,583.00	1,485.00
Grand total	$5,429,142.85	$6,802,826.35	$1,373,683.50

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES STATEMENT OF FUNDED DEBT AS OF DECEMBER 31, 1930.

The Western Pacific Railroad Company, First Mortgage Gold Bonds, maturing March 1, 1946:	
Issued June 26, 1916, Series A, 5%	$19,570,300.00
Issued May 31, 1921, Series A, 5%	4,078,000.00
Issued April 24, 1925, Series A, 5%	3,926,000.00
Issued December 1 and 31, 1926, Series A, 5%	2,600,000.00
Issued September 1 and October 18, 1927, Series A, 5%	2,950,000.00
Issued April 26, 1929, Series A, 5%	5,000,000.00
Issued April 23, 1930, Series A, 5%	572,800.00
Issued September 24, 1930, Series A 5%	5,000,000.00
Total amount outstanding December 31, 1930	$43,697,100.00

(Testimony of M. J. Curry.)

The Western Pacific Railroad Company, 5½% Equipment Trust Certificates, Series "B":		
Total amount issued February 21, 1923	$5,600,000.00	
Par value maturing serially on the first day of March in each year from 1924 to 1937, inclusive	375,000.00	
Par value maturing on March 1, 1938	350,000.00	
Total amount outstanding December 31, 1930		2,975,000.00
The Western Pacific Railroad Company, 5½% Equipment Trust Certificates Series "C":		
Total amount issued March 10, 1924	$3,105,000.00	
Par value maturing serially on the first day of December in each year from 1924 to 1938, inclusive	207,000.00	
Total amount outstanding December 31, 1930		1,656,000.00
The Western Pacific Railroad Company, 5% Equipment Trust Certificates, Series "D":		
Total amount issued June 3, 1929	$1,095,000.00	
Par value maturing serially on the first day of November in each year from 1929 to 1943, inclusive	73,000.00	
Total amount outstanding December 31, 1930		949,000.00
Tidewater Southern Railway Company, First Mortgage Thirty-Year Five per Cent Gold Bonds, maturing April 15, 1942, issued April 15, 1912:		
Total amount outstanding December 31, 1930		135,500.00
Sacramento Northern Railroad, First Mortgage Twenty-Year Five Per Cent Gold Bonds, issued July 1, 1918, and maturing July 1, 1938, payment of which has been assumed by Sacramento Northern Railway (subsidiary of Railroad Company), the successor in ownership		

(Testimony of M. J. Curry.)

of all the property of the Sacramento Northern Railroad:		
Total amount outstanding December 31, 1930	$5,224,373.14	
Less amount owned by The Western Pacific Railroad Company and pledged under its said First Mortgage	5,213,475.35	
		$10,897.79
Amount of note of Bisbee Investment Company dated January 14, 1925, in favor of California Trust and Savings Bank, maturing in installments due on various dates up to October 1, 1934, secured by mortgage on union passenger station, property of Sacramento Northern Railway in the City of Sacramento, which property was acquired by said Railway subject to said mortgage, which must be paid by Sacramento Northern Railway, outstanding on December 31, 1930		60,000.00

THE WESTERN PACIFIC RAILROAD COMPANY AND SUBSIDIARY COMPANIES CONSOLIDATED INCOME ACCOUNT FOR YEAR ENDED DECEMBER 31, 1929, AND YEAR ENDED DECEMBER 31, 1930.

	Year ended Dec. 31, 1929	Year ended Dec. 31, 1930
Freight revenue	$16,358,102.74	$15,451,540.74
Passenger revenue	2,187,700.11	1,797,223.18
Mail and express revenue	560,197.38	477,871.76
Miscellaneous revenue	990,618.68	1,095,901.67
Total revenue	$20,096,618.89	$18,822,537.35
Expenses operating	$16,732,912.47	$15,831,967.27
Taxes	1,467,522.66	1,278,372.01
Uncollectible railway revenues	1,325.25	450.60
Operating income	$1,894,858.21	$1,711,747.47

(Testimony of M. J. Curry.)

Other income:		
Rental of property	$660,107.01	$642,360.67
Hire of equipment, receipts	1,418,910.88	1,000,303.20
Dividend income	185.00	220.00
Income from funded securities	22,715.42	23,525.77
Income from unfunded securities and accounts	96,683.08	65,857.93
Miscellaneous income	328.67	40,164.05
Gross income	$4,093,788.27	$3,484,179.09
Income deductions:		
Interest on funded debt, First Mortgage Bonds	$1,843,664.61	$1,977,897.77
Interest on funded debt, Equipment Notes	322,826.61	319,070.41
Interest on funded debt advances	297,926.30	367,178.11
Rental of leased property	232,674.53	266,341.95
Hire of equipment, payments	1,171,651.44	1,380,941.99
Miscellaneous deductions	79,980.86	163,397.75
Amortization of discount on funded debt	130,972.48	135,984.32
Total deductions	$4,079,696.83	$4,610,812.30
Net income	$14,091.44	*$1,126,633.21

ANALYSIS OF SURPLUS ACCOUNT CHANGES—DECEMBER 31, 1928, TO DECEMBER 31, 1930

	Year ending Dec. 31, 1929	Year ending Dec. 31, 1930	Consolidated total
Net income	$14,091.44	*$1,126,633.21	*$1,112,541.77
Add: Net miscellaneous credits	66,187.10	39,472.62	105,659.72
Total	$80,278.54	*$1,087,160.59	*$1,006,882.05

(Testimony of M. J. Curry,)

Deduct:			
Net miscellaneous debits	$30,099.27	$38,179.42	$68,278.69
Dividends on Preferred Stock			
Total deductions	$30,099.27	$38,179.42	$68,278.69
Surplus—Increase	$50,179.27	*$1,125,340.01	*$1,075,160.74
Surplus credit balance, December 31, 1930	$6,093,788.44		
Surplus credit balance, December 31, 1928	7,168,949.18		
Increase	*$1,075,160.74		

CONSOLIDATED GENERAL BALANCE SHEET, DECEMBER 31, 1929, AND DECEMBER 31, 1930

ASSETS

	Dec. 31, 1929	Dec. 31, 1930
Investments:		
Investment in railroad and equipment	$137,832,688.69	$142,315,020.95
Investment in real estate and improvements	1,085,363.12	1,088,677.84
Sinking funds	50,235.92	50,938.14
Deposits in lieu of mortgaged property sold	4,850.00	13,515.60
Miscellaneous physical property	1,915,076.95	2,522,173.43
Other investments	1,544,750.30	1,668,128.47
Total Investments	$142,432,964.98	$147,658,454.43
Current assets:		
Cash	$1,596,289.57	$1,048,205.94
Deposits of mortgage trust funds	40,841.46	40,906.85
Deposits of equipment trust funds	46,695.92	46,695.92
Special deposits	156,864.60	154,135.76
Loans and notes receivable	9,709.70	5,660.15

(Testimony of M. J. Curry.)

	Dec. 31, 1929	Dec. 31, 1930
Traffic and car service balances receivable	523,332.58	406,286.08
Net balances receivable from agents and conductors	222,549.91	128,835.33
Miscellaneous accounts receivable	1,289,034.69	1,226,287.72
Material and supplies	3,129,323.72	3,128,395.78
Interest and dividends receivable	11,330.25	9,424.71
Other current assets	89.74	89.74
Total current assets	$7,026,062.14	$6,194,923.98
Deferred assets: Working fund advances	$5,665.59	$4,906.81
Total deferred assets	$5,665.59	$4,906.81
Unadjusted debits:		
Rents and insurance premiums paid in advance	$49,302.29	$36,660.55
Discount on funded debt	1,958,634.10	1,961,148.49
Other unadjusted debits	733,376.05	862,956.55
Total unadjusted debits	$2,741,312.44	$2,860,765.59
Total assets	$152,206,005.15	$156,719,050.81
Excess of par value over book value of capital stock and bonds of subsidiary companies	$1,372,741.50	$1,373,683.50
	$150,833,263.65	$155,345,367.31

LIABILITIES

	Dec. 31, 1929	Dec. 31, 1930
Capital Stock:		
Common	$47,526,699.00	$47,522,931.00
Preferred	28,300,000.00	28,300,000.00
Premium on Capital Stock	498,238.00	498,238.00
Total stock	$76,324,937.00	$76,321,169.00

(Testimony of M. J. Curry.)

	Dec. 31, 1929	Dec. 31, 1930
Long term debt:		
Funded debt (First Mortgage Gold Bonds)	$38,414,197.79	$43,903,497.79
Funded debt (Equipment Trust Certificates)	6,235,000.00	5,580,000.00
Total long term debt	$44,649,197.79	$49,483,497.79
Debt to affiliated companies:		
Open accounts	$4,838,739.75	$4,387,007.87
Total debt to affiliated companies	$4,838,739.75	$4,387,007.87
Current liabilities:		
Loans and notes payable	$1,014,647.24	$998,235.00
Traffic and car service balances payable	629,875.95	384,268.34
Audited accounts and wages payable	1,309,584.46	1,606,490.82
Miscellaneous accounts payable	252,739.51	315,187.86
Interest matured unpaid	15,077.72	12,348.88
Funded debt matured unpaid	11,100.00	11,100.00
Unmatured interest accrued	720,035.60	786,908.51
Unmatured rents accrued	4,804.16	4,666.66
Other current liabilities	82,280.45	76,341.42
Total current liabilities	$4,040,145.09	$4,195,547.49
Deferred liabilities:		
Other deferred liabilities	$16,483.28	$141,392.03
Total deferred liabilities	$16,483.28	$141,392.03
Unadjusted credits:		
Tax liability	$220,629.25	$206,175.37
Accrued depreciation—equipment	6,070,695.76	6,930,965.21
Other unadjusted credits	281,750.49	414,267.32
Surplus—Investment, equipment and other property purchased	7,171,556.79	7,171,556.79
Total unadjusted credits	$13,744,632.29	$14,722,964.69

	Dec. 31, 1929	Dec. 31, 1930
Surplus:		
Additions to property through income and surplus	$6,758,472.14	$7,439,295.80
Funded debt retired through income and surplus	549,884.98	599,313.98
Sinking fund reserves	353,651.42	399,853.64
Profit and loss balance	*442,880.09	*2,344,674.98
Total surplus	$7,219,128.45	$6,093,788.44
Total liabilities	$150,833,263.65	$155,345,367.31

*Denotes red figures.

Policy As to Depreciation

No specific amount is set aside either monthly or annually on account of depreciation of roadway or structures, but all such property is fully maintained and when retired or replaced is written off out of capital account.

With respect to equipment, charges are made monthly to operating expenses and corresponding amounts credited to "Accrued depreciation equipment," at a general rate of 3% per annum on the original cost of the equipment.

Agreements

The Western Pacific Railroad Company, in consideration of the listing of the securities covered by this application, agrees with the New York Stock Exchange as follows:

To notify the New York Stock Exchange promptly of any change in the general character or nature of its business.

(Testimony of M. J. Curry.)

To notify the New York Stock Exchange immediately if it or any subsidiary or controlled company should dispose of any property or of any stock interest in any of its subsidiary or controlled companies, when such disposal would impair or materially affect its financial position or the nature or extent of its operations as theretofore conducted.

Subject to Interstate Commerce Commission regulations, to publish periodical statements of earnings, as agreed upon with the Committee.

To publish at least once in each year and submit to stockholders at least fifteen days in advance of the annual meeting of the corporation, a Balance Sheet, an Income Statement for the last fiscal year and a Surplus statement of the applicant company as a separate corporate entity and of each corporation in which it holds directly or indirectly a majority of the voting stock: or, in lieu thereof, eliminating all inter-company transactions:

(a) a similar set of financial statements fully consolidated as to the applicant company and all corporations in which it owns directly or indirectly a majority of the voting stock, or

(b) a similar set of financial statements consolidated as to the applicant company and specifically named or described subsidiaries, with separate similar financial statements for each unconsolidated corporation in which the applicant company holds directly or indirectly a majority of the voting stock.

Such statements shall disclose fully the nature

(Testimony of M. J. Curry.)

and extent of the interest of the applicant company in the corporations whose unconsolidated financial statements are furnished, and also the existence of any default in interest, cumulative dividend requirements or sinking fund or redemption fund requirements of any of the corporations whose accounts are thus consolidated or separately shown.

Subject to Interstate Commerce Commission regulations, to publish all future annual financial statements of any character, in the form contained in the listing application and, in the publication of reports of earnings for any period of less than a fiscal year, to show net profits in the aggregate and per share after Depreciation, Depletion, Income Taxes and Interest, estimating the proportionate amount of these items as accurately as may be if not finally determined at date of publication.

Not itself, and not to permit any subsidiary, directly or indirectly controlled, to take up as Income stock dividends received at an amount greater than that charged against Earnings, Earned Surplus or both of them by the issuing Company in relation thereto.

To maintain, in accordance with the rules of the Stock Exchange, a transfer office or agency in the Borough of Manhattan, City of New York, where all listed securities shall be directly transferable, and the principal of all listed securities with interest or dividends thereon shall be payable; also a registry office in the Borough of Manhattan, City of

(Testimony of M. J. Curry.)

New York, south of Chambers Street, other than its transfer office or agency in said city, where all listed securities shall be registered. If its transfer books should be permanently closed, to continue to split up certificates of listed stock into smaller denominations in the same name so long as such stock shall be retained upon its list by the New York Stock Exchange. If its transfer office or agency should be or should become located north of Chambers Street, to arrange, at its own cost and expense that its registry office will receive and re-deliver all securities deposited at such registry office for the purpose of transfer.

Not to add to the number of its transfer agencies nor to make any change of a transfer agency, or of a trustee of its listed bonds or securities, without prior notice to the Committee on Stock List, and not to add to the number of registrars of its listed stock nor to change a registrar of its listed stock without the prior approval of the Committee on Stock List, nor to select an officer or director of the company as a trustee of its mortgages or other listed securities unless such officer or director be a co-trustee for an issue having a corporate trustee.

Not to make any change in the form or nature of its listed securities or in the rights or privileges of the holders thereof, without having given twenty days' prior notice to the Committee on Stock List of such proposed changes, and having made appli-

(Testimony of M. J. Curry.)

cation for the listing of the securities as changed, if the Committee on Stock List so requires.

To notify the Stock Exchange in the event of the issuance or creation in any form or manner of any rights to subscribe to, or to be allotted its securities, or of any other rights or benefits pertaining to ownership in its securities, and to afford the holders of its listed securities a proper period within which to record their interests and to exercise their rights, and to issue all such rights in form approved by the Stock Exchange and to make the same transferable, payable and deliverable in the Borough of Manhattan, City of New York.

To make application to the Stock Exchange for the listing of additional amounts of listed securities sufficiently prior to the issuance thereof to permit action in due course upon such application.

To forward to the Stock Exchange copies of all notices mailed to stockholders looking toward Charter amendments, and to file with the Stock Exchange two copies of amended Charter, or Resolutions of Directors in the nature of amendments (one of which must be certified), as soon as such amendments or resolutions have become effective.

To notify the Stock Exchange of the change or removal, to a substantial extent, of collateral deposited under any of its mortgage or trust indentures under which listed securities are outstanding.

To have on hand at all times a sufficient supply of bonds to meet the demands for transfer.

(Testimony of M. J. Curry.)

To furnish the New York Stock Exchange, on demand, such reasonable information concerning the company as may be required.

General

The fiscal year of the Railroad Company ends on the 31st day of December.

The principal office of the Company is in the Mills Building, San Francisco, California.

The annual meeting of stockholders is held on the last Wednesday in March at the principal office of the Railroad Company in San Francisco, California.

The names and addresses of the Directors, whose terms expire March 25, 1931 are: Arthur Curtiss James, Thomas M. Schumacher, Arthur W. Loasby and Winthrop W. Aldrich, of New York, N. Y.; Frank E. Sullivan, William Fries, J. G. Hooper, Scott F. Ennis, Wellington T. Smith, W. L. Hughson, H. M. Adams, A. R. Baldwin, and F. M. Angellotti, of San Francisco, California; John L. Nagle, of Sacramento, California; Charles Elsey of Oakland, California; Frederick E. Williamson and James E. Gorman, of Chicago, Illinois; L. W. Baldwin, of St. Louis, Missouri; and C. W. Nibley, of Salt Lake City, Utah.

The Executive Committee is: Arthur Curtiss James, Arthur W. Loasby, Winthrop W. Aldrich and Thomas M. Schumacher, Chairman, and H. M. Adams, President ex-officio.

The Officers of the Railroad Company are: Chairman of the Board, Arthur Curtiss James; Chairman

(Testimony of M. J. Curry.)

of the Executive Committee, Thomas M. Schumacher; President, H. M. Adams; Executive Vice-President, Charles Elsey; Vice-Presidents, E. W. Mason, J. F. Hogan and M. J. Curry; Secretary, W. G. Bruen; Treasurer, E. C. Bates; Assistant Secretary and Assistant Treasurer, M. J. Curry; Assistant Secretaries, Thomas J. Byrne and C. L. Droit.

The Bonds are interchangeable as to denomination and may be transferred and registered at The Chase National Bank of the City of New York, 11 Broad Street, New York, N. Y.

The Agents for the payment of interest are The Chase National Bank of the City of New York and Crocker First Federal Trust Company of San Francisco, California.

The place for the payment of the principal is at the office of The Chase National Bank of the City of New York.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By M. J. CURRY,
Vice-President.

This Committee recommends that the above-mentioned $5,000,000 First Mortgage 5% Gold Bonds, Series A, due March 1, 1946, included in numbers M-43551 to M-48550, for $1,000 each (and registered bonds issued in exchange for coupon bonds) be added to the list on official notice of issuance, sale and distribution, in accordance with the terms

(Testimony of M. J. Curry.)

of this application, making the total amount authorized to be listed $49,302,800.

FRANK ALTSCHUL,
Chairman.

Adopted by the Governing Committee, March 11, 1931.

ASHBEL GREEN,
Secretary.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Irving Trust Exhibit No. 12. Filed 1/22/1940. Walter B. Maling, Clerk.

Mr. McCollum: That is all I have, your Honor.

Mr. Wood: If your Honor please, in respect to these exhibits, I want to make clear the position of the First Mortgage Trustees. [1170] I do not intend to object to their admission in evidence, but I want to make clear that we do not consider that these listing applications or listing statements which they contain are proper evidence, because they are not binding upon the First Mortgage Trustees. We are perfectly willing that they go in the record, and we can argue the question of their relevancy in the argument and briefs.

The Court: Very well.

Mr. Sloss: If your Honor please, I should like to introduce an exhibit through Mr. Curry. It is prob-

(Testimony of M. J. Curry.)

ably not cross-examination, but I imagine it would be simpler to take it up at this time.

Q. Mr. Curry, you are an officer, are you not, of the Western Pacific Railroad Corporation?

A. I am.

Q. Which holds all of the stock of the Debtor?

A. I am.

Q. And you are familiar with the holdings of stock in that corporation by the Western Pacific Corporation? A. Yes, sir.

Q. There has been prepared as an exhibit a statement showing the percentage of the preferred stock of the corporation held by A. C. James and two corporations which he owns, supplementing paragraph 48 of the Stipulation of Facts. Have you that exhibit?

A. I have, Mr. Sloss. It happens to be in my papers.

Q. I will hand you this copy and I will ask you whether the statements therein are correct as shown by the stock records of the corporation?

A. Yes, sir, to the best of my knowledge they are correct.

Mr. Sloss: If your Honor please, we will offer this in evidence on behalf of the Corporation as Western Pacific Railroad Corporation's Exhibit No. 1. Copies have been handed to counsel.

(The document was marked "Western Pacific Railroad Corporation's Exhibit 1.")

(Testimony of M. J. Curry.)

WESTERN PACIFIC RAILROAD CORP.

EXHIBIT No. 1

The Western Pacific Railroad Corporation

MEMORANDUM RE HOLDINGS OF PREFERRED AND COMMON STOCK.

At the close of business on September 13, 1939 there were outstanding (excluding treasury stock) 574,501 shares of the common stock and 381,250 shares of the preferred stock of The Western Pacific Railroad Corporation.

The holdings of such shares, as shown by Paragraph 48 of the "Stipulation as to Facts not in Dispute", held by Arthur Curtiss James, Curtiss Southwestern Corporation and Curtiss Southwestern Company, constituted the following percentages of the total outstanding stock of each of such classes, to-wit:

Of the preferred stock 8.76%

Of the common stock ..... between 61% and 61.5%

Figures and computation furnished by M. J. Curry, Sec. and Treas. of The Western Pacific Railroad Corporation.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. Western Pac. R. R. Corp. Exhibit No. 1. Filed 1/22/1940. Walter B. Maling, Clerk.

The Court: Anything further of this witness? That is all. [1171]

J. W. WILLIAMS,

Called by the Institutional First Mortgage Bondholders Committee; Sworn.

The Clerk: Will you state your name to the Court, please? A. J. W. Williams.

Direct Examination

Mr. Swaine: Q. Will you state your occupation, Mr. Williams?

A. Chief Engineer of the Western Pacific Railroad Company.

Q. Were you present this morning when Mr. Elsey testified as to the present efficiency of the property? A. Yes.

Q. Do you concur in his judgment? A. Yes.

Mr. Swaine: That is all.

The Court: Any questions? That is all.

Mr. Clay: We have two witnesses for the R. F. C. I would like to call Mr. Blyth.

CHARLES R. BLYTH,

Called by Reconstruction Finance Corporation; Sworn.

The Clerk: Will you state your name to the Court? A. Charles R. Blyth.

Direct Examination

Mr. Clay: Q. Will you state your business, Mr. Blyth?

(Testimony of Charles R. Blyth.)

A. I am the President of Blyth & Company, a corporation that has been in business for twenty-five years in handling investment bonds, investment securities.

Q. They are engaged in the business of distributing and underwriting?

A. Underwriting and distributing, yes.

Q. They also underwrite securities?

A. Yes, they do.

Q. And take participation in public offerings, do they not? A. That is correct. [1172]

Q. And you have handled railroad securities?

A. Yes, we have.

Q. And you have branches both in San Francisco and New York? A. Yes, we do.

Q. With your head office here. Have you studied the characteristics of the new First Mortgage Bonds provided for in the Western Pacific plan?

A. Yes, I have.

Q. Have you formed any conclusion as to whether your firm would be interested in those bonds?

A. My firm would not be interested in those bonds at any price that I could imagine would be acceptable.

Q. Do you think any private underwriter would be interested in taking them to re-sell to the public?

A. I feel sure they would not.

Q. Do you think they would be salable through private channels?

(Testimony of Charles R. Blyth.)

A. Only that certain private individuals might be interested from a speculative standpoint in perhaps offering to buy the bonds at a big discount. They would not be available to institutional buyers.

Q. Why would they not be available to institutional buyers?

A. The chief buyers of that kind are in the East, in New York City, largely—New York savings banks and the larger institutions. The law provides a certain continuity of earnings as applicable to a sufficient amount to pay bond interest over a period of years before they would be available for such institutional investment. These bonds do not qualify.

Q. You stated a moment ago that they would not be salable except to somebody who would take them at a big discount. What do you mean by a big discount? Can you estimate at what discount they would be salable to someone?

A. These bonds I think would bear what is called in our business a rating of about "A", according to Moody, which is one of the standard organizations. We are forced to recognize these ratings. Bonds that bear an "A" rating usually yield at the present market about 4½ per cent. It would mean that the [1173] market value of these bonds, if you could forget everything except the pure statistics, would range around 90, I should say.

Q. That is, a prospective buyer who was willing to take them and hold them might pay 90, but could not re-sell publicly?

(Testimony of Charles R. Blyth.)

A. He could not re-sell them; it would be purely a speculation.

Q. Have you any other reasons which you would like to give for the conclusions you have stated?

A. I think that the most important consideration is the historical background of the Debtor corporation. I think that the public is very slow to fancy a bond which is the obligation of a corporation which has been in default, or has been reorganized, we will say, twice in about 25 years, I think. It doesn't give you much confidence in what the future might bring forth, even though the reduction in the debt, compared to what it previously had, seems to be very small.

Q. You state that they would not be legal investments for institutions. Aren't the institutions such as insurance companies and savings banks at the present time the largest buyers of a publicly-offered railroad bond?

A. They are almost the only buyers. Railroad bonds at this rate of interest are not attractive to the individual investor. They won't buy them.

Q. Do you think these bonds could be sold to anybody except R. F. C.?

A. I am sure they could not.

Mr. Clay: That is all.

The Court: Any questions?

Mr. Coulson: May I ask a question?

The Court: Yes, Colonel.

(Testimony of Charles R. Blyth.)

Cross Examination

Mr. Coulson: Q. Mr. Blyth, you are familiar with the fact that during the years 1936, 1937 and 1938 there were considerable expenditures on this property by way of the completion of an improve-
[1174] ment and rehabilitation program?

A. I have seen the figures. I am not a close student of this situation; I don't want to pose as that, but I do know that that is a fact.

Q. Do you know, Mr. Blyth, that a large part of those expenditures, almost half, were necessarily charged to the operating expenses of the company?

A. I did not know that.

Q. Well, I state to you, Mr. Blyth, that during the years 1936, 1937, and 1938 approximately ten million dollars was spent on the improvement and rehabilitation of this property, and that of that amount almost half was charged to operating expenses under Interstate Commerce Commission rules, and I ask you, would the investment public recognize in buying bonds the necessity of some readjustment in the operating income to eliminate that extraordinary factor?

A. I do not think the investment public would concern itself with that, except to say it was a sign of great weakness that a road had to do that.

Q. Let me go on further, Mr. Blyth, then: This Court will shortly have before it the 1939 operating income of this property. I ask you to assume that the operating income of the Railroad Company will

(Testimony of Charles R. Blyth.)

be approximately $1,800,000. Would that sum constitute, in your mind, taking the year 1939 alone into account, an adequate coverage for an issue of ten million 4 per cent first mortgage bonds on the property?

A. If you want me to answer directly, yes, but I should think——

Q. I will bring it out. I know what you have in mind. Mr. Blyth, assuming that that year 1939 were the first year in which this extraordinary influence on income appeared. Would you think that those earnings for 1939 would have some significance to an investor?

A. Can I make a statement before I answer that?

Q. Answer it and then explain. A. Yes.

Q. I think I know what you have in mind. I intend to bring it out, [1175] but go ahead and explain. A. All right; I will wait.

Q. Mr. Blyth, if this property had earned for a reasonable period of years a sum comparable with its earnings in the year 1939 as assumed in my question, you would regard the coverage as adequate under the standards which investment bankers apply for an issue of ten million dollars first mortgage 4 per cent. bonds? A. Yes.

Q. Now, will you explain to the Court, if I haven't brought out what you have in mind?

A. I thought I was trying to answer whether these bonds were salable or not, and the fact that

(Testimony of Charles R. Blyth.)

the road might have made money in two or three years would not necessarily affect them.

Mr. Coulson: I think that is clear, Mr. Blyth, but I just wanted the record clear also as to the fact that we are dealing with a record where the earnings are not significant. Thank you, Mr. Blyth.

Mr. Clay: That is all, Mr. Blyth.

The Court: That is all.

Mr. Clay: I wish to call Mr. Futterer.

CHARLES FUTTERER,

Called for the Reconstruction Finance Corporation; Sworn.

The Clerk: Will you state your name to the Court, please? A. Charles Futterer.

Direct Examination

Mr. Clay: Q. Mr. Futterer, will you state in your own words what your past experience has been?

A. I am presently employed as an examiner in the Railroad Division of the Reconstruction Finance Corporation. After graduation from high school in 1920 I attended the University of Maryland, and graduated from the George Washington University in 1930. From graduation date from high school I was employed by the Western Maryland Railway Company in its mechanical [1176] and transportation departments for a continuous service of two

(Testimony of Charles Futterer.)

years, and during summer vacations in the same railroad. From 1925 to 1932 I was employed by the Bureau of Railway Economics, which is a division of the then American Railway Association, now a division of the Association of American Railroads. The Bureau of Railway Economics has a department supported by railroads that engages in scientific study of railroad problems which have to do statistical analysis and other research matters dealing with freight rate investigations, and so on.

From February, 1932 until July, 1936 I was engaged by the Reconstruction Finance Corporation in its Railroad Division, serving in various capacities there as an examiner. In the tour of duty it was necessary for me to prepare reports for consideration of the directors of the R. F. C. on applications for loans to railroads, which necessitated an appraisal of the collateral offered, and other matters that an ordinary lending organization would consider.

From 1936 until the close of 1939 I was employed by the Young Management Corporation in New York City, an investment counsellor firm, and by the Union Trust Company, of Pittsburgh, in their respective research and statistical departments. In these departments I was assigned the duties of submitting material that lent themselves to the consideration of the investment committees of those institutions with regard to the purchase, sale or retention of railroad securities.

(Testimony of Charles Futterer.)

Since my return to the R.F.C., in the Railroad Division, I have been assigned similar duties heretofore outlined.

Q. In passing upon applications, or in making recommendations to the directors of the R.F.C., do you not have to consider whether the prospective borrower can obtain the money from private sources?

A. It is my understanding that under the Act that enables the R. F. C. to make loans, that it is necessary that the company cannot borrow [1177] funds through regular banking channels at reasonable terms.

Q. And, therefore, both in your duties with the R.F.C. and in your duties with the investment counsel in New York and Pittsburgh, you have had to study marketing conditions?

A. That is true.

Q. And the possibility of railroads being able to borrow through private channels?

A. That is correct.

Q. Have you made any study of the public offerings of railroad securities in recent years?

A. I have.

Q. Is this a chart which you have prepared?

A. Yes.

Q. And from what was the information on that chart taken?

A. Principally from the Commercial and Financial Chronicle.

Q. Was it not all taken from the Commercial and Financial Chronicle? A. Yes, it was.

(Testimony of Charles Futterer.)

Q. In other words, the correction shown on the chart in ink is a correct correction?

A. That is right.

Q. And the data on here is correct as shown by the Commercial and Financial Chronicle?

A. That is correct.

Mr. Clay: I would like to offer this as R.F.C. Exhibit No. 1.

The Court: How is that designated, briefly?

Mr. Clay: The chart is headed "Offerings of Railroad Bond Issues, 1937-1940."

The Witness: Your Honor, may I interpose a correction, there, to say that it is 1938 to '40?

Mr. Clay: Yes, the heading should be changed from 1937 to 1938.

(The document was marked "R.F.C. Exhibit No. 1.")

R. F. C. EXHIBIT No. 1

OFFERINGS OF RAILROAD BOND ISSUES 1937-1940

1940		Rate	Series	Description	Dated	Date Due	Sold to Bankers % Price Cost	Offered to Public % Price Yield	Amount
	Louisville and Nashville	3½		10 yr. Coll. Tr. Bds.	Jan. 1, 1940	Jan. 1, 1950	99½	100	$30,000,000
	"	4		20 yr. Coll. Tr. Bds	Jan. 1, 1940	Jan. 1, 1960	98½	100½	30,000,000
1939								Total	$60,000,000
September	Norfolk & Portsmouth Belt Line R. R. (1)	1½		Refunding	Apr. 1, 1939	1940-1949			700,000
August	Terminal R. R. Assn. of St. Louis (2)	3⅜	"B"	Refunding & Improvement	Jul. 1, 1939	Jul. 1, 1974	100.66	102.60	7,000,000
June	Wheeling & Lake Erie	3⅛	"F"	"	Jun. 15, 1939	Jun. 15, 1966	Par & Accrued		5,250,000
"	"	2⅛	"E"	"	Jun. 15, 1939	1940-1949	"		2,188,000
"	Winston-Salem Terminal Co. (3)	3½	—	—	Sep. 1, 1939	Sep. 1, 1970	2.90		800,000
"	Atlanta Terminal Co. (4)	4	—	30 yr. Bds.	Aug. 1, 1939	Aug. 1, 1969	100.512 and Acc'd		1,600,000
March	Wabash-St. Charles Co. (5)	4	—	First Mtge. Bds.	Mar. 1, 1939	1935-1959	101		2,085,000
February	Cincinnati Union Termina Co. (6)	3⅜	"E"	"	Feb. 1, 1939	Feb. 1, 1969	107.38	3.0	12,000,000
1938								Total	
December	Chesapeake & Ohio Ry.	3½	"F"	Refunding & Improvement	Dec. 1, 1938	Dec. 1, 1963	100 —	101½	30,000,000
March	Duluth Missabe & Iron Range	3½	—	First Mtg. Bds.	Oct. 1, 1937	Oct. 1, 1962	—	98	28,000,000

Source: The Commercial & Financial Chronicle and Bank and Quotation Record.

Guarantors

(1) Southern Ry. and Virginian, Atlantic Coast Line, C. & O., Norfolk & Western, Receivers of Norfolk Southern, Penn. R. R., Receivers of Seaboard Air Line.

(2) Louisville Nashville, Chi Rock Island & Pac., Southern Ry., I. C., Alton, C. B. & Q., C. & E. I. Ry., Mo. Pac., St. Louis-San Francisco, Pitts, Cinn., Chi. & St. Louis, Wabash, M-K-T, St. Southwestern, B. & O., Cleve., Cin., Chi. & St. L.

(3) Southern Ry., Norfolk & Western, Winston-Salem Southbound Ry.

(4) Southern Ry., Centra of Georgia, Atlanta & West Point R. R. Co.

(5) Wabash Ry. Co. and its Receivers

(6) Norfolk & Western, Baltimore & Ohio, Chesapeake & Ohio, Cincinnati New Orleans & Texas Pacific, Louisville & Nashville, Pennsylvania.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. R. F. C. Exhibit No. 1. Filed 1/22/1940. Walter B. Maling, Clerk.

(Testimony of Charles Futterer.)

Mr. Clay: Q. Will you in your own words comment on this exhibit?

A. To date in 1940 the principal, or the only railroad bond issue that has been offered to the public, has been the 10- and 20-year collateral trust notes of the Louisville & Nashville Railroad. Those were sold to bankers in the first instance, [1178] the 3½s of 1950 at 99½, and the 4s of the 20-year maturity at 98½. The L. & N., serving as it does part of the Pocahontas Coal Region and Southeastern Coal Regions has had a long and established record of satisfactory earning power. For years it has been enabled, by virtue of its position and credit and resources, to pay dividends on its common stock, with probably one exception in 1933.

In 1939 the issue of railroad bonds to the public was limited, other than those of terminal companies, to the issue of the Wheeling & Lake Erie Railroad Company, which sold at 3⅛ and 2⅛, with maturities of 1970 and 1969. Of my own personal knowledge I know that the 2⅛ issue of Wheeling & Lake Erie was taken solely by one institution, and the 3⅛ were taken altogether by insurance companies and institutional investors.

In so far as the terminal companies are concerned, as will be shown by the footnote in the exhibit, they are in nearly every instance guaranteed by companies or their receivers.

Q. Take one, for example.

A. For example, to take the strongest one, probably, on the exhibit, is the Cincinnati Union Ter-

(Testimony of Charles Futterer.)

minal, which has as guarantors such predominant railroad earners as the C. & O., Norfolk & Western, Louisville & Nashville, P. R. R., and C. N. O. & T. P., which is controlled directly or indirectly by the Southern Railway; and the Terminal Railroad Association of St. Louis, where the guarantee may not be established by the fact that the credit position of the guarantors is so good, which I am not admitting, but, nevertheless, it provides such an essential facility that they just could not get along without it, and, naturally, bankers or other persons, other investors, are willing to take a railroad security of that character.

Q. In other words, is there only one railroad bond issue which was offered during 1939 which does not come under the category of a [1179] terminal issue guaranteed by one or more railroads?

A. In so far as the Commercial and Financial Chronicle report, the Wheeling & Lake Erie bonds were the only ones offered privately or to the public in 1939.

Q. During the entire year?

A. During the entire year.

Q All right. Do you consider the Wheeling & Lake Erie a security that is comparable to the new Western Pacific bonds?

A. Well, this issue of the Wheeling & Lake Erie, while it is a junior mortgage, none the less it is an obligation of a railroad company that has been able throughout the depression to earn its

(Testimony of Charles Futterer.)

fixed charges at least one and one-half times in the poorest year, and has been able, probably, with the first dividend since its reorganization in 1916 of $7 in 1937, was still able to pay one in 1939 of $5 on the common.

Q. Do you consider these Western Pacific bonds comparable to the Louisville & Nashville bonds which have been publicly offered this year?

A. The Louisville & Nashville bonds, being collateral trust notes, are not comparable with respect to the assets securing them; but, nevertheless, viewing the bonds from the standpoint of a private individual as an investor, or an institutional buyer, the asset value is overcome very much by the earnings record of the company in the mind of a person who is willing to put his funds in the railroad industry in general, or the particular company that has an opportunity to sell.

Q. Do the L. & N. and Wheeling & Lake Erie extend into the same general region?

A. No; the Louisville & Nashville was considered probably a Southern carrier, whereas the Wheeling & Lake Erie's predominant operations are from Toledo and Cleveland to Wheeling, and can be considered as probably one of the Great Lakes carriers. Nevertheless, both the Louisville & Nashville and the Wheeling & Lake Erie are both coal carriers, and for that particular reason [1180] are not subjected to the wide fluctuations in earning power that a railroad, say the Western Pacific,

(Testimony of Charles Futterer.)

is subject to, in that it does not have a commodity that is predominant in its tonnage, like coal.

Q. Is that observation true, also, of the Chesapeake & Ohio Railway?

A. The Chesapeake & Ohio is one of the strongest railroad companies in the country, from an earnings standpoint, and enjoys that position by reason of the fact that it operates in the Pocahontas coal fields. It has paid continuous dividends since 1922.

Q. Now, that brings you down to the last offering on the list, the Duluth, Missabe & Iron Range.

A. In 1938 the Duluth, Missabe & Iron Range sold their 3½s in the amount of $28,000,000. As you know, the Duluth, Missabe & Iron Range is a wholly owned subsidiary of United States Steel, and its prosperity depends on the transportation of iron from the Missabe and Vermillion ranges to the lakes. That originally was taken by the parent company in the amount of thirty million dollars, and when the market became propitious they offered it to the public at a price of 98, and the Steel Company still retained two million out of an originally authorized amount of thirty.

Q. Summarizing your exhibit, or summarizing your testimony in regard to the exhibit, do I follow you that during the period shown on the exhibit only four railroad bond issues were publicly sold which do not come into the classification of terminal issues? A. Corect.

(Testimony of Charles Futterer.)

Q. Guaranteed by other carriers?

A. Correct.

Q. Have you studied the provisions of the Western Pacific plan? A. I have.

Q. And the characteristics of the new First Mortgage Bonds? A. I have.

Q. Have you formed any conclusion as to the salability of these [1181] bonds through private channels?

A. I have, yes. In considering the possibility of the sale of the new mortgage bonds of the reorganized debtor, I have first taken the element of the general disfavor into which secured obligations of railroads in general have fallen. As heretofore adverted to, only the obligations of the strongly entrenched companies—operating companies—have been able to market their bonds in the past three years.

Q. In other words, only three roads in the United States, during the last three years?

A. Yes.

Q. As shown by the Commercial and Financial Chronicle?

A. Yes. In considering the railroad industry in general, one must take note that it has been affected by competition of carriers that have not probably been brought into proper competitive control; that the railroad industry is burdened with rigid costs that include taxes, and that elements affecting the Western Pacific in particular are not

(Testimony of Charles Futterer.)

so much different from that that affects the railroad industry in general. One important—

Q. Have you made a particular study of the factors that affect the Western Pacific, or prepared any charts to illustrate your testimony?

A. I have. I have attempted to prepare a chart that shows by way of explanation the factor of safety for the new fixed mortgage interest-bearing bonds of the Western Pacific Railroad.

Q. Is this a copy of that chart, or is this the chart? A. Yes.

Q. Where did you obtain the figures and information shown on that chart?

A. As indicated by the footnotes, the total operating revenues, the income available for interest, and the adjusted income available for interest as shown respectively by columns 1, 3 and 5, were taken from the Stipulation in these proceedings. The other figures were computed from the Stipulation.

Q. The other figures are mere mathematical compilations, are they not?

A. Correct. [1182]

Q. The result of mathematical computations?

A. I might suggest with regard to this exhibit that it might be clearer in column 10 if it was shown that the result was column 1—just strike that. I think it is clear as it stands.

Q. And these computations are correct?

(Testimony of Charles Futterer.)

A. To the best of my knowledge and belief they are correct.

Mr. Clay: I would like to offer this as R.F.C. Exhibit No. 2. It is a table headed "Western Pacific Railroad Company indicated income remaining after proposed interest charges and per cent. of gross revenues of such income remaining, 1922-1938, inclusive."

(The document was marked "R.F.C. Exhibit 2.")

R. F. C. EXHIBIT No. 2

THE WESTERN PACIFIC RAILROAD COMPANY*
INDICATED INCOME REMAINING AFTER PROPOSED FIXED CHARGES AND PERCENT OF GROSS REVENUES OF SUCH INCOME REMAINING—1922-1938, INCLUSIVE

Year	(1) Par. 74 Total Operating revenues	(2) % Inc. or Dec. over previous year	(3) Par. 75 Income available for Interest	(4) % Inc. or Dec. over previous year	(5) Par. 76 Adjusted Income available for Int.	(6) % Inc. or Dec. over previous year	(7) Estimate Fixed Charges	(8) Net Remainder Col.(3)—Col. (7)	(9) Net Remainder Col. (5)—Col. (7)	(10) % Remainder of gross revenues after Col. (3) (Col. (8)÷1)	(11) % Remainder of gross remainder after Col. (5) (Col. 9÷1)
1922	$12,736,564	—	$2,306,124	—	$2,404,890	—	$494,000#	1,812,124	1,910,890	14%	15%
1923	14,414,812	+13%	3,313,976	+ 44%	4,412,234	+ 83%	"	2,819,976	3,918,234	20	27
1924	14,669,313	+ 2	3,144,124	— 5	3,241,823	— 27	"	2,650,124	2,747,823	18	19
1925	15,898,548	+ 8	4,454,352	+ 42	4,557,798	+ 41	"	3,960,352	4,063,798	25	26
1926	17,951,468	+13	4,759,282	+ 7	4,868,390	+ 7	"	4,265,282	4,374,390	24	24
1927	18,306,675	+ 2	2,674,494	— 44	3,470,861	— 29	"	2,180,494	2,976,861	12	16
1928	19,421,851	+ 6	2,964,371	+ 11	4,376,972	+ 26	"	2,470,371	3,882,972	13	20
1929	20,096,557	+ 3	2,529,846	— 15	3,718,436	— 15	"	2,035,846	3,224,436	10	16
1930	18,819,062	— 6	1,552,487	— 39	2,381,529	— 36	"	1,058,487	1,887,529	6	10
1931	14,852,938	—21	Def. 186,708	Def.	Def. 220,494	Def.	"	Def. 680,708	Def. 714,494	Def.	Def.
1932	12,251,071	—18	252,706	—	283,912	—	"	Def. 241,294	Def. 210,088	Def.	Def.
1933	12,202,489	No chg.	674,007	+167	474,365	+ 67	"	180,007	Def. 19,635	1	Def.
1934	13,779,238	+13	1,084,244	+ 61	1,396,353	+194	"	590,244	902,353	4	7
1935	14,407,458	+ 5	805,589	— 26	1,377,026	— 1	"	311,589	883,026	2	6
1936	16,547,344	+15	181,102	— 78	1,901,423	+ 38	"	Def. 312,898	1,407,423	Def.	9
1937	17,918,485	+ 8	Def. 903,113	Def.	1,007,407	— 43	"	Def. 1,397,113	583,407	Def.	3
1938	16,057,451	—10	Def. 243,916	Def.	225,431	— 79	"	Def. 1,737,916	Def. 268,569	Def.	Def.

#Excludes $500,000 Capital Fund.
*System figures.

Source: Column (1) Paragraph 74 of the stipulation;
Column (3) Paragraph 75 of the stipulation;
Column (5) Paragraph 76 of the stipulation;
All other columns computed from stipulated figures.

January 20, 1940.

[Endorsed]: United States District Court. No. 26591. Western Pac. R. R. Co. R. F. C. Exhibit No. 2. Filed 1/22/1940. Walter B. Maling, Clerk.

(Testimony of Charles Futterer.)

Q. Mr. Futterer, will you comment on this exhibit and discuss it in your own words?

A. The purpose of this exhibit is to point out the so-called factor of safety for railroad mortgage bonds. Generally speaking, it is possible that a reduction or drastic reduction in fixed charges would offer assurance to the average railroad investor that he would be protected in income and probably in principal at the maturity of his obligation. A drastic reduction in fixed charges, obviously, would assist in restoring the credit position of any company. But such a reduction, or such a course is possible only when the margin of expenses over revenues, taking into consideration the normal fluctuations in the business cycle, and railroad earnings, would give what we might call a buffer for the fixed charges as indicated under the plan, and which are 494,000 odd. For this purpose we might take the years 1936 and 1937 for comparative reasons. In the former year—that is 1936—the income available for fixed charges as shown in column 5 on the adjusted basis, which takes into consideration the rehabilitation program and amortization of discount on funded debt and other adjustments that are specified—the margin of protection, —that is what was left after you paid the bare fixed interest charg- [1183] es—was only 9 per cent. of the total operating revenues of the Western Pacific System. Now, theoretically—and it could happen actually—if you had a decline of say 9 or

(Testimony of Charles Futterer.)

10 per cent. in your gross revenues, which would not be an unusual situation or fluctuation in railroad earnings, you would wipe out the coverage for your fixed charges, which indicates that, so far as the marketability of a bond and its standing from an investor's standpoint, is damaged to that extent. One bad year might put it into disrepute that four or five good years would have similarly built it up.

Q. Look at the year 1938. What decline in gross revenues was there in 1938 as compared with the years 1936 and 1937?

A. In 1938 the gross revenues of the Western Pacific System declined 10 per cent. under 1937, and was slightly less than it was in 1936. None the less that decline on the adjusted basis, as shown in paragraph 5, you only had $225,431 available for the bare fixed charges under the plan, resulting in a net deficit, or a coverage of such fixed charges of about 50 per cent.

Q. That is, a 10 per cent. decline in gross revenues reduced the amount available for the payment of interest to $225,000?

A. Yes. Of course, that statement should be qualified to the extent that it is possible for management of a railroad to adjust its expenses in some respects to minimize the amount of the decline in the total volume of business handled.

Q. Would it not also be true if taxes and other expenses increased 10 per cent., your margin of safety would be gone?

(Testimony of Charles Futterer.)

A. It would conversely operate that way. If you would assume the same level of operating revenues, and as we had in our recent experience of 1937, when the railroad retirement taxes and increase in the general wage level pushed the operating expenses of railroads generally to an all-time high level—in that situation, assuming [1184] the same level of total operating revenues and an unexpected increase in expenses, the margin of safety for the bonds could be similarly wiped out.

Q. You mentioned the year 1937 and the results of 1937 as shown on your exhibit. Was that not a relatively good year?

A. 1937, in so far as industry was concerned, and many railroads in particular, was the best year since 1930.

Q. From the standpoint of freight revenues of the Western Pacific, how would you compare 1937 with previous years?

A. Outside of the exhibit, but in the record I am sure, it would be noted that the freight revenues of the Western Pacific System in 1937 were just about 1½ per cent. more than in the year 1929. While this increase was impressive, because of changed conditions in the industry it was necessary for the Western Pacific, in order to establish such a record, to transport 18 per cent. more tonnage than in *1939*, as measured—

Q. Pardon me; you mean 1929? A. 1929.

Q. You said 1939.

(Testimony of Charles Futterer.)

A. —1929 as measured by total revenue net ton miles. While this increase might be used to measure the potentialities of the reorganized company, it is none the less true that, between 1929 and 1937 the average revenue per ton mile on the Western Pacific Railroad declined 11 per cent., or, in figures, from somewhere around 9½ mills to about 8.6 mills.

The Court: We will take a recess now until two o'clock.

(A recess was here taken until two o'clock p. m.)

[1185]

Afternoon Session

The Court: You may proceed.

Mr. Clay: Mr. Futterer.

CHARLES FUTTERER

Recalled;

Direct Examination

(Resumed).

Mr. Coulson: If your Honor please, in the hope of shortening the proceeding somewhat, with Mr. Clay's permission, I would like to make a brief statement. As I understand it, this witness has testified, like the prior witness, to the fact that under the existing conditions, bonds such as these proposed bonds of the Western Pacific, First Mortgage Bonds, which are refund trustees' certificates, are not marketable through ordinary channels, and that

(Testimony of Charles Futterer.)

the R.F.C. would be the only available customer at par. I don't understand that any of the objectors are going to put in any contrary testimony, and, as representing my client, I would be glad to concede, for purposes of the record, that in view of the earnings record of the Western Pacific, these bonds are not marketable through ordinary channels. The importance of it is that the R.F.C is organized and authorized only to buy such bonds when they cannot be marketed through ordinary channels at par, and it will all have to be made the subject of a further proceeding before the Interstate Commerce Commission at the time the bonds are actually offered to the R.F.C.; it seems to me we are only extending the record and taking up time by further testimony by Mr. Futterer as to the grounds upon which he arrived at his conclusion as an expert.

Mr. Swaine: If your Honor please, I think it goes a little further than that, from the standpoint of my clients. Several of the objections involve the issue as to whether the R.F.C. has been given an unfair consideration for taking these bonds. In [1186] other words, I think your Honor appreciates that under the Commission's plan the R.F.C. has been given treatment better than it would be entitled to for its present claim in protecting the rights of that present claim, in consideration of its taking new bonds; so, there is not only the question as to whether, under the technicalities of the R.F.C., the R.F.C. can take the bonds—that is, whether

(Testimony of Charles Futterer.)

they are marketable—but, as to whether the consideration which the Commission has prescribed in the Commission's plan constitutes excessive consideration; so, I think this testimony is relevant to that.

Mr. Clay: Your Honor, that is the whole point; the various parties are objecting that the R.F.C. is receiving preferential treatment; that is the issue we are meeting.

The Court: Yes.

Mr. Clay: On the point of consuming time, Colonel Coulson need not be alarmed, because I have only a few more questions.

The Court: You may proceed.

Mr. Clay: Q. Mr. Futterer, you heard Mr. Blyth's testimony this morning? A. I did.

Q. And the statement that the Western Pacific bonds—fixed interest bonds, could not be sold profitably except at a price of 90; do you agree with what Mr. Blyth said in that connection?

A. I think that the estimated discount of 10 points, as suggested by Mr. Blyth, is on the side of conservatism. 10 points would be a reasonable expectation that the bonds would sell at.

Q. Had you estimated a larger discount?

A. Well, with the benefit of Mr. Blyth's considered opinion, I would go on a little further and say—or would have said—they probably would have sold at a discount of 15 to 20 points.

Q. Have you read the Stipulation in this case?

(Testimony of Charles Futterer.)

A. I have.

Q. And in forming your conclusions you have taken into consideration [1187] the data contained in the Stipulation? A. Yes.

Q. You are aware that the Stipulation shows that the book value of the property of this Debtor is around $173,000,000? A. Yes.

Q. And the value for rate-making, around one forty-four? A. Yes.

Q. In your experience, would a prospective purchaser of the bonds inform himself as to these figures?

A. I am of the opinion that an ordinarily prudent investor would take in these elements of value in considering the value of the bonds to be issued, but only as a secondary consideration to the primary one that the earning power of the property is the important base upon which to rest the fixed capitalization of the property.

Q. You said "important base." Will you expand that? Important relative to what other factors?

A. Well, with respect to the factor of safety to which I have already alluded, it seems to me that the earning power of the property is primarily the most important consideration, although valuation and book investment, and those other elements, are proper considerations.

Q. You mean the earning power and the factor of safety that you discussed this morning?

A. Yes.

(Testimony of Charles Futterer.)

Q. Would a prospective bidder of the bonds consider any other factors?

A. Yes, a person that would make a loan on any property would probably take into consideration—and particularly, with reference to the Western Pacific—that in California, Nevada and Utah the assessed valuation—

Mr. Sloss (interrupting): Just a minute; we desire to object to any testimony on the question of the assessed valuation of these properties, on the ground it is incompetent, irrelevant, and immaterial, and I am prepared to cite a number of authorities in support of that objection.

Mr. Clay: The testimony is not being offered as testimony of the value of the property; it is merely testimony as to what [1188] factors the bond buyer would inform himself to in making a bid on the bonds.

The Court: Overruled.

Mr. Clay: Will you proceed?

Mr. Sloss: May I have an exception also, your Honor?

The Court: Yes.

The Witness: (Continuing) The valuation of the Western Pacific in the States of California, Utah and Nevada, for the year 1939 amounted to $22,858,555.

Mr. Clay: That is all as to this witness.

The Court: Any cross?

(Testimony of Charles Futterer.)

Cross Examination

Mr. Sloss: Q. Mr. Futterer, on this matter of the assessed valuation, will you kindly explain how you take that into account as bearing upon the value or salability of the bonds?

A. The assessed valuation of the Western Pacific for tax purposes in those States is an element of value that can be taken, just the same as the valuation, for rate-making purposes, or the book investment of the company; it is an element to be considered among others.

Q. Is it a factor that, in your opinion, would be taken into account by the ordinary investor in determining whether a bond is or is not a good investment?

A. It may not be taken into account by an ordinary investor, but certainly, by a person who is presenting to his clients all the material facts relating to a bond, he would be prepared to answer such questions.

Q. Have you made any study of the method of assessing property for tax purposes in California?

A. I have not.

Q. Or in Nevada? A. I have not.

Q. Or in Utah? A. I have not.

Q. And do you know whether or not, as a matter of fact, property—I am speaking not only of railroad property, but of any property— [1189] is in any of those States, assessed by the taxing

(Testimony of Charles Eutterer.)

authorities at its actual value, or anything approaching it?

A. I would presume that it would not be assessed at its actual value; however, I have been informed that in Nevada, taxes on the railroad property there are approximately the actual value of the property.

Q. You have made no investigation about California? A. No.

Q. And you don't know whether or not it is the fact that in California, ordinarily, real property is assessed at 50 per cent. or less of its real value, and, personal property, at a still smaller ratio? A. I am not informed as to that.

Mr. Sloss: We will move, if your Honor please, to strike out the testimony of the witness as to assessed valuation, on the ground that it appears that there is no foundation for the testimony as relating to any issue in this case.

The Court: I don't understand that it was offered for the purpose of fixing value; I understand it was offered for the purpose of showing it was one of the elements that might be considered by the prospective buyer.

Mr. Sloss: So limited, it is perhaps not so objectionable.

The Court: Denied.

Mr. Coulson: If your Honor please, I would like to have the record clear that I object to the testimony of the witness as to the assessed valuation,

(Testimony of Charles Futterer.)

and move to strike it out, on the ground that no sufficient basis was laid for his testimony as to what the assessed valuation actually was in these States, and the qualification of this witness as a witness—

The Court (Interrupting): Is it worth making such a fuss about?

Mr. Coulson: I would like the record to be clear that we do not admit that testimony as testimony in the case for all purposes, [1190] in the first place, your Honor, and in the second place I would like the record to be quite clear that we object to proving assessed values without showing any relationship, and what relation it has to the property, generally, of the Debtor.

The Court: Mr. Clay—is that your name, sir?

Mr. Clay: Yes, sir.

The Court: I understood that you were not offering this for the purpose of proving value.

Mr. Clay: We are not; we are offering it merely as evidence of one of the factors that a prospective purchaser of the bonds would look into.

Mr. Coulson: Your Honor, if Mr. Clay will limit this testimony to being one of the factors of information which this witness had, from which he arrived at his conclusions, rather than affirmative testimony for this Court as to the fact, I am perfectly content.

Mr. Clay: Well, as to that, Colonel, if you will limit the testimony which is in the record as to valuation for rate-making——

(Testimony of Charles Futterer.)

The Court (Interrupting): I don't think the assessed value of the property in California would have great weight with the Court in fixing the value of this property, because, as Judge Sloss has pointed out, the assessors in California do not assess property here for its full value, and, as he further pointed out, real property is assessed at perhaps 50 per cent. of its value, and maybe less, and personal property is scaled down much lower, so it wouldn't have any weight at all. I don't think, with the Court. I think you simply offered it for the purpose of showing it was one of the elements a prospective purchaser of stocks or bonds might take into consideration in buying this stock, before he bought the stock. It might be natural for a man to look up the assessed valuation of property, but, as I say, gentlemen, I [1191] don't think it is worth bothering much about; your motion, Colonel, is denied.

Mr. Coulson: Exception.

The Court: Yes.

Mr. Clay: May I make this remark: that, as I see the issue in this case, the issue is valuation for the purpose of reorganization, and I would like to take a similar exception to the relevancy and materiality of the evidence which Colonel Coulson has included in the Stipulation as to valuation for rate-making, and as to book values.

The Court: Yes?

(Testimony of Charles Futterer.)

Mr. Clay (Continuing): Those figures are not relevant or material to the issue before this Court.

The Court: Is that before me now?

Mr. Coulson: The question will be before your Honor on the argument: I doubt if it is before your Honor at the moment. There is a good deal to be said about it——

The Court: Do you wish me to make a ruling at this time on that, Mr. Clay?

Mr. Clay: I do, because the stipulation expressly reserves the right of any party to object to the materiality or relevancy or competency of the evidence that was stipulated to, and I merely request that my objection be recorded so that there will be no question raised later that no objection was made.

The Court: Your objection will be overruled.

Mr. Clay: Q. Mr. Futterer, this figure as to the aggregate valuation for tax purposes; where did you obtain that?

A. That was handed to my counsel by the secretary of the Western Pacific Railroad Company, and presumably—or, in fact, the source of the information were the records of the trustee of the Western Pacific Company. [1192]

Q. You mean the trustees in bankruptcy?

A. In bankruptcy.

Mr. Clay: That is all.

The Court: I suppose we are all agreed that that would not be an element in fixing value, are we not? You agree to that, yourself, do you not, Mr. Clay?

(Testimony of Charles Futterer.)

Mr. Clay: I do, your Honor.

The Court: Anything further of this witness?

Mr. Coulson: May I ask him just one or two questions, to complete the table? It is the table where you deal with coverage in relation to gross, Mr. Futterer.

Mr. Clay: I think that is Exhibit No. 2; Exhibit No. 2 for R. F. C.

Mr. Coulson: Q. Mr. Futterer, when you prepared this table for Mr. Clay, I assume you did not have available the earnings for 1939?

A. That is correct.

Q. So they are not included for that reason?

A. The year 1939 was not included.

Q. Now, under our Stipulation, the final figures of the Debtor's Trustee, as reported to the Court, and as they will be reported to the Court within a few days, are to become part of the record. I would like to ask you—for I have the estimates from the Agent of the Debtor's Trustee—what the result would be if you take for the year 1939 the estimate of gross—your column 1—16,700,000, and for your columns 3 and 5, 1,800,000——

Mr. Swaine: (Interrupting) Just a second, Colonel, the final figure that has already gone in is 1,005,000.

The Witness: 1,539,860, according to the testimony this morning.

Mr. Coulson: That was for the system, and this is for the company, Mr. Clay, the Railway Company.

(Testimony of Charles Futterer.)

itself. I am right, Mr. Elsey, in showing the company alone would be a million eight [1193] hundred——

Mr. Elsey: The company alone.

Mr. Coulson: That is what this total is based on——

Mr. Swaine: So that your Honor will understand what we are talking about, the company earnings include a good many fictitious earnings from subsidiaries, which are, in fact, deficits for which the company has to make advances to the subsidiaries. What we are reorganizing here is the system.

Mr. Coulson: Let me find out from Mr. Futterer.

Q. Mr. Futterer, the earnings, both total operating revenues and earnings available for interest, refer to after adjustment—that is, in columns 1, 3, and 5; what have you used, system earnings, or company earnings?

A. System earnings, as set forth in the Stipulation.

Q. Well, then, let me modify my question to you: assuming that you have for the year 1939, as system earnings, 16,700,000, and for the net available for interest——

Mr. Swaine, what was your amount?

Mr. Swaine: A million five.

Mr. Coulson: Well, let's take a million five hundred thousand.

Q. (Continuing) Now, will you indicate to the Court briefly what effect that will have on columns 2, 4, 6, 9, and 11? I think you can do that very quickly, so as to bring this down through 1939,

(Testimony of Charles Futterer.)

which is, because of the deflection of earnings, based on the rehabilitation program, and in our judgment the more significant figure, your Honor.

The Witness: May I interrupt just a minute? Your "available for fixed charges" showed 1,539,868.60.

Mr. Swaine: The adjusted figure was 1,005,000—my recollection is that the figure, without adjustment, was one million four hundred four, whereas the figure after adjustment was one [1194] million five thirty-nine; that was introduced by Mr. McCollum this morning.

Mr. Coulson: Is the sixteen million seven hundred right?

Mr. Elsey: For the system?

Mr. Coulson: For the system.

Mr. Swaine: No, it is not.

Mr. Coulson: What is the correct figure?

The Witness: 18,299,412.

Mr. Coulson: Q. Good. Let's use our eighteen million two ninety-nine and the two figures given for the—one million four, for income available for interest, before adjustment, and 1,539,860 after adjustment, and just indicate briefly, so the record will be complete, what the effect is on your other column?

Mr. Clay: Your Honor, is this necessary? You have given a certain figure, and the other results follow.

(Testimony of Charles Futterer.)

Mr. Coulson: I am trying to keep the prior mathematical computation that has been introduced from being too confusing to the Court by failure to carry this down close to date. This whole question of marketability of the bonds is a question that is prospective, and the tabulation, which is only a tabulation from matters of record, is a little confusing unless he can cover the year 1939; and I think he can give you these figures very quickly.

The Witness: A. For column 1, taking the gross revenues on the basis of the same testimony submitted this morning, 18,299,412; column 2, the increase over the prior year, would be 14 per cent. Taking Mr. Coulson's adjusted figure of a million four——

Q. (Interrupting) That is Column 3, you are speaking of? That is not the adjusted figure, as I understand it; column 3 is the income available for interest, before adjustment, is that right?

A. The actual figure that was put in this morning was 1,539,860. [1195]

Q. That was after adjustment, as I understand it; the one million four is before adjustment, and one million five thirty-nine, after.

The Witness: A. Based on the prior year, the percentage comparison with one million four—that is column 3—would be without any relevant significance, by reason of the fact the prior year ran a deficit. In column 5, the adjusted income, 1,539,860 over the prior year, would represent an increase of approximately 600 per cent.

(Testimony of Charles Futterer.)

Q. Plus 600.

A. (Continuing) The net remaining, column 8, 906,000; the net remaining, column 9, 1,045,860.

Q. Now, as to this coverage——

A. As to the margin of protection on the basis of the earnings in 1939, as submitted this morning, what you would have left after the payment of the bare fixed charges, excluding the capital fund—in the first place, before adjustment, you would have a little less than 5 per cent. as a margin of safety; on the basis of your 1,539,860, you would have a little bit over 5 per cent., which is an unsafe margin.

Q. What goes into column 10 and column 11?

A. That is percentage there (indicating).

Q. What are the percentages? A. 4 and 9.

Q. What? A. 4 and 9.

Q. And in column 11? A. Column 11, 5.

Q. 5? A. Yes, a little over 5.

Q. You gave this testimony this morning about this Louisville & Nashville issue, I believe?

A. That is right.

Q. What was the coverage of the percentage of remaining gross revenues in accordance with your column 10 and 11 as to that issue?

A. I haven't that before me.

Q. Do you know what the average coverage is in the percentage of gross and railroad bonds today? A. For the industry?

Q. For the industry.

(Testimony of Charles Futterer.)

A. In 1938 the figure was an aggregate [1196] net deficit; for 1939, I don't think anybody knows yet.

Q. And you don't know what it was for the L. & N.? A. No, I don't.

Mr. Coulson: My recollection is that it was about 6 per cent., but I don't dare put it in unless you know. That is all.

The Court: Anything further?

Mr. Clay: I have nothing further of this witness.

Mr. Buckland: I wasn't going to ask this witness anything, I just wanted to offer some exhibits here.

(Witness excused.)

The Court: Yes.

Mr. Buckland: I propose, in the course of the argument in behalf of the Railroad Credit Corporation to cite two opinions of District Courts that are not reported. I have a certified copy of the opinion of the District Court of the United States for the Eastern District of Missouri, by Judge Davis, given in 1938, findings of fact and conclusions of law, and the memorandum of decision, in regard to Order No. 1 given by Judge Hinks, United States District Judge for the District of Connecticut. Both of them, your Honor, have to do with the right of a railroad corporation as a creditor—as a secured creditor, to obtain, currently, the income from the

collateral, and to apply it to the principal or interest of the debt in its untrammeled discretion. Now, I don't know what the practice of the Court is here with respect to unreported opinions. I have here the originals, and I have plenty of copies to distribute to counsel, and I would like to have the privilege either of offering them as exhibits, or the privilege of referring to them in my argument.

The Court: You certainly would have a right to refer to them in your argument; whether or not they should be received in evidence, I can't say, unless you offer them. If you offer them and there [1197] is no objection, they will be received.

Mr. Swaine: I don't believe they should be received in evidence. We had the same problem in respect to unreported opinions in respect to the Akron, Canton & Youngstown Case and the Louisiana Northern Case, but we tried to meet it in our brief by printing the unreported opinions as annexes to the brief, but on the other hand, so far as I am concerned, I think all parties ought to be able to refer to any decision, whether reported or not, subject only to the condition that the Court be supplied with a copy of the decision that is being placed before it.

Mr. Buckland: Your Honor, I had anticipated that, because I have typewritten copies of all the opinions here, which I will be very glad to distribute to counsel; I didn't know whether it was customary to offer them as exhibits in evidence.

Mr. Swaine: I don't think they are part of the record in the case.

The Court: Properly speaking, they are not part of the record. You may refer to them in your argument, and you may furnish the Co rt with copies of them.

Mr. Buckland: That was all I wished to know.

[Endorsed]: Filed Oct. 10, 1940. [1198]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge:

This is a proceeding under section 77 of the Bankruptcy Act[1] for the reorganization of the Western Pacific Railroad Company.

On August 2, 1935, the Debtor filed a petition stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization. The court approved the petition and authorized the Debtor, pending further order of the court, to continue in possession of and operate and maintain the railroad and its properties, and to manage and conduct its business as a railroad company. Trustees were appointed and ratified by the Interstate Commerce Commission. "The judicial functions of the bankruptcy court and the ad-

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(1) 11 USCA, § 205. [1200]

ministrative functions of the Commission work cooperatively in reorganizations."[2]

Thereafter all necessary legal steps required by the Act were taken, and on February 8, 1936, Debtor filed a plan of reorganization with the Commission. In addition, plans were filed on behalf of the Institutional Bondholders Committee, and on behalf of A. C. James Co. On August 1, 1937, the Bureau of Finance of the Interstate Commerce Commission issued a proposed report containing a recommended plan of reorganization to which exceptions were filed by the Debtor, the Institutional Bondholders Committee, the First Mortgage Trustees, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation, and the Railroad Credit Corporation. Hearings were had before the Commission, and on October 10, 1938, the Commission issued its original report and order approving a plan of reorganization.[3]

On December 9, 1938, the Debtor, the Institutional Bondholders Committee, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation and the Railroad Credit Corporation filed their separate petitions with the Commission for rehearing and modification of the original report and order and the plan of reorganization approved therein. Answers to certain of said

(2) Warren et al. v. Palmer et al., Case No. 643, decided by the Supreme Court on April 29, 1940; Palmer v. Massachusetts, 308 U. S. 79, 87, note 14.

(3) 230 I. C. C. Reports, page 61. [1201]

petitions were filed by the First Mortgage Trustees and The Railroad Credit Corporation. Proposals for modification of the Commission's plan were attached to or contained in such petitions. A rehearing on the basis of these petitions was granted by order of the Commission entered December 30, 1938.

On June 21, 1939, the Commission issued its "Report and Order on Further Consideration" (hereinafter referred to as the supplemental report and order) approving a modified plan of reorganization (hereinabove and hereinafter referred to as the Commission plan). By its report and order of June 21, 1939, the Commission modified the original report and revoked and rescinded the original order.

On or about August 1, 1939, and prior to the certifying to the court of the Commission plan and the record before the Commission, the Debtor filed a petition for rehearing and modification of the Commission plan. Answers thereto were filed by certain parties. Said petition was denied by the Commission by a report and order entered September 19, 1939.

Pursuant to the requirements of subsection (d) of section 77, the Commission on or about September 28, 1939, certified to the court the Commission plan together with a transcript of the proceedings before it and a copy of the supplemental report and

(4) 233 I. C. C. Reports, page 409. [1202]

order approving the plan, which were filed in this proceeding on October 3, 5 and 6, 1939.

On November 8, 1939, the court, pursuant to the provisions of subsection (e) and of clause 8 of subsection (c) of section 77, entered its order fixing the time within which objections to the Commission plan and claims for equitable treatment might be filed herein, fixing the time within which applications might be filed for expenses and fees incident to the reorganization, and fixing December 8, 1939, as the date for the filing of such objections and claims for equitable treatment and petitions for an allowance for compensation for services rendered or for expenses (including reasonable attorneys' fees) incurred, in connection with the proceeding and plan of reorganization up to and including October 31, 1939, and providing for the giving of due notice by the Debtor's trustees to creditors and stockholders, or their representatives, and all other parties in interest.

Petitions for intervention were granted to several parties in interest, and pursuant to the order of November 8, 1939, objections to the Commission plan and claims for equitable treatment were filed by or on behalf of the Debtor, the Institutional Bondholders Committee, the Refunding Mortgage Trustee, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation, and The Western Realty Company. [1203]

On December 18, 1939, the court, pursuant to Rule 16 of FRCP, held a pre-trial conference of

the attorneys for the parties in interest. At the conference the parties agreed upon substantially all the facts upon which depend the decision of the issues raised by the objections and claims for equitable treatment, and accordingly, on December 20, 1939, filed a "Stipulation as to Facts Not in Dispute." The parties failed to agree upon a stipulation as to the issues. On December 21, 1939, the court made its order fixing January 22, 1940, as the time for hearing objections to the plan of reorganization. On December 29, 1939, the court made its order reciting the action taken at the pre-trial conference and ordered "that the issues for trial of said hearing on January 22, 1940, shall be the issues raised and presented by said objections to said plan of reorganization and by said claims for equitable treatment."

The Debtor owns or operates 1,207.51 miles of standard gauge railroad. A main line extends eastward 924.17 miles from Oakland, California, to Salt Lake City, Utah. The Northern California Extension extends northward 111.81 miles from Keddie to Bieber, California, with operating rights from Bieber to Hambone, California—46.38 miles—over the Great Northern Railway. In addition to said main line mileage and the Northern California Extension, the Debtor has approximately 131.66 miles of branch line mileage springing from the Oakland-Salt Lake City line.

Reference is hereby made to the original report and order of the Commission[5] for more detailed

(5) 230 I. C. C. Reports, page 61 et seq. [1205]

descriptions of the property owned and controlled by the Debtor, its corporate and financial history, financial structure, traffic and revenue, earnings available for charges, classes of creditors and stockholders, and the proposed plans of reorganization. Such reference is made for the purpose of shortening this opinion and because the data contained in the Commission's original report is in the main correct. However, it is to be understood, unless otherwise stated herein, that facts and figures stated in this opinion and upon which it is based, are from the "Stipulation as to Facts Not in Dispute", the record certified to the court by the Commission, and additional proof offered in open court.

The essential, undisputed facts with respect to the Commission plan necessary for the court's determination of the issues are set forth in the following summarization, taken from the brief of the Institutional Bondholders Committee, because concisely stated. The Commission plan, which by its terms is to be made effective as of January 1, 1939, provides the following capital structure for the reorganized company:

Title of Issue	Presently Issued	Interest, Dividends or Other Income Charges
Undisturbed Existing Equipment Trusts, Baldwin Lease and Pullman Contract	$2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total Annual Fixed Charges		$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative	21,219,075	954,858
Total Funded Debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund		106,095
Participating 5% Preferred Stock ($100 par value). Dividends non-cumulative, participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of $3 per share	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, Sinking Fund and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shares	

The existing claims against, and interests in, the Debtor dealt with by the Commission plan, together with interest accrued from the last interest payment date to the effective date of the plan, January 1, 1939, computed at the contract rates, are as follows. Brevity demands the use of initials for the names of claimants in the following tables, foot-

notes and context, as RFC for Reconstruction Finance Corporation, ACJ for A. C. James Co., W. P. Corp. for Western Pacific Railroad Corporation, RCC for The Railroad Credit Corporation:

[1206]

Claim or Interest	Principal of claim or interest	Accrued interest at contract rate to effective date of plan	Total claim, including interest at contract rate to effective date of plan
Trustee's Certificates	$10,000,000.00	$	$10,000,000.00
Undisturbed existing equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
RFC Collateral Notes (a)	2,963,000.00	899,869.98	3,862,869.98
RFC Collateral Notes (b)	2,445,609.88	145,314.23	2,590,924.11
ACJ Collateral Notes (c)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$72,448,559.88	$15,533,112.87	$87,981,672.75
W P Corp. advances on open account	5,768,791.00	1,980,429.00	7,749,220.00
The Western Realty Company (d) advances on open account	50,000.00	11,667.00	61,667.00
Total debt	$78,267,350.88	$17,525,208.87	$95,792,559.75
W P Corp., owner of the entire outstanding 283,000 shares of Preferred Stock, par value $100 per share	28,300,000.00		28,300,000.00

W. P. Corp., owner of the entire outstanding 475,000 shares of Common Stock, par value $100 per share	47,500,000.00		47,500,000.00
Totals	$154,067,350.88	$17,525,208.87	$171,592,559.75

(a) The notes held by RFC are secured by the pledge of $8,750,000, principal amount, of refunding mortgage bonds, series A, and $2,000,000, principal amount, of refunding mortgage bonds, series B; by the pledge of voting trust certificates for 150,000 shares of common stock of Denver & Rio Grande Western Railroad Company, pledged with RFC by W. P. Corp.; and by a second lien upon $2,000,000 of refunding mortgage bonds, series A, now pledged with RCC.

(b) The notes held by RCC are secured by the pledge of $2,000,000, principal amount, of refunding mortgage bonds, series A, and $2,000,000 principal amount, of refunding mortgage bonds, series B, of which $2,000,000, principal amount, of series A bonds were repledged with it by ACJ. In addition, such notes are secured by a second lien on all the securities pledged with RFC; by a first lien on the Debtor's distributive share in the fund established by the marshalling and distributing plan, 1931; by a first lien on the advances from W. P. Corp. to the Debtor in the sum of $5,494,722; by a lien on the advances made by W. P. Corp. to Standard Realty and Development Company in the sum of $120,000; and by a lien on the advances made by W. P. Corp. to Sacramento Northern Railway in the sum of $856,260, subject, as to the Sacramento Northern advances, to any and all rights and claims in respect thereof, if any, of the trustees or the holders of first mortgage bonds.

(c) The notes held by ACJ are secured by the pledge of $6,249,500, principal amount, of refund-

The Commission plan provides for the distribution of the securities of the reorganized company among the existing security holders of the Debtor as follows:

Existing Securities of Debtor	New First Mortgage 4% Bonds, Series A	New Income Mortgage 4½% Bonds, Series A	New 5% Preferred Stock, Series A, ($100 par)	New Common Stock (No Par)
5% First Mortgage Bonds		$19,716,040	$29,574,060	230,593 shs.
RFC New Money (In exchange for Trustee's Certificates all now held by RFC.)	$10,000,000			
Collateral Notes		1,185,200	1,777,800	15,788 shs.
RCC Collateral Notes		154,111	241,681	35,425 shs.
ACJ Collateral Notes		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

The first mortgage bonds are allotted new income mortgage bonds for 40% of the principal of their claim, new preferred stock for 60% of the

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ing mortgage bonds, series A, of which $2,000,000, principal amount, are subject to the prior lien of RCC as pledgee, ACJ having repledged said $2,000,000 of such bonds with RCC as additional collateral security for the Debtor's note to RCC.

(d) While Western Realty Company is a separate corporate entity, [1207] which has separately intervened and appeared in this proceeding, all of its stock is held by W P Corp. Its rights as a creditor of the Debtor are identical with those of W P Corp. as a creditor of the Debtor. Accordingly, for the sake of simplicity, it and its rights are hereinafter included in any reference to W P Corp or W P Corp's rights as creditor of the Debtor unless the context otherwise requires. [1208]

principal of their claim and new common stock for 100% of their accrued interest, such common stock having been allotted at the price $57 per share.

RFC is allotted treatment in respect of its collateral note pari passu with the treatment allotted the first mortgage bonds in consideration of its exchanging its $10,000,000 trustees certificates for $10,000,000 new first mortgage bonds or purchasing said bonds at par to retire said trustees certificates.

RCC and ACJ are allotted new securities on the following basis: From the new securities, which the Commission finds are properly issuable in respect of the refunding mortgage bonds held as collateral for the RFC, RCC and ACJ notes, are deducted that proportion of each class which the principal amount of refunding mortgage bonds held by RFC as collateral bears to the total amount of pledged refunding mortgage bonds. The balance of such new securities is then divided between RCC and ACJ in proportion to the principal amounts of refunding mortgage bonds held by them respectively as collateral. The result is the allotment of common stock to RCC on its claim at the price of $62.00 per share.

The unsecured claims of The Western Pacific Railroad Corporation and The Western Realty Company, and other unsecured claims not entitled to priority over existing mortgage, are found by the Commission to be without value and not entitled to participate in the distribution of cash or securities of the reorganized company.

The capital stock of the debtor (all held by W. P. Corp.) is found by the Commission to be without equity or value and the stockholders not to be entitled to participate in the plan.

The issues raised by the objections relate, first, to the amount and character of the capitalization, second, to the distribution of the new securities among the holders, and, third, to the execution of the Commission plan.

It is objected by A. C. James Co., The Western Pacific Railroad Corporation, The Western Realty Company, the Debtor, and The Railroad Credit Corporation, that the Commission plan is unfair and inequitable and fails to afford due recognition to the rights of each class of creditors and stockholders in relation to the value of the assets of the Debtor; that it is discriminatory and does not comply with the law of the land; and that it is confiscatory of private property rights, in violation of the Fifth Amendment to the Constitution. While it is not asserted that section 77 is unconstitutional, objectors argue that it "should not be interpreted as authorizing the confiscation and destruction of private property," and that as "the findings and conclusions of the Commission result in such confiscation and destruction [they] are in violation of the Constitution and the law of the land." These questions go to the heart of the matter.

The powers and functions of the Commission and [1209] the court are found in subsections (d) and (e) of section 77.[6] Subsection (f) incorpor-

(6) By the provisions of section 77(b) of the Bankruptcy Act, as amended, a plan of reorganization shall include provisions modifying or altering the rights of creditors generally, or any class of them, secured or unsecured, either through the issue of new securities of any character or otherwise; shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in the light of its earning experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; and shall provide adequate means for the execution of the plan. Subsection (e) of section 77 provides that the judge shall approve the plan certified to the court by us, if satisfied, after hearing, and without hearing if no objections are filed, that the plan complies with the provisions of subsection (b), is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; that the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of the hearing, are reasonable, are within such maximum limits as are fixed by us, and are within such maximum limits as to be subject to the approval of the judge; that the plan provides for the

ates the provisions of section 20a[7] of the Interstate Commerce Act. relative to issuance of securities. Subsection (d) provides that the Commission "shall approve a plan * * * that will in its opinion meet with the requirements of subsections (b) and (e) of this section, *and will be compatible with the public interest.*" [Italics supplied.] Similar terms are to be found in paragraph 2 of section 20a and paragraph 3 of section 5 of the Interstate Commerce Act. In N. Y. Central Securities Co. v. U. S., 287 U. S. 12, 24, it was held that such a delegation of authority to the Commission was not invalid because the stated criteria is uncertain.

In its original report and order the Commission

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payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances for the actual and reasonable expenses, including reasonable attorney's fees, incurred in connection with the proceedings and plan by parties in interest and by reorganization managers and committees or other representatives of creditors and stockholders, and the actual and reasonable expenses incurred in connection with the proceedings and plan and reasonable compensation for services in connection therewith by trustees under indentures, depositaries, and such assistants as we, with the approval of the judge, may especially employ, may be paid in securities provided for in the plan if those entitled thereto will accept such payment. By the provisions of subsection (d) of section 77, the plan approved by us must meet with these requirements of subsections (b) and (e) and be compatible with the public interest, but such plan may be different from any which has been proposed. Original report and order of Commission, 230 I.C.C Reports, pages 86 and 87.

(7) 49 USCA, §20a. [1210]

said: "It will be observed that so far as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and that the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization shall not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent shall be within its probable earning power."[8]

The construction given by the Commission to the term "public interest" is neither new nor arbitrary, but has been consistently followed before and since the enactment of section 20a of the Interstate Commerce Act.

The last paragraph of subsection (e) of section 77 provides: "The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effects shall be given to the

(8) 230 I.C.C. Reports, 61, 87. [1211]

present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land in light of its earning power and all other relevant facts." This paragraph was incorporated in the statute as part of the 1935 amendments.

Mr. Leslie Craven, attorney for the Railroad Security Owners Association, who was counsel for Honorable Joseph B. Eastman when he was Federal Coordinator of Transportation, testified at the hearing before the Special Sub-Committee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives in 1939, concerning this legislation. The particular amendment was drawn by Mr. Craven and sponsored by him and Mr. Eastman. Mr. Craven says that "the valuation provisions in the existing law were so drawn that whoever tried to upset the valuation of the Commission would not be able to do it. The language is left in generalities. * * * As the Act stands, the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relative facts.'"[9] [1213]

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(9) H. Rep., 76 Congress, 1st Session on §1869, Serial No. 11, part 1, 1939, Railroad Reorganization, p. 464. [1212]

(10) H. Rep. 76 Congress, supra, pp. 485, 486. In discussing the quoted provision (subsection (e) of 77), Mr. Craven said in an article in the

The idea of a sound financial structure in railroad reorganization is not an innovation. In Missouri-Kansas-Texas Reorganization, 76 I. C. C. 84, 108, (1922), in administering the provisions of the Transportation Act of 1920, Commissioner Eastman said: "In the past such reorganizations have largely been a matter of bargain and trade between groups of security holders without adequate con-

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Harvard Law Review: "Amendments simplifying and clarifying the determination of the valuation were required, because the provisions of the original act [the 1933 Act] enabling an elimination of the consent of claimants demonstrated to have no interest by a valuation, or for the value of whose interest a cash payment was provided, were regarded as unworkable because of the great task of valuing property of such magnitude and because of uncertainty as to the results, due to doubt as to the legal principles governing such a valuation. The assignment of the determination to the courts, as provided in the original Act, was inappropriate. The courts are ordinarily inexperienced with this technical problem, while the Commission has had extended experience since 1913 in its administration of the LaFollette Valuation Act. This experience has indicated great difficulty in making such determinations, if the kind of value to be determined in a reorganization case is the same as a value for rate-making purposes under the principles of Smyth v. Ames * * *. The obstructive possibilities open to the equity and creditor interests, through the probability of prolonged hearings and litigation involving these complicated questions, were evident from the Commission's valuation cases. That the equity interests were well aware of the strategic value to them of the original provisions of section 77 was evidenced by the in-

sideration of the paramount public interest, so that the results have often been consistent neither with the public interest nor even with sound business principles, and recurring receiverships have been far from uncommon. * * * The public interest, I think, clearly demands that a reorganized property should begin its new career with a capitalization which will enable it, if that be possible, not only to

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sistence with which they fought any simplification of the process. They asserted that value in a reorganization case is the same as in a rate case.

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"The purpose of these provisions [the provisions contained in the last paragraph of subsection (e) of section 77] is to lodge the determination of the value in the Commission in the first instance, and to incline the determination away from the doctrine of Smyth v. Ames, under which the value is fixed on the basis of a consideration of the original and reproduction cost of the property and the investment therein. [1213] The actual value of the property cannot be determined, nor is it ordinarily evidenced by the investment in the property or its present cost of construction. The railroads are competitive properties. The value of their operative property, for purposes of reorganization, must necessarily be what, for better terms, we may call the actual value or the economic worth of the property, as determined primarily by its present and prospective earning capacity. The actual value of the property depends upon the demand for its service and its ability to meet the demand economically. The provisions of the amended statute, therefore, make clear that emphasis shall be put on a consideration of earning power, past, present and prospective."—Leslie Craven and Warner Fuller, "The 1935 Amendments of the Railroad Bankruptcy Law," 49 Harv. L. Rev. 1254, 1272, 1274. [1214]

keep clear of bankruptcy but also to attract the capital necessary for future development." And in the Denver & Rio Grande Western Reorganization, 90 I. C. C. 141, 157 (1924), Commissioner Eastman said: "It seems to me that we should at least insist, in the case of any such reorganization, that the new company shall start life with a reasonably sound financial structure. If this were our policy, reorganization managers would stand on firmer ground in dealing with the holders of the securities of insolvent companies than they now find under their feet." In Chicago, Milwaukee & St. Paul Investigation, 131 I.C.C. 615 (1928), a reorganization matter, the Commission again expressed dissatisfaction with the state of the law which it was said presented a situation fundamentally unsatisfactory and required reform. The subject has been repeatedly discussed in Congress,[11] and such discussions undoubtedly induced the enactment of the amendments of 1935 for the purpose of clarifying the then existing law. Having in mind the judicial history of railroad reorganizations, and the provisions of the Transportation and Interstate Commerce Acts,

(11) As reflecting these discussions I quote the following from report No. 454 of the Senate Committee on Interstate Commerce, issued on May 18, 1939:

"For the purpose of creating a sound financial structure, it is immaterial what may at one time have been invested in the road, what it originally cost, what it would cost to reproduce, or what its value may be claimed to be as an abstraction. The

Congress in its wisdom, by the amendments of 1935, delegated to the Commission, where it logically belongs and can best be performed, authority to determine for any purpose the value of the property of the railroad seeking reorganization.

It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned. For a period of four years, since August, 1935, the Debtor has

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controlling question is: What can the property earn to support its capital structure?

"It would be tantamount to fraud to create worthless securities in reorganizations, securities that cannot be reasonably expected to be supported by earnings. That would be simply creating tokens for stock-market speculation.

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"Reorganizations cannot succeed if they are based on claimed values that have long since disappeared in a realistic sense and on business that has long since been lost to the railroads never to return. A reorganization based on a sound judgment of earning power destroys no values and creates no losses. It merely [1215] realistically recognizes the facts, including the unpleasant but nevertheless inescapable fact that values based on original cost or even reproduction cost simply do not exist without earning power to support them." —H. Rep., 76 Congress, 1st Session, serial 11, part 1, 1939, Hearing on Railroad Reorganization, p. 346.

been before the Commission in an intensive investigation of its affairs in the present proceeding.[12]

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(12) In its original report, 230 I.C.C. 61, the Commission said: "Under section 19a of the Interstate Commerce Act, this Commission, by division 1, in Western Pacific Ry. Co., 29 Val. Rep. 239, reported the value for rate-making purposes of the property owned by the debtor to be $63,321,000 as of June 30, 1914, excluding working capital. In other proceedings, we reported the value for rate-making purposes of the properties of the debtor's wholly owned subsidiaries, Sacramento Northern Railway; Tidewater Southern Railway Company, and Deep Creek Railroad Company, in the total amount of $18,123,283, as of their respective valuation dates. If there were added to the above amounts the net costs of additions and retirements between valuation dates and December 31, 1935, the total would be $139,600,455." (Original Report, p. 76.)

* * * * * * *

"If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future." (Original Report, p. 87.)

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"It is true that, considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, [1216] in our opinion, those factors cannot be of controlling importance in a determination of the capital structure for the re-

In its original report and order the Commission says:

"The present reorganization of the debtor is the second since it began complete operations in 1911. A review of its financial history shows that due to an inherent lack of earning power its past operations have resulted in financial failure, and that the investment in its property has not been justified by its earnings. In Denver & R. G. Investigation, 113 I.C.C. 75, we pointed out that economically the original construction of the debtor was an ill-advised undertaking. If this reorganization is to be successful, the capital structure of the reorgan-

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organized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740.3 shares of preferred stock of the par value of $100 per share, and not more than 313,703 shares of no-par-value common stock." (Original Report, p. 94.)

* * * * * * *

"Under the provisions of section 77, stockholders are not entitled to participate in the plan if we find, and the judge affirms the finding, that at the time of the finding the equity of such stockholders has no value. Section 77 also contains a similar provision with respect to creditors whose claims have been found to have no value. We have hereinbefore found that, considering the past, present, and probable future earnings of the debtor, its investment, the data of record pertaining to its rate-making value, and all other relevant data of record, we can not approve the issue of new securities in a greater amount than that hereinbefore approved. On the same basis and for the same reasons we find, therefore, that there is no equity over and

ized company, must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future." 230 I.C.C. Rep., p. 61, 87.

The capital structure, existing claims and distribution of securities of the reorganized company are contained in the summarization of the Commission plan hereinbefore set forth. The reported and adjusted earnings of the Debtor appearing in the stipulation of facts are as follows:

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above the securities hereinbefore approved; and that the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan." (Original Report, p. 100, 101.)

The following extract is from the Commission's supplemental report, 233 I.C.C. 409, 413:

"In our prior report we stated that the entire capital structure of the reorganized company must be realistically related to its actual earning power, and that in determining such capital structure consideration should be given to the investment in the property only to the extent that such investment should be justified by the probable earnings reasonably foreseeable for the future if the reorganization was to be successful. With these considerations in mind, and for the reasons there set forth, and upon consideration of the investment of the debtor in its property, the probable rate-making value thereof, and its traffic and earnings, we conclude that we cannot approve the total capital structure under the Credit Corporation's proposed modification." [1217]

Year	Earnings Available for Interest	
	Reported	As Adjusted
1922	$2,306,124	$2,404,890
1923	3,313,976	4,412,234
1924	3,144,124	3,241,823
1925	4,454,352	4,557,798
1926	4,759,282	4,868,390
1927	2,674,494	3,470,861
1928	2,964,371	4,376,972
1929	2,529,846	3,718,436
1930	1,552,487	2,381,529
1931	186,708 (D)	220,494 (D)
1932	252,706	283,912
1933	674,007	474,365
1934	1,084,244	1,396,353
1935	805,589	1,377,026
1936	181,102	1,901,423
1937	903,113 (D)	1,077,407
1938	1,243,916 (D)	225,431
1939 (first ten months)	1,061,883	1,174,717

(D)—Deficit.

The capitalization permitted by these earnings is a mere matter of computation,[13] which will dem-

(13) The following results of computation are taken [1218] from the brief of the Institutional Bondholders for purposes of illustration: The earnings of the Debtor's system, as adjusted for the five years 1934 to 1938, inclusive, averaged $1,195,528; for the ten years 1929 to 1938, inclusive, $1,261,539; and for the seventeen years 1922 to 1938, inclusive, $2,350,000. If such average earnings be capitalized at 5% the capitalization based on earnings for the 1934-1938 period would amount to $23,910,560; for the 1929-1938 period to $25,230,780, and for the 1922-1938 period to $47,000,000. Each such capitalization is substantially less than the $65,819,422 of senior par value securities provided for in the Commission plan.

onstrate that the Commission did not act arbitrarily in limiting capitalization nor the respective classes thereof.

In its original report the Commission, with the aid of its financial experts, has fully analyzed and

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In order to permit a capitalization equal in amount only to the $65,819,422 par value of senior securities contemplated by the Commission plan (thus disregarding entirely the no par value common stock) the 1934-1938 average earnings would have to be capitalized on a 1.81% basis; the 1929-1938 average earnings on a 2.00% basis; the 1922-1938 average earnings on a 3.57% basis; and the 1939 adjusted earnings on a 2.34% basis.

The average system earnings for the five years ending December 31, 1938, were insufficient by $753,432 to cover the total charges through interest on the new income mortgage bonds, and by $2,452,142 to cover the charges through dividends on the new preferred stock, under the Commission plan.

The average earnings for the ten year period ending December 31, 1938, were insufficient by $687,521 to cover the total charges through the interest on the new income mortgage bonds, and by $2,386,131 to cover the charges through dividends on the new preferred stock, under the Commission plan.

The average system earnings for the seventeen year period ending December 31, 1938, were sufficient to cover the total charges through interest on the new income mortgage bonds under the Commission plan, with $400,940 to spare, but were insufficient by $1,297,670 to cover the charges through the dividends on the new preferred stock.

The system earnings for the year 1939, as adjusted, were insufficient by $409,200 to cover the total charges through interest on the new income mortgage bonds, and by $2,107,810 to cover the charges through dividends on the new preferred stock. [1219]

discussed the traffic and revenue of the Debtor and its subsidiaries, also its earnings available for charges. The Commission closes its discussion of the latter subject with the statement: "A consideration of these recent data (reported subsequent to the preparation of the Debtor's estimate), together with other data of record, convinces us that too great reliance may not be placed upon the Debtor's estimate of future earnings, and that the capital structure of the reorganized company must be conservative." And again: "It is obvious, therefore, that based upon the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation."

It is objected that without a finding of insolvency in the bankruptcy sense, the provision of the Commission plan excluding stockholders from participation in the reorganization is invalid and inequitable and contrary to the law of the land. The statute makes no such requirement. Subsection (e) of 77 provides for the following five alternatives: "That at the time of the finding the corporation is insolvent, *or* that at the time of the finding the equity of such class of stockholders has no value, *or* that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, *or* that the

interest of such class of stockholders will not be adversely and materially affected by the plan, *or* that the debtor has, pursuant to authorized corporate [1220] action, accepted the plan and its stockholders are bound by such acceptance." [Italics supplied.]

The Commission's finding that the equity of certain stockholders was without value, is based upon the second alternative. In in re 620 Church Street Building Corp., 299 U. S. 24, a ruling in a reorganization case, under section 77B, excluding creditors and stockholders upon a finding that their claims had "no value", was sustained.

In Consolidated Rock Products Co., et al. vs. E. Blois Du Bois,[14] a reorganization case under section 77B of the Bankruptcy Act (containing in some of its provisions terms identical with those in section 77), the Circuit Court of Appeals, for the Ninth Circuit, used the following language which is applicable here:

"* * * A corporation may come within the terms of §77B although it is not insolvent, but 'unable to meet its debts as they mature'. Continental Bank v. Rock Island Ry., 294 U. S. 648, 672. The statute requires a proposed plan to be 'fair and equitable' regardless of the condition of the corporation, whether it be solvent or insolvent. The statute does not limit the test, 'fair and equitable', to plans of

(14) Case No. 9000, decided June 19, 1940. [1221]

reorganization of insolvent corporations, but lays down the requirement that a plan must be 'fair and equitable' for all corporations seeking relief under §77B. We think a proposed plan of reorganization under §77B must be 'fair and equitable', whether the corporation sought to be reorganized is solvent or insolvent.

* * * * * * *

"Considerable argument is made to the effect that the debtor's preferred stockholders are forgotten men; that they lose 96% of their investment; and that they have an equity and must be given an interest in any plan of reorganization. We are not impressed by this argument. When a person buys a bond, he obtains it on the theory that he is not an owner but a creditor. When a person buys stock, common or preferred, he knows that he is buying an interest in the corporation which is subordinate to claims of the corporate creditors. He runs the risk of having an interest in something that is valueless."

The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and

not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. However, since these private property rights had not been adjudicated, it became the duty of the Commission to determine them preliminarily for the purpose of considering the plans [1222] before it, 230 I. C. C. 61, 97 Without such consideration and determination, it would have been impossible for the Commission to have complied with the statute and certified a plan to the court. While the decision of the Commission in the premises is advisory only, it was of inestimable value to the court in enabling it to see the whole picture and arrive at a decision. In this connection I wish to say that I have read the record and carefully considered all of the objections offered by the respective objectors to the Commission plan. I have also read the briefs of respective counsel in support of the objections. I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidentally related thereto. It seems to me that further discussion would be superfluous. Every question presented by the objections was considered and passed upon by the Commission as shown by its original and supplemental reports.

Objections to the administration or execution of the Commission plan are without merit and will be overruled.

Petitions for allowance for compensation for services rendered and for expenses (including reasonable counsel fees) incurred, in connection with the proceeding and plan of reorganization up to and including October 31, 1939, were filed by the following persons, corporations, and committees: the Debtor and its counsel; The Institutional Bondholders Committee and its counsel; Crocker First National Bank of San Francisco as Corporate Trustee under the First Mortgage and Samuel Armstrong as Individual [1223] Trustee under the First Mortgage; The Chase National Bank of the City of New York, as Trustee (until November 13, 1936) under the Refunding Mortgage; Irving Trust Company, as successor Trustee under the Refunding Mortgage; A. C. James Co. and its counsel; and Reconstruction Finance Corporation. Said petitions were referred under the provisions of the Act to the Commission to fix the maximum limits of final allowances. The Commission filed in this court on June 1, 1940, a certified copy of its report and order fixing the maximum limits for allowances for fees and expenses. The matter came on regularly for hearing before the court on August 5, 1940. Counsel for A. C. James Co. moved that the court postpone the consideration of allowances, other than certain ad interim administration expenses. The motion will be denied. The Irving Trust Company, as successor Trustee under the general and refunding mortgage, moved (1) for payment out of the general estate of the Debtor of the compensation

and expenses of itself and its counsel in the maximum limits fixed by the Commission, and (2) for payment of the balance of reasonable compensation of the Trustee and its counsel out of the cash held by said Trustee. The motion was based upon the contention that the allowances made were unreasonably low and that "it is not entirely clear whether or not the Commission intended to fix maximum limits of compensation payable out of the general estate for *all* services of the Trustee and its attorneys." An examination of the report and order of the Commission shows that in no case did the Commission allow as a maximum the amount

[1224]

claimed for compensation. All claims appear to have been treated upon a comparative basis. And it further appears from the report that allowances were made for all services rendered. The motion will be denied. I am of the opinion that the amounts allowed by the Commission as compensation for services rendered and for actual and reasonable expenses (including attorneys' fees) incurred are reasonable, and they will be approved.

Upon a consideration of the entire record I am of the opinion that the Commission plan complies with the provisions of subsection (b) of section 77 and is supported by the evidence; that it is fair and equitable; that it affords due recognition to the rights of each class of creditors and stockholders; that it does not discriminate unfairly in favor of any class of creditors or stockholders; that it

will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and that it provides for payment of all costs of administration and other allowances made or to be made by this court.

All objections to the Commission plan will therefore be overruled and the plan will be approved in toto.

Dated: August 15, 1940.

[Endorsed]: Filed Aug 15-1940. [1225]

In the Southern Division of the United States District Court for the Northern District of California.

No. 26591-S

In the Matter of
The Western Pacific Railroad Company,
Debtor.

ORDER APPROVING PLAN OF REORGANIZATION FOR DEBTOR

These proceedings coming on for hearing on the modified plan of reorganization for the Debtor, approved by the Interstate Commerce Commission in its Report and Order entered June 21, 1939, and certified to this Court by said Commission on September 28, 1939, together with a transcript of [1226] the proceedings before said Commission and

a copy of its said Report and Order approving said modified plan, and the Court having considered the entire record in these proceedigs, including the transcript of the proceedings before said Commission certified to this Court and the evidence adduced and arguments presented at the hearing before this Court on January 22 to 25, 1940, and the Court having heretofore on August 15, 1940, filed its opinion herein,

The Court finds:

1. The findings of fact made by the Interstate Commerce Commission in its Original Report of October 10, 1938, as modified by its Supplemental Report of June 21, 1939, are supported by the evidence, and as supplemented by the stipulation of the parties filed herein on December 20, 1939, are adopted as findings by this Court.

2. The Plan of Reorganization, approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939:

(a) Includes provisions modifying and altering the rights of creditors of the Debtor;

(b) Provides for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property, in light of its earnings experience and all other relevant facts, there should be adequate coverage of such fixed charges by the probable earnings available for the payment thereof;

(c) Provides adequate means for the execution [1227] of the Plan; and

(d) In all other respects complies with the provisions of Subsection (b) of Section 77.

3. Said Plan of Reorganization:

(a) Is fair and equitable;

(b) Affords due recognition to the rights of each class of creditors and stockholders;

(c) Does not discriminate unfairly in favor of any class of creditors or stockholders;

(d) Will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and

(e) Provides for payment of all costs of administration and all other allowances made or to be made by this Court.

4. By order entered August 15, 1940, this Court fixed the amount to be paid by the Debtor, or any corporation acquiring its assets, for fees and expenses incident to the reorganization through October 31, 1939. Said amounts are reasonable and within maximum limits heretofore fixed by the Interstate Commerce Commission and said order constitutes full disclosure of the approximate amounts to be paid by the Debtor, or such other corporation, for such fees and expenses so far as they could be ascertained at the date of said hearing before this Court on January 22 to 25, 1940. Such additional amount as may be required to be paid

by the Debtor or such other corporation for services performed and expenses incurred (including reasonable attorneys' fees) after October 31, 1939, in connection with the proceedings and plan of reorganization, and in connection with the carrying out of said plan, if the same is finally confirmed, [1228] cannot be ascertained at this time, but such amounts will be subject to the approval of this Court within maximum limits hereinafter to be fixed by the Interstate Commerce Commission.

5. By order entered August 20, 1935, this Court divided the creditors and stockholders of the Debtor into classes and the classes of creditors hereinafter referred to are those fixed by said order.

Wherefore, it is ordered:

First: The objections to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment heretofore filed herein by or on behalf of the Debtor, the Institutional Bondholders Committee, the Trustee under the Debtor's General and Refunding Mortgage, A. C. James Co., Reconstruction Finance Corporation, The Railroad Credit Corporation, The Western Pacific Railroad Corporation and The Western Realty Company are hereby severally overruled and denied.

Second: Said Plan of Reorganization is hereby in all respects approved.

Third: The findings made by the Interstate Commerce Commission that the interests of the following classes of creditors:

(a) The Debtor's equipment obligations to be assumed by the Reorganized Company, being classes 6, 7, 8 and 9;

(b) Claims against the Debtor entitled to priority over any mortgage of the Debtor, current liabilities and obligations incurred by the Trustees of the Debtor during this reorganization [1229] proceeding, and expenses of reorganization allowed by this Court within the maximum limits fixed by the Interstate Commerce Commission, which shall be paid in cash or assumed by the Reorganized Company, and which are unclassified;

(c) Executory contracts of the Debtor which have been affirmed or have not been disaffirmed by the Trustees of the Debtor and not terminating prior to the conclusion of this reorganization proceeding which are to be assumed by the Reorganized Company and which are unclassified;

(d) Executory contracts made by the Trustees of the Debtor with the approval of this Court which by their terms do not terminate at or prior to the conclusion of this reorganization proceeding, which are to be assumed by the Reorganized Company, and which are unclassified; and

(e) All taxes levied, assessed or accrued against the Debtor or its property or against any subsidiary and remaining unpaid at the date of the confirmation of the plan, which are to be assumed and paid by the Reorganized Company

with the same relative priority that they now have with respect to other obligations of the Debtor;

will not be adversely and materially affected by said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to any of such classes for acceptance or rejection.

Fourth: The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of [1230] unsecured creditors of the Debtor and the equity of the holders of the Debtor's Preferred Stock and the Debtor's Common Stock have no value, and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor under said Plan of Reorganization is hereby affirmed, and said Plan of Reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.

Fifth: The only classes of creditors to whom said Plan of Reorganization shall be submitted for acceptance or rejection are:

(a) Class (1)—holders of claims evidenced by The Western Pacific Railroad Company First Mortgage 5% Bonds due March 1, 1946, issued under the First Mortgage of The Western Pacific Railroad Company dated June 26, 1916, and the interest coupons appurtenant thereto;

(b) Class (3)—Debtor's secured promissory

notes issued to A. C. James Co., dated March 28, 1932, and May 31, 1932, respectively, bearing interest at the rate of 5% per annum and due March 28, 1935, and May 31, 1935, respectively, together with the accrued and unpaid interest thereon;

(c) Class (4)—Debtor's secured promissory notes to Reconstruction Finance Corporation, dated March 1, 1932, June 29, 1932, August 1, 1932, August 30, 1932, and March 25, 1933, respectively, bearing interest at the rate of 6% per annum, and due March 1, 1935, June 29, 1935, August 1, 1935, August 30, 1935, and March 25, 1936, respectively, [1231] together with accrued and unpaid interest thereon;

(d) Class (5)—Debtor's secured promissory notes to The Railroad Credit Corporation, dated June 29, 1932, and March 25, 1933, respectively, bearing interest at the rate provided for in the Marshalling and Distributing Plan, 1931, of The Railroad Credit Corporation, each note payable on demand, together with accrued and unpaid interest thereon.

Sixth: T. M. Schumacher and Sidney M. Ehrman, Trustees of the Debtor, be, and they are hereby directed to send a certified copy of this Order and a certified copy of the opinion of this Court filed herein on August 15, 1940, to the Interstate Commerce Commission for use in submitting said Plan of Reorganization hereby approved to the

holders of said claims and interests found to be entitled to vote thereon.

Dated: August 15, 1940.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Aug. 15, 1940. [1232]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of California,
City and County of San Francisco—ss.

J. Francis Hoey, being duly sworn, deposes and says: That he is over twenty-one years of age; that he is an employee of Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, Crocker Building, San Francisco, California; that on August 22nd, 1940, he served the within Notice of Entry of Orders upon the [1233] following attorneys at law:

C. W. Dooling,
878 Mills Building,
San Francisco, California,
Attorney for Debtor.

Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California,
Attorneys for Irving Trust Company, as Substituted Trustee under General and Refunded Mortgage.

Garret W. McEnerney and Andrew F. Burke,
2002 Hobart Building,
San Francisco, California,
Attorneys for A. C. James & Co.
Brobeck, Phleger & Harrison,
Crocker Building,
San Francisco, California,
Attorneys for Reconstruction Finance Corporation.
Sloss, Turner & Finney,
111 Sutter Street,
San Francisco, California,
Attorneys for Western Pacific Railroad Corporation.
Chickering & Gregory,
111 Sutter Street,
San Francisco, California,
Attorneys for Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage.
Pillsbury, Madison & Sutro,
Standard Oil Building,
San Francisco, California,
Attorneys for Chase National Bank of the City of New York.

by delivering a copy of said Notice to said attorneys at their respective office addresses; and that he served a copy of the said Notice upon the following attorneys at law:

Edward G. Buckland,
Maryland Trust Building,

Baltimore, Maryland,
Attorney for The Railroad Credit Corporation.
LeRoy R. Goodrich,
1001 Bank of America Building,
Oakland, California,
Attorney for The Western Realty Company.

by depositing a copy of said Notice securely enclosed in a [1234] postpaid wrapper in the United States Post Office in San Francisco, California, directed to said Edward G. Buckland and LeRoy R. Goodrich at the above addresses.

J. FRANCIS HOEY.

Subscribed and sworn to before me this 22nd day of August, 1940.

[Seal] W. W. HEALEY,
Notary Public
in and for the City and County of
San Francisco, State of California.

My Commission expires August 29, 1941. [1235]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF ORDERS

To: The Western Pacific Railroad Company, Debtor, and to Messrs. Pierce & Greer and C. W. Dooling, Esq., its attorneys; Irving Trust Company, as Substituted Trustee under General and Refunding Mortgage, and Messrs. Pillsbury, Madison & Sutro and Messrs. Davies, Auerbach, Cornell & Hardy, its attorneys; A. C. James & Co., and Messrs. Witman, Ransom,

Coulson & Goetz and Garret W. McEnerney and Andrew F. Burke, its attorneys; Reconstruction Finance Corporation, and C. M. Clay, Esq., Florence de Hass Dembitz, Esq., and Messrs. Brobeck, Phleger & Harrison, its attorneys; The Railroad Credit Corporation, and Edward G. Buckland, Esq., its attorney; Western Pacific Railroad Corporation, and Messrs. Sloss, Turner & Finney, its attorneys; The Western Realty Company, and LeRoy R. Goodrich, Esq., its attorney; Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage, and Messrs. Chickering & Gregory and Messrs. Milbank, Tweed & Hope, their attorneys; and Chase National Bank of the City of New York, and Messrs. Pillsbury, Madison & Sutro and Messrs. Milbank, Tweed & [1236] Hope, its attorneys:

You and each of you will please take notice that on August 15, 1940, there were regularly made in the above entitled cause by the Honorable A. F. St. Sure, United States District Judge, and on said date regularly entered in said cause, the following entitled orders:

(1) Order granting leave to Bankers Trust Company, Trustee, to file a claim against The Western Pacific Railroad Company;

(2) Order approving plan of reorganization for Debtor; and

(3) Order making allowances to various parties in interest for fees and expenses.

Dated: San Francisco, August 22, 1940.

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK.
CRAVATH, deGERSDORFF, SWAINE & WOOD,
Attorneys for Frederick H. Ecker, John W. Stedman and Reeve Schley, Committee representing a group of holders of First Mortgage Bonds.

[Endorsed]: Filed Aug. 22, 1940. [1237]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER APPROVING PLAN OF REORGANIZATION OF DEBTOR.

Notice Is Hereby Given that A. C. James Co., a corporation, a secured creditor of the above named debtor, which has heretofore, by order of Court been granted leave to intervene, for all purposes, in the above entitled proceeding, and constituted a general party therein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court, "Approving Plan of Reorganization of Debtor", which was made, filed and entered in the above en-

titled proceeding on August 15, 1940, and from each and every part of said order.

Dated: September 20, 1940.

WHITMAN, RANSOM,
COULSON & GOETZ
GARRET W. McENERNEY
ANDREW F. BURKE
Attorneys for Appellant, A. C. James Co.

[Endorsed]: Filed Sept 20-1940. [1238]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER APPROVING PLAN OF REORGANIZATION OF DEBTOR

Notice is hereby given that The Western Pacific Railroad Corporation, a corporation, one of the intervenors in the above entitled proceeding, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court, Approving Plan of Reorganization of Debtor, made, filed and entered in the above entitled proceeding on August 15, 1940, and from each and every part of said order.

Dated: September 20, 1940

M. C. SLOSS
SLOSS & TURNER
Attorneys for Appellant,
The Western Pacific Railroad
Corporation

[Endorsed]: Filed September 20, 1940. [1239]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER CONFIRMING PLAN OF REORGANIZATION

Sirs:

Please Take Notice that The Railroad Credit Corporation, a secured creditor of the above-named debtor, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an order entered in the above-entitled proceeding in the office of the Clerk of the United States District Court for the Northern District of California, Southern Division, on the 15th day of August 1940, approving and confirming a plan of reorganization of the debtor, and from each and every part of said order.

September 20, 1940.

Yours truly,
WM. J. KANE
EDWARD G. BUCKLAND,
704 Maryland Trust Building
Calvert and Redwood Streets
Baltimore, Maryland
Attorneys for The Railroad Credit Corporation

To:
Pierce & Greer Esqs.
40 Wall Street
New York, New York
C. W. Dooling Esq.
878 Mills Building
San Francisco, California
Attorneys for Debtor. [1240]

Cravath, de Gersdorff, Swaine & Wood Esqs.
15 Broad Street
New York, New York
Morrison, Hohfeld, Foerster, Shuman & Clark Esqs.
Crocker Building
San Francisco, California
Attorneys for Institutional Bondholders' Committee.
Pillsbury, Madison & Sutro Esqs.
Standard Oil Building
San Francisco, California.
Davies, Auerbach, Cornell & Hardy Esqs.
1 Wall Street
New York, New York
Attorneys for Irving Trust Company, as Substituted Trustee under General and Refunding Mortgage.
C. M. Clay Esq.
1325 H. Street, N. W.
Washington, D. C.
Brobeck, Phleger & Harrison Esqs.
Crocker Building
San Francisco, California
Attorneys for Reconstruction Finance Corporation.
Garret W. McEnerney and Andrew F. Burke
2002 Hobart Building
San Francisco, California
Whitman, Ransom, Coulson & Goetz
40 Wall Street
New York, New York
Attorneys for A. C. James Co.

Sloss & Turner Esqs.
111 Sutter Street
San Francisco, California
Attorneys for Western Pacific Railroad Corporation.
Leroy R. Goodrich Esq.
1001 Bank of America Building
Oakland, California
Attorney for The Western Realty Company.
Chickering & Gregory Esqs.
111 Sutter Street
San Francisco, California
Milbank, Tweed & Hope Esqs.
15 Broad Street
New York, New York
Attorneys for Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage.
Pillsbury, Madison & Sutro Esqs.
Standard Oil Building
San Francisco, California
Milbank, Tweed & Hope Esqs.
15 Broad Street
New York, New York
Attorneys for Chase National Bank of the City of New York.
Thomas, Beedy & Paramore,
315 Montgomery Street,
San Francisco, California.
Attorneys for Bankers Trust Company, Trustee.

[Endorsed]: Filed Sept 20-1940. [1241]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF DEBTOR FROM ORDER APPROVING PLAN OF REORGANIZATION OF DEBTOR.

Notice Is Hereby Given that The Western Pacific Railroad Company, a corporation, Debtor above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above entitled Court approving plan of reorganization of debtor which was made, filed and entered in the above entitled proceeding on August 15, 1940, and from each and every part of said order.

Dated, September 20, 1940.

PIERCE & GREER
C. W. DOOLING
Attorneys for Debtor and Appellant The Western Pacific Railroad Company.

[Endorsed]: Filed Sept 20-1940. [1242]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Irving Trust Company, as [1243] substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from so much of the order of this Court made and entered

August 15, 1940, as overrules and denies the objections filed herein by Irving Trust Company, as Trustee as aforesaid, to the Plan of Reorganization approved by the Report and Order of the Interstate Commerce Commission of June 21, 1939, and the claims for equitable treatment filed herein by Irving Trust Company, as Trustee as aforesaid, and from so much of said order as, contrary to the aforesaid objections and claims for equitable treatment, approves in all respects said Plan of Reorganization.

Dated: September 20, 1940.

FELIX T. SMITH
Standard Oil Building
San Francisco, California
Attorney for Irving Trust Company, as Trustee aforesaid, Appellant.
PILLSBURY, MADISON & SUTRO
Standard Oil Building
San Francisco, California
DAVIES, AUERBACH, CORNELL & HARDY
One Wall Street,
New York,
Of Counsel.

[Endorsed]: Filed Sept 20-1940. [1244]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANTS, THE WESTERN PACIFIC RAILROAD COMPANY, THE WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, AND IRVING TRUST COMPANY AS TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY DATED JANUARY 1, 1932, OF THE PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

The Western Pacific Railroad Company, debtor herein, The Western Pacific Railroad Corporation, A. C. James Co., a corporation, The Railroad Credit Corporation and Irving Trust Company as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, dated January 1, 1932, have appealed severally to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the above entitled Court approving a plan of reorganization of the debtor, which order was made and filed in the above proceeding on August 15, 1940, and hereby jointly and severally designate the following as the portions of the record, proceedings and evidence to be contained in the record on appeal herein; such designations are made in conformity with Rule 75 (a) of the Rules of Civil Procedure: [1257]

(1) The petition of The Western Pacific Rail-

road Company, debtor, filed herein on August 2, 1935, pursuant to Subdivision (a) of Section 77 of the Bankruptcy Act as amended.

(2) Order of the above entitled Court approving such petition filed August 2, 1935, and restraining the sale, conversion or other disposition of collateral.

(3) Petition for order respecting the filing of claims and division of creditors and stockholders into classes, filed August 20, 1935.

(4) Order dividing claims into classes, filed August 20, 1935.

(5) Petition for appointment of trustees and order respecting notice of hearing of said petition, filed August 31, 1935.

(6) Claim of A. C. James Co., filed herein September 10, 1935.

(7) Claim of The Western Pacific Railroad Corporation, filed September 12, 1935.

(8) Claim of Western Realty Company, filed September 13, 1935.

(9) Claim of Railroad Credit Corporation, filed on or before September 15, 1935.

(10) Claim filed on behalf of holders or pledgees of General and Refunding Mortgage Bonds, on or before September 15, 1935. [1258]

(11) Order appointing trustees, filed September 23, 1935.

(12) Order of September 30, 1935, modifying order appointing trustees.

(13) Proposed plan of reorganization filed by the debtor February 8, 1936, being Exhibit "1" of

the exhibits introduced at the hearings before the Interstate Commerce Commission.

(14) Plan of Reorganization filed with the Interstate Commerce Commission on behalf of the Committee representing Institutional Bondholders on September 28, 1936, being Interstate Commerce Commission Exhibit No. "42".

(15) Plan of Reorganization filed with the Interstate Commerce Commission on behalf of A. C. James Co. on October 26, 1936, being Interstate Commerce Commission Exhibit No. "76".

(16) Transcript of the hearings and proceedings before the Interstate Commerce Commission in this matter, which is numbered "Finance Docket No. 10913", and has heretofore been certified to and filed in the above named Court, including the transcript of all proceedings before the Commission or any of its Bureaus or Divisions, together with the remainder of the 126 exhibits (in addition to those specified in items (13), (14) and (15) above), introduced before said Commission and its Bureaus and Divisions.

(17) The proposed report of the Bureau of [1259] Finance of the Commission dated August 2, 1937.

(18) The report and order of the Commission dated October 10, 1938.

(19) The order of the Commission granting a rehearing dated December 30, 1938.

(20) The final modifying report and order of the Commission dated June 21, 1939. Two copies

of all of the Reporter's Transcript of the hearings are filed herewith pursuant to Rule 75(b) of the Rules of Civil Procedure.

(21) Petition of A. C. James Co. for leave to intervene before the Commission dated April 18, 1936.

(22) Petition of Railroad Credit Corporation for leave to intervene before the Commission dated March 14, 1936.

(23) Petition of Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor, for leave to intervene before the Commission dated November 19, 1936.

(24) Exceptions of the several parties to the aforesaid proposed report of the Bureau of Finance.

(25) Petitions of the several parties filed with the Commission on December 9, 1938, for rehearing and modification of the report and order of the Commission dated October 10, 1938.

(26) The debtor's petition, dated August 1, 1939, for rehearing and modification of the Commission's report and order of June 21, 1939. [1260]

(27) The Commission's order of September 19, 1939, denying debtor's petition of August 1, 1939, for rehearing and modification.

(28) Order of the Court made November 8, 1939, fixing the time within which objections to the Plan of Reorganization and claims for equitable treatment might be filed, and designating December 8, 1939, as the date for filing such objections and claims.

(29) Petition for leave to file petition of intervention of A. C. James Co. and order granting such petition, both filed December 1, 1939, petition of intervention of A. C. James Co. for leave to intervene and order made and filed, December 1, 1939, fixing time and place for hearing such petition, notice of filing petition of intervention of A. C. James Co. and order granting petition of intervention of A. C. James Co. made and filed December 4, 1939, and notice of making and entry of said order.

(30) Petition for leave to file petition of intervention of The Western Pacific Railroad Corporation and order granting such petition and fixing date of hearing upon petition of intervention, both filed December 7, 1939, petition of intervention of Western Pacific Railroad Corporation and notice of filing same, both dated December 7, 1939 and order granting petition of intervention, dated December 11, 1939, and notice of making and entry of said order.

(31) Petitions, orders and notices relating to [1261] intervention of Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor in this proceeding.

(32) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by A. C. James Co. on December 8, 1939.

(33) Objections to the Plan of Reorganization and claims for equital le treatment filed herein by The Western Pacific Railroad Corporation on December 8, 1939.

(34) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Railroad Credit Corporation on December 8, 1939.

(35) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by The Western Pacific Railroad Company on December 8, 1939.

(36) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor on December 8, 1939.

(37) Objections to the Plan of Reorganization and claims for equitable treatment filed herein by Western Realty Company on December 8, 1939.

(38) Stipulation as to facts not in dispute filed herein on December 20, 1939, and order of the Court made and filed December 20, 1939, making said stipulation a part of the record.

(39) Summary of issues remaining for decision by [1262] the Court, filed herein by The Western Pacific Railroad Corporation and A. C. James Co. on December 20, 1939.

(40) Summary of issues as stated by counsel for Institutional Bondholders Committee, filed herein on December 20, 1939.

(41) Order of the Court fixing January 22, 1940, as date for hearing parties in interest, providing for notice, etc. filed December 21, 1939.

(42) Order of the Court made and filed December 29, 1939, relative to issues raised by objections to the Commission Plan.

(43) Transcript of the evidence and proceedings (other than the arguments of counsel), had and taken in the above entitled Court on January 22, 1940, and all exhibits received in evidence on said hearing. Two copies of said transcript are filed with these designations, pursuant to Rule 75(b) of the Rules of Civil Procedure.

(44) Opinion of the Court upon approval of plan of reorganization dated and filed August 15, 1940.

(45) Order of the Court overruling all objections and approving plan of reorganization, filed August 15, 1940.

(46) Notice of entry of order of the above entitled Court overruling objections and approving plan of reorganization and affidavit of service of said notice, filed August 22, 1940.

(47) Notice of appeal from the aforesaid order [1263] of August 15, 1940, filed by A. C. James Co. on September 20, 1940.

(48) Notice of appeal from the aforesaid order of August 15, 1940, filed by The Western Pacific Railroad Corporation on September 20, 1940.

(49) Notice of appeal from the aforesaid order of August 15, 1940, filed by Railroad Credit Corporation on September 20, 1940.

(50) Notice of appeal from the aforesaid order of August 15, 1940, filed by The Western Pacific Railroad Company, debtor herein, on September 20, 1940.

(51) Notice of appeal from the aforesaid order of August 15, 1940, filed by Irving Trust Company

as Trustee under the General and Refunding Mortgage of the debtor on September 20, 1940.

(52) Notice from the Clerk of the Court of the filing of the aforesaid notices of appeal.

(53) Bonds for costs on appeal filed on September 20, 1940, by A. C. James Co., The Western Pacific Railroad Company, The Western Pacific Railroad Corporation, Railroad Credit Corporation and Irving Trust Company, pursuant to Rule 73(c) of the Rules of Civil Procedure.

(54) A copy of this designation.

(55) Statement of points on which The Western Pacific Railroad Company intends to rely on its appeal.

(56) Statement of points on which A. C. James Co. intends to rely on its appeal. [1264]

(57) Statement of points on which The Western Pacific Railroad Corporation intends to rely on its appeal.

(58) Statement of points on which the Railroad Credit Corporation intends to rely on its appeal.

(59) Statement of points on which Irving Trust Company as Trustee under the General and Refunding Mortgage of the debtor intends to rely on its appeal.

(60) All certificates made by the Clerk of the above named Court with reference to the proceedings, rulings and orders of the Court hereinbefore mentioned.

(61) All endorsements of filings and all acknowledgments and other proofs of service of any of the aforesaid records or papers in the above

named Court, or, in lieu thereof, memoranda by the Clerk showing the due filing and/or service of said records or papers.

Dated, October 8, 1940.

PIERCE & GREER
C. W. DOOLING
Attorneys for Appellant, The Western Pacific Railroad Company
WHITMAN, RANSOM, COULSON & GOETZ,
GARRET W. McENERNEY
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Attorneys for Appellant, Irving Trust Company as Trustee under the General and Refunding Mortgage of the Debtor

[Endorsed]: Filed Oct 10-1940. [1265]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, A. C. JAMES CO., WILL RELY ON ITS APPEAL FROM THE ORDER OF THE ABOVE COURT MADE AUGUST 15, 1940, APPROVED PLAN OF REORGANIZATION OF DEBTOR.

A. C. James Co., a corporation which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

1. The District Court has erred in approving a plan of reorganization which is unfair and inequitable, fails to afford due recognition to the rights of A. C. James Co. as a secured creditor in relation to the value of the assets of the debtor; discriminates unfairly against the A. C. James Co. in relation to other secured creditors; does not conform to the requirements of the law of the land regarding the participation of A. C. James Co., as a secured creditor, and is confiscatory of private property rights of A. C. James Co., in violation of the Fifth [1266] Amendment of the Constitution, the provisions of which A. C. James Co. hereby invokes.

2. The District Court has erred in approving said plan of reorganization in that it has adopted a theory and concept of the functions of the Court

in approving or disapproving a plan of reorganization, which theory and concept are without support in the law and permeate and vitiate the approval by the Court; the District Court has not exercised an independent and informed judgment in approving the plan, as is required by Section 77 of the Bankruptcy Act and the law of the land, but has merely reviewed the findings and determinations of the Interstate Commerce Commission.

3. The District Court has erred in approving a plan of reorganization which was not proposed by the debtor or any other party to the proceeding but was framed by the Commission upon the erroneous theory that the Commission was empowered under Section 77 of the Bankruptcy Act to limit the capitalization of the reorganized company solely on the basis of an estimate of probable prospective earnings in order to assure a material return on its capital stock, without giving effect to the investment in and value of the debtor's property.

4. The District Court has erred in holding that the determination of the amount and character of the capitalization of the reorganized company is a legislative function affecting the public interest and exclusively within the province of the Commission; the Commission's assumption of power to limit the capiltalization of the [1267] reorganized company, and the acquiescence of the District Court in such assumption, are unwarranted and contrary to law, and result in the confiscation of private property rights in violation of the Fifth Amendment to the Constitution.

5. The limitation on capitalization fixed in the plan approved by the District Court does not constitute a valuation or appraisal of the debtor's property, such as is required by Section 77 of the Bankruptcy Act and the law of the land.

6. Neither the District Court nor the Commission made such a precise finding as to the value of the property of the debtor as is necessary to sustain the disregard of a substantial portion of the claim of the A. C. James Co., as contemplated in the plan approved by the District Court.

7. The District Court has erred in approving a plan which does not give "Such effect * * * to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts." The drastic limitation upon the capitalization of the debtor which is imposed by the Interstate Commerce Commission in the plan certified by it disregards completely the investment in the property of the debtor and the value thereof as heretofore found and reported by the Commission, and without any new appraisal or valuation of such property by the Interstate Commerce Commission; the capitalization of a debtor in reorganization cannot lawfully be determined [1268] or limited below the amount proposed by the parties to the proceeding unless such determination is made with reference to the investment in the debtor's property and the value

thereof as disclosed by an appraisal or valuation.

8. The determinations and findings of the Interstate Commerce Commission as to the probable earnings and earning power of the debtor's property, the limitation upon total capitalization and the resulting delimitation of private property rights were made arbitrarily, in disregard of the evidence and in violation of the meaning and intent of Section 77 of the Bankruptcy Act; if Section 77 is interpreted as authorizing such findings and determinations by the Commission, or as conferring upon the Commission plenary and exclusive power to so limit the capitalization of the debtor upon reorganization, then Section 77 is unconstitutional and void as in violation of the Fifth Amendment of the Constitution, the provisions of which A. C. James Co. hereby invokes.

9. The District Court has erred in approving a plan which arbitrarily disregards and denies recognition to a substantial proportion of the secured claim of A. C. James Co., while, according to the other secured creditors (Reconstruction Finance Corporation and Railroad Credit Corporation), preferential treatment which is unfair, inequitable and discriminatory as against the A. C. James Co., and contrary to the law of the land; the preferential treatment granted in the plan to Reconstruction Finance Corporation in respect of its claim as a secured creditor, to [1269] compensate such corporation for its agreement to accept First Mortgage Bonds of the reorganized company in

exchange for the Trustees' Certificates which it now holds, is unjust and contrary to law.

10. The plan of reorganization approved by the District Court is unfair, inequitable and discriminatory in attempting to preserve to other secured creditors full rights in collateral for the obligations of the debtor furnished by a third party at the same time it completely refunds the obligations of the debtor held by such secured creditors, and disregards and fails to fund a substantial portion of the secured claim held by A. C. James Co.

11. The District Court has erred in approving a plan of reorganization which adjudicates, delimits and destroys the property rights of A. C. James Co. without a judicial determination of the facts and issues necessary to an adjudication and delimitation of private property rights in violation of Section 77 of the Bankruptcy Act, the law of the land and the Fifth Amendment of the Constitution.

12. The District Court has erred in approving a plan of reorganization which fails to recognize that a reorganization under Section 77 of the Bankruptcy Act is a statutory alternative to liquidation and forced sale of the debtor's assets and fails to recognize the statutory intent that the value of the debtor's assets shall for the purposes of a reorganization be the fair going concern value and not forced sale value or the market value of the debtor's securities. [1270]

13. The District Court erred in finding that the

secured claim of A. C. James Co. is not fully secured by the lien of the debtor's General and Refunding Mortgage, and in disregarding a large part of said claim.

14. The plan approved by the District Court discriminates against A. C. James Co. unfairly and unlawfully, in that it affords less favorable treatment to A. C. James Co. than to any other secured creditor, notwithstanding that the claim of said A. C. James Co. is deserving of more favorable equitable treatment for the reasons, among others:

(a) That it resulted from cash advances made by A. C. James Co. to the debtor, during 1931 and 1932, the depth of the financial depression from which the railroads of the country have suffered, to enable the debtor to complete its Northern California Extension which completion was essential to protect the interest of all investors in the property, and has been an important factor in the earning power of the debtor; and

(b) That the advances made during 1931 and 1932 by said A. C. James Co. to the debtor, were made with the express approval of the Interstate Commerce Commission which found the necessary issue of securities by the debtor to represent such advances to be "compatible with the public interest," even though the then earnings status of the debtor was substantially less favorable than at the time the Commission formu-

lated and [1271] promulgated the plan approved by the Court, or at the present time.

15. The District Court erred in approving the allocation, as proposed in the plan, of common stock without par value of the reorganized company, apparently valued by the Commission at $100 per share for the purpose of capitalization, to First Mortgage bondholders, and the Reconstruction Finance Corporation at $57 a share, to Railroad Credit Corporation at $62 a share, and to A. C. James Co. (if it should be urged that the entire debt of the A. C. James Co. is thereby refunded) at approximately $155 a share, in violation of Section 77 of the Bankruptcy Act and the law of the land.

16. The findings of the Commission and the above Court, that the claim of A. C. James Co. has no value in excess of that recognized by the Commission and the provisions of the plan which give effect to such findings, are and each of them is unsupported by and contrary to the evidence.

17. The District Court erred in holding that Section 77 of the Bankruptcy Act authorizes or permits the exclusion from participation in the reorganization of part of the secured claim of A. C. James Co. without a finding that the debtor was insolvent in the bankruptcy sense.

18. The District Court erred in approving a plan of reorganization which provides for the issue of common stock of the reorganized company to holders of First Mortgage Bonds of the debtor and

to secured creditors, [1272] in respect of many millions of dollars of interest accrued on the bonds and secured notes of the debtor after the filing of the debtor's petition on August 2, 1935, whereas under Section 77 of the Bankruptcy Act and the law of the land the rights and liabilities of creditors and of all persons with respect to the debtor and its property were fixed as of the date of filing said petition; the plan approved by the District Court cannot be supported in law in so far as it provides for an effective date thereof of January 1, 1939, and not August 2, 1935, as contemplated by Section 77 of the Bankruptcy Act.

19. The District Court erred in approving a plan of reorganization which imposes arbitrary limitations upon the functions of the management of the reorganized company, contemplated by said plan, through the provision for a mandatory rather than a discretionary capital fund.

20. The aforesaid order of August 15, 1940, approving the plan and overruling the objections of A. C. James Co. and other parties is erroneous upon each and all of the grounds hereinbefore specified.

Dated, October 9th, 1940.

WHITMAN, RANSOM,
COULSON & GOETZ,
GARRET W. McENERNEY,
ANDREW F. BURKE,
Attorneys for Appellant, A. C. James Co.

[Endorsed]: Filed Oct. 10, 1940. [1273]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT, THE WESTERN PACIFIC RAILROAD CORPORATION, INTENDS TO RELY ON THE APPEAL.

The Western Pacific Railroad Corporation, a corporation which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a Plan of Reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

(1) The Plan of Reorganization approved by the Judge is not fair or equitable as to the appellant as owner of an unsecured claim. [1274]

(2) The Plan of Reorganization approved by the Judge is not fair or equitable as to the appellant as owner of all the capital stock, preferred and common, of the Debtor.

(3) The Plan of Reorganization approved by the Judge does not afford due recognition to the rights of unsecured creditors and particularly of the appellant as an unsecured creditor.

(4) The Plan of Reorganization approved by the Judge does not afford due recognition to the rights of appellant as sole stockholder of the Debtor.

(5) The Plan of Reorganization approved by the Judge does not conform to the requirements

of the law of the land regarding the participation of unsecured creditors and particularly of the appellant as an unsecured creditor.

(6) The Plan of Reorganization approved by the Judge does not conform to the requirements of the law of the land regarding the participation of the stockholders of the Debtor, and particularly of the appellant as the sole stockholder of the Debtor.

(7) The Plan of Reorganization, if made effective, would deprive the appellant of its property, i. e., its unsecured claim, without compensation, and without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

(8) The Plan of Reorganization, if made effective, would deprive the appellant of its property, i. e., of its equity and interest in the property of the Debtor, as owner and holder of all of the capital stock of the Debtor, without compensation, and without due process of law, contrary to the Fifth Amendment of the Constitution of the United States.

(9) The Plan of Reorganization approved by the Judge [1275] discriminates unfairly in favor of all classes of secured creditors and against the appellant as an unsecured creditor.

(10) The Plan of Reorganization approved by the Judge discriminates unfairly in favor of all classes of secured creditors and against the appellant as a stockholder of the Debtor, i. e., as the sole stockholder of the Debtor.

(11) The Plan of Reorganization approved by the Judge will not conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

(12) The finding of the Interstate Commerce Commission that, at the time of the finding, the interests of the unsecured creditors of the Debtor had no value is unsupported by the evidence.

(13) The finding of the Interstate Commerce Commission that at the time of the finding the equity of the holders of the Debtor's preferred stock and the Debtor's common stock had no value is unsupported by the evidence.

(14) The District Court and the Judge thereof erred in affirming the finding of the Interstate Commerce Commission that at the time of the finding the interests of unsecured creditors of the Debtor had no value.

(15) The District Court and the Judge thereof erred in affirming the finding of the Interstate Commerce Commission that at the time of the finding the equity of holders of the Debtor's preferred stock and the Debtor's common stock had no value.

(16) The District Court and the Judge thereof erred in holding and deciding that the Plan of Reorganization shall not be submitted to the unsecured creditors of the Debtor for acceptance or rejection. [1276]

(17) The District Court and the Judge thereof erred in holding that the Plan of Reorganization

shall not be submitted to the shareholders of the Debtor for acceptance or rejection.

(18) The evidence before the Interstate Commerce Commission and its findings, together with the evidence before the Court on the hearing of objections to the Commission's report, show that the value of the Debtor's property exceeded the aggregate amount of all claims which were given recognition in the Plan of Reorganization; there was therefore no justification under Section 77 of the Bankruptcy Act as amended, or under the law of the land, for denying participation to the holders of unsecured claims against the Debtor.

(19) The evidence before the Interstate Commerce Commission and its findings, together with the evidence before the Court on the hearing of objections to the Commission's report, show that the value of the Debtor's property exceeded the aggregate amount of all claims which were given recognition in the Plan of Reorganization, together with the amount of the unsecured claims against the Debtor. There was therefore no justification under Section 77 of the Bankruptcy Act as amended, or under the law of the land, for denying participation to the holders of the stock of the Debtor.

(20) The evidence before the Interstate Commerce Commission and the evidence before the District Court on the hearing of objections to the report of the Commission showed that the Debtor

was not and is not insolvent within the meaning of the term "insolvent", as defined in Section 1, of the Bankruptcy Act as amended.

(21) There was no finding by the Interstate Commerce Commission, or by the District Court or the Judge thereof, that [1277] the Debtor was insolvent within the meaning of the term "insolvent", as defined in Section 1, of the Bankruptcy Act as amended.

(22) Any implied finding, if such there was, by the Interstate Commerce Commission or by the District Court or the Judge thereof, that the Debtor was insolvent, as the term "insolvent" is defined in Section 1 of the Bankruptcy Act, as amended, was unsupported by the evidence before the Commission or the Court or the Judge thereof.

(23) The District Court and the Judge thereof erred in holding that Section 77 of the Bankruptcy Act as amended authorizes the exclusion of stockholders of the Debtor from participation in the reorganization even though the Debtor be not insolvent, and in holding that Section 77, as so interpreted, is not in violation of the law of the land.

(24) The Interstate Commerce Commission, in its report promulgating the Plan of Reorganization, and the District Court and the Judge thereof, in approving said Plan, proceeded in violation of Section 77 of the Bankruptcy Act as amended, and in violation of the law of the land in going upon the view that the only measure of value of the

Debtor's property was a capitalization of the net earnings of the Debtor over a past period.

(25) The Interstate Commerce Commission and the District Court and the Judge thereof erred in failing to give due consideration to the prospective earning power of the Debtor's property and in refusing to give any consideration to all or any other relevant facts.

(26) The Interstate Commerce Commission and the District Court and the Judge thereof erred in refusing to give any effect to the present cost of reproduction new and less depreciation of the property of the debtor or to the original [1278] cost of the property or to the actual investment therein.

(27) The District Court and the Judge thereof erred in failing to form or declare an informed, independent judgment on the question whether the Plan of Reorganization certified to it complies with the following requirements of subdivision (e) of Section 77 of the Bankruptcy Act as amended, or any of them; That the Plan be fair and equitable; that it afford due recognition to the rights of each class of creditors or stockholders; that it will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders.

(28) The District Court and the Judge thereof erred in failing to make an independent determination of the value of the Debtor's property in so far as such determination was an element in disposing of the appellant's contention that the Plan of Re-

organization, if carried into effect, would result in the confiscation of appellant's property, without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

(29) The District Court and the Judge thereof erred in holding that the Interstate Commerce Commission has plenary power, under Section 77 of the Bankruptcy Act as amended, to determine the amount and character of the capitalization of a reorganized railroad company.

(30) The District Court and the Judge thereof erred in holding that the determination of the amount and character of the capitalization of the reorganized debtor company is a legislative function affecting the public interest, and in holding that such determination is exclusively within the province of the Interstate Commerce Commission, subject only to the qualification that the Court shall independently determine whether, [1279] in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily.

Dated: October 8, 1940.

M. C. SLOSS,
SLOSS & TURNER
Attorneys for Appellant, The Western Pacific Railroad Corporation.

[Endorsed]: Filed Oct. 10, 1940. [1280]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, THE RAILROAD CREDIT CORPORATION, WILL RELY ON ITS APPEAL FROM THE ORDER OF THE ABOVE COURT MADE AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR.

The Railroad Credit Corporation, which has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the above mentioned Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal:

1. The District Court has erred in approving a plan of reorganization which provides for an effective date that will be at least a year and ten months earlier than the actual effective date of a plan of reorganization without making adequate provision and adjustments for the application of proceeds and income from collateral, including the income from advances made by The Western Pacific Railroad Corporation to The Standard Realty & Development Company, or from any income that may be payable from other pledged securities. The rights of The Railroad Credit Corporation to apply income from and proceeds of collateral exist by virtue of the general law of pledges and the guarantee of the Fifth Amendment to the Constitution. [1281]

2. The District Court has erred in approving a plan of reorganization which provides for a maximum capitalization that is so low as to be confiscatory, and therefore diverts assets of the Debtor from junior creditors to senior creditors.

3. The District Court has erred in approving a plan of reorganization which treats the new common stock, to be issued upon reorganization, for most purposes as having a value of $57.00 and $62.00 per share, but for the purposes of computing capitalization it is to be taken at $100.00 per share.

4. The District Court has erred in approving a Plan which, though providing for a low capitalization and leaving substantial assets uncapitalized, requires the establishment and maintenance of a capital fund, thus diverting income from some creditors, especially the collaterally secured creditors whose status the Plan proposes to change by shifting them in part from a creditor to an equity position.

5. The Plan further depreciates the standing accorded by it to existing collaterally secured creditors

(a) by diverting income to sinking funds for both the new fixed and income mortgages;

(b) by providing for the conversion of income bonds into common stock at the rate of 20 shares per $1,000, principal amount of such bonds;

(c) by providing that new preferred stock shall share ratably with common stock in divi-

dends declared in excess of 3% upon such common stock, and by other provisions (such as sale price of new stock) of a like effect. The effect of such a course upon future financing is obvious. [1282]

6. The District Court has erred in approving a plan of reorganization which treats the claim of the Reconstruction Finance Corporation upon a different basis with respect to the collateral securing that claim than similar claims of The Railroad Credit Corporation and the A. C. James Company to the extent that they are secured by the same or similar collateral.

7. The limitation on capitalization fixed in the Plan approved by the District Court does not constitute a valuation or appraisal of the Debtor's property, including the actual investment therein, such as is required by Section 77 of the Bankruptcy Act, as Amended, and the law of the land.

8. The District Court has erred in approving a plan of reorganization which concludes that "The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value."

9. The District Court has erred in approving a plan of reorganization which is unfair and inequitable, fails to afford due recognition to the rights of the Railroad Credit Corporation as a secured creditor in relation to the value of the collateral which it holds; discriminates unfairly

against The Railroad Credit Corporation in relation to other secured creditors; does not conform to the requirements of the law of the land regarding the participation of The Railroad Credit Corporation as a secured creditor, and is confiscatory of private property right of The Railroad Credit Corporation, in violation of the Fifth Amendment of the Constitution.

Dated October 8, 1940.

E. G. BUCKLAND,
WM. J. KANE,
Attorneys for The Railroad Credit Corporation.

[Endorsed]: Filed Oct. 10, 1940. [1283]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR HEREIN, WILL RELY ON ITS APPEAL FROM THE ORDER OF THE ABOVE COURT MADE AUGUST 15, 1940, APPROVING THE PLAN OF REORGANIZATION OF THE DEBTOR CERTIFIED TO THE COURT BY THE INTERSTATE COMMERCE COMMISSION.

The Western Pacific Railroad Company, a corporation organized under the laws of the State of California, which has heretofore appealed to the

United States Circuit Court of Appeals for the Ninth Circuit from the order of the above-mentioned Court made August 15, 1940, approving a Plan of Reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon said appeal: [1284]

I.

The District Court erred in its conception of the functioning of the Court under Section 77 of the Bankruptcy Act and the law of the land and did not exercise the independent judicial judgment that the Court was required to exercise by said Section 77 and by the law of the land.

II.

The District Court, proceeded upon the erroneous assumption and theory that it was entitled to exercise or was permitted to exercise only such jurisdiction or authority as might be exercised by a Court in a proceeding to set aside an order of the Interstate Commerce Commission under the Act of Congress commonly known as the "Urgent Deficiencies Act", approved October 22, 1913, and the Acts of Congress amendatory thereof.

III.

The District Court erred in approving a Plan of Reorganization for the Debtor, certified to it by the Interstate Commerce Commission, which is unfair and inequitable and fails to give due recognition to the Debtor's unsecured creditors and

stockholders and discriminates unfairly in favor of the holders of the Debtor's First Mortgage Bonds and does not comply with the law of the land requiring the participation of the Debtor's unsecured creditors and the holders of the Debtor's Preferred Stock and Common Stock in the following particulars, among others:

(1) Said Plan of Reorganization is applied to the Debtor's capital structure as it existed on January 1, 1939, instead of the Debtor's capital structure as it existed on August 2, 1935, in violation of Subsection (1) of Section 77 of the Bankruptcy Act and Section 103 of the United States Code Annotated, being the former Section 63 of the Bankruptcy Act.

(2) Said Plan of Reorganization gives recogni- [1285] tion to large amounts of interest accrued but unearned subsequent to August 2, 1935, in violation of Subsection (1) of Section 77 of the Bankruptcy Act and Section 103 of the United States Code Annotated, being the former Section 63 of the Bankruptcy Act.

(3) Said Plan of Reorganization attempts to exclude the Debtor's unsecured creditors and the holders of its Preferred Stock and Common Stock from participation therein, although the undisputed evidence shows a substantial value for the equity represented by the Debtor's unsecured indebtedness and Preferred Stock and Common Stock.

(4) Said Plan of Reorganization attempts to take the Debtor's properties belonging in equity to its unsecured creditors and holders of Preferred Stock and Common Stock and transfer it to the holders of the Debtor's First Mortgage Bonds, without any appraisal, without any valuation and without due process of law.

(5) Said Plan of Reorganization attempts arbitrarily and without any express or implied authority under Section 77 of the Bankruptcy Act to so limit the capitalization of the Reorganized Company as to exclude the Debtor's unsecured creditors and the holders of its Preferred Stock and Common Stock from participating therein.

(6) Said Plan of Reorganization attempts arbitrarily and without any express or implied authority under Section 77 of the Bankruptcy Act to assign to new Common Stock of the Reorganized Company having no par value a value of $100, for the purpose of estimating the total capitalization and a lower value or values in settlement of the claims of creditors so as to [1286] limit the total number of shares to an amount that will leave none available for the owners of the equity represented by the Debtor's unsecured debt and its Preferred Stock and Common Stock.

(7) Said Plan of Reorganization attempts to give undue preference to Reconstruction Finance Corporation.

IV.

The District Court erred in approving a Plan of Reorganization for the Debtor which provides for the appropriation of accommodation collateral pledged by the Debtor but not owned by it and at the same time provides that collateral belonging to the Debtor shall be surrendered to the Reorganized Company, all contrary to the principles of equity and good conscience.

V.

The District Court erred in approving a Plan of Reorganization for the Debtor which is based upon an erroneous determination by the Interstate Commerce Commission (which determination the Court expressly declined to review) that the Debtor's First Mortgage covered important items of property as a first and paramount lien thereon, whereas such items of property are covered by the Debtor's General and Refunding Mortgage as a first and paramount lien thereon, the value of such properties being not less than $10,000,000.

VI.

The District Court erred in approving a Plan of Reorganization for the Debtor providing for a capitalization more than $10,000,000 greater than the Debtor's secured indebtedness without at the same time making provision for the Debtor's unsecured indebtedness and Preferred Stock and Common Stock.

VII.

The District Court erred in approving a Plan of Reorganization for the Debtor providing for annual capital expenditures [1287] cut of estimated future income of $606,095, without giving credit for such earnings to the Debtor's unsecured creditors and Preferred and Common stockholders.

VIII.

The District Court erred in approving a Plan of Reorganization for the Debtor wherein the capitalization of estimated future earnings is substituted for the elements of value required to be considered by the law of the land.

IX.

The District Court erred in approving a Plan of Reorganization for the Debtor designed to take large amounts of capital invested in the Debtor's property under the protection of the Fifth Amendment and to dedicate such property to the public use without just compensation or without any compensation.

X.

The District Court erred in approving a Plan of Reorganization for the Debtor which fails to meet the requirements of Subsections (b), (c) and (e), of Section 77 of the Bankruptcy Act and in refusing to disapprove such Plan of Reorganization and refer the proceeding back to the Inter-

state Commerce Commission in accordance with the provisions of said Subsection (e).

Dated, October 9th, 1940.

PIERCE & GREER,
C. W. DOOLING,
Attorneys for Appellant,
The Western Pacific
Railroad Company.

[Endorsed]: Filed Oct. 10, 1940. [1288]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT, IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, WILL RELY ON ITS APPEAL FROM THE ORDER OF THE DISTRICT COURT MADE AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR. [1289]

Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company (hereinafter termed the "General and Refunding Mortgage" and dated as of January 1, 1932, and executed on February 29, 1932), which has heretofore appealed to the United States Circuit Court of Appeals for

the Ninth Circuit from the order of this Court made August 15, 1940, approving a plan of reorganization for the Debtor, hereby makes the following statement of points upon which it will rely upon the appeal.

1. The District Court has erred in approving a plan of reorganization which is unfair and inequitable to the holders of the General and Refunding Mortgage bonds and is contrary to the requirements of the law of the land regarding participation of said General and Refunding Mortgage bondholders and the provisions of Section 77 of the Bankruptcy Act.

2. The District Court has erred in approving a plan of reorganization which does not afford due recognition to the rights of the holders of bonds secured under the General and Refunding Mortgage bonds and discriminates unfairly in favor of the holders of bonds secured by the First Mortgage of the Western Pacific Railroad Company, dated June 26, 1916.

3. The District Court has erred in approving a plan of reorganization which fails to recognize that the Debtor's equity (amounting, as of the inception of the reorganization proceeding, to about $6,100,000) in rolling-stock subject to conditional sale or equipment trust agreements is free from the lien of the aforesaid First Mortgage and subject only to the lien of the General and Refunding Mortgage.

4. The District Court has erred in approving a plan of reorganization which fails to recognize that the [1290] aforesaid First Mortgage is a first lien upon the Northern California Extension only to the extent of the First Mortgage Bonds used in the acquisition thereof, and that otherwise the said Northern California Extension is subject to the pari passu lien of the General and Refunding Mortgage.

5. The District Court has erred in approving a plan of reorganization which fails to recognize that substantial items of non-carrier real estate, as well as cash, and receivables are free from the lien of either the First Mortgage or the General and Refunding Mortgage and that, therefore, the holders of General and Refunding Mortgage Bonds are entitled to share in the value thereof and to receive securities of the same type as issued to holders of First Mortgage Bonds on account of their share therein.

6. The District Court has erred in approving a plan of reorganization which fails to attribute adequate value to the cash deposited under the General and Refunding Mortgage and to the vote and stock of Tidewater Southern Railway Company pledged under said Mortgage.

7. The District Court has erred in approving a plan of reorganization which fails to recognize that the Central California Traction Company bonds and stock and the Alameda Belt Line Stock, all pledged under the General and Refunding Mortgage, are of material vaiue and such value

should be considered in determining the allocation of securities.

Dated: October 9, 1940.

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[Endorsed]: Filed Oct. 10, 1940. [1291]

Before the Interstate Commerce Commission

Finance Docket No. 10913

The Western Pacific Railroad Company Reorganization.

REPLY OF RECONSTRUCTION FINANCE CORPORATION TO EXCEPTION BRIEFS FILED BY OPPOSING PARTIES TO PROPOSED REPORT OF THE BUREAU OF FINANCE.

Three plans were filed with the Commission in this proceeding; and the Bureau has recommended

that the Commission adopt a plan which differs from any of the three filed. Each of the intervening parties has filed exceptions, with accompanying briefs, to the plan proposed by the Bureau.

At page 51 of the brief filed by the Bondholders' Committee the following suggestion is made:

> "The Bureau Plan seems lacking in specification on important substantive points. To obviate any justifiable basis for such a criticism of the ultimate Plan, the Bondholders' Committee urges that before the Commission publicly announces the Plan which it will approve, it give to all the interested parties an opportunity to confer with its representatives and work out the provisions of the ultimate Plan in sufficient detail to make to the security holders an adequate disclosure of what they are voting upon."

Reconstruction Finance Corporation (hereinafter called "Reconstruction") regards this as a constructive suggestion, inasmuch as such a conference should afford the Commission an opportunity of [1510] exploring the practical chances of a composition being worked out in this proceeding. The brief filed by the Debtor is frankly based upon the following assumption (page 30):

> "Section 77, like the Frazier-Lemke Act, the Home Owners' Loan Act, the various state enactments providing for the suspension of foreclosure remedies, and a great mass of legislation, Federal and state, which came in the wake of

the depression, was all for the protection and relief of the Debtor, and not for the aid of the creditors, and we submit with all deference, to the Bureau of Finance that the Commission should recognize this as the true spirit of Section 77."

The position of the Debtor is shown by the emphasis given to the above statement by placing it in the concluding paragraph of its brief (page 30).

The very nature of a composition is that a plan will be evolved which will receive the approval of the required percentage of *each class* of creditors and stockholders. This is admitted in the brief filed in behalf of the Debtor in the Chicago and Eastern Illinois Railway Company Reorganization Proceedings, Finance Docket No. 9952, from which we shall take the liberty of quoting (pp. 22-23):

"At the outset of our analysis of the statutory provisions we wish to direct attention to the fact that the principles of bankruptcy compositions go only to the point of binding dissenting minorities to compromises agreed to by a majority. If a majority will not agree the due-process clause of the Constitution prevents imposition of a composition upon them. See Louisville Bank v. Radford, 295, U. S. 555, particularly at pages 585-586; Ogilvie v. Dexter Horton Estate, 86 F. (2d) 282, at p. 283. [1511] It necessarily follows that statutory provisions prescribing for dissenting *classes* better treat-

ment than composition principles would produce in no way negative the conclusion that the statute adopts composition principles with respect to the treatment of dissenting *minorities* in classes which accept the plan. Similarly, statutory provisions and decisions determining how much must be given to a class in order to eliminate the necessity of its consent are not in point. Typical of such decisions are Tennessee Publishing Co. v. American National Bank, 81 F. (2d) 463; In re Murel Holding Corporation, 75 F. (2d) 941; Francisco Bldg. Corporation, Limited v. Batson, 83 F. (2d) 93. The holding in Louisville Bank v. Radford, 295 U. S. 555, was on such a point.

"We are here concerned only with the treatment which the statute prescribes for dissenting minorities in classes which accept the plan; not with the treatment which must be accorded non-assenting classes. *Composition principles cannot be applied to the latter situation.*" (Italics ours.)*

* To prevent misunderstanding, it must not be taken for granted that Reconstruction agrees with the viewpoint of the Debtor in the Chicago and Eastern Illinois proceeding, that, even in a case where it would seem likely that the requisite assents can be obtained from each class, the so-called doctrine of Northern Pacific Railway Co. v. Boyd, 228 U. S. 432, is not applicable. On that point, it is not necessary to take a position in this proceeding at the present time, since on the basis of the record herein, it remains to be shown that a composition can be proposed which will be acceptable to all the various classes. [1512]

If from such a conference it would appear to the Commission that there is no reasonable expectation of the Commission being able to approve a plan in the instant reorganization proceeding, which will command the assent of each class of creditors, then it is respectfully submitted that the Commission has no other alternative herein (if it is to approve any plan at all in this proceeding) than to approve a plan which recognizes the well-established decisions of the Supreme Court and the lower Federal courts with respect to railroad reorganizations, giving effect to the elementary principles so effectively stated by District Judge Hincks in the New York, New Haven and Hartford Railroad Company reorganization proceeding now pending in his court and before this Commission, viz:

"* * * since only an equitable plan may be approved, the plan must provide that every creditor in the order of his priority shall receive under the plan rights which in equity are the fair equivalent of such of his rights as have been subjected to equitable modification, at least in so far as the assets of the debtor's estate permit. *Any creditor found to be only partially secured is entitled to the equitable equivalent of such security as he has, with a right to share in equality with common creditors for the excess of his claim as allowed above the value of his security as ascertained by equitable considerations.* And the plan must recognize the prior right of common

creditors with respect to such assets as remain after equitable treatment has been accorded to secured creditors. Kansas City Ry. v. Central Union Trust Co., 271 U. S. 445. Such is the intent of the Act: * * *." (Italics ours.) In re New York, New Haven and Hartford Railroad Company; 16 F. Supp. 504, 509 (D. C., D. of Conn., Sept. 16, 1936).

The position taken by Reconstruction and the position taken by The Railroad Credit Corporation in their exceptions, are in accordance with the foregoing equitable principles. So, likewise, would seem to be the position taken by the Bondholders' Committee except that it is based on the assumption that the General and Refunding Mortgage is in all respects junior to the First Mortgage, a view which [1513] is clearly erroneous, as shown by exceptions, and accompanying brief, filed by the Irving Trust Company, trustee of the General and Refunding Mortgage. Likewise, the Bondholders' Committee neglects entirely that there is pledged both with Reconstruction and The Railroad Credit Corporation other collateral besides General and Refunding Bonds. As a matter of fact, both these parties, as appears from their respective exceptions, hold substantial additional collateral. (See exceptions of Reconstruction, pp. 5-8, and exceptions of The Railroad Credit Corporation, pp. 2, 8-9.) The Committee likewise does not mention the Bureau's discrimination against Reconstruction in failing to

recognize some $2,150,000 of accrued unpaid interest on the General and Refunding Mortgage Bonds pledged with Reconstruction, though recognizing the interest accrued and unpaid on the First Mortgage Bonds. Clearly, this interest is as much a part of the indebtedness represented by these Bonds, as is the principal thereof (see exceptions of Reconstruction, pp. 2-5).

The position of the A. C. James Co. requires special mention. It is not unlike the position taken by Reconstruction and The Railroad Credit Corporation, with one very important point of difference. The A. C. James Co. assumes that the claims of itself, Reconstruction, and The Railroad Credit Corporation are all fully secured and that there can be no deficiency on any of these claims. Without this assumption there can be no justification for the A. C. James Co. dismissing as [1514] inapplicable herein (page 19 of its brief) the rule in equity laid down in First National Bank of Ottawa v. Kay Bee Co., et al., 366 Ill. 202, 7 N.E.(2d) 860 (1937), with respect to deficiency claims.

Unless, and until the Commission determines the value of the collateral pledged as security for the respective claims of Reconstruction, The Railroad Credit Corporation and the A. C. James Co., it is respectfully submitted that the Commission should recommend to the court that all three creditors be permitted to reduce their collateral to possession, in order that the deficiencies on their claims, if any, may be established in court in accordance with customary practice in past reorganizations.

By this reply Reconstruction is not to be deemed to have modified or waived in any way its rights as contended for in its exceptions and in the several briefs which it has filed herein. Neither is the failure to discuss in this reply any of the proposals or principles, or statements or conclusions of fact, set forth in any of the opposing exceptions and briefs, which are in disagreement with the position taken by Reconstruction in its exceptions and briefs, to be taken as either an acceptance or an admission of the soundness or accuracy of any thereof.

In filing this answer, Reconstruction desires to assist the Commission in the development of a plan that will be able to withstand [1515] attack by dissentient classes, and will lead to a successful reorganization of the Debtor in the present proceeding.

Respectfully submitted,

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Of Counsel:

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General Counsel.

[Endorsed]: Filed Oct. 5, 1939. [1516]

Before the

Interstate Commerce Commission

Finance Docket No. 10913

In the Matter

of

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION

REPLY BRIEF ON BEHALF OF

Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing a Group of Not Exceeding Twenty-five Bona Fide Holders of the First Mortgage Bonds of The Western Pacific Railroad Company (Hereinafter Called the Bondholders' Committee). [1517]

TABLE OF CONTENTS

	Page of Original Printed Document	Page of Printed Record
I. Total Capitalization	2	1664
II. Total Debt	3	1666
III. Total Fixed Charges	5	1668
IV. Future Financing	6	1669
V. No Par Value Common Stock	8	1672
VI. Provision for New Money	8	1672
VII. Treatment of Present First Mortgage Bonds	11	1675
VIII. Treatment of RFC, RCC and ACJ	14	1679
IX. Protection of Dissenting Classes by Sale at Fair Up-Set Price	21	1686
X. Effective Date of the Plan	23	1689
XI. Conclusion	23	1689

[1518]

The main briefs heretofore filed herein demonstrate that the Debtor and all its creditors are in agreement not only that the Bureau Plan is invalid but also that it is impracticable and unavailable as a basis of discussion for bringing together the various interests concerned in this reorganization.

While, on superficial examination, the paths of reasoning by which the several interested parties have reached this common conclusion would appear to be divergent, careful analysis of the arguments contained in the various briefs (including those filed before the Bureau in January) will indicate that in respect of certain problems the various interests are thinking along somewhat similar lines. Such analysis will also furnish [1519] to the Commission the basis for recommending a plan which has (1) a reasonable chance of securing the assent of all classes of creditors or (2) in the alternative, a reasonable certainty of being carried through after a minimum of litigation and without being wrecked on constitutional grounds.

It will be the purpose of this Reply Brief to attempt such an analysis.

I

Total Capitalization

The Debtor and everyone of its creditors has opposed the drastically low capitalization imposed by the Bureau Plan, either directly or by urging a larger amount of securities for its own claim.

The Bureau Plan recommends a total capitalization of $91,406,510, all in securities of par value.

As against this:

The Debtor[1] now asks $88,318,269 with 300,000 no par value Common shares which, if valued at $100 per share, gives a total of $118,518,269 (brief, p. 29).

ACJ[1] now asks $111,474,730, all in securities of par value (brief, p. 44).

The Bondholders' Committee asks $69,553,056 plus 339,995 no par value Common shares which, if valued at $100 per share, gives a total of $103,552,556. The Bondholders' Plan contemplates the possibility (though not the probability) of a maximum of 150,000 additional shares of no par value Common Stock in connection with underwriting the raising of the new money.

While neither RFC nor RCC suggests a figure as to the total, both insist that the amount of securities allotted them in the Bureau Plan is inadequate, arguing not only for more securities for the principal of their collateral General and Refunding Bonds but also for more securities in recognition both of interest on these bonds and of other collateral (RFC brief, pp. 2-10; RCC brief, pp. 8-9). Accordingly, it is clear that the criticism of the Bureau Plan by RFC and RCC includes criti-

[1]References are to the Debtor's Plan and the James Plan as modified by suggestions contained in the present main briefs of the Debtor and ACJ respectively. [1520]

cism of the low capitalization permitted by the Bureau Plan.

As has already been indicated by the two briefs heretofore filed by the Bondholders' Committee and for additional reasons hereinafter pointed out, the Bondholders' Committee believes that the total capitalization suggested by the Bondholders' Plan (1) provides an adequate amount of securities to permit "due recognition" of the rights of all parties; (2) is conservative in the light of all the "relevant facts", and (3) furnishes a reasonable compromise between the views of the junior creditors, based on their private interests, and the apparent views of the Bureau based on its conception of the public interest.

II

Total Debt.

The Bureau Plan limits the total debt to $31,764,230.

As against this:

The Debtor now asks $71,825,997 of debt (brief, p. 29).

ACJ now asks $71,783,308 of debt (brief, p. 44).

The Bondholders' Plan contemplates $41,622,250 of debt.

Again neither RFC nor RCC suggests any specific figure with respect to total permissible debt, but RFC mentions, with apparent acceptance of the principle involved, [1522] its original conditional offer under the Debtor's original Plan to pur-

chase $10,000,000 of First Mortgage Bonds out of a total debt of $77,591,595, of which $25,675,000 were to be First Mortgage Bonds (RFC brief, p. 13).

The Debtor and ACJ request these large amounts of debt in order, as contemplated by their Plans, to permit all present debt to continue *as debt* (Debtor's brief, pp. 9-11, 27; ACJ brief, pp. 42-44).

Of course, the Bondholders' Committee would much prefer to have the bondholders interest in the property continue as debt, rather than be commuted into stock of any class, *if it believed the circumstances permitted.*

It was solely because the Bondholders' Committee endeavored fairly to appraise the public interest in a sound capital structure, as well as to recognize that the bondholders' own private interests would better be served by the attainment of a sound capital structure than by undue piling up of debt, that the Bondholders' Plan conceded the conversion into preferred stock of a part of the position of the present First Mortgage Bonds. As pointed out in its main brief, the Bondholders' Committee believes that its concession in this regard may have been greater than the circumstances really require, and may, as the Debtor's brief also suggests (p. 26), have resulted from the Committee's taking an unduly conservative view of the future prospects of the property.

If, however, while making this concession in "the public interest," the Bondholders' Plan nevertheless

less provides "due recognition" for the interests of the other creditors, does not the relative division of the capital structure into debt and stock proposed by the Bondholders' Plan furnish [1522] the most satisfactory and feasible basis for dealing with this particular problem?

III.

Total Fixed Charges.

While, on this point, the ACJ brief superficially indicates agreement with the Bureau Plan, and the RCC brief is silent, the arguments advanced in both those briefs with reference to the proposal of the Bureau Plan for raising the new money necessarily condemn the principle upon which the Bureau Plan based its limitation of obligations bearing a fixed charge (ACJ brief, p. 38; RCC brief, pp. 4-8).

Out of the permissible debt, the Bureau Plan and the James Plan permit only $10,000,000 to be represented by First Mortgage fixed charge obligations.

The Debtor's original Plan urged $25,675,900, and although its present brief accepts the bondholders' lower concession, the Debtor still declares its original suggestion of that amount to be sound (brief, pp. 8-9, 25-26).

The Bondholders' Plan proposes $19,858,020.

The RFC, through its reference to its conditional offer to purchase at par $10,000,000 of First Mortgage Bonds out of the total of $25,675,900 pro-

posed by the original Debtor's Plan, indicates its approval of that amount of First Mortgage Bonds (brief, p. 13).

All the briefs, in their indication that the $10,000,000 of First Mortgage 4% Bonds proposed by the Bureau Plan are worth a premium above par, with no bonus of Common Stock, indicate, as expressed by the RCC brief (p. 6) (and in substantially similar language by the RFC brief, p. 13), the belief of all parties that the Bureau Plan "tends [1523] not only to discredit the securities of the New Company but to discredit even the new First Mortgage Bonds themselves."

Here again the "ultra conservative" suggestion of the Bondholders' Committee, contrary to what might seem to be their own selfish interests, that the First Mortgage Bondholders receive only 20% of their principal in First Mortgage 4% Bonds, would seem to be both a generous recognition of the paramount public interest, and also a fair compromise in the light of the bondholders' further concession that 40% of their principal and all their interest may be converted into stock.

IV.

Future Financing

The RFC brief criticizes (p. 12) the provision of the Bureau Plan (equally pertinent to the Bondholders' Plan) permitting a total authorized issue of $50,000,000 principal amount of bonds under the First Mortgage, with provision for future is-

sues for 75% of capital expenditures. It urges that this will encourage the piling up of debt and that "the new Mortgage should provide restrictions * * * against the issuance of additional bonds when there is insufficient earnings coverage." With the principle behind this suggestion of the RFC the Bondholders' Committee is in entire accord. It believes that the First Mortgage restrictions upon the issue of further bonds should be such as not to encourage the use of First Mortgage Bonds for future financing.

However, the detail of the RFC suggestion, it is submitted, is erroneous in two respects.

In the first place: The important thing is not the total authorized amount of First Mortgage Bonds, but the [1524] circumstances under which bonds may from time to time be issued. Indeed, if the restrictions upon future issues are such as to encourage the maintenance of a sound capital structure, it may well be wise to omit any dollar amount as the authorized maximum, substituting a fixed maximum ratio to capital stock.

In the second place: It is in times when earnings coverage is reduced that a carrier will be forced to use its best bonds in order to keep down the cost of new money. It is in prosperous years, when earnings coverage on senior bonds is excessively high, but earnings coverage on junior bonds or equity securities is adequate to permit their sale on reasonable terms, that the use of First Mortgage Bonds should be denied and the use of junior securities compelled. It was for that rea-

son that the Bondholders' Committee in its main brief adopted the suggestion contained in the Bureau's Proposed Report (but not in the Bureau Plan) that the Income Mortgage should be opened to provide for the new financing.

If Income Mortgage Bonds are to be saleable at any reasonable price to provide future financing, their interest cannot be wholly non-cumulative, but must be made cumulative for some reasonably limited period, such as the three years suggested by the Bondholders' Plan. Therefore, adequate provision for the future, as well as due recognition of the bondholders' present rights in the Debtor's property, requires that this limited cumulative feature pertain to the Income Mortgage Bonds.

The Bondholders' Committee also believes that under the capital structure which it proposes not only the Income Bonds, but also the Participating Preferred Stock, might be made available for future financing. [1525]

The details of these suggestions are too complicated to be set forth in this brief, and it is submitted, should not be worked out by the Commission itself without the benefit of conferences among all the interested parties. Accordingly, this is one of the points in respect of which the Bondholders' Committee urges that the Commission, when it has settled general principles involved, should confer with all the parties in interest to work out the detailed provisions of the ultimate Plan.

V.

No Par Value Common Stock.

With the arguments advanced in the Debtor's brief (pp. 14-19) in support of its contention that the Common Stock of the reorganized Debtor should be without par value, the Bondholders' Committee is in entire accord.

With the arguments advanced in the briefs of RFC (pp. 15-17) and RCC (pp. 4-7) that the use of par value stock creates a risk upon its recipients as to its full paid character and that this risk is accentuated by the provisions of the Bureau Plan with respect to the provision of new money, the Bondholders' Committee is also in accord. These arguments furnish an additional persuasive reason why the Commission should permit the Common Stock of the reorganized Debtor to be without par value.

VI.

Provision for New Money

Every creditor, even including ACJ, the dominating interest in the Western Pacific Corporation, joins in the condemnation of the Bureau's proposal for raising new money. All agree that that proposal constitutes such an [1526] unnecessary discrimination in favor of Western Pacific Corporation as completely to invalidate the Bureau Plan (Bondholders' brief, pp. 24-27, 41-47; RFC brief, pp. 11-18; RCC brief, pp. 4-8; ACJ brief, p. 38; Refunding Mortgage Trustee's brief, pp. 19-21). Even the

Debtor, the wholly owned subsidiary of the Western Pacific Corporation, impliedly disapproves the proposal (Debtor's brief, pp. 6, 28-29).

RFC and RCC join the Bondholders' Committee in pointing out the "unrealistic", "futile" and "illusory" character of the proposal of the Bureau Plan for successive offering of the new money "package" to the junior creditors and then to the First Mortgage Bondholders upon exactly the same terms as the original offering to the Western Pacific Corporation (RFC brief, p. 18; RCC brief, p. 7; Bondholders' brief, pp. 44-45).

The Debtor, ACJ, and RFC indicate a belief, and RCC a hope, that $10,000,000 of First Mortgage 4% Bonds can be sold at par without a bonus of Common Stock.

The Debtor's original proposal (which as already pointed out the Debtor still defends, although accepting the bondholders' concession in asking but 20% instead of 30% in First Mortgage Bonds) and also the RFC brief (p. 13), indicate the belief that $10,000,000 First Mortgage 4% Bonds can be sold at par, without a stock bonus, even though the total issue of such bonds aggregates $25,675,900.[1]

It must, therefore, be clear that the reasonable probability is that a "package" composed of $10,-

[1]The ACJ brief on this point is somewhat ambiguous since it is discussing $10,000,000 of First Mortgage Bonds constituting the sole outstanding first lien, but on the other hand, part of a capital structure in which there is $61,783,308 of additional debt.

000,000 of [1527] First Mortgage Bonds out of a total issue of but $19,858,020, together with 30% of the Common Stock, subject to prior charges of only $3,542,443 (only $3,263,135 if the Preferred dividend is reduced to 5%) as proposed by the Bondholders' Plan, should be saleable at the par value of the bonds and provide the necessary new money.

The Bondholders' Plan also contains the provisions, suggested by the briefs of both RFC (p. 13) and RCC (p. 6), that if a 4% coupon will not bring substantially par for the bonds, the coupon rate may be adjusted upward.

The Bondholders' Plan also meets the criticism of RFC and RCC as to the illusory and futile character of the Bureau Plan's offerings of the new money "package", first to junior creditors, and then to the First Mortgage bondholders, after an offering on the same terms has been rejected by the Western Pacific Corporation. The Bondholders' Plan steps up, on the successive offerings, the amount of bonus stock to be contained in the "package" with the bonds. This tends to insure the raising of the new money even without raising the interest rate, should (as is not expected to be the case) the original offering to the Western Pacific Corporation not be availed of.

The Bondholders' Plan contains the further insurance feature of permitting underwriting. Although it is believed this will not be necessary, it would seem to be wise foresight to contemplate the possibility that it may be necessary by including in

the Plan such a permissive provision. The recent collapse of the securities market while several offerings to stockholders were outstanding, furnished striking examples of the value of underwriting.

The criticisms of RFC (p. 11) and RCC (p. 8) that the record shows no necessity for $10,000,000 of new money [1528] overlooks the facts that already $6,400,000 of Trustees' Certificates are outstanding which must be retired, and that an additional $3,300,000 is required to complete the rehabilitation program (Ex. 38). There can be no question as to the necessity for the $10,000,000 of new money.

The Bondholders' Committee therefore urges that the provisions of the Bondholders' Plan with respect to providing the new money should be approved by the Commission as written in the Bondholders' Plan and without the modification which the Bondholders' Committee indicated in its main brief it would be willing to accept (p. 58, modification 9).

VII.

Treatment of Present First Mortgage Bonds.

The Bondholders' Plan is predicated upon the fact that the First Mortgage is a lien prior to the General and Refunding Mortgage upon all assets of the Debtor of any substantial value.

That fact is recognized to the full in the Debtor's original Plan and the Debtor's new proposal (pp. 27-29) modifies it only to the extent of subordinating Preferred Stock allotted to present First

Mortgage Bond interests, in favor of notes allotted to RFC, RCC and ACJ.

Since the original James Plan denied participation to all claims for interest, it in principle recognized the full priority of the present First Mortgage Bonds, and its present modifications continue (pp. 42-44) to recognize that priority as to principal but, as in the case of the Debtor's modified Plan, subordinate Preferred Stock allotted to First Mortgage Bond interest to debentures proposed to be issued to junior creditors. [1529]

Upon the fact of the First Mortgage priority the Bondholders' Committee will stand. The contrary contention made in the brief of the Irving Trust Company, as Trustee under the General and Refunding Mortgage, is without sufficient merit to justify any concession by the bondholders by way of compromise with respect either to the principal of, or the interest upon, the present First Mortgage Bonds.

For the answer to this contrary contention the Bondholders' Committee refers both to its own[1] and the First Mortgage Trustees' January, 1937, briefs before the Bureau of Finance and to the present reply brief of the Trustees under the First Mortgage.

Concurring with the assertion of the Bondholders' Committee as to the priority of the First Mort-

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[1] See pages 36-63. See particularly page 56 with reference to agreements made by RFC, RCC and ACJ with the bondholders upon their extension of the 1934 bond interest.

gage, the Bureau Plan nevertheless commuted the present First Mortgage Bonds into

Non-cumulative, 4% Income Mortgage Bonds for 40% of principal;

Non-cumulative, 5% Preferred Stock for 60% of principal;

Common Stock for accrued interest, but on a basis less favorable than that allotted junior creditors.

That there is no possible justification for such drastic treatment of the First Mortgage Bonds, nor any possible expectation that it would be accepted by the bondholders, [1530] seems clear even from the arguments advanced in the briefs of the Debtor and the other creditors.

The Debtor (pp. 25-29) now tenders the First Mortgage Bondholders

20% of principal in First Mortgage 4% Bonds.

80% of principal in non-cumulative, 4% Income Mortgage Bonds; and

Interest in Preferred Stock, but subordinate to the principal of notes issued to junior creditors.

The James Plan, as now modified (pp. 42-44), offers:

100% of principal in non-cumulative, 4% Income Mortgage Bonds; and

Interest in Preferred Stock, but subordinate to the principal of debentures issued to junior creditors.

The Bondholders' Committee, in an "ultra conservative" concession to the public interest in a sound capital structure, asks:

20% of principal in new First Mortgage 4% Bonds,

40% of principal in Income Mortgage 5% Bonds, cumulative against three years' income; and

40% of principal, and accrued interest, in 6% Preferred Stock non-cumulative to the extent that dividends for any year are not earned.

The arguments advanced in the briefs of the Debtor and all its securityholders establish that this allotment can be made within the limits of a sound, even conserva- [1531] tive, capital structure (Debtor's brief, pp. 5-9, 25-27; Bondholders' brief, pp. 8-35; ACJ brief, pp. 4-10, 42-44; RFC brief, pp. 11-18; RCC brief, pp. 4-8).

The principles enunciated even in the proposed Bureau Report sustain the bondholders' request.

The Commission should therefore approve it as made, including a maximum dividend rate of 6% on the Preferred Stock to compensate for the years in which the earnings will provide a dividend, if any, materially below the 5% return on the present First Mortgage Bonds. However, as stated in the main brief of the Bondholders' Committee (pp. 32-34), it is not believed that a reduction of the Preferred Stock dividend rate from 6% to 5% would defeat acceptance of the Plan by the bond-

holders in the interest of an expeditious reorganization if the Commission, sitting in a judicial capacity (as contrasted with "trading"), should determine that such a concession is required.

VIII.

Treatment of RFC, RCC and ACJ.

The briefs filed on behalf of these three creditors demonstrate not only the complicated character of their rights in the Debtor's property but also the hopeless conflict between them as to the proper method of appraising those rights in the reorganization.

The ACJ brief concedes (pp. 15-23) that the effect of the pledge of the General Mortgage Bonds to secure the RFC Note, RCC Note and ACJ Note, was not to create a new and additional *debt* (in the form of General and Refunding Bonds), but merely to give to the three Notes rights in the property proportionate to their collateral, [1532] and that upon the enforcement of their collateral they should share the proceeds in proportion to the principal amounts of their collateral, but up to the amount of the debts represented by the Notes, *if those proceeds so distributed leave a deficiency on any of the Notes*. But it asserts that they cannot properly be allotted new securities in proportion to the principal amount of their collateral, *because the Notes are all fully secured and there can be no deficiency on any of them*.

RFC (pp. 2-5) and RCC (p. 8), on the other hand, apparently assert that the Debtor's *debt* to

them is represented by the pledged General and Refunding Mortgage Bonds, and that they are entitled to interest on those bonds. This means that RFC contends that for a *loan* of $2,963,000 the Debtor incurred a *debt* of $10,750,000 which together with interest to January 1, 1938 amounts to $12,900,000 (see RFC brief, pp. 4-5). If this proposition needs any more answer than its mere statement, the answer is to be found in the very cases cited by ACJ (pp. 17-18), the fellow creditor of RFC and RCC, as well as the cases cited in the January, 1937, brief (p. 66) of the Bondholders' Committee.

RFC (pp. 8-10) and RCC (pp. 4-8), in further conflict with the contentions of ACJ, deny that they are fully secured, and assert that they are entitled in the reorganization, not merely to securities for their debt itself, plus apparently also for their collateral itself, but also to additional securities in recognition of their "deficiency". This contention produces the somewhat anomalous result that the less a secured creditor is secured (i.e. the greater his deficiency), the greater will be his participation in the reorganization of his debtor. [1533]

All three of these junior creditors (RFC brief, pp. 5-8; RCC brief, pp. 8-10; ACJ brief, p. 24) also make much of the point of their interlocking and cross liens (e.g., the second lien of RFC upon certain RCC collateral and conversely the second lien of RCC upon certain RFC collateral) and seem to make the argument that the fact that there are

two liens upon the same collateral requires a double allotment of securities in the reorganization. This complication is also adverted to in the Debtor's brief (pp. 19-21, 27).

RFC (pp. 5-8) and RCC (pp. 8-10) also stress their rights in collateral, not affecting the Debtor or its property (e.g., the D&RG stock), but pledged by third parties to secure the indebtedness of the Debtor. Their argument apparently is that because third parties have pledged independent property to secure the Debtor's obligations, the Commission and the Courts are without power under Section 77 to affect the Debtor's obligations in respect of which the third party pledge was made.

The Debtor joins the chorus of complications with the point that the Bureau Plan disregards its "equity of redemption" in the pledged General and Refunding Mortgage Bonds and asserts its right (p. 20) to

(a) a reasonable nisi period within which the Debtor may pay, and

(b) an opportunity to bid at a public sale, and

(c) a reasonable period thereafter within which to redeem.

With all this controversy between the junior creditors themselves, and between them and the Debtor, the Bond- [1534] holders' Committee has no concern except to see that the ultimate Plan shall so deal with these three creditors that none of them

has a reasonable chance of invalidating the Plan upon any of the points in controversy.

Both the Debtor's Plan, as now modified (pp. 27-29), and the James Plan, as now modified (pp. 42-44), attempt to solve this problem by allotting to the three junior creditors notes or debentures for the principal amount of their claims with accrued interest to the effective date of the Plan. These notes or debentures constitute fixed debt, maturing, in the case of the Debtor's Plan in 15 years, and in the case of the James Plan in 60 years, and in both cases ranking in priority to the Preferred Stock allotted to the accrued interest on the present First Mortgage Bonds. The Debtor proposes that these notes should be secured by new Preferred Stock in the same principal amount as the pledged General and Refunding Mortgage Bonds. ACJ would make the debentures convertible into $1,500 par value of Preferred Stock for each $1,000 Note, thus ultimately allotting to these junior creditors new securities ranking pari passu with those which ACJ allots to present First Mortgage Bondholders' interest, but with a premium of 50% in excess of the rate at which that stock is allotted to the First Mortgage Bonds.

Obviously these suggestions are wholly impracticable, as well as unduly discriminatory against the present First Mortgage Bonds.

If the present First Mortgage Bonds are to be commuted in part into stock, the junior debt cannot remain as debt, whatever the maturity of that debt may be.

Even if the present First Mortgage Bonds were to remain wholly (including accrued interest) as debt, it [1535] would not be proper to permit the debt issued for the junior RFC, RCC and ACJ claims to have a maturity earlier than that of the new obligations allotted to the First Mortgage Bonds and thus permit the payment of the junior creditors before payment of the senior bonds.

The situation does not permit the allocation to the RFC, RCC and ACJ General and Refunding Mortgage Bond collateral of anything higher than stock, and, the bondholders having made the concessions which the Bondholders' Plan tenders with respect to the bondholders' position, the Bondholders' Committee is in accord with the recommendation of the Bureau's proposed Report that the stock allotted in respect of the collateral General and Refunding Mortgage Bonds should be Common Stock.

But since the three creditors concerned cannot agree among themselves on a simple resolution of their complicated situation by the present distribution of that stock, the Commission must, if it is to have a Plan which will withstand attack, use a device which will recognize all the complicated legal rights which are properly asserted by these three claimants. That device is furnished in the Escrow Certificates provided by the Bondholders' Plan for these three claimants.

These Escrow Certificates constitute obligations of the reorganized Debtor to pay to the three several claimants the full amount of their respective

claims as of the effective date of the Plan, with interest at the rate of 4% per annum from that date to the maturity dates of the Certificates (RFC 5 years, RCC 6 years, and ACJ 7 years), or in the alternative, at the option of the reorganized Debtor, to deliver to the holders of the Escrow Certificates upon their maturity dates, the Common Stock issued in respect of the collateral General and Refunding Mortgage Bonds. [1536]

The successive rights of RCC in the RFC collateral, and of ACJ in the RFC and RCC collateral, are recognized by giving each successive claimant the right to redeem the collateral on which it has the subordinate lien by paying off the holder of the prior lien. Furthermore, this device recognizes the rights asserted by the Debtor as above quoted by giving to the Debtor a substantial "nisi period" within which to pay, and, in effect, a right of redemption.

The right of RFC, RCC and ACJ to interest on their claims to the effective date of the Plan is recognized by including in the principal amount of the Escrow Certificates the amount of that accrued interest. Their right to continuing interest on their claims thereafter is recognized by the provision that neither a junior creditor as to any of them, nor the Debtor itself, can redeem the Common Stock pledged under any Escrow Certificate, without paying interest upon the unpaid amount of the Escrow Certificate at the rate of 4% per annum from the effective date of the Plan.

The contention of RFC and RCC that they should have interest not only upon their primary debt but also upon their collateral bonds is, of course, wholly fallacious.

On the other hand, the contentions of RFC and RCC are sound that collateral pledged by third parties to secure their Notes, and not constituting a claim against the Debtor's property (e.g., the D&RG stock), should not be affected by the reorganization of the Debtor. Indeed, neither the Commission nor the Court can affect such outside collateral, for their jurisdiction, under Section 77, is limited to the *Debtor's property*. But on the other hand the fact of this independent collateral cannot add to the [1537] rights of RFC and RCC *in the Debtor's property* as against other creditors of the Debtor. Hence, the apparent arguments of RFC and RCC that (1) the existence of this outside third party collateral prevents the disturbance of their claims against the Debtor, or (2) that in the reorganization of the Debtor they must be allotted securities of the reorganized Debtor in recognition of this outside third party collateral are both entirely unsound.

The Bondholders' Committee did not intend, in the Bondholders' Plan, in any way to affect the outside third party collateral. To make the matter clear, and to protect RFC and RCC against any contrary claim by either AGJ or Western Pacific Corporation, the third party pledgors, an express declaration to the effect that the delivery of the

Escrow Certificates shall be without prejudice to any rights which RFC and RCC may have in outside third party collateral should be added to the Bondholders' Plan, and contained in the Escrow Certificates themselves.

RCC (p. 3) makes the further contention that it is entitled to preserve its rights under the Marshalling and Distributing Plan. The Bondholders' Plan expressly so provides with respect to the Escrow Certificate proposed to be delivered to RCC.

Accordingly, the Commission, to insure a Plan which cannot be upset by RFC, RCC or ACJ upon any argument founded upon the complications of their situation, should approve the adoption of the device of Escrow Certificates proposed by the Bondholders' Plan. Notwithstanding the willingness of the Bondholders' Committee, so far as the bondholders themselves are concerned, to eliminate those provisions, the Commission should not now eliminate them. [1538]

IX.

Protection of Dissenting Classes by Sale at Fair Up-Set Price.

The conflicting assertions of ACJ that the RFC, RCC and ACJ Notes are fully secured, and of RFC and RCC that they are entitled to recognition of a "deficiency," as well as the Debtor's own contention that its rights in the property represented by the General and Refunding Mortgage cannot be "expropriated" without "an opportunity to bid at

a public sale" confirm the wisdom, if indeed not the necessity, of including in the Plan the provision expressly permitted by sub-section (b)(5) of Section 77 for "the sale of all * * * the property of the Debtor * * * at not less than a fair up-set price" for the protection of any class which may dissent from the ultimate Plan.

The insertion of such a provision would also seem to be a wise precaution against an attack by the Debtor, or by the Western Pacific Corporation, upon the propriety of the finding, recommended by the Bureau, that the equity of the Preferred and Common stockholders of the Debtor has no value. While the Bondholders' Committee is not inclined to dispute the correctness of the Bureau's finding, it recognizes that the basing of the reorganization upon that finding (certainly on the present sketchy record) will subject the reorganization to the risk of long and complicated litigation which, to say the least, will not be frivolous. It is submitted that the public interest, as well as the private interest of the parties, that this particular reorganization shall be expedited, and the public interest that Section 77 shall be made workable, all require the elimination of this risk by the inclusion of the provision for a sale at a fair up-set price. The stockholders [1539] of the Debtor could then have no cause for complaint, even if the proposed Report were erroneous in its finding that their equity has no value.

Assuming the inclusion of such a provision, then if the Plan be confirmed but the First Mortgage

Bondholders dissent as a class, ACJ, believing the General and Refunding Bonds to be fully secured, can pay off the dissenting First Mortgage Bonds, or more probably, can bid in the property at that price, lower than the principal amount of those Bonds, at which the bondholders would be willing to give up their interest in the property.

Similarly, if either RFC, RCC or ACJ shall be a member of a dissenting class, they or any of them can bid in the property if they think it worth more than the bondholders are willing to pay to keep it for reorganization.

This expressly recognized "means for execution of the plan" would also serve to test out the rival claims of the First Mortgage Bondholders and the junior creditors as to the priority of the First Mortgage. The properties could be sold in parcels at a judicial sale and reorganized under the plan without waiting the delays which the ingenuity of counsel for the junior creditors can undoubtedly conceive in the litigation which will ultimately establish the priority of the First Mortgage. The proceeds of sale can be distributed later when the rights of the dissenting classes have been established. The judicial sale of properties similarly complicated by conflicting claims, and their reorganization, frequently occurred under the old equity procedure, the distribution of the proceeds of sale awaiting the determination of the litigation. [1540]

X.

Effective Date of the Plan.

RCC objects (p. 11) to January 1, 1937, as the effective date of the Plan on the ground that it is a date already passed. This objection seems to the Bondholders' Committee not to be without merit. The Commission should bear in mind that unless it promptly approves a Plan which has substantial hope of acceptance by enough securityholders to permit its consummation, even in the face of litigation, interest both upon the First Mortgage Bonds and upon the junior RFC, RCC and ACJ Notes will accrue in such an aggregate amount as to disturb the relationships between the parties and make January 1, 1937, so unreasonable an effective date as itself to constitute a valid objection to the Plan.

XI.

Conclusion.

The Bondholders' Committee urges the Commission, upon its consideration of all the arguments which have been made during the long delay of these proceedings, first in the January briefs of the several parties, then in the main briefs filed upon submission of the Bureau's proposed Report and the Bureau Plan, and now in the reply briefs, to approve the Bondholders' Plan with *only* the following modifications:

1. Modify the provisions of the new First Mortgage with respect to the issue of future First Mortgage Bonds, and open the Income

Mortgage to provide for future financing through Income Bonds, all under provisions to be worked [1541] out in conference with the parties and designed to induce future financing through junior securities, whenever such financing is feasible upon reasonable terms.

2. Eliminate the Contingency Reserve Fund.

3. Make the Sinking Fund payable out of available net income before Preferred dividends, but, as provided in the Bureau Plan, reduce it to an annual ½ of 1% Fund instead of a 1% Fund.

4. Clarify the provision respecting the offering of new securities to provide new money, by providing that it shall be made to the unsecured creditors, or their assignees (i.e.: the Western Pacific Corporation or RCC as its assignee, and Western Realty Company or Curtiss Southwestern Company as pledgee of its stock) proportionately to the amounts of their respective claims.

5. Include in the Escrow Certificates to be delivered to RFC and RCC for their Notes express provisions that they are delivered only in extinguishment, under Section 77, of the claims of RFC and RCC against the Debtor or its property; and that neither the delivery of said Escrow Certificates, nor their acceptance by RFC or RCC, shall prejudice the rights of RFC or RCC against collateral which has been

delivered by third persons to secure the obligations of the Debtor and which does not itself constitute a claim against the Debtor or the Debtor's property. [1542]

6. Provide that the Reorganization Committee shall be constituted of such number of members, not more than five, as the Commission may determine, but a majority of whom shall be elected by the bondholders in any manner which the Commission may prescribe.

7. Eliminate the provision requiring the consent of two-thirds of the bondholders to the confirmation of the Plan, but extend the provision for protecting a dissenting class through a judicial sale at a fair up-set price to include the bondholders as a class.

The Bondholders' Committee repeats its willingness to recommend acceptance by the bondholders of the further modifications mentioned on pages 58 and 59 of its main brief (including the reduction of the dividend rate on the Preferred Stock from 6% to 5%), if the Commission shall determine that any of those modifications should fairly be required. The Bondholders' Committee, however, now urges, in the light of the arguments revealed in the main briefs of several of the parties, that the modification of the Preferred Stock dividend rate is neither required nor fair, and that the suggested modifications of the procedure for raising the new money and for dealing with the claims of RFC, RCC and ACJ would be most unwise.

The Bondholders' Committee hopes that the Commission will recognize (what the Bureau seems to have failed to recognize) that the Bondholders' Committee has approached the problem of the Western Pacific Reorganiza- [1543] tion with a desire to give full recognition to the public interest, wherever it may conflict with the private rights of the bondholders, and also with the desire, as between their own private rights and those of other creditors, not to be unyielding or grasping of their "pound of flesh", but to make extreme concessions to junior interests in the hope of avoiding a forfeiture of those junior interests and of permitting them ultimately to recoup their present investments through the future growth and prosperity of the reorganized property.

Respectfully submitted,

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[Endorsed]: Filed Oct. 5, 1936. [1544]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

The Western Pacific Railroad Company
Reorganization

REPLY BRIEF ON BEHALF OF CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916. [1545]

INDEX

	Page of Original Printed Document	Page of Printed Record
Introductory Statement	1	1697
I. The Conclusions in the Report are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Equity in Equipment Subject to Leases, Conditional Sale Agreements or Equipment Trust Agreements	2	1697
(a) The So-Called "Exception Clause" in the First Mortgage	3	1698
(b) The Absence from the First Mortgage of the Proviso Appearing in the Refunding Mortgage	9	1706
(c) The Listing Application of December 21, 1931	9	1707
(d) Judge Sanborn's Opinion in "The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al."	11	1709
II. The Conclusions in the Report are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Northern California Extension and with Respect to the Various Branches and Spurs	12	1710
III. The Conclusions in the Report are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to Non-Carrier Real Estate	16	1715
(a) With Respect to Non-Carrier Real Estate Acquired Prior to the Execution and Delivery of the First Mortgage	16	1715

	Page of Original Printed Document	Page of Printed Record
(b) With Respect to After-Acquired Non-Carrier Real Estate	17	1716
IV. Any Property of the Debtor Which May Be Free of the Lien of the First Mortgage Is of Insufficient Value Materially to Affect the Fairness of Any Plan	19	1718
Conclusion	20	1720
Appendix—Memorandum Opinion of Judge Sanborn in "The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al."	21	1720

Table of Cases

	Page of Original Printed Document	Page of Printed Record
Brown vs. Pennsylvania R. Co., 250 Fed. 513, 518 (C. C. A., 3rd Circ., 1918), cert. denied 248 U. S. 558 (1918)	6	1703
Equitable Trust Co. of N. Y. vs. Wabash Railroad Co. (D. C., E. D. Mo., 1921, unreported)	3	1698
	6	1703
	10	1708
	11	1709
	21	1720
Kane vs. Schuylkill Fire Ins. Co., 48 Atl. 989 (Pa., 1901)	10	1708
Kinney vs. McBride & Co., 88 App. Div. 92 (N. Y., 1903)	10	1708
N. F. I. Bridge Co. vs. Grand Trunk Ry. Co., 241 N. Y. 85 (1925)	10	1708
Sternbergh vs. Brock, 74 Atl. 166, 169 (Pa., 1909)	10	1708

Table of Other Authorities

3 Williston on Contracts (Williston and Thompson Revised Edition), page 1779	6	1703

Introductory Statement.

The Refunding Mortgage Trustee has filed exceptions to the conclusions in the Report with respect to the extent and priority of the lien of the First Mortgage. The First Mortgage Trustees believe that the conclusions in the Report in this respect are correct and should be approved by the Commission.

This Reply Brief will be confined to a discussion of certain points raised in these exceptions of the Refunding Mortgage Trustee. For a more comprehensive analysis of the questions involved, the First Mortgage Trustees beg leave to refer to their brief dated January 9, 1937, heretofore filed in this proceeding. [1548]

I.

The Conclusions in the Report are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Equity in Equipment Subject to Leases, Conditional Sale Agreements or Equipment Trust Agreements.

The exceptions of the Refunding Mortgage Trustee to the conclusions in the Report with respect to the priority of the First Mortgage over the Refunding Mortgage as a lien on the Debtor's equity in equipment covered by leases, conditional sale agreements or equipment trust agreements are based upon the following grounds specified at pages 3-4 of the brief of the Refunding Mortgage Trustee dated September 24, 1937:

1. That the First Mortgage expressly excepts such equipment unless acquired by the use of First Mortgage Bonds or cash; and that the record shows that no First Mortgage Bonds or cash were used in the acquisition of such equipment.

2. That the First Mortgage omits the provision contained in the Refunding Mortgage* to the effect that when and as the Debtor acquires an equity in such equipment the equity becomes subject to the Refunding Mortgage.

3. That the Listing Application of December 21, 1931 (Exhibit 112), specifically states that such equipment is not subject to the lien of the First Mortgage. [1549]

4. That the Report is directly contrary to the conclusions reached in the memorandum opinion of Circuit Judge Sanborn in The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al., which is discussed at pages 52-54 of the brief of the Refunding Mortgage Trustee dated January 11, 1937.

These points will be discussed in order.

(a) The So-called "Exception Clause" in the First Mortgage.

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*In the briefs of the Refunding Mortgage Trustee dated, respectively, January 11 and September 24, 1937, the Refunding Mortgage is referred to as the "General Mortgage".

The Refunding Mortgage Trustee contends that the equity in the equipment covered by the three equipment trusts and the Baldwin Lease is entirely free of the lien of the First Mortgage, by reason of the following language (the so-called "exception clause") appearing on page 22:

> "and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust; or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

The brief of the First Mortgage Trustees dated January 9, 1937, sets forth the reasons why this contention is deemed unsound and states what the First Mortgage Trustees believe to be the correct interpretation (see pages 66-68). That brief points out that the "exception clause" should be construed both in the light [1550] of the language which precedes it in the same paragraph* and in the light of

*The language referred to is the language on page 21 of the First Mortgage which states in effect that the right of the Debtor to acquire property free from the lien of the First Mortgage shall not apply to "equipment * * * consisting of * * * property * * * used or acquired for use in or for the * * * operation of * * * any of the lines of railroad * * *

the paragraph which follows the habendum clause on page 22.** It further points on that the "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby", mentioned in the paragraph following the habendum clause, are those referred to in the "exception clause" and that therefore the "exception clause" cannot have the effect of making all equipment acquired under equipment trusts entirely free of the lien of the First Mortgage.

The First Mortgage Trustees believe that the correct interpretation of the provisions in question is as follows: the Debtor may acquire equipment and create equipment trust liens which are superior to the lien of the First Mortgage; if the equipment

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subject * * * to the lien of this indenture." The record shows that the equipment covered by the three equipment trusts and the Baldwin Lease was acquired for use, and was actually used, on the mortgaged lines.

**The full text of the paragraph following the habendum clause is as follows:

> "Subject, however, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture."

is of such character that it would, under the after-acquired property clauses, be free of the lien of the First Mortgage if otherwise acquired, it will be free of the lien when acquired under an equipment trust; but, if the equipment is of such character that it would, if otherwise acquired, be subject to the lien of the First Mortgage, that lien will attach, [1551] subject to the lien of the equipment trust, and will spread to the Debtor's equity in the equipment as payments are made on the equipment trust obligations.

The Refunding Mortgage Trustee, in its brief dated September 24, 1937 (see pages 4-8), attempts to meet that argument by suggesting that the phrase "equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby" refers only to the possibility that the equity in equipment, subject to equipment trust or conditional sale agreements, might be acquired by the use of First Mortgage Bonds or deposited cash, in which case such equity might come under the First Mortgage by virtue of the provisions relating to the use of First Mortgage Bonds or deposited cash.

Not only is there nothing in the language of the First Mortgage to indicate that the phrase quoted has so restricted a meaning; the suggested interpretation ignores the practical realities of equipment trust financing. For a railroad to purchase equipment under an equipment trust and to finance the acquisition of the equity with first mortgage bonds authenticated and delivered against the ac-

quisition of such equity would be so unusual as to be a practically unheard of situation. It is difficult to believe that the draftsman of the First Mortgage inserted the phrase above quoted merely to provide for such a situation. It is logical to suppose that he had in mind situations involving the ordinary methods of equipment trust financing.

The phrase "as to equipment hereafter acquired", to which the phrase above quoted refers, is general; if the draftsman had intended to limit the applicability of the provision to the particular situation suggested by the Refunding Mortgage Trustee, it would have been natural to use specific language of limitation, such as "as to equipment hereafter acquired against which First Mortgage [1552] Bonds shall have been authenticated and delivered or their proceeds or cash deposited hereunder paid out".

Nor does adopting the interpretation set forth in the brief of the First Mortgage Trustees dated January 9, 1937, result, as suggested in the brief of the Refunding Mortgage Trustee dated September 24, 1937, in permitting the language of the paragraph following the habendum clause "to override the clear and controlling language of the granting clauses" (see page 6). The language of the paragraph following the habendum clause merely affords additional evidence of the intent disclosed by the preceding provisions of the granting clauses. The "exception clause" cannot be construed apart from its context, and the paragraph following the

habendum clause forms a part of that context.

No rule of construction is more fundamental than that the "writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose."* [1553]

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*3 Williston on Contracts (Williston and Thompson Revised Edition), page 1779.

"The purpose of every written contract or conveyance is to express the intention of the parties thereto. The object of all construction of the terms of a mortgage or agreement is to ascertain that intention. That intention must be deduced from the entire mortgage or contract and the situation and circumstances of the parties when they made it. That intention when ascertained must prevail over the dry words of the instrument, inapt expressions, and careless recitals in the mortgage or agreement unless it is directly contrary to the plain meaning of the binding words of the instrument." United States Fidelity & G. Co. vs. Board of Commissioners of Woodson County, Kans. 145 Fed. (CCA) 144, 145. The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study." The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al., (Appendix, infra, pages 23-24).

"Of course, the sinking fund provision should be construed not by its terms alone, but with reference to all other provisions of the mortgage. And, similarly, the mortgage should be construed not arbitrarily by its terms, but with reference to the purposes for which it was made and the objects intended and achieved in its operation." Brown vs. Pennsylvania R. Co., 250 Fed. 513, 518 (C. C. A., 3rd. Circ., 1918), cert. denied, 248 U. S. 558 (1918).

An examination of the after-acquired property clauses and of the "free funds" provision of the First Mortgage discloses a clearly defined general purpose, namely, (1) to subject to the lien all after-acquired property of the character described, provided that such property falls within any one of four specifically enumerated categories,* and (2) to permit the Debtor, through the use of its credit, or free funds, to acquire free of the lien any such property which does not fall within one of the four specifically enumerated categories.

The language used on pages 17-18 of the First Mortgage to define the extent of the after-acquired property clauses is substantially identical with the language used on pages 21-22 (preceding the "exception clause") to define the limitations upon the Debtor's right to acquire property free of the lien. The language used is not contradictory; it is complementary. The after-acquired property clauses and the "free funds" provision, when placed side by side, fit together like the two parts of an ancient

*The categories enumerated are as follows:

(1) Property on account of which First Mortgage Bonds or deposited cash shall have been taken down;

(2) Property constituting an integral part of the mortgaged property;

(3) Property used or acquired for use in or for the maintenance or operation of or appertaining to any of the mortgaged property; and

(4) Securities of certain corporations.

parchment indenture and indicate clearly the general purpose above stated.

The "exception clause" appears at the end of the paragraph containing the "free funds" provision. It is a part of the sentence which sets forth the limitations upon the Debtor's right to acquire property free of the lien, and it is connected with the preceding part of the sentence by the conjunction "and". There is therefore a strong presumption that the "exception clause" [1554] was not intended to be inconsistent with the general purpose evidenced in the preceding part of the sentence.

The "exception clause" was obviously inserted to meet the requirements of a particular situation of great practical importance—the necessity of permitting the Debtor to finance purchases of equipment through loans secured by liens upon the equipment purchased. To that end it was essential to empower the Debtor to make effective pledges of the equipment—whether under the ordinary form of equipment trust or conditional sale agreement or under some form of chattel mortgage—as security for the advances obtained. There is no reason to believe that the draftsman of the First Mortgage sought to accomplish anything more. To accomplish that result, consistently with the general purpose above stated, it was only necessary to suspend the operation of the after-acquired property clauses to the extent required to vest an unencumbered security title in the equipment lienor; it was not neces-

sary also to prevent the lien of the First Mortgage from attaching to the Debtor's equity in such equipment, and such a result would be inconsistent with the general purpose above stated.

The First Mortgage Trustees believe that the "exception clause" should be given a meaning consistent with the general purpose above stated, and they believe that the granting clauses and the paragraph containing the "free funds" provision, on pages 21-22 of the First Mortgage, when read as a whole, have the effect of subjecting to the lien of the First Mortgage the Debtor's equity in the equipment covered by the three equipment trusts and the Baldwin Lease. [1555]

(b) The Absence from the First Mortgage of the Proviso Appearing in the Refunding Mortgage.

The Refunding Mortgage Trustee further contends that the absence from the First Mortgage of language such as appears in the proviso on pages 22-23 of the Refunding Mortgage is of "controlling significance" (see brief of the Refunding Mortgage Trustee dated January 11, 1937, page 51).

The First Mortgage Trustees believe that the construction of the provisions of the First Mortgage must be governed exclusively by the terms of that instrument, without reference to the terms of the Refunding Mortgage. As pointed out above (pages 3-8), the First Mortgage Trustees believe that, under the proper construction of the granting clauses of the First Mortgage, the Debtor's equity in the equipment in question is subject to the lien of the

First Mortgage. It is not perceived how this result can be deemed to be affected by the chance circumstance that the draftsman of a mortgage executed nearly sixteen years later considered it appropriate to insert in that instrument additional language not appearing in the First Mortgage.

(c) The Listing Application of December 21, 1931.

The Refunding Mortgage Trustee further contends that certain language appearing in the Listing Application of December 21, 1931 (Exhibit 112), indicates a practical construction of the First Mortgage as not covering the Debtor's equity in the equipment under discussion (see brief of Refunding Mortgage Trustee dated January 11, 1937, pages 48-49).

The Listing Application, however, at most indicates the construction placed upon the First Mortgage by the [1556] Debtor, which is the party beneficially affected by such construction. There is nothing in the record to indicate that either the First Mortgage Trustees or the First Mortgage Bondholders—the parties adversely affected—acquiesced in such construction. It is difficult to understand how the meaning of a contract can be deemed to be governed by a purely unilateral construction placed upon it by the party beneficially affected, without such construction being acquiesced in by the parties adversely affected.

> "Contemporary construction of a contract by acts of the parties is entitled to very great weight, but it ought to appear with reasonable

certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are now sought to be applied. In the present case there was no ratification shown, or even knowledge, of the entries as to taxes, which was sufficient to establish a construction by the parties." Kane v. Schuylkill Fire Ins. Co., 48 Atl. 989 (Pa., 1901); cited with approval in Sternbergh v. Brock, 74 Atl. 166 (Pa., 1909) at page 169.

See also:

N. F. I. Bridge Co. v. Grand Trunk Ry. Co., 241 N. Y. 85 (1925).

Kinney v. McBride & Co., 88 App. Div. 92 (N. Y., 1903).

On page 53 of the brief of the Refunding Mortgage Trustee dated January 11, 1937, appears a quotation from the opinion of Judge Sanborn in The Equitable Trust Company of New York, Trustee, v. The Wabash Railroad Company, et al. (see Appendix, infra, page 28) containing a statement of the doctrine of practical construction. [1557] It should be noted, however, that the facts relied upon by Judge Sanborn in that case as indicating a practical construction of the mortgage there under consideration showed that the construction adopted had been acquiesced in by the parties adversely affected (see Appendix, infra, pages 28-29).

To give to the Listing Application the effect claimed by the Refunding Mortgage Trustee would amount to adopting the fantastic proposition that

the lien of the holders of outstanding bonds can be changed or made to vanish by the mortgagor company inserting a statement in a listing application which the bondholders may never have seen or heard of.

(d) Judge Sanborn's Opinion in The Equitable Trust Company of New York, Trustee, v. The Wabash Railroad Company, et al.

The brief of the Refunding Mortgage Trustee dated January 11, 1937, quotes (at pages 53-54) excerpts from the above mentioned opinion (which is apparently unreported) but does not set forth the full text of the opinion. For the convenience of the Commission, the text of that portion of the opinion which deals with the question of after-acquired equipment is set forth in the Appendix to this brief.

The Refunding Mortgage Trustee, in its brief above mentioned, recognizes that the "general language in the Wabash mortgage is not sufficiently close to the language in the present First Mortgage to justify an extended discussion thereof" (page 52), and apparently cites the case only in support of two propositions: (1) the doctrine of practical construction, and (2) a rule of construction based upon the position of what Judge Sanborn calls the "reservation paragraph" (in terms reserving to the [1558] mortgagor company the right to acquire certain kinds of property free of the lien*) in the

*The "reservation paragraph" in the Wabash mortgage may be said to correspond roughly with the "free funds" provision in the First Mortgage, but the language of the two provisions differs so radically as to make a comparison unprofitable.

Wabash mortgage at the end of the property descriptions and just before the habendum paragraph.

The effect of the doctrine of practical construction has already been discussed (supra, pages 9-11). As regards the rule of construction based upon the position of the "reservation paragraph", it should be pointed out that we are not here dealing with a situation in which specific contradictory language in a "reservation paragraph" is relied upon to cut down the effect of broad general language in the preceding provisions of the granting clauses. As stated above (supra, pages 6-7), the language of the granting clauses of the First Mortgage and the language of the paragraph defining the right of the Debtor to acquire property free of the lien are not contradictory but complementary and, when read together, clearly indicate the intent of the parties. In view of this fact, the rule of construction mentioned in Judge Sanborn's opinion is of little help in ascertaining that intent.

II.

The Conclusions in the Report Are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to the Northern California Extension and with Respect to the Various Branches and Spurs.

The First Mortgage Trustees believe that the Report is correct in concluding that the First Mortgage is a first [1559] lien upon the entire Northern

California Extension and upon the various branch lines, spurs and industrial tracks. The questions involved are fully discussed in the brief of the First Mortgage Trustees dated January 9, 1937, at pages 4-48 (as to the Northern California Extension), at pages 48-54 (as to the branch lines), and at pages 54-57 (as to the spurs and industrial tracks). They are also discussed in the brief of the Institutional Committee dated January 9, 1937, at pages 44-52.

The Refunding Mortgage Trustee contends, in its brief dated September 24, 1937 (pages 9-12), that the lien of the Refunding Mortgage ranks equally with the lien of the First Mortgage upon the Northern California Extension and upon all branches, spurs and industrial tracks and the construction or acquisition of which was financed only in part with First Mortgage Bonds or deposited cash.

The argument advanced in support of this contention overlooks the fact that the bond take-down provisions of the First Mortgage do not permit the bonding of property unless the property bonded becomes subject in its entirety to the lien of the First Mortgage (see brief of the First Mortgage Trustees dated January 9, 1937, pages 26-27). In view of this requirement, there can be no merit in the argument that the provision on page 17 of the First Mortgage has the effect of making the First Mortgage a lien on property bonded only to the extent of the First Mortgage Bonds or deposited cash taken down.

The argument advanced by the Refunding Mortgage Trustee also overlooks the covenant contained

in Section 13 of Article Fourth of the First Mortgage (page 79), which reads as follows: [1560]

> "In case the Company shall hereafter mortgage any of the property which is, or by the terms hereof purports to be or which is intended to become, subject hereto, such mortgage shall be, and shall be expressed to be, subject to the prior lien of this indenture for the security of all First Mortgage Bonds then or thereafter to be outstanding hereunder."

In the face of this covenant, it is impossible to construe the after-acquired property clauses of the First Mortgage as creating a lien ranking merely pari passu with the lien of a subsequently executed mortgage on property financed only in part with First Mortgage Bonds or deposited cash. If the lien of the First Mortgage attaches at all to the property, it clearly attaches as a first lien upon the property in its entirety and is prior in every respect to the lien of the subsequently executed mortgage.

Inasmuch as the Refunding Mortgage by its terms (page 23) is made expressly subordinate to the lien of the First Mortgage, there can be no basis for any claim that the lien of the Refunding Mortgage ranks equally with the lien of the First Mortgage upon any property which is subject to the lien of the First Mortgage.

The Refunding Mortgage Trustee also contends, in its brief dated September 24, 1937 (page 9), and in its brief dated January 11, 1937 (pages 56-57 and

59-61), that certain branch lines, aggregating in length some twenty-three miles, and certain spurs and industrial tracks are free of the lien of the First Mortgage, because (it is asserted) their purchase, acquisition or construction was not financed by the use of First Mortgage Bonds or deposited cash.

With respect to these branch lines, the record shows that deposited cash was withdrawn to finance expendi- [1561] tures upon all of them, with the exception of only two, namely, the Glannvale-Bradford Winery Branch, which is about 1.6 miles long, and the Spanish Creek Spur, which is about 0.6 miles long.

The Refunding Mortgage Trustee contends that the use of First Mortgage Bonds or deposited cash to finance the making of additions and betterments to branch lines (as distinguished from the purchase, acquisition or construction thereof) is insufficient to subject such branch lines to the lien of the First Mortgage. This contention ignores the express language of Clause Third of the granting clauses of the First Mortgage (page 17), which provides in effect that after-acquired branches shall become subject to the lien of the First Mortgage if First Mortgage Bonds or deposited cash shall be taken down "on account of the purchase, acquisition or construction thereof *or work thereon*" (Italics ours). This contention also ignores the fact that, as stated above (page 13), the bond take-down provisions of the First Mortgage do not permit the bonding of

property unless the property bonded becomes subject in its entirety to the lien of the First Mortgage.

Moreover, it is clear that all of these branch lines constitute integral parts of the main line or are used in the maintenance or operation of the main line and are therefore subject to the lien of the First Mortgage (see page 17 of the First Mortgage), irrespective of whether or not their purchase, construction or acquisition was financed by the use of First Mortgage Bonds or deposited cash.

As regards the spurs and industrial tracks, the record shows that very substantial amounts of deposited cash were withdrawn under the First Mortgage to reimburse expenditures for the construction of numerous spurs, industrial tracks, and similar tracks located on [1562] various parts of the mortgaged lines. Furthermore, spurs, industrial tracks, and other similar tracks are, by their very nature, so inseparably connected with the mortgaged lines, and with their use and operation, that they clearly constitute an integral part of them. It therefore seems clear that all of the spurs, industrial tracks, and other similar tracks owned by the Debtor are subject to the lien of the First Mortgage, (1) because they are integral parts of the mortgaged lines, used in their maintenance and operation and appurtenant to them, and also, at least as to the substantial part of them, (2) because they were financed in whole or in part by the use of deposited cash under the First Mortgage.

III.

The Conclusions in the Report Are Correct as Regards the Extent and Priority of the Lien of the First Mortgage with Respect to Non-Carrier Real Estate.

(a) With Respect to Non-Carrier Real Estate Acquired Prior to the Execution and Delivery of the First Mortgage.

The Refunding Mortgage Trustee contends, both in its brief dated September 24, 1937 (pages 13-14), and in its brief dated January 11, 1937 (pages 65-69), that non-carrier real estate acquired prior to the execution and delivery of the First Mortgage is not subject to the lien thereof, because the plan of reorganization of the old Western Pacific Railway Company, dated December 15, 1915, provided that the First Mortgage Bonds were to be secured, inter alia, by a first mortgage upon all of [1563] the "existing railway properties" of the Debtor's predecessor.*

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*Article XIX of the Plan of Reorganization above referred to reads as follows:

"Statements Contained in Plan.

"This Plan has been adopted by the Protective Committee, acting under the Protective Agreement. The statements contained in the Plan have been compiled from sources believed to be reliable and accurate, but certain of them are necessarily approximate *and none is to be construed as a repre-*

Subdivision VII of the granting clauses of the First Mortgage (pages 15-16) covers the following property:

"All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause First of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled."

The language used is clear and free from ambiguity. It plainly includes all non-carrier real estate acquired by the Debtor from its predecessor, the Western Pacific Railway Company. The provisions of the plan of reorganization are inadmissible to contradict the clear and unambiguous provisions of the First Mortgage.

(b) With Respect to After-Acquired Non-Carrier Real Estate.

The arguments advanced by the Refunding Mort-

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sentation or as an inducement to any action or to any omission to act upon the part of anyone. No error or misstatement of any description in the Plan shall constitute ground for the withdrawal of any Depositor from the Plan and Agreement nor for any complaint with respect to the same or with respect to any consequences arising from having become a party thereto." (Italics ours.) [1564]

gage Trustee in support of its contention that after-acquired non-carrier real estate is not subje t to the lien of the First Mortgage are set forth at pages 14-15 of its brief dated September 24, 1937, and at pages 63-65 of its brief dated January 11, 1937. The questions involved are fully discussed at pages 57-62 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed in the brief of the Institutional Committee dated January 9, 1937, at pages 53-55.

The after-acquired property clauses of the First Mortgage are not limited to property actually used for transportation purposes, and the fact that the Debtor, in its reports to the Commission, characterized certain property as being for "non-carrier purposes" does not affect the question of the scope of the after-acquired property clauses of the First Mortgage. Moreover, the record shows* that most, if not all, of the major items which the Debtor reported to the Commission as "non-carrier" property were originally carried on the books of the Debtor as "carrier" property and were subsequently transferred from Account 701, which is the account entitled "Investment in Road and Equipment." The items so transferred include both property acquired prior to the date of the execution and delivery of the First Mortgage and property acquired subsequent to that date.

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*See Exhibit 12, Exhibit 31 (sheets 208, 233, 252, 273, 277, 278, 280, 281, and 284) and Exhibit 113 (footnote, page 4). [1565]

The after-acquired property clauses of the First Mortgage (page 21) cover property "acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject * * * to the lien of this indenture." It is difficult to understand how the lien of the First Mortgage upon property which had become subject thereto could be destroyed by a subsequent change in the accounting classification under which the property was carried upon the books of the Debtor.

IV.

Any Property of the Debtor Which May Be Free of the Lien of the First Mortgage Is of Insufficient Value Materially to Affect the Fairness of Any Plan.

The Refunding Mortgage Trustee, in support of its contention that the holders of Refunding Mortgage Bonds are entitled to more favorable treatment than is accorded them in the Plan proposed in the Report, sets forth at page 17 of its brief dated September 24, 1937, a list of property which the Refunding Mortgage Trustee claims is free from the lien of the First Mortgage. This list includes certain branch lines, spurs and industrial tracks, and non-carrier real estate, as well as certain cash and other collateral pledged under the Refunding Mortgage and certain cash in the hands of the Debtor at the date of the institution of the reorganization proceedings.

As regards the branch lines, spurs and industrial tracks, and non-carrier real estate, the questions involved have been discussed above at pages 12-16 (as regards branch lines, spurs and industrial tracks) and at pages 16-19 (as regards non-carrier real estate).

As regards the cash and other collateral pledged under the Refunding Mortgage, the questions involved are discussed at pages 69-71 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed at pages 58-63 of the brief of the Institutional Committee dated January 9, 1937. It is not believed that any cash or other collateral which the Refunding Mortgage Trustee may hold free of the lien of the First Mortgage is of sufficient value to affect, in any material degree, the fairness of any plan. [1566]

As regards the cash in the hands of the Debtor at the date of the institution of the reorganization proceedings, the questions involved are discussed at pages 68-69 of the brief of the First Mortgage Trustees dated January 9, 1937. They are also discussed at pages 55-56 of the brief of the Institutional Committee dated January 9, 1937. So far as the record discloses, no part of this cash now remains on hand.

Conclusion.

The First Mortgage Trustees ask that the Commission approve the conclusions in the Report with respect to the extent and priority of the lien of the First Mortgage.

Opportunity for oral argument is respectfully requested.

Respectfully submitted,
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ORVILLE W. WOOD,
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Of Counsel. [1567]

APPENDIX

Memorandum Opinion of Judge Sanborn in "The Equitable Trust Company of New York, Trustee, vs. The Wabash Railroad Company, et al."*

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*We do not have a certified copy of this opinion. The transcript set forth in this Appendix was made from a copy furnished by counsel for Wabash Railway Company, which we believe to be correct.

In the
United States District Court
for the Eastern District of Missouri
In Equity No. 3977
Filed Nov. 7th, 1921

THE EQUITABLE TRUST COMPANY OF NEW YORK

Trustee,

vs.

THE WABASH RAILROAD COMPANY and JAMES B. FORGAN

Defendants.

IN THE MATTER OF THE INTERVENTION OF ROME LANE, ET AL., AND OF THE EXCEPTIONS TO THE REPORT OF BYRON F. BABBIT, ESQUIRE, SPECIAL MASTER HEREIN.

Mr. Wells H. Blodgett, for Receivers under the Creditors' bill.

Mr. Clifford B. Allen and Mr. Lee W. Hagerman, (Mr. P. H. Cullen was with them on the Brief) for the interveners.

Mr. James L. Minnis for the defendants. [1568]

Mr. N. S. Brown for the Wabash Railway Company, the purchaser at the foreclosure sale, (Mr. Winslow S. Pierce and Mr. Lawrence Greer, were with him on the brief.)

Sanborn, Circuit Judge.

It is not intended by this memorandum to discuss or even state the many serious questions presented

by the exceptions to the Master's Report, or to do more than to indicate the views of the court upon a few of the issues.

* * * * *

II.

Interveners' Claim on Account of the Seventy Locomotives.

The Railroad Company in October 1907 entered into an equipment trust agreement for the purchase of seventy locomotives. The refunding mortgage was made on July 1, 1906. Prior to the filing of the foreclosure bill the Railroad Company had paid $852,240.55 for these locomotives according to the terms of the trust agreement. The unpaid balance thereunder, $399,000.00 was paid by the receivers and charged in their reports against the proceeds of the unmortgaged assets of the railroad company. After the foreclosure decree, but before the sale, a bill of sale of these locomotives was made to the mortgagor company by the trustee of the equipment trust. Although there was no allegation in the foreclosure bill, all the averments of which were admitted by the answer of the mortgagor, that these locomotives were a part of the mortgaged property, although the special master in the consolidated cause, in pursuance to an order of the court to ascertain and report the mortgaged property, [1569] did not report these locomotives as a part thereof while he did so report other rolling stock subject to equipment trust agreements, and although these locomotives were not specifically described in the

decree or notice of sale, the receivers delivered them to the Wabash Railway Company, the actual purchaser at that sale. The interveners insist that these locomotives were not subject to the refunding mortgage, but were in equity subject to the trust for the benefit of themselves and the other unsecured creditors that was fastened upon them by the filing of the creditors' bill, that the railway company took them subject to that trust, and that the interveners and their associates are entitled to an accounting for these locomotives by the railway company.

The Special Master in his report held that this property was not covered by the refunding mortgage, and that the interveners as against the railway company, were entitled in equity to the $852,240.55 paid for them by the mortgagor before the receivership or to an interest in them in the proportion which that amount bears to the whole amount paid for them. Upon exception to this conclusion by the Railway Company and after hearing further testimony and argument he concluded that these locomotives were subject to the refunding mortgage and that the interveners were entitled to no relief on account of this claim.

The question is—did the refunding mortgage subject these locomotives to its lien? The purpose of every written contract or conveyance is to express the intention of the parties thereto. The object of all construction of the terms of a mortgage or agreement is to ascertain that intention. That intention must be deduced from the entire mortgage or con-

tract and the situation and circumstances of the parties when they made it. That intention when ascertained must prevail over the dry words [1570] of the instrument, inapt expressions, and careless recitals in the mortgage or agreement unless it is directly contrary to the plain meaning of the binding words of the instrument. United States Fidelity & G. Co. vs. Board of Commissioners of Woodson County, Kans. 145 Fed. (CCA) 144, 145. The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study.

This refunding mortgage of July 1, 1906 was authorized by a resolution of the Board of Directors of the Railroad Company, which provided that the bonds issued under it should be secured by "A mortgage or deed of trust covering and embracing all of the railroads and property now owned by the company, and all other property hereafter acquired by it through the issue of said bonds or their proceeds, as well as all other property which may from time to time be expressly conveyed, assigned or pledged, or by writing of any kind transferred to the trustee of said mortgage or anyone in its behalf." The seventy locomotives in question were not thereafter acquired by the railroad company through the issue of the bonds secured by that mortgage or by their proceeds, nor were they ever expressly assigned, conveyed or mortgaged to the trustee, so that it is reasonably clear that they never fell

into any of the classes of property which the railroad company intended to subject to the mortgage when its Board of Directors passed this resolution which authorized it.

The refunding mortgage granted to the trustees named therein, the railroads of the mortgagor by a specific description of each of them, and, among other things "also all property of every kind and description, real, personal, or mixed, stocks, interests, rights, privileges and franchises now owned by the railroad com- [1571] pany or hereafter acquired by it, and which may be or become subject to the lien of any of the mortgages of the railroad company herein before recited." One of the mortgages therein recited was the mortgage of May 1, 1889, which contained a grant to the trustee for its bondholders of the railroads therein specified "and all other things, real and personal, now owned or used or that may hereinafter be owned or used by the party of the first part in connection with said lines of railroad or appertaining thereto." It is contended that the seventy locomotives which were purchased in October, 1907, more than a year after the date of the refunding mortgage, under the equipment trust agreement whereby the title was retained in the vendor until the purchase price was paid years thereafter, fell under that portion of the refunding mortgage above quoted, which reads: "or hereafter acquired by it, and which may be or become subject to the lien of any of the mortgages of the railroad company herein before recited", and became subject

to that mortgage because they came within that part of the quotation from the mortgage of July 1, 1889 which describes property "that may hereafter be owned or used by the party of the first part in connection with said lines of railroad or appertaining thereto." This contention, however, seems to invoke an unauthorized stretch or extension of the grant of the refunding mortgage beyond the intention of the parties to it therein expressed. It is evident that the draftsman of that mortgage was not of the opinion that the interest of the mortgagor in locomotives and other rolling stock then held by it under equipment trust agreements, was included in the terms which have been quoted; much less the interest the mortgagor might thereafter acquire in property under such agreements; [1572] for the third paragraph of the mortgage quoted reads in this way: "Also, subject to the provisions hereinafter in this indenture contained all the right, title and interest which the railroad company now has or hereafter may acquire in and to all rolling stock now covered by the equipment agreements herein before recited." That paragraph in all probability would never have been written and inserted in the mortgage if the draftsman had supposed that he had covered the interests of the mortgagor therein described by the preceding paragraphs quoted, and it is clear that he did not intend to include or subject to the mortgage, by any of the paragraphs quoted, interests in locomotives, rolling stock, or equipments thereafter acquired under equipment trust

agreements, for, if that had been his intention, the matter would have come to his attention when he wrote the paragraph last quoted, and he would have included them in that paragraph. The paragraphs of the refunding mortgage to which reference has been made, and which have been considered, fail to satisfy that the parties to the refunding mortgage intended to subject to that mortgage the seventy locomotives thereafter acquired by the mortgagor under the equipment trust agreement.

But, supposing that the paragraph quoted from the mortgage of July 1, 1889, is broad enough to cover the interest which the mortgagor secured in the seventy locomotives in October 1907 and thereafter under the equipment agreement; and supposing that the provision of the refunding mortgage covering property of the mortgagor "hereafter acquired by it and which may be or become subject to the lien of any of the mortgages of the railroad company hereinbefore recited" was sufficient, standing alone, to include the after-acquired interest in the seventy locomotives. Nevertheless, it was [1573] competent for the parties to that mortgage, by a stipulation therein, to except that interest from the lien thereof. They could have done so by the addition thereto of the clause "Except that property acquired by the mortgagor otherwise than by the use of the proceeds of the bonds secured by this mortgage shall not become subject to the lien thereof unless made so by a subsequent written instru-

ment's and for this purpose, as it seems to the court, they did insert, after all the numerous descriptions of the mortgaged property and just preceding the habendum clause of the mortgage, this reservation covenant and agreement: "But it is hereby covenanted and agreed that the Railroad Company reserves the right, except as in this indenture expressly otherwise provided, to acquire or construct any railroad, branch or extension and to acquire any stocks, bonds, securities and other property of any kind and description free from the lien of this indenture and any railroad, branch or extension and any stocks, bonds, securities and other property of any kind or description, acquired by the Railroad Company without the use of bonds or proceeds of bonds issued hereunder or constructed or acquired by the use of any such bonds or the proceeds of any such bonds as may be delivered to the Railroad Company as hereinafter provided in reimbursement of expenditures then already made out of other resources for purposes for which bonds secured by this Indenture are hereinafter provided to be issued, shall, except as in this Indenture expressly otherwise provided, be free from the lien of this Indenture unless specifically subjected thereto by an instrument in writing executed by the Railroad Company or by any one with its consent on its behalf to the Trustee hereof." A comparison of this reservation with the resolution which warranted the mortgage is very persuasive that both [1574] parties to that instrument

had the abiding intention and settled purpose which was clearly expressed in that resolution to leave such after acquired property as these seventy locomotives, which was not acquired through the issue of the bonds secured by the mortgage, free of its lien unless and until such property was specifically subjected to that lien by an express conveyance, assignment, pledge, or writing such as the resolution requires or "by an instrument in writing executed by the railroad company" as the reservation paragraph describes.

This view that an intention to subject these seventy locomotives to the lien of the refunding mortgage is not evidenced by that instrument, and the situation and circumstances of the parties when they made it is strongly supported by their practical interpretation of it before the present controversy arose. The practical interpretation given to their contracts by the parties to them while they are engaged in their performance, and before any controversy had arisen concerning them, is one of the best indications of their true intent, and courts that adopt and enforce such a construction are not likely to commit serious errors. Topliff vs. Topliff, 122 U. S. 121, 131; City of Chicago vs. Sheldon, 9 Wall. 50, 54; Manhattan Life Insurance Co. vs. Wright, 126 Fed. (CCA) 82, 87.

The Equitable Trust Company, the representative of the bondholders secured by the refunding mortgage, applied in 1913 to the court in the consolidated cause to appoint a Master to hear testi-

mony, ascertain and report what property was covered by the mortgage, and the court appointed Mr. Thomas T. Fauntleroy and ordered him to take evidence, find and report what property was subject to the mortgage. He received testimony and reported that the mortgage covered much specifically described property, and; (1) "and all locomotives, [1575] engines, and other rolling stock * * * and all other property of every kind and description owned by the railroad company at the time of the execution and delivery of said refunding mortgage appurtenant to and used with the lines of road, and; (2) all extensions, branches, equipment, terminals and other property of every nature acquired by said railroad company through the use of the bonds secured by said first refunding and extensions mortgage or the proceeds thereof." He did not, however find or report that this mortgage covered the interest of the mortgagor in these seventy locomotives. It is common knowledge that the Equitable Trust Company, through its counsel, presented the evidence and claim of the Bondholders to the property which they deemed covered by this mortgage to the Special Master and the obvious inference from this hearing and the report of the Master is that neither the mortgagee, the mortgagor, nor the Master was of the opinion that the railroad company intended to mortgage or did mortgage the interest of the mortgagor in these seventy locomotives, which was acquired through the equipment trust agreement of 1907.

In opposition to the considerations which have been recited counsel for the defendant earnestly contends that these locomotives do not fall under the reservation paragraph because it contains the words "except as in this indenture expressly otherwise provided" and the mortgagor had in a previous part of this mortgage granted all property thereafter "acquired by it and which has become or may become subject to the lien of any of the mortgages of the railroad company herein before recited." But this exception in the mortgage covers only dispositions therein before "expressly otherwise provided;" that is to say "in an express, direct or pointed [1576] manner; of set purpose; in direct terms; plainly; explicitly." Century Dictionary, 2087, and in view of the facts that the clause of the grant invoked is so general and indefinite, that the mortgage contains an express grant of the interest of the mortgagor in all rolling stock covered by equipment trust agreements therein recited but no express grant of any interest that it should thereafter acquire in locomotives under equipment trust agreements, the court is unable to conclude that it was anywhere in that mortgage "expressly otherwise provided" than as it was provided in the other parts of the reservation paragraph.

Another contention of counsel for the defendant and that which persuaded the Master to reverse his opinion finding that the seventy locomotives were

not subject to the lien of the mortgage, is that the reservation paragraph does not conflict with the granting clause of the refunding mortgage which extends its lien to after acquired property that might be or become subject to the lien of the prior mortgages recited therein because it is limited and restricted in its meaning, scope and effect to the property described in Section 4 of Article II of the refunding mortgage which provides that $110,260,500.00 par value of the bonds secured by the mortgage shall be issued and used for certain specified purposes only and the acquisition of locomotives under equipment trust agreements is not one of the purposes so specified. But (1) if the granting parts of the mortgage fail to evidence an intention of the parties to subject after acquired locomotives, procured through equipment trust agreements, to the lien of the refunding mortgage, they were not subjected thereto by the reservation paragraph, and the question presented by this contention becomes immaterial; (2), if, on the other hand the granting clauses do evidence such an intention, the position of the reservation para- [1577] graph in the mortgage after all the descriptions of the property granted and just before the habendum paragraph, its independent, clear and sweeping covenant in these terms "but it is hereby covenanted and agreed that the railroad company reserves the right, except as in this indenture expressly otherwise provided, to acquire or construct any railway, branch, or extension and to acquire

any stock, bonds and other property" not other property of the kinds therein described, but "of any kind and description free from the lien of this indenture" etc., and the evident purpose of this paragraph to carry out thereby the intention expressed in the authorizing resolution seem to the court, to converge with almost compelling force to persuade that the construction which this contention seeks to apply to the reservation never was intended by the parties to it, and; (3) the provisions of Section 4, Article II relate to property purchased or to be purchased by the use of the proceeds of the bonds to be issued and to the application of those proceeds. The reservation paragraph relating to property not purchased or to be purchased by means of such bonds or proceeds, was evidently put into the mortgage for the purpose of preventing such property from falling under the lien thereof unless so placed by a subsequent written agreement, and it does not seem probable that the provisions of Section 4, regarding property, of which the locomotives are not a part, were intended to restrict the reservation of property not procured by means of the bonds.

In his final conclusion the Master suggested, as one reason therefor, that these locomotives, which he had held in his original report, had not been acquired by the railroad company by the execution of the trust agreement were subsequently acquired after the decree and before the sale by a bill of sale of the trustee in the equipment agreement. But it

seems to the court that this change [1578] in the situation is immaterial. It is inclined to the view that if the lien of the refunding mortgage had ever attached to the locomotives it would have attached to the equitable interest of the mortgagor at the time it commenced to pay for them under the agreement, and would have increased with the increase of the payments.

In the consideration of this claim the court has received great assistance from the able and exhaustive arguments and briefs of counsel for each of the parties and from the studied and comprehensive report of the Master. All these have received examination and reflection, with the result that the entire mortgage the parts thereof specified and discussed, the situation and circumstances of the parties when they made the mortgage, the resolution which authorized it and the practical interpretation of it by the parties before this controversy arose, and other considerations which have been referred to herein, have led to the conclusion that the parties to the refunding mortgage never intended thereby, to subject, and did not subject, after acquired locomotives purchased, by means of equipment trust agreements to the lien of that mortgage; that the interveners are entitled to an accounting by the Wabash Railway Company for those locomotives and their use by it, and to equitable and just relief on account thereof.

* * * * * * *

[Endorsed]: Filed Oct. 5, 1939. [1579]

Before the
Interstate Commerce Commission
Finance Docket No. 10913.

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

REPLY OF THE RAILROAD CREDIT CORPORATION TO THE EXCEPTION BRIEFS FILED HEREIN ON OR BEFORE SEPTEMBER 27, 1937.

There appears to be no substantial difference between the position taken by the A. C. James Co. and the position taken by the R.F.C. and The Railroad Credit Corporation in their respective exceptions (and supporting briefs) in relation to the treatment proposed by the Bureau of Finance for their several claims.

All agree on the underlying principles:

(1) That every creditor is entitled to such priority with respect to the Debtor's estate, as derives from the security which he holds.

(2) That if a secured creditor is not fully secured, he is to be treated as a general creditor for the amount of the deficiency, or unsecured portion of his claim.

(3) That every creditor is entitled to be paid in full in money or moneys worth, before any part of the Debtor's estate is allocated, in cash or new securities, to junior claimants,

whether they be creditors or stockholders, unless such junior claimant furnishes an adequate new consideration. (Obviously it would be proper to admit strangers on this basis.)

Apparent rather than real differences arise in the application of these principles to the facts in this proceeding:

The claims of the Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Co. are each secured by General and Refunding Bonds of the Debtor in varying amounts. (The Reconstruction Finance Corporation [1581] and The Railroad Credit Corporation each holds additional security, but for simplification consideration of that security is deferred to a later point in this memorandum.) If those General and Refunding Bonds were completely junior to the First Mortgage, it would be clear that their holders would not be entitled to receive anything from the estate of the Debtor, either in cash or new securities, until the First Mortgage Bondholders had been satisfied. A fortiori those junior to the General and Refunding Mortgage would be entitled to nothing until that Mortgage had been satisfied. It appears, however, that the General and Refunding Mortgage is not in all respects junior to the First Mortgage. It can not be said, even tentatively, that the First Mortgage is entitled to look to the entire estate of the Debtor ahead of the General and Refunding Mortgage.

The Bureau of Finance states in its proposed

report that after the First Mortgage has been given all that the Bureau believes that Mortgage is entitled to receive, the value remaining in the estate of the Debtor will be sufficient to support approximately $21,000,000 par value of common stock (in addition to the approximately $8,000,000 of common stock to be issued to cover unpaid interest on First Mortgage Bonds), and that approximately only $11,000,000 par value of that stock is available for General and Refunding Bonds. Assuming this to be true, it follows that the holders of those bonds are entitled to their pro rata share of that stock, up to the full amount of their claims. If their pro rata shares are insufficient to satisfy their claims, deficiencies will result. If an assignment of two shares of stock for $100 of claim is not excessive, as indicated in the Bureau's proposal, with respect to Reconstruction Finance Corporation, then assignments of lesser amounts of stock, as in the case of The Railroad Credit Corporation and A. C. James Company, necessarily leave deficiencies.

[1582]

If there is no remaining asset value, then no further stock should be issued, and the deficiencies must be wiped out, along with the claims of general creditors and stockholders.

The A. C. James Company argument is based on the assumption, which we believe is amply supported, that there is additional value in the Debtor's estate sufficient to satisfy these deficiencies. Whether or not sufficient value does in

fact exist, remains to be determined, but it is clear that substantial additional value has been found by the Bureau to exist, for it proposes to issue $10,000,000 of common stock as a bonus. That stock, unless paid for (by a creditor, stockholder, or third party, it is immaterial which), must be distributed among the note holders to the extent necessary, if it is more than sufficient, otherwise in its entirety, towards satisfaction of the deficiencies above referred to.

Thus the arguments advanced by A. C. James Company, Reconstruction Finance Corporation, and The Railroad Credit Corporation, in this respect are based on the same principles of law, and all tend to the same end—with but one point of difference: the Reconstruction Finance Corporation and The Railroad Credit Corporation contend that the stock proposed to be issued to them will be worth substantially less than $50 per share, and that in consequence deficiencies will exist. This low valuation of the new stock is supported by the Bureau's proposed report, as above shown. The A. C. James Company, however, appears to assume, in spite of the record and the action of the Bureau, that the new common stock *will* be worth $100 a share, or so nearly that amount that there *is* an excess of collateral held by Reconstruction Finance Corporation. If the A. C. James Co. is right about the value of the new stock, then it is right in its conclusion, but its valuation finds no support in the Bureau's figures. The Railroad Credit Corporation

contends that if the full value of General and Refunding Bonds were recognized, both R.F.C. and The Railroad Credit Corporation would have an excess [1583] of collateral, but on the basis of exchange proposed by the Bureau, no excess could exist. (Here again no consideration is given to the additional collateral held by The Railroad Credit Corporation).

In other words, the Reconstruction Finance Corporation and The Railroad Credit Corporation see sufficient value in their existing collateral to warrant issuing to them new securities equal in value to their respective claims, and they regard the stock allocated to them as inadequate. The A. C. James Co. also believes that present collateral note claims, including its own, are fully secured, but it sees sufficient value in the new common stock to satisfy those claims, provided the new stock is allocated in proportion to the amounts of the several claims. Thus, the only issue between them is as to the *value* of the new stock. A conclusive answer would seem to be found in the Bureau's proposed report, unless substantially greater value is assigned to the Debtor's estate. In that event, a different distribution would be required.

The Railroad Credit Corporation holds as security for its claim, valuable items of collateral in addition to General and Refunding Bonds; its right to that collateral is a substantive property right that can not be taken away from it without due process of law, or just compensation. Reference is

made to the Brief of The Railroad Credit Corporation for a more extended discussion of the value of that collateral.

It is idle to dismiss these difficulties, as the Bondholders' Committee seeks to do at page 49 of their brief, by saying "and since R.F.C., R.C.C. and A.C.J. must, as the proposed Report correctly finds, participate as among themselves in proportion to their collateral, the participations allotted to R.C.C. and A.C.J. in respect of their Notes must be proportionately less than the participation allotted to R.F.C." That statement is, of course, true in the sense that it is true of all secured creditors, including First Mortgage Bondholders, but recognition must be given to all collateral and to all elements [1584] of value in the collateral held by the several secured creditors. The Railroad Credit Corporation has liens upon certain property of the Debtor, superior to the lien of the First Mortgage. Recognition of the rights of The Railroad Credit Corporation necessarily defeats the attempt to have the claims of First Mortgage Bondholders treated without regard to other creditors, and to relegate the claims of other creditors, including the claim of The Railroad Credit Corporation to the level of inconsequential details.

There is nothing in the record to support the suggestion that the $2,000,000 principal amount of bonds pledged by the A. C. James Company with The Railroad Credit Corporation as security for

obligations of the Debtor, were "loaned" to The Railroad Credit Corporation, as stated on page 24 of the brief of the A. C. James Company. The evidence is clear that those bonds were pledged to The Railroad Credit Corporation, and that The Railroad Credit Corporation has all the rights of a pledgee therein.

Passim it should be noted that there is absolutely no basis in the record in this proceeding for the suggestion by the A. C. James Company, that it has any rights of subrogation or exoneration, or that there is occasion for marshaling or restitution, insofar as the aforesaid bonds are concerned. (For brief summary of law as to marshaling see 38 Corpus Juris pp. 1368 ff.)

These propositions have nothing to do with the error, assigned by all three of the collateral note holders to the Bureau proposal that stock which is to be exchanged for collateral, must be accepted, by the holders of that collateral in full discharge of the principal debts. The error of that proposal lies, insofar as private interests are concerned, primarily in its substantial failure to recognize deficiencies, or other collateral, or existing priorities, or the rights of general creditors, as has been previously pointed out. [1585]

The Bondholders' Committee, Reconstruction Finance Corporation and the A. C. James Company, all object to the offer of $10,000,000 of common stock to the general claim of Western Pacific Rail-

road Corporation as being a discrimination in favor of The Railroad Credit Corporation, which holds that claim in pledge: The Railroad Credit Corporation admits this to be true, even though it may well be entitled, because of the collateral held by it, to that amount (or more) of additional stock. Taken by itself, the proposed offer of this $10,000,000 par value of stock is as unsound in law as it is in economics.

The Debtor's brief at page 27 et seq. proposes a new plan of reorganization involving the issue of 15 year collateral income notes to the secured note holders. The Railroad Credit Corporation does not oppose this proposal, which may afford a practical solution, provided such notes are given upon such terms and in such amounts as to satisfy its claim in full. The proposed priority provision must be rejected as without support in law or equity. Unless made as here indicated, this new proposal can not be accepted even on composition principles in view of the treatment proposed for other creditors, and the equity holders. If The Railroad Credit Corporation is not paid in full, it is entitled to "(a) voting power and, (b) the right to participate in possible future prosperity," ahead of junior creditors and stockholders. Assigning a book value of one dollar to no par stock that carries the rights above quoted, is no justification for giving those rights to parties who no longer have any interest in the Debtor's estate. The principle of de minimis

can not be made to apply through the simple expedient of labeling as "minima" matters (such as those quoted) that do not in fact belong in that category.

Failure to discuss in this memorandum any proposals or principles of law or equity, or statements or conclusions of fact, to be found in any of the briefs submitted herein, in disagreement with this answer or any brief filed in behalf of The Railroad Credit Corporation is not to be taken as an acceptance, [1586] or admission of the soundness or accuracy thereof. The Railroad Credit Corporation adheres to the statements of fact and principles of law and equity set out in its several briefs herein.

The Railroad Credit Corporation unreservedly joins in the suggestion of the Bondholders' Committee stated at page 51 of their brief as follows:

> "The Bureau Plan seems lacking in specification on important substantive points. To obviate any justifiable basis for such a criticism of the ultimate Plan, the Bondholders' Committee urges that before the Commission publicly announces the Plan which it will approve, it give to all the interested parties an opportunity to confer with its representatives and work out the provisions of the ultimate Plan in sufficient detail to make the security

holders an adequate disclosure of what they are voting upon."

Respectfully submitted,

D. WILLARD, JR.,
General Counsel, The Railroad Credit Corporation.

Office and P. O. Address:
D. WILLARD, JR.,
805 Transportation Building,
17th & H Streets, Northwest, Washington, D. C.

Dated—Washington, D. C., October 6, 1937.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party.

Dated at Washington, D. C., this 6th day of October, 1937.

D. WILLARD, JR.,
General Counsel, The Railroad Credit Corporation.

[Endorsed]: Filed Oct. 5, 1939. [1587]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION.

REPLY ON BEHALF OF CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916, TO PETITIONS FILED HEREIN UNDER SUBSECTION (d) OF SECTION 77 OF THE BANKRUPTCY ACT.

The above named trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, intervenors in the above entitled proceeding, for reply to the above-mentioned petitions, respectfully state:

I.

Said First Mortgage trustees submit that the Plan of Reorganization (hereinafter called the Commission Plan) approved by the Report and Order entered herein under date of October 10, 1938, fails, in the allotment of common stock therein contemplated, to afford due recognition to the rights of the holders of bonds outstanding under said First Mortgage (hereinafter called the First Mortgage bondholders).

The Commission Plan in effect allots 154,241 shares [1589] of new common stock to the $11,-

914,521 claim of the First Mortgage bondholders for accrued and unpaid interest to June 30, 1938, 90,255.5 shares of new common stock to the $3,612,181 claim of the Reconstruction Finance Corporation (hereinafter called the RFC) and 33,646.5 shares of new common stock to the $2,580,906 claim of the Railroad Credit Corporation (hereinafter called the RCC).

This allocation results in giving the First Mortgage bondholders $129.46 of new common stock (taken at $100 per share) for each $100 of that portion of their claim representing accrued and unpaid interest to June 30, 1938, whereas the RFC is given $249.86 of new common stock (taken at $100 per share) for each $100 of its claim and the RCC is given $130.37 of new common stock (taken at $100 per share) for each $100 of its claim. Thus a portion of the claim of the First Mortgage bondholders is accorded less favorable treatment than the claims of the RFC and the RCC, notwithstanding the fact that the Commission found in its Report (pp. 59-60) that the claims of the RFC and the RCC were "not entitled to the same treatment as first-mortgage bondholders, who should be considered as having a first lien upon practically all the assets of the debtor".

II.

Said First Mortgage trustees submit that the Plan of Reorganization of the Institutional Bondholders' Committee [1590] (hereinafter called the Committee Plan), which is annexed as Exhibit A

to the petition of said Committee, provides for a fair allotment of new common stock and affords due recognition to the rights of the First Mortgage bondholders.

III.

Said First Mortgage trustees submit that the Committee Plan affords due recognition to the value and earnings of the collateral subject to the General Mortgage as a first lien.

The petition of the Irving Trust Company as trustee discusses (pp. 3-9) the values to be attributed to the collateral subject to the General Mortgage as a first lien. The figures given in the petition for the Central California Traction Company securities and for the Alameda Belt Line stock are the values carried on the books of the Debtor. It is submitted that such book values do not furnish an appropriate test of values for a plan under Section 77. Furthermore, the discussion of these securities and of this stock in the petition ignores the fact that both companies have been operating at a loss; reference is made to the brief (pp. 60-63) dated January 9, 1937, filed herein on behalf of the Institutional Bondholders' Committee, for a summary and analysis of the data in the record as to the earnings of these companies. [1591]

The petition mentions $810,331 free cash on hand at the institution of the reorganization proceedings as something entitling the General Mortgage bondholders to favorable treatment in the reorganization. Since the shortage of cash for operation dur-

ing the reorganization proceedings was such as to require the issue of $10,000,000 in principal amount of trustees' certificates, the cash on hand at the institution of the reorganization proceedings cannot, it is submitted, be deemed a fund available for payment to the unsecured creditors; where all the cash on hand at the institution of the reorganization proceedings is used up in the operation of the railroad, to say that, for the purpose of determining a fair distribution of securities at the end of the reorganization, unsecured creditors are entitled to credit for the cash on hand at the institution of the reorganization proceedings is to say that such creditors are entitled to credit for a nonexistent thing.

The General Mortgage bonds are held in pledge by the RFC, the RCC and the A. C. James Co. (hereinafter called the ACJ). The Committee Plan accords to the RFC special treatment in consideration of its agreement to furnish $10,000,000 of new money. The Committee Plan allots to First Mortgage bondholders $150 of new common stock (taken at $100 per share) for each $100 of that portion of their claim representing accrued and unpaid interest to January 1, 1939, but allots to the RCC $142.86 of new common stock [1592] (taken at $100 per share) for each $100 of its $2,592,113 claim (interest accrued and unpaid to January 1, 1939), and allots to the ACJ new common stock in the proportion which the General Mortgage bonds of the Debtor held by the ACJ bear to the General Mortgage bonds held by the RCC. Accordingly, this distri-

bution of common stock to the RCC and (proportionately) to the ACJ is on a basis nearly as favorable as that accorded in the distribution on said claim of the First Mortgage bondholders, which is secured by all the property on which the First Mortgage is a first lien.

Wherefore said First Mortgage trustees respectfully pray that the Report and Order of the Commission entered herein under date of October 10, 1938, be modified so as to give due recognition to the rights of the First Mortgage bondholders by the approval of the Committee Plan hereinabove referred to or otherwise as to the Commission may seem just and reasonable, and that the Commission enter such further order or orders as to it may seem just and reasonable.

Dated December 17, 1938.

CROCKER FIRST NATIONAL
BANK OF SAN FRANCISCO
and
SAMUEL ARMSTRONG,
as Trustees,

By ORVILLE W. WOOD,
Attorney for First Mortgage
Trustees,
15 Broad Street,
New York, N. Y.

MILBANK, TWEED & HOPE,
Of Counsel.

[Endorsed]: Filed Oct. 5, 1939. [1593]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION.

ANSWER OF FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY (AS A COMMITTEE REPRESENTING INSTITUTIONAL HOLDERS OF FIRST MORTGAGE BONDS OF THE WESTERN PACIFIC RAILROAD COMPANY) TO THE PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY DATED AUGUST 1, 1939.

Answering the Petition dated August 1, 1939, of The Western Pacific Railroad Company (hereinafter called the Debtor), Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter called the Committee) respectfully show:

First: The Committee is without knowledge of any negotiations between the parties to the proceeding herein for "an agreed upon Plan of Reorganization which might be [1594] acceptable to the Interstate Commerce Commission and susceptible of early consummation," after December 9, 1938, and prior

to June 9, 1939. On the latter date counsel for the A. C. James Co. and the Debtor asked the opinion of counsel for the Committee as to the basis upon which the Committee would consider agreement upon a compromise of the various questions affecting the reorganization of the Debtor then pending, undecided, before the Interstate Commerce Commission. Following that conference there was submitted by counsel for the A. C. James Co. to the Committee a proof of a Plan of Reorganization which did not comply with the conditions expressed in the opinion of the Committee's counsel at said conference of June 9, 1939. At a meeting of the Committee, attended also by counsel for the Committee, counsel for the A. C. James Co., counsel for the Debtor, and counsel for The Western Pacific Railroad Corporation, on June 30, 1939, the Committee failed to agree upon the proposals of the other parties and the other parties failed to agree upon proposals by the Committee.

Second: All said proposals were predicated upon the fact that numerous issues between the parties had not yet been decided by the Interstate Commerce Commission and that it was possible, as to each of the parties concerned, that such issues might be determined adversely. [1595]

Third: On July 24, 1939, counsel for the Debtor and counsel for The Western Pacific Railroad Corporation advised counsel for the Committee that those corporations were prepared to accept the proposals made by the Committee on June 30, 1939.

Before any action by A. C. James Co. in the premises and before any reconsideration by the Committee whether it was prepared to renew the proposals rejected by the other parties on June 30, 1939, the Final Report and Order herein of the Interstate Commerce Commission, bearing a notation "Decided June 21, 1939," was made public on July 25, 1939. This decision determined most of the issues between the parties in favor of the position taken by the Committee and approved a Plan materially more favorable to the First Mortgage Bondholders than the proof of Plan annexed to said Petition dated August 1, 1939, of the Debtor, not only in the respects mentioned in said Petition but also in other and material respects. Thus in large part the basis for a compromise which had theretofore existed was removed upon the publication of said Final Report and Order.

Fourth: The Committee represents the holders of approximately 34.37% of the outstanding First Mortgage Bonds. While the Committee believes that prior to the determination by the Commission all of the holders of bonds which the Committee represents would have accepted the compromise which [1596] the Committee was then willing to recommend, and that a sufficient additional number of the holders of publicly held bonds would have followed such a recommendation to enable a compromise so recommended to be accepted by a sufficient number of the holders of First Mortgage Bonds to permit its confirmation under the provisions of Section 77 of the Bankruptcy Act, the

Committee does not believe that, in the present state of the record, it can fairly recommend such a compromise.

Fifth: Reorganization of the Debtor has already been unduly delayed and the Committee believes that no useful purpose would be served by reopening the record before the Commission upon which the Commission's Final Report and Order released July 25, 1939, was entered.

Wherefore, the Committee respectfully prays (1) that said Petition of the Debtor, dated August 1, 1939, be denied, and (2) that the Commission promptly "certify the Plan to the Court, together with a transcript of the proceedings before it, and a copy of the Report and Order approving the Plan" in accordance with the provisions of subsection (d) of Section 77 of the Bankruptcy Act.

Respectfully submitted,

FREDERICK H. ECKER,
JOHN W. STEDMAN and
REEVE SCHLEY,
as a Committee representing institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company,

By CRAVATH, deGERSDORFF,
SWAINE & WOOD,
Counsel for the Committee,
15 Broad Street,
New York, N. Y.

Dated August 2, 1939. [1597]

State of New York,
County of New York—ss.

Littleton Groom, being duly sworn, deposes and says that he is Secretary of the Committee referred to in the foregoing Answer; that he has read the foregoing Answer and knows the contents thereof; that the same are true as stated except as to matters and things, if any, stated on information and belief, and that as to those matters and things he believes them to be true.

(Signed) LITTLETON GROOM.

Subscribed to in my presence and sworn to this 2nd day of August, 1939.

(Notarial Seal) G. G. BERKELEY,
Notary Public, New York County; N. Y. Co. Clerk's No. 594; Reg. No. 0B-770; Kings Co. Clerk's No. 322, Reg. No. 599; Bronx Co. Clerk's No. 89, Reg. No. 243B40. Certificates filed also in Richmond and Dutchess Counties.

Commission expires March 30, 1940.

[Endorsed]: Filed Oct. 5, 1939. [1598]

[Title of District Court and Cause.]

OBJECTIONS TO PLAN OF REORGANIZATION OF DEBTOR APPROVED BY INTERSTATE COMMERCE COMMISSION AND CLAIMS FOR EQUITABLE TREATMENT

To the Honorable the Judge of the United States District Court for the Northern District of California, Southern Division:

Now come Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee representing a group of institutional owners and holders of First Mortgage Bonds of The Western Pacific Railroad Company, Debtor herein (hereinafter [1634] referred to as the Committee), by its attorneys, Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark and Messrs. Cravath, de Gersdorff, Swaine & Wood, and pursuant to the order of this Court entered November 8, 1939, file these the Committee's objections to the Plan of Reorganization of the Debtor approved by the Interstate Commerce Commission June 21, 1939, and certified to this Honorable Court on or about September 28, 1939 (hereinafter referred to as the Commission Plan) and its claims for equitable treatment:

I.

Subparagraph 4 of paragraph P of the Commission Plan (pages 26-27 of mimeographed Report and Order) provides that there shall be allotted to The Railroad Credit Corporation, in addition to

35,425 shares of Common Stock of the Reorganized Company, $154,111 of Income Mortgage 4-1/2% Bonds, Series A, and $241,681 of 5% Preferred Stock, Series A, of the Reorganized Company.

Subparagraph 5 of paragraph P of the Commission Plan (page 27 of mimeographed Report and Order) provides that there shall be allotted to A. C. James Co., in addition to the 37,635 shares of Common Stock of the Reorganized Company, $163,724 of Income Mortgage 4-1/2% Bonds, Series A, and $256,756 of 5% Preferred Stock, Series A, of the Reorganized Company.

Accordingly, the notes of The Railroad Credit Corporation and of A. C. James Co., although secured by the Debtor's General and Refunding Mortgage Bonds, which Bonds are junior in lien to the Debtor's First Mortgage Bonds on substantially all of the property of the Debtor, are accorded *pro tanto* like treatment as that accorded [1635] the First Mortgage Bonds. In other words, the Commission necessarily found that the collateral pledged under the General and Refunding Mortgage had a value sufficiently great to justify the foregoing allocation of Income Mortgage Bonds and Preferred Stock to The Railroad Credit Corporation and A. C. James Co.

It appears from the face of the Report of the Commission on Further Consideration, decided June 21, 1939, which accompanies the Commission Plan (pages 9-13 of mimeographed Report and Order) that the allocation of said Income Mortgage Bonds

and Preferred Stock to said The Railroad Credit Corporation and said A. C. James Co. is based on a finding of the Commission that the securities of Tidewater Southern Railway Co. (a subsidiary of the Debtor), pledged under the General and Refunding Mortgage of the Debtor, have a value equal to their par value. It further appears from the face of the Report (pages 11-12 of the mimeographed Report and Order) that the Commission found that the lien of the General and Refunding Mortgage on the securities of the other companies, namely, the Central California Traction Company and the Alameda Belt Line, pledged under said Mortgage, has no material value.

The Commission found in its said Report (page 12 of mimeographed Report and Order) that the creditors secured by the General and Refunding Mortgage Bonds, that is, Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., should be awarded new Income Mortgage Bonds in the amount of $732,010 and new Preferred Stock of a par value of $1,147,955. The aggregate par value of such new securities is $1,879,965. This is exactly the [1636] total of the Tidewater Southern securities pledged under the General and Refunding Mortgage ($508,278 note and $1,147,955, par value, capital stock) plus cash ($223,732) in the hands of the Trustee under said General and Refunding Mortgage. It appears, therefore, that the creditors secured by the General and Refunding Mortgage Bonds have been awarded by

the Commission, in respect of the Tidewater Southern collateral, $508,278 of the Reorganized Company's Income Mortgage 4-1/2% Bonds and $1,147,955 of the Reorganized Company's 5% Preferred Stock.

Earnings required to pay interest on such Income Mortgage Bonds ($22,872) and dividends on such new Preferred Stock ($57,398) aggregate $80,270. The Tidewater Southern's earnings available for payment of interest during the ten-year period 1929-1938 averaged $75,436 a year. Against these earnings should be offset the Debtor's proportion of the deficits of the Central California Traction and the Alameda Belt Line. The Debtor's average yearly proportion of the Traction Company's deficits during the 1929-1939 period was $31,920 per year, and its average yearly proportion of the Belt Line's deficit during the period was $20,700 per year, making an average total deficit of $52,600 per year which the Debtor had to make good by advances. Deducting such average losses from the Tidewater Southern's average earnings ($75,436 minus $52,600) gives average annual earnings of $22,836 from the collateral pledged under the General and Refunding Mortgage. Such average earnings lack $57,000 of being sufficient to cover the $80,270 required to pay interest on the Income Mortgage Bonds and dividends on the Preferred Stock which the Commission [1637] found should be awarded to the creditors secured by the General and Refunding Mortgage Bonds. In only one year

since 1925 (the year 1935) would the earnings on the General and Refunding Mortgage collateral have been sufficient to pay such charges.

It further appears from the record that the note which is pledged under the General and Refunding Mortgage (in the face amount of $508,278) represents an accumulation of advances made by the Debtor to the Tidewater Southern in each of the years 1927 to 1932, inclusive. It further appears from the record that in 1923 the Debtor paid an assessment of 30¢ per share on the 1,147,955 shares of Tidewater Southern stock owned by it, and in 1924 an assessment of 18¢ per share. Such assessments aggregated $344,390 in 1923 and $206,234 in 1924. It further appears from the record that no dividends have ever been paid on the Tidewater Southern stock since the acquisition thereof by the Debtor in 1917.

For the foregoing reasons, the Committee alleges that the Commission erred in its valuation of the securities pledged under the General and Refunding Mortgage; and in finding that the creditors secured by the Debtor's General and Refunding Mortgage Bonds should be awarded new Income Mortgage Bonds in the amount of $732,010, and new Preferred Stock of a par value of $1,147,955.

II.

Paragraph R of the Commission Plan (page 30 of mimeographed Report and Order) provides that the Plan shall be carried out under the supervision

of a reorganization committee consisting of three persons, one of whom shall be [1638] designated by the Bondholders Committee, one by Reconstruction Finance Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly. This gives to the junior creditors (Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., the pledgees of the General and Refunding Mortgage Bonds), whose total claims aggregate $12,704,000, two-thirds of the reorganization committee as against one-third to the holders of approximately $62,000,000 of senior claims. The Committee alleges, therefore, that the Commission Plan is unfair to the First Mortgage Bondholders.

The Committee believes that, in order for the Plan to be fair and equitable, the reorganization committee should be composed of five persons, three to be designated by the holders of existing First Mortgage Bonds in such manner as the Court or the Commission may prescribe, one by Reconstruction Finance Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly.

III.

The Committee reluctantly finds it necessary to file these objections to the Commission Plan. It has heretofore consistently manifested a willingness to make sacrifices in the interest of the reorganization. It has no desire or inclination to depart from that policy. The Committee states, therefore, that if the Commission Plan be approved by the Court

in its entirety, it is prepared to, and will, waive the foregoing objections. The Committee reserves all rights to object to any changes in the Commission Plan other than changes to correct the foregoing defects. [1639]

Wherefore, the Committee respectfully prays that the Commission Plan be approved as an entirety without change but that if any change therein is made that the defects in the Commission Plan in respect of which objections are herein taken be corrected by this Honorable Court and holders of First Mortgage Bonds of the Debtor be given equitable treatment:

(1) by allocating to The Railroad Credit Corporation and A. C. James Co., respectively, Income Mortgage Bonds and Preferred Stock of the Reorganized Company only in such amounts and proportions as a fair valuation of the collateral under the Debtor's General and Refunding Mortgage shows them to be entitled; and

(2) by modifying and correcting the provisions of the Commission Plan respecting the constitution of the reorganization committee to read as follows:

> "The Plan shall be carried out under the supervision of a reorganization committee consisting of five persons, all to be approved by the Court, who shall be designated, three by holders of existing First Mortgage Bonds in such manner as the Court or the Commission may prescribe, one by Reconstruction Finance

Corporation, and one by The Railroad Credit Corporation and A. C. James Co. jointly. Should the holders of existing First Mortgage Bonds or Reconstruction Finance Corporation or The Railroad Credit Corporation and A. C. James Co., jointly, fail to designate a representative or representatives for membership on the committee within such time as the Court [1640] shall consider reasonable, the Court shall appoint such representative or representatives."

Dated New York, N. Y., December 6, 1939.

FREDERICK H. ECKER,
JOHN W. STEDMAN,
REEVE SCHLEY,
As a Committee representing a group of institutional owners and holders of First Mortgage Bonds of The Western Pacific Railroad Company,
by FREDERICK H. ECKER,
Chairman.

MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,
Crocker Building,
San Francisco, California.
CRAVATH, de GERSDORFF,
SWAINE & WOOD,
15 Broad Street,
New York, N. Y.
Attorneys for Petitioners. [1641]

State of New York,
County of New York—ss.

Frederick H. Ecker, being duly sworn, deposes and says that he is one of the petitioners named in the foregoing petition; that he is Chairman of the Committee therein described; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

FREDERICK H. ECKER

Subscribed and sworn to before me this 6 day of December, 1939.

[Seal] EDWARD A. KEARNS

Notary Public Residing in Bronx County Clerk's No. 44, Register's No. 59K40 Certificate filed in New York County Clerk's No. 714, Register's No. OK414 My Term Expires March 30, 1940

[Endorsed]: Filed Dec 8-1939. [1642]

[Title of District Court and Cause.]

MEMORANDUM STATEMENT SUBMITTED BY RECONSTRUCTION FINANCE CORPORATION IN REGARD TO THE PLAN OF REORGANIZATION CERTIFIED TO THE COURT BY THE INTERSTATE COMMERCE COMMISSION, WITH OBJECTION AND CLAIM FOR EQUITABLE TREATMENT IN CASE THAT PLAN IS NOT APPROVED.

On November 8, 1939, this Court entered an order requiring all parties in interest, having any objection to the plan of reorganization certified to the Court by the Interstate Commerce Commission to file with the Clerk of this Court their detailed and specific objections in writing to said plan and their claims, if any, for equitable treatment.

Reconstruction Finance Corporation (hereinafter called RFC) submits to the Court the following statement of its position with respect to that plan:

I.

RFC is the holder for value of $10,000,000 principal amount of certificates of indebtedness issued by the Trustees herein. Upon the maturity of those [1643] certificates on December 1, 1939, the Trustees, pursuant to the prior authorizations of the Interstate Commerce Commission granted in its report and certificate of November 21, 1939, Finance Docket No. 12,213, and the approval of RFC, extended the maturity thereof until December 1,

1940. Interest on said Trustees' Certificates, as extended, is payable monthly at the rate of four per cent per annum. The Trustees herein have the privilege of redeeming all of said Trustees' Certificates, but not less than all, on any monthly interest payment date on thirty (30) days' previous notice, at the principal amount and accrued interest to the date fixed for redemption.

Under the applicable orders of this Court, said Trustees' Certificates rank equally and ratably as expenses of the administration by the Court of the property of the Debtor and, as such, constitute equally with other expenses of administration, a direct charge and lien on all property held by the Trustees of the Debtor as such.

II.

Subsections (d) and (e) of Section 77 of the Bankruptcy Act, as amended, it is respectfully submitted, require the liquidation in cash of all expenses of administration. Reference to these subsections clearly indicates that the term "creditors" as used throughout refers to creditors of the Debtor and not to creditors of the Trustees of the Debtor. Thus RFC's treatment in respect of the $10,000,000 of Trustees' Certificates which it holds is not governed by the clauses of the statute governing creditors of the Debtor. This is made even clearer by a provision in subsection (e) to the effect that the Court shall approve the plan (previously certified by the Interstate Commerce Commission) if satis-

fied, among other things, that "the plan provides for the payment of all costs of administration." In the instant case, the Certificates held by RFC by their terms are "expenses of administration" by the Court of the property of the Debtor; and under the terms of the statute, it would seem that the holder thereof, RFC, is entitled to insist that any plan effectuated herein provide for the payment thereof, along with other expenses of administration. [1644]

III.

RFC, however, has heretofore indicated (Petition dated December 9, 1938, for Modification of the Report and Order of the Interstate Commerce Commission of October 10, 1938) that it would not insist on said $10,000,000 of Trustees' Certificates being paid in cash, if, in respect thereof and in respect of its claim against the Debtor, RFC should receive the treatment actually provided for in the plan certified by the Commission.

Prompt effectuation of a plan of reorganization of the Debtor is in the public interest, and in the interest of all classes of creditors of the Debtor, who since the institution of these proceedings more than four (4) years ago have received no interest on their claims, though there have been earnings available for the payment of interest. Since the position taken by RFC represents a concession on its part of rights which it is entitled to assert under the statute, it is hoped that other creditors in consideration thereof will be willing to make cor-

responding concessions, in the common interest of all, so that the Debtor can be reorganized without further delay.

IV

Apart from the above considerations, the Interstate Commerce Commission has approved the plan which it has certified to the Court, including the treatment provided therein for RFC, as meeting, in its opinion, the requirements of subsections (b) and (e) of said Section 77, and as being compatible with the public interest. In so doing, the Interstate Commerce Commission necessarily has had to consider legal questions not yet passed upon by this Court, such as the legal effect of mortgages and of other instruments evidencing creditors' rights. Otherwise it is necessary to impute to the Interstate Commerce Commission the adoption by it of an unrealistic conception of its function in these proceedings; for, if the Court disapproves the plan, the Court is required, by subsection (e) of Section 77, either to dismiss the proceedings or to refer the plan back to the Commission for further action.

The treatment proposed for RFC in the plan certified by the Interstate [1645] Commerce Commission is fully justified on the basis, alone, of RFC's taking in exchange for the $10,000,000 of Trustees' Certificates which it holds an equivalent amount of the new fixed interest bonds provided for in that plan, in lieu of payment in cash of said Trustees' Certificates. No assurance has been af-

forded at any time by any party herein that the $10,000,000 of said new fixed interest bonds can be sold at par, as required in the plan certified by the Interstate Commerce Commission, through private channels. In compensation of the RFC's taking, instead of cash, new fixed interest bonds, for its $10,000,000 of Trustees' Certificates, the plan certified by the Commission allows the RFC MORE new income mortgage bonds and new participating preferred stock, and LESS new common stock than would be allowed to it solely on the basis of the general mortgage bonds pledged with it. This provision is fully warranted in view of the fact that if the plan is effectuated RFC will hold, in lieu of $10,000,000 of short-term Trustees' Certificates which are obligations of the Court's Trustees, $10,000,000 of 35-year bonds which will be obligations of a reorganized company and a much less valuable security.

V.

Should the plan certified by the Interstate Commerce Commission not be approved, RFC urges the following detailed and specific objection to any plan which provides for RFC different and less favorable treatment than is provided for RFC in that plan.

The plan approved by the Commission allocates to the holders of the General Mortgage Bonds of the Debtor a total of $732,010 of new income mortgage bonds and $1,147,955 of new participating pre-

ferred stock, in recognition of the admittedly prior lien of the General and Refunding Mortgage upon $223,732 of cash in the hands of the Mortgage Trustee and upon a note of Tidewater Southern Railroad Company for $508,278 and $1,147,955 par value of capital stock of Tidewater Southern Railroad Company pledged under a General and Refunding Mortgage. Additional new income mortgage bonds and new participating preferred stock are provided in that plan for RFC, in respect of RFC's collateral other than the [1646] General Mortgage Bonds, and in consideration of RFC's accepting, in exchange for the $10,000,000 of Trustees' Certificates which it holds, in lieu of cash payment therefor, the $10,000,000 of new fixed interest bonds provided for in said plan. Should the Court find that there has been error in the construction placed by the Interstate Commerce Commission upon certain provisions of the First Mortgage of the Debtor and the effects which were assumed to follow, necessitating the disapproval of that plan by the Court, then RFC objects to any plan which does not provide for the payment in cash of the $10,000,000 of Trustees' Certificates which RFC holds, and the full recognition, in the new securities allocated to RFC, not only of the collateral pledged with RFC other than General Mortgage Bonds, but also, of the share of the new securities which are allocated to the General Mortgage Bonds to which RFC is entitled by reason

of RFC's first lien on $10,750,000 of General Mortgage Bonds and its second lien on an additional $2,000,000 of General Mortgage Bonds, out of the total $18,999,500 of General Mortgage Bonds issued and outstanding.

VI.

In case the plan certified by the Interstate Commerce Commission is not approved, RFC urges the following claim for equitable treatment:

(a) The $10,000,000 of Trustees' Certificates which RFC now holds should be paid in cash with accrued interest.

(b) Full recognition, in the new securities allocated to RFC should be had, not only of the collateral pledged with RFC other than General Mortgage Bonds, but also, of the share of the new securities which are allocated to the General Mortgage Bonds to which RFC is entitled by reason of RFC's first lien on $10,750,000 of General Mortgage Bonds and its second lien on an additional $2,000,000 of General Mortgage Bonds, out of the total $18,999,500 of General Mortgage Bonds issued and outstanding.

Wherefore, RFC prays that the plan of reorganization certified by the Interstate Commerce Commission be approved, and, if that plan be not so approved, that no plan be approved that does not give due effect to RFC's [1647] objection and its claim for equitable treatment, herein stated.

Dated at Washington, D. C., the 5th day of December, 1939.

RECONSTRUCTION
FINANCE CORPORATION,
By CLAUDE E. HAMILTON, JR.
General Counsel and an Officer
of said Corporation.

Of Counsel:
CASSIUS M. CLAY,
Assistant General Counsel.
FLORENCE DE HAAS DEMBITZ,
Attorney,
Reconstruction Finance Corporation,
BROBECK, PHLEGER & HARRISON,
Crocker Building,
San Francisco, California. [1648]

District of Columbia,
City of Washington—ss.

Claude E. Hamilton, Jr., being duly sworn, deposes and says:

That he is General Counsel and an officer of Reconstruction Finance Corporation, the petitioner herein, which is a corporation organized and existing under and by virtue of the laws of the United States; that he has read the foregoing petition and that the same is true except as to those matters

stated to be on information and belief, and that as to those matters he believes it to be true.

CLAUDE E. HAMILTON, JR.

Sworn to before me this 5th day of December, 1939.

NANCY H. KOUNDOUREAT,
Notary Public.

My Commission expires Feb. 14, 1943.

[Endorsed]: Filed Dec. 7, 1939. [1649]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES, FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, AS A COMMITTEE FOR A GROUP OF INSTITUTIONAL HOLDERS OF FIRST MORTGAGE BONDS OF THE WESTERN PACIFIC RAILROAD COMPANY, AND CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE FIRST MORTGAGE DATED JUNE 26, 1916, OF THE WESTERN PACIFIC RAILROAD COMPANY, OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

Pursuant to the provisions of Rule 75(a) of the Federal Rules of Civil Procedure and of Rule

19(6). of the Circuit Court of Appeals for the Nint . Circuit, Frederick H. Ecker, John W. Stedman and Reeve Schley (hereinafter referred to as the Institutional Committee), as a Committee for a Group of institutional holders of First Mortgage Bonds of The Western Pacific Railroad Company (hereinafter referred to as the Debtor), and Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage dated June 26, 1916, of the Debtor (hereinafter referred to as the First Mortgage Trustees), appellees in connection with the appeals taken by the Debtor, The Western Pacific Railroad Corporation, A. C. James Co., a corporation, The Railroad Credit Corporation and Irving Trust Company, as Trustee under the General and [1650] Refunding Mortgage dated January 1, 1932, of the Debtor, pursuant to notices filed September 20, 1940 (hereinafter together referred to as the appellants), hereby designate the following portions of the record, proceedings and evidence to be included in the record on appeal to the Circuit Court of Appeals for the Ninth Circuit in addition to the portions of such record, proceedings and evidence heretofore on October 10, 1940, designated by the appellants:

1. The verified statement of Crocker First National Bank of San Francisco, as Corporate Trustee under the Debtor's First Mortgage, filed herein on September 4, 1935, and showing the principal amount of First Mortgage Bonds outstanding under said First Mortgage.

2. Opinion and Order entered November 9, 1935, of the District Court confirming appointment of Trustees of the Debtor.

3. Petition of the First Mortgage Trustees for an order impounding income, for leave to intervene, and other relief, filed March 5, 1936, and Order to Show Cause, dated March 5, 1936, fixing time and place of hearing on said Petition.

4. Order entered March 9, 1936, permitting First Mortgage Trustees to intervene and making provision as to rights of said Trustees with respect to income of the Debtor.

5. Petition dated June 25, 1936, of the Institutional Committee for leave to intervene in proceedings before the Interstate Commerce Commission and filed on or about June 26, 1936.

6. Order of Interstate Commerce Commission [165] entered July 9, 1936, permitting intervention of Institutional Committee in proceedings before said Commission.

7. Petition dated October 23, 1936, of the First Mortgage Trustees for leave to intervene before the Interstate Commerce Commission and filed on October 26, 1936.

8. The exceptions to the proposed report dated August 2, 1937, of the Bureau of Finance of the Interstate Commerce Commission, filed on behalf of the Institutional Committee and on behalf of the First Mortgage Trustees, if such exceptions are not already included in designation No. (24) of the appellants, filed herein on October 10, 1940.

9. Replies of the several parties to the exceptions of the parties to the proposed report of the Bureau of Finance of the Interstate Commerce Commission dated August 2, 1937.

10. Petitions of the Institutional Committee, Reconstruction Finance Corporation and The Railroad Credit Corporation for modification of Report and Order dated October 10, 1938, of the Interstate Commerce Commission, and filed with said Commission on December 9, 1938, if not already included in designation No. (25) of the appellants, filed herein on October 10, 1940.

11. Reply of First Mortgage Trustees to the petitions of the several parties for modification of the Interstate Commerce Commission's Report and Order dated October 10, 1938, such Reply having been filed with the Interstate Commerce Commission on or about December 17, 1938.

12. Answer dated August 2, 1939, of the Institutional Committee to the Petition, dated August 1, 1939, of [1652] the Debtor for rehearing and modification of the Report and Order, dated June 21, 1939, of the Interstate Commerce Commission.

13. Petition of the Institutional Committee for leave to file petition of intervention and order granting such petition, both filed November 22, 1939; petition of intervention, verified November 16, 1939, of the Institutional Committee and notice of filing of same dated November 22, 1939, both filed November 22, 1939; order granting Institutional Committee's petition of intervention entered Novem-

ber 27, 1939, and notice of making and entry of said order dated November 28, 1939.

14. Petition for leave to file petition of intervention of Reconstruction Finance Corporation and order granting such petition and fixing date of hearing on petition of intervention, both filed December 7, 1939, petition of intervention of Reconstruction Finance Corporation and notice of filing of same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, and notice of making and entry of said order.

15. Objections to Plan of Reorganization of the Debtor Approved by the Interstate Commerce Commission and Claims for Equitable Treatment of the Institutional Committee dated December 6, 1939, and filed December 8, 1939.

16. Memorandum statement submitted by Reconstruction Finance Corporation in regard to Plan of Reorganization certified to the Court by the Interstate Commerce Commission, with objections and claims for equitable treatment in case that Plan should not be approved, dated December 5, 1939, and filed December 8, 1939. [1653]

17. Monthly income statements of the Debtor filed with the Interstate Commerce Commission and made a part of the record in the proceedings before said Commission Finance Docket 10,913, pursuant to stipulation of the parties, which record has heretofore been certified to and filed in the above-named Court.

18. Copy of this additional designation.

Dated, October 17, 1940.

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
By HERBERT W. CLARK,
CRAVATH, DE GERSDORFF, SWAINE & WOOD,
By ROBERT T. SWAINE,
Attorneys for Appellees Frederick H. Ecker, John W. Stedman and Reeve Schley, as an Institutional Committee as aforesaid.

CHICKERING & GREGORY,
By DONALD M. GREGORY,
MILBANK, TWEED & HOPE,
By ORVILLE W. WOOD,
Attorneys for Appellees Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under Debtor's First Mortgage.

(Affidavit of service.)

[Endorsed]: Filed Oct. 21, 1940. [1654]

[Title of District Court and Cause.]

PETITION RESPECTING THE SALE OR DISPOSITION OF COLLATERAL BY RECONSTRUCTION FINANCE CORPORATION, THE RAILROAD CREDIT CORPORATION AND A. C. JAMES CO. [1655]

To the Honorable the Judges of the District Court of the United States for the Northern District of California, Southern Division.

Now comes The Western Pacific Railroad Company, debtor in the above proceeding, and respectfully represents to the Court:

First: That Reconstruction Finance Corporation is a corporation created by Act of Congress approved January 22, 1932, and certain Acts supplementary thereto and amendatory thereof; that The Railroad Credit Corporation is a corporation organized and doing business under and by virtue of the laws of the State of Delaware; and that A. C. James Co. is a corporation organized and doing business under and by virtue of the laws of the State of Delaware.

Second: That under authority of the Interstate Commerce Commission the debtor from time to time borrowed sums of money from Reconstruction Finance Corporation, the amount whereof as of June 30, 1935, after crediting certain amounts repaid thereon, is $2,963,000. That these loans are evidenced by promissory notes a copy of one of

which is hereto annexed and made a part hereof and marked Exhibit "A." [1656]

Third: That the debtor from time to time has borrowed from The Railroad Credit Corporation sums of money, the amount whereof as of June 30, 1935, after crediting certain amounts repaid thereon, is $2,538,956. That these loans are evidenced by promissory notes, a copy of one of which is hereto annexed and made a part hereof and marked Exhibit "B."

Fourth: That the debtor from time to time has borrowed from A. C. James Co. sums of money which as of June 30, 1935, amount to $4,999,800. These loans are evidenced by promissory notes, a copy of one of which is hereto annexed and made a part hereof and marked Exhibit "C."

Fifth: All of the said notes are secured by the deposit and pledge, in varying amounts, of General and Refunding Mortgage Bonds of the debtor dated January 1, 1932. The aggregate amount of General and Refunding Bonds pledged under said notes is $18,999,500, or a sum amounting to more than 180% of the face amount of the notes held by the above named corporations as of June 30, 1935. In addition to the General and Refunding Mortgage Bonds so pledged there are pledged under certain of said notes other collateral having a substantial value, the exact amount of which the debtor is unable to estimate at the present time and under prevailing market conditions.

Sixth: Each of said notes held by Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co contains provisions that upon non-performance of any of the covenants or agreements made with the payee, or upon the non-payment of the liabilities contained in such notes, or upon default in payment of interest thereon, or in case of the insolvency of the debtor, or the appointment of a receiver of the debtor or of its property, or in case of an assignment for the benefit of creditors, the payee may sell, assign, transfer and deliver any of the said collateral security, either at any broker's board or at public or private sale, and for cash, or upon credit, or for future delivery, without demand, advertisement, or notice of the time or place of sale.

[1657]

Seventh: That by reason of the fact that the said notes of the debtor are held by corporations, the debtor believes that there is danger that certain of the noteholders may claim that one or more of the events entitling them to sell said collateral have occurred, and may proceed to exercise their rights of sale under said collateral notes, which action the debtor fears would precipitate similar action by other holders of pledged collateral.

Eighth: That sale of such collateral, including, as it does, an amount of General and Refunding Mortgage Bonds of the debtor, largely in excess of the amount of indebtedness secured thereby, would greatly increase the debt of the corporation

and would cause a substantial and irreparable loss to the trust estate, and would impede, if not render abortive, the plan of reorganization which the debtor proposes forthwith to submit to the Interstate Commerce Commission, and the sale of such collateral during the progress of the reorganization proceeding would require such changes in detail from time to time as to force an abandonment of the proceedings. For this reason the debtor submits that the maintenance of the status quo for a reasonable length of time is necessary to enable the debtor to perfect a reorganization under the plan which it is to submit to the said Commission.

Ninth: That the debtor has no adequate remedy at law and accordingly files this petition in this Court pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, whereunder this Court, having approved the debtor's petition, has during the pendency of these proceedings exclusive jurisdiction of the debtor and its property, wherever located.

Tenth: Wherefore, the debtor asks that this Court include in its Order approving the petition filed herein under the aforesaid Section 77, a provision that all persons and corporations holding collateral heretofore pledged by the debtor as security for its [1658] notes and obligations, be and each of them is restrained and enjoined from selling, converting, or otherwise disposing of, such col-

lateral or any part thereof until further Order of this Court.

THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

By CHARLES ELSEY,
President.

WARREN OLNEY, JR.,
Balfour Building, San Francisco, California.
PIERCE & GREER,
15 Broad Street, New York City, New York,
Attorneys for Debtor. [1659]

State of California,
City and County of San Francisco—ss.

Charles Elsey, being duly sworn, deposes and says: That he is an officer, to-wit, President, of The Western Pacific Railroad Company, a railroad corporation, the petitioning debtor mentioned and described in the foregoing petition; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true; also that the said petition is filed in good faith.

CHARLES ELSEY.

Subscribed and sworn to before me this 2nd day of August, 1935.

[Seal] FLORA HALL, Notary Public in and for the City and County of San Francisco, State of California.

[1660]

(EXHIBIT "A")

NOTE

New York, New York,
August 1, 1932.

$136,045.00

On or before Aug. 1, 1935, The Western Pacific Railroad Company, a corporation of the State of California (hereinafter called the "Railroad Company"), for value received promises to pay to the Reconstruction Finance Corporation (hereinafter called the "payee"), or order, at the Federal Reserve Bank of New York, in New York, New York, in gold coin of the United States of America of the present standard of weight and fineness, One Hundred Thirty-six Thousand and Forty-five Dollars, with interest at the rate of six per cent (6%) per annum from the date hereof, payable quarterly on the first day of November, February, May, and August in each calendar year and until payment of said principal sum, with the option on the part of the said Railroad Company to repay the whole or any part of said principal sum, with accrued interest thereon, at any time before maturity; having deposited with the said payee as collateral security for the payment

of this note or any extension or renewal thereof, or for the payment of any other liability or liabilities of the Railroad Company to the said payee due or to become due, or which may hereaftter be contracted or existing, including, among said liabilities, note of the Railroad Company for $799,000, maturing on before March 1, 1935, and the note of the Railroad Company for $734,584, maturing on or before June 29, 1935; both payable to Reconstruction Finance Corporation, or order, the following described property, which shall be applied pari passu and without preference to all of said notes and liability or liabilities:

$8,750,000 principal amount of The Western Pacific Railroad Company's General and Refunding Mortgage, Series "A" 5% Bonds of 1957;

100,000 principal amount of Tidewater Southern Railway Company's First Mortgage 5% 30-year Sinking Fund Bonds, due 1942;

All of the right, title and interest of The Western Pacific Railroad Corporation in 150,000 shares of the Common Capital Stock of The Denver & Rio Grande Western Railroad Company represented by stock trust certificates, subject, among other things, to all covenants and agreements made in a certain agreement dated June 15, 1923, between The Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company.

The Railroad Company hereby agrees, on demand of the payee, to deposit with the payee such additional security as it may from time to time demand, and further agrees that the securities hereby pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation of the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any and all such obligations. And all such securities in the hands of the payee shall stand as one general continuing collateral security for the whole of said obligations so that the deficiency on any one may be made good by enforcement of the rights and remedies of the payee in respect of the sale of collateral or otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount of all the liabilities aforesaid upon all other property of the Railroad Company at any time coming into the possession of the payee. And the Railroad Company hereby agrees to remain responsible for any deficiency in payment, waiving any benefit, exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with and on file with the Interstate Commerce Commission or the Reconstruction Finance Corporation and/or the payee, as

hereinafter defined, or upon the nonpayment of any of the abovementioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto, or any such other property, at such time or times to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad or of its property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or

all of said securities or interest therein or other property on credit or for future delivery, such securities or such interest therein or such other property shall remain vested in and shall be retained by the payee until the sale price therefor be paid by the purchaser, but the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or properly so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option, at any time, to appropriate and apply

to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter to the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without suit,

the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include the Reconstruction Finance Corporation and/or any successor, or assign, or liquidator, or transferee of the Reconstruction Finance Corporation or any other transferee of this note.

In Witness Whereof, The Railroad Company has caused this note to be executed by its president or vice-president and its corporate seal to be hereunto affixed by its secretary or assistant secretary, this 1st day of August, 1932.

(Seal) THE WESTERN PACIFIC RAILROAD COMPANY,
By M. J. CURRY,
Vice-President.

Attest:
(Signed) THOMAS J. BYRNE,
Assistant Secretary. [1661]

EXHIBIT "B"

NOTE OF BORROWING CARRIER

New York, N. Y.,
June 29, 1932.

$1,303,000.

On demand, but if no demand is made, then on or before February 28, 1934, The Western Pacific Rail-

road Company, a corporation of the State of California (hereinafter called the "Railroad Company"), for value received, promises to pay to The Railroad Credit Corporation (hereinafter called the "payee"), or order, at its office in Washington, D. C., in gold coin of the United States of America of the present standard of weight and fineness, One Million Three Hundred Three Thousand Dollars, with interest thereon payable semi-annually at the rate of 2½ per cent per annum from the date hereof, to and including the 30th day of June, 1932, and thereafter at rates to be fixed as provided in the Marshalling and Distributing Plan, 1931, and until payment of said principal sum, with the option on the part of the Railroad Company to repay the whole or any part of said principal sum, with accrued interest thereon, at any time before maturity; having deposited with the payee as collateral security for the payment of this note and any extension or renewal thereof, as well as for the payment of any other liability or liabilities of the Railroad Company to the payee due or to become due, or which may hereafter be contracted or existing, the following described property: [1662]

In addition thereto the Railroad Company agrees subject to the approval of the Interstate Commerce Commission when required by law, to pledge and does hereby pledge with the payee, the Railroad Company's distributive share in the fund established under the aforesaid Plan, as the same may

e at any time and from time to time determined, nd also all right, title and interest of the Railroad Company in and to any and all securities now or hereafter deposited as collateral security for any oan or loans from the Reconstruction Finance Corporation to the Railroad Company, subject always o the lien thereon of said Reconstruction Finance Corporation.

The Railroad Company hereby agrees, on demand f the payee, to deposit with the payee such additional security as the payee may from time to time demand, and further agrees that the securities hereby pledged, together with any that may be pledged hereafter or may have been pledged heretofore as security for this or any other obligation f the Railroad Company to the payee, shall be applicable in like manner to secure the payment of any nd all such obligations. And all such securities in he hands of the payee shall stand as one general ontinuing collateral security for the whole of said bligations so that the deficiency on any one may be nade good by enforcement of the rights and remeies of the payee in respect of the sale of collateral r otherwise as to the rest. And the Railroad Company hereby gives to the payee a lien for the amount f all the liabilities aforesaid upon all other property of the Railroad Company at any time coming to the possession of the payee. And the Railroad Company hereby agrees to remain responsible or any deficiency in payment, waiving any benefit,

exemption, or privilege under any law now or hereafter to be in force.

The Railroad Company further agrees that on the nonperformance of the foregoing agreement to furnish additional security upon demand of the payee and/or upon nonperformance of any of the covenants or agreements made with the payee, as hereinafter defined, or upon the nonpayment of any of the above mentioned liabilities, or upon default in payment of interest on any of the said liabilities as the same may become due, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, or assignment for the benefit of creditors, then in any such case the payee is hereby authorized to sell, assign, transfer, and deliver any or all of said securities or interest therein or any substitute therefor, or any additions thereto, or any such other property, at such time or times, to such person or persons, and in such several parts or parcels as the payee may decide, and to sell the whole or any of such parts or parcels or interest therein, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without demand, advertisement, or notice of the time or place of sale or adjournments thereof which are hereby expressly waived. Upon the nonpayment or the nonfulfillment of any of the conditions of this note, or upon any sale of any of the collateral security held by the payee or upon the appointment of a receiver of the Railroad Company or of its

property or upon an assignment for the benefit of creditors as aforesaid, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof for payment.

In case of any sale by the payee in pursuance of the terms of the last preceding paragraph of any or all of said securities or interest therein or other property on credit or for future delivery, the payee shall incur no liability in case of failure by the purchaser to take up and pay for such securities or such interest or such other property so sold. In case of any such failure the payee shall have the same right to dispose of said securities and interest therein and such other property as are given in the last preceding paragraph to the same effect as though no sale had theretofore been made.

At any sale under the provisions of this instrument, the payee may itself purchase the whole or any part of the securities sold or interest therein or other property, free from all right of redemption on the part of the Railroad Company, which right is hereby waived and released. In case of any sale the payee may first deduct all expenses incident to the collection, sale, and delivery of the securities or property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any

deficiency remaining or existing after such sale. And the Railroad Company hereby further authorizes the payee, at its option, at any time, to appropriate and apply to the payment of any of the aforesaid liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the aforesaid liabilities are then due or not due.

The Railroad Company further agrees that, upon any transfer of this note, the payee may deliver the securities or property held as security, or any part thereof, or interest therein, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto for the purpose of securing and enforcing the payment to the holder of the whole or any part of the indebtedness evidenced by this note. And the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter of the Railroad Company or to its successors or assigns.

The Railroad Company and indorsers and guarantors hereby waive presentment, protest, and notice of dishonor, and agree to remain bound for the payment of this note and all interest and charges thereon, and that the lien hereof and the pledge hereunder shall remain undisturbed, notwithstanding any extension of time, substitution of collateral, or other indulgence granted by the holder of this

note, hereby waiving all notice of such extension, substitution, or other indulgence.

In the event this note, or any part thereof, is collected by an attorney, either with or without suit, the Railroad Company agrees to pay a reasonable attorney's fee and cost of collection.

The term payee shall mean and include The Railroad Credit Corporation and/or any successor, or assign, or liquidator, or transferee of The Railroad Credit Corporation or any other transferee of this note.

Until this note and interest thereon have been fully paid, the Railroad Company agrees not to pay any dividend on any of its capital stock (except on stock, if any, on which non-payment of a specific dividend constitutes a default).

In witness whereof the Railroad Company has caused this note to be executed by its Vice-President and attested or countersigned by its Assistant Secretary, both being thereunto duly authorized, this 29th day of June, 1932.

THE WESTERN PACIFIC
RAILROAD COMPANY,
By M. J. CURRY,
Vice-President.

Countersigned by:

.....

Title.....

Attest:
T. J. BYRNE,
Assistant Secretary. [1663]

EXHIBIT "C"

March 28, 1932.

$347,000.

Three years after date, The Western Pacific Railroad Company, a corporation of the State of California, (hereinafter called the "Railroad Company") for value received, promises to pay to the A. C. James Co., a Delaware corporation (hereinafter called the "payee") or order, at the office of the payee at No. 40 Wall Street, in the City of New York, in gold coin of the United States of America of the present standard of weight and fineness, Three Hundred Forty-seven Thousand Dollars ($347,000), with interest at the rate of Five per cent (5%) per annum from the date hereof, payable quarterly on the first day of April, July, October and January in each year and until payment of said principal sum; having deposited with said payee as collateral security for the payment of this or any other liability or liabilities of the Railroad Company to the payee due or to become due, or which may hereafter be contracted or existing, the following described property:

$433,500. principal amount of the Railroad Company's General and Refunding Mortgage Gold Bonds, Series A.

The Railroad Company hereby agrees to deposit with the payee such additional security as the payee may from time to time demand, and also hereby gives to the payee a lien for the amount of all the

liabilities aforesaid upon all property of the Railroad Company at any time coming into the possession of the payee.

On the nonperformance of the foregoing agreement as to furnishing additional security, or upon the nonperformance of any of the covenants or agreements of the Railroad Company in its First Mortgage of June 26, 1916, its General and Refunding Mortgage of January 1, 1932, or in an obligation dated March 1, 1932 made by the Railroad Company with and on file with the Reconstruction Finance Corporation, or upon the nonpayment of any of the above mentioned liabilities, or in case of insolvency or the appointment of a receiver for the Railroad Company or of its property, then in any such case the payee is hereby authorized to sell, assign and deliver, the said property or any substitute therefor, or any additions thereto, or any such other property, at such time or times and in such several parts or parcels as the payee may decide, and to sell the whole or any said parts or parcels, either at any broker's board or at public or private sale, either for cash, upon credit, or for future delivery, at the option of the payee, without advertisement, or notice, which are hereby expressly waived. Upon the non-payment or the nonfulfillment of any of the conditions of this note, then the whole or any designated part of the liabilities of the Railroad Company to the payee shall mature at the election of the payee by presentation thereof

for [1664] payment. In case of any sale by the payee of any of said property on credit or for future delivery, the property sold shall be retained by the payee until the selling price is paid by the purchaser, but the payee shall incur no liability in case of failure of the purchaser to take up and pay for the property so sold.

In case of any such failure the property may be again sold. At any sale hereunder the payee may itself purchase the whole or any part of the property sold, free from all right of redemption on the part of the Railroad Company, which is hereby waived and released. In case of any sale the payee may first deduct all the expenses of collection, sale, and delivery of the property so sold, and any other expenses incurred by the payee in connection with such sale; and may then apply the residue to any one, or more, or all, of said liabilities, whether due or not due, returning the overplus, if any, to the Railroad Company, which shall remain liable to the payee for any deficiency arising upon any such sale. The Railroad Company does hereby further authorize the payee at its option at any time to appropriate and apply to the payment of any of said liabilities, whether now existing or hereafter contracted, any and all property now or hereafter in the hands of the payee belonging to the Railroad Company, whether the said liabilities are then due or not due. The Railroad Company further agrees that, upon any transfer of this note, the payee may

deliver the property held as security, or any part thereof, to the transferee, who shall thereupon become vested with all the powers and rights above given to the payee in respect thereto, and the payee shall thereafter be forever relieved and fully discharged from any liability or responsibility in the matter.

The term "payee" shall mean and include the A. C. James Co. and/or any successor or assign or liquidator or transferee of said A. C. James Co. or any other transferee of this note.

THE WESTERN PACIFIC RAILROAD COMPANY,

By M. J. CURRY,

(Corp. Seal) Vice-President.

Attest:

T. J. BYRNE,

Assistant Secretary. [1665]

The Western Pacific Railroad Company

		Present Annual Salary
T. M. Schumacher	Chairman of the Executive Committee	$15,000.00
Charles Elsey	President	25,000.00
E. W. Mason	Vice President and General Manager	13,608.00
J. F. Hogan	Vice President in Charge of Traffic	12,960.00
J. W. Williams	Chief Engineer	10,692.00

Salary of President December 31, 1931, $45,000 per annum.

United States District Court
No. 26591

Re The Western Pac. R. R. Co., Debtor.

Exhibit on Hearing on Original Petitions. Filed 8/2/35.

WALTER B. MALING,
Clerk,
By (signed) LYLE S. MORRIS,
Deputy Clerk.

[Endorsed]: Filed in Open Court August 2, 1935, at 2 o'clock and 30 minutes P. M. Walter B. Maling, Clerk, By (signed) Lyle S. Morris, Deputy Clerk. [1666]

[Title of District Court and Cause.]

PETITION OF REORGANIZATION TRUSTEES FOR SUPPLEMENTAL ORDER AUTHORIZING THEM TO BORROW $10,000,000 FROM RECONSTRUCTION FINANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS.

T. M. Schumacher and Sidney M. Ehrman, the duly appointed and qualified Trustees of the properties of the debtor above named, hereby represent to the court and petition as follows:

I.

On October 5, 1938, upon hearing after due notice and with the approval of the Interstate Commerce Commission in accordance with Section 20a of the Interstate Commerce Act, [1711] this court made its order (1) finding (a) that your petitioners had theretofore issued and there were then outstanding their certificates of indebtedness in the principal amount of $10,000,000, maturing and payable on December 1, 1938, (b) that said certificates represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain work upon and acquiring certain equipment for the railroad of the debtor which it was necessary should be done and acquired in order that said railroad might be operated with safety and reasonable efficiency, that its physical

elements might be conserved and its existing business retained and that it might furnish to the public service in the way of transportation of persons and property adequately responsive to the reasonable requirements and demands of the public upon said railroad for such service, (c) that it was necessary that your petitioners provide themselves with funds for payment of said certificates at their maturity in order to insure against a default upon them and (d) that the only means your petitioners had for securing the necessary funds with which to meet the principal of said certificates when it falls due was the issuance by them of new certificates of indebtedness in the amount of such principal, and (2) authorizing and empowering your petitioners, for the purpose of paying at maturity their said certificates of indebtedness then outstanding, to issue and to sell their certificates of indebtedness in the aggregate principal amount of $10,000,000 and prescribing the terms of such certificates and the conditions of their sale. The necessity for your petitioners to provide themselves with funds for payment of said outstanding certificates at their maturity in order to insure against a default upon them and to issue for said purpose new certificates of indebtedness in the [1712] amount of the principal of said outstanding certificates, as found by said order, continues to exist. Your petitioners have made inquiries and conducted negotiations looking to the issuance and sale of the certificates so authorized but have not

yet been able to sell the same upon satisfactory terms or to arrange to do so. Your petitioners believe, however, that they can obtain a loan from the Reconstruction Finance Corporation in the said sum of $10,000,000, such loan to be evidenced and secured by the issuance to said Reconstruction Finance Corporation of the certificates of indebtedness of your petitioners in that aggregate amount maturing either December 1, 1939, or December 1, 1940, and bearing interest at the rate of 4 per cent per annum. It is in the interest of their trust estate that your petitioners be authorized to borrow said sum from Reconstruction Finance Corporation in order to insure that your petitioners have the necessary funds with which to meet the principal of said outstanding certificates when it falls due, in case they are unable shortly to sell, upon more favorable terms, their certificates as already authorized. If such loan is made, the terms of the certificates of indebtedness to be issued to evidence and secure the same should be the same as those authorized or prescribed by said order of October 5, 1938. To consummate and fully authorize the making of said loan it is necessary for your petitioners to make formal application for the same to the Reconstruction Finance Corporation and to secure the approval of the loan by the Interstate Commerce Commission.

II.

For the purpose of meeting the requirements of Section 4 of Public Act No. 35 of the Seventy-

Third Congress of the United [1713] States, approved June 10, 1933, it will be necessary, if said loan is made, for your petitioners to enter into an agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit I.

Wherefore, your petitioners pray:

1. That upon the filing of this petition the court set the same for hearing and prescribe the notice to be given thereof and authorize your petitioners forthwith to apply to the Reconstruction Finance Corporation for said loan and to the Interstate Commerce Commission for its approval thereof.

2. That upon the hearing of said petition the court make its order supplemental to said order of October 5, 1938, whereby, in addition to the authority given by said order and without derogation therefrom, your petitioners be authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of $10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding, and to evidence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, the terms of said certificates to be the same as those of the certificates authorized by said order of October 5, 1938.

3. That your petitioners be further authorized by such supplemental order to make an agreement with the Reconstruction Finance Corporation substantially in the form of the agreement attached hereto as Exhibit I.

WARREN OLNEY, JR.,
Counsel for Petitioners.

[1714]

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says: That for more than five years last past he has been the President of The Western Pacific Railroad Company and since the appointment of the Trustees of the properties of said Company he has been their Agent in immediate charge of the railroad and other property of that Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY.

Subscribed and sworn to before me this 21st day of October, 1938.

[Seal] FRANK L. OWEN,
Notary Public,
in and for the City and County of
San Francisco, State of California.

[1715]

EXHIBIT I

....., 1938.

Reconstruction Finance Corporation,
Washington, D. C.

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated ....., 1938 in Finance Docket No. ....., approving a loan by the Reconstruction Finance Corporation (hereinafter called Reconstruction) to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees), in the total amount of $10,000,000, the Trustees as such and not individually hereby agree with Reconstruction as follows:

1. The term "compensation" as used in this agreement shall include all salaries, bonuses, commissions or other payment, direct or indirect, in money or otherwise, for personal services.

2. Attached hereto as Exhibit "A" is a schedule, consisting of one sheet, showing as of October ....., 1938, the compensation of officers and employees of the Trustees at a rate in excess of $4800 per annum. Attached hereto as Exhibit "B" is a schedule, consisting of ..... sheets, showing as of ....., 1938, the compensation of all officers and employees of the Trustees receiving compensation at a rate of $4800 per annum or less. Attached hereto as Exhibit "C" is a statement, consisting of one sheet, showing compensation paid by any

company controlling or affiliated with or controlled by the debtor to any officer or employee of the Trustees. In addition to the compensation shown by the foregoing exhibits the Directors of The Western Pacific Railroad [1716] Company who are not officers or employees of the Trustees are each paid a fee of $20 for each meeting attended and these fees are paid by the Trustees. The total of such fees paid in 1937 was $460. No fees are paid other Directors.

3. While said loan from Reconstruction is outstanding and unpaid, the Trustees will not, without in each case obtaining the prior written consent of Reconstruction,

(a) Increase the compensation (either directly or through appointment to any additional office or position) of (1) any officer or employee shown on said Exhibit "A" above the rate shown on said Exhibit "A" for such officer or employee, or (2) of any officer or employee shown on said Exhibit "B" to a rate in excess of $4800 per annum; or (3) of any Director.

(b) Elect, appoint or otherwise engage or employ any person to or for any office or position not shown on such schedules at a compensation in excess of $4800 per annum,

4. Nothing contained in this agreement shall be deemed to prohibit the Trustees from effecting any reduction in compensation below the respective amounts set forth in Exhibit "A" or Exhibit "B," as the case may be, for the officers and employees

therein specified, or in case of a vacancy of any of the offices or positions shown on Exhibit "A," from filling such vacancy through promotion, new employment or otherwise, at the rate of compensation for such office or position set forth on Exhibit "A," or to require the Trustees to violate any of the provisions of the Railway Labor Act or of any existing or future agreements made with labor organizations. [1717]

5. If any company controlling or affiliated with or controlled by the debtor shall, directly or indirectly, increase the compensation paid by it to any officer or employee of the Trustees so as to increase the total compensation of such officer or employee above the amount thereof shown on said Exhibit "A," Exhibit "B" or Exhibit "C," the compensation payable to such officer or employee by the Trustees shall be forthwith correspondingly reduced by them so as to avoid such increase in total compensation. The Trustees will give immediate notice to Reconstruction of any such increase by any such company of such compensation paid to any officer or employee of the Trustees.

6. From time to time on request of Reconstruction, the Trustees will furnish to Reconstruction, in the form attached, schedules of all compensation currently paid to the officers and employees of the Trustees.

7. During the life of said loan the Trustees will not permit the creation of any lien upon the property of said The Western Pacific Railroad

Company, or upon the trust estate of the Trustees, which shall have priority over the lien of the Trustees' Certificates to be issued by the Trustees as security for said loan, except the liens of current taxes and such necessary expenses of the Trustees as may be allowed by the Court and given such priority.

8. This agreement shall be binding on the successors of the Trustees and shall inure to the benefit of the successors and assigns of Reconstruction.

T. M. SCHUMACHER,
SIDNEY M. EHRMAN,
Trustees in Reorganization of The Western Pacific Railroad Company.

[Endorsed]: Filed Oct. 21, 1938. [1718]

[Title of District Court and Cause.]

ORDER PROVIDING FOR HEARING UPON PETITION OF REORGANIZATION TRUSTEES FOR SUPPLEMENTAL ORDER AUTHORIZING THEM TO BORROW $10,000,000 FROM RECONSTRUCTION FINANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS.

Upon due consideration of the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the debtor, filed herein and praying for a supplemental order authorizing said

Trustees to borrow $10,000,000 from the Reconstruction Finance Corporation and to evidence and secure said loan by the [1719] issuance of their certificate of indebtedness,

It is hereby ordered as follows:

1. That said petition shall be and it hereby is set for hearing before this court on November 7th, 1938, at 10 o'clock A. M.

2. That the said Trustees be and they hereby are directed to give notice of the said hearing. That such notice be given by the publication, on or before October 22, 1938, of a notice substantially in the following form in two newspapers of general circulation published in the City and County of San Francisco, State of California, to-wit: The Recorder and the San Francisco Examiner.

LEGAL NOTICE

In the District Court of the United States for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, Debtor.

NOTICE OF HEARING UPON PETITION OF REORGANIZATION TRUSTEES FOR SUPPLEMENTAL ORDER AUTHORIZING THEM TO BORROW $10,000,000 FROM RECONSTRUCTION FI-

NANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS.

Notice is hereby given, pursuant to the order of the above named court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above entitled court, at the Courtroom of the said Judge in the United States Postoffice and Courtroom Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on November 7th, 1938, at 10 o'clock A. M., or as soon thereafter as the same may be heard, upon the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, praying for an order supplemental to the order of court of October 5, 1938, authorizing them to borrow $10,000,000 from the Reconstruction Finance Corporation and to evidence and secure said loan by the issuance of their certificates of indebtedness.

T. M. SCHUMACHER,
SIDNEY M. EHRMAN,
Trustees in Reorganization of The
Western Pacific Railroad Company.

[1720]

And by mailing prior to the 23rd day of October, 1938, a copy of this order and of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.

2. Irving Trust Company, as Trustees under indenture securing Debtor's General and Refunding Mortgage Bonds.

3. A. C. James Co.

4. Reconstruction Finance Corporation.

5. The Railroad Credit Corporation.

6. Fidelity-Philadelphia Trust Co.

7. The Chase National Bank of the City of New York, as Trustees under agreement dated March 15, 1924, covering Equipment Trust Certificates.

8. The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates.

9. The Western Pacific Railroad Company.

10. The Western Pacific Railroad Corporation.

11. The Western Realty Company.

12. Central Hanover Bank and Trust Company, as Trustee under agreement dated February 1, 1937, covering Equipment Trust Certificates.

It is further ordered that the said Trustees be and they are hereby authorized to make application to the Reconstruction Finance Corporation to borrow said $10,000,000 and to apply to the Interstate Commerce Commission for its approval of said loan.

Dated October 21, 1938.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Oct. 21, 1938. [1721]

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER (1) AUTHORIZING REORGANIZATION TRUSTEES TO BORROW $10,000,000 FROM RECONSTRUCTION FINANCE CORPORATION AND TO EVIDENCE AND SECURE SAID LOAN BY THE ISSUANCE OF THEIR CERTIFICATES OF INDEBTEDNESS AND (2) AUTHORIZING AGREEMENT BY REORGANIZATION TRUSTEES WITH RECONSTRUCTION FINANCE CORPORATION.

The petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the debtor above named, filed October 21, 1938, for an order supplemental to the court's order of October 5, 1938, whereby the said Trustees (1) would [1722] be authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of $10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding, and to evi-

dence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, and (2) would be authorized to execute an agreement with Reconstruction Finance Corporation in the terms, or substantially in the terms, hereinafter set forth, came on duly to be heard this day. The said Trustees, Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees under the Indenture securing the debtor's First Mortgage Bonds, and Irving Trust Company, Trustee under the indenture securing the debtor's General and Refunding Mortgage Bonds, appeared by their respective counsel, and no other person or party appeared.

The petition was heard and submitted to the court for its decision thereon. The court being now fully advised, makes its findings and order with respect to said petition as follows:

The court finds:

1. Notice of the hearing upon said petition was given to all parties interested as required by law and the previous order of this court.

2. All of the averments of said petition are true.

3. The necessity for said Trustees to provide themselves with funds for payment of their outstanding certificates of indebtedness in the aggregate principal amount of $10,000,000 at their maturity in order to insure against a default upon them and to issue for said purpose new certificates of indebtedness in the [1723] amount of the prin-

cipal of said outstanding certificates, as found by said order of October 5, 1938, continues to exist and it is in the interest of their trust estate that said Trustees be authorized to borrow said sum from Reconstruction Finance Corporation upon the terms stated in said petition.

Now, therefore, it is hereby ordered, adjudged and decreed:

(1) That in addition to the authority given the said Trustees by said order of October 5, 1938, and without derogation therefrom, they be and they are hereby authorized, in case they find it advantageous to their trust so to do, in lieu of selling their certificates of indebtedness as authorized by said order of October 5, 1938, to borrow from the Reconstruction Finance Corporation the sum of $10,000,000 for the purpose of paying at maturity their certificates of indebtedness now outstanding and to evidence and secure such loan by the issuance to that corporation of their certificates of indebtedness in said aggregate amount, bearing interest at the rate of 4 per cent per annum, said certificates to be issued and authenticated as provided in said order of October 5, 1938, and the terms of said certificates to be the same as those of the certificates authorized by said order.

(2) That the Trustees be and they hereby are authorized to make an agreement with the Reconstruction Finance Corporation in the following, or substantially in the following, terms:

....., 1938.

Reconstruction Finance Corporation,
Washington, D. C.

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated ....., 1938, in [1724] Finance Docket No. ....., approving a loan by the Reconstruction Finance Corporation (hereinafter called Reconstruction) to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees), in the total amount of $10,000,000, the Trustees as such and not individually hereby agree with Reconstruction as follows:

1. The term "compensation" as used in this agreement shall include all salaries, bonuses, commissions or other payment, direct or indirect, in money or otherwise, for personal services.

2. Attached hereto as Exhibit "A" is a schedule, consisting of one sheet, showing as of October ....., 1938, the compensation of officers and employees of the Trustees at a rate in excess of $4800 per annum. Attached hereto as Exhibit "B" is a schedule, consisting of ..... sheets, showing as of ....., 1938, the compensation of all officers and employees of the Trustees receiving compensation at a rate of $4800 per annum or less. Attached

hereto as Exhibit "C" is a statement, consisting of one sheet, showing compensation paid by any company controlling or affiliated with or controlled by the debtor to any officer or employee of the Trustees. In addition to the compensation shown by the foregoing exhibits the Directors of The Western Pacific Railroad Company who are not officers or employees of the Trustees are each paid a fee of $20 for each meeting attended and these fees are paid by the Trustees. The total of such fees paid in 1937 was $460. No fees are paid other Directors.

3. While said loan from Reconstruction is outstanding and unpaid, the Trustees will not, without in each case obtaining the prior written consent of Reconstruction,

(a) Increase the compensation (either directly or through appointment to any additional office or position) of (1) any officer or employee shown on said Exhibit "A" above the rate shown on said Exhibit "A" for such officer or employee, or (2) of any officer or employee shown on said Exhibit "B" to a rate in excess of $4800 per annum; or (3) of any Director.

(b) Elect, appoint or otherwise engage or employ any person, to or for any office or position not shown on such schedules at a compensation in excess of $4800 per annum.

4. Nothing contained in this agreement shall be deemed to prohibit the Trustees from effecting any reduction in compensation below the respective amounts set forth in Exhibit "A" or Exhibit "B," as the case may be, for the officers and employees therein specified, or in case of a vacancy of any of the offices or positions shown on Exhibit "A," from filling such vacancy through promotion, new employment or otherwise, at the rate of compensation for such office or position set forth on Exhibit "A," or to require [1725] the Trustees to violate any of the provisions of the Railway Labor Act or of any existing or future agreements made with labor organizations.

5. If any company controlling or affiliated with or controlled by the debtor shall, directly or indirectly, increase the compensation paid by it to any officer or employee of the Trustees so as to increase the total compensation of such officer or employee above the amount thereof shown on said Exhibit "A," Exhibit "B" or Exhibit "C," the compensation payable to such officer or employee by the Trustees shall be forthwith correspondingly reduced by them so as to avoid such increase in total compensation. The Trustees will give immediate written notice to Reconstruction of any such increase by any such company of such compensation paid to any officer or employee of the Trustees.

6. From time to time on request of Reconstruction, the Trustees will furnish to Reconstruction, in the form attached, schedules of all compensation currently paid to the officers and employees of the Trustees.

7. During the life of said loan the Trustees will not permit the creation of any lien upon the property of said The Western Pacific Railroad Company, or upon the trust estate of the Trustees, which shall have priority over the lien of the Trustees' Certificates to be issued by the Trustees as security for said loan, except the liens of current taxes and such necessary expenses of the Trustees as may be allowed by the Court and given such priority.

8. This agreement shall be binding on the successors of the Trustees and shall inure to the benefit of the successors and assigns of Reconstruction.

T. M. SCHUMACHER,
SIDNEY M. EHRMAN,
Trustees in Reorganization of The
Western Pacific Railroad Company.

It is further ordered that the authority granted to the Trustees by the Court's order of October 21, 1938, to make formal application to the Reconstruction Finance Corporation for such loan and to make application to the Interstate Commerce Commission for approval thereof be and the same hereby is confirmed.

Dated November 7, 1938.

A. F. ST. SURE,

District Judge.

[Endorsed]: Filed Nov. 7, 1938. [1726]

[Title of District Court and Cause.]

PETITION OF TRUSTEES FOR ORDER AUTHORIZING THEM TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF $10,000,000.

T. M. Schumacher and Sidney M. Ehrman, the duly appointed and qualified Trustees of the properties of the Debtor above named, hereby petition the court and represent as follows:

I.

Pursuant to authority duly given them by this Court, with the approval of the Interstate Commerce Commission, your petitioners, as such Trustees, have heretofore issued and there are now outstanding their certificates of [1727] indebtedness in the principal amount of $10,000,000, maturing and payable on December 1, 1939. The said certificates were issued to evidence and secure a loan in the sum of $10,000,000 from the Reconstruction Finance Corporation. The Trustees borrowed the said sum of $10,000,000 from the Reconstruction

Finance Corporation for the purpose of paying at maturity their certificates of indebtedness then outstanding and maturing and payable on December 1, 1938. The proceeds of said loan were used for said purpose. The said certificates then outstanding and maturing and payable on December 1, 1938, represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain work upon and acquiring certain equipment for the railroad of the Debtor which it was necessary should be done and acquired in order that said railroad might be operated with safety and reasonable efficiency that its physical elements might be conserved and its existing business retained, and that it might furnish to the public service in the way of transportation of persons and property adequately responsive to the reasonable requirements and demands of the public upon said railroad for such service. The proceeds realized by the incurrence of the indebtedness represented by said certificates were expended in the doing of said work and the acquiring of said equipment.

II.

The orders of this Court authorizing the issuance of said certificates of indebtedness now outstanding and maturing and payable on December 1, 1939, and the orders of the Interstate Commerce Commission approving the issuance [1728] of said certificates expressly provide that said certificates rank as expenses of the administration by the Court

of the Debtor's property and as such are payable in due course of administration equally with other expenses of administration out of said property and constitute a charge and direct first lien upon said property prior in right to the debts and obligations of the Debtor and to any lien created by it; and said certificates were issued by your petitioners for value upon the representation that such was their character.

III.

At the time said certificates now outstanding and maturing and payable on December 1, 1939, were issued your petitioners anticipated that before December 1, 1939, a plan of reorganization of the Debtor providing for the redemption and payment of said certificates would be adopted by the Court and put into effect. No plan of reorganization has, however, been adopted by the Court. While your petitioners anticipate that they will be able to meet the interest charges on said certificates out of current funds, they have not, nor is there any reasonable possibility that they will have when said certificates mature, the funds wherewith to meet the principal of the certificates, either in whole or in part, and it is necessary that your petitioners obtain an extension of said loan and that they extend the said certificates as evidence of and security for said loan, in order to insure against a default upon the said certificates. Your petitioners believe that they can obtain an extension of said loan to December 1, 1940, from the Reconstruction Finance Cor-

poration, the said extension of said loan to be evidenced and secured by an extension of the said certificates of indebtedness by [1729] your petitioners to December 1, 1940, with interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said outstanding certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and subject to a right on the part of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said outstanding certificates on any interest payment date, the said extension of said certificates to be effectuated by stamping or writing upon each of said certificates a legend or endorsement reading substantially as follows:

> "The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the

principal amount and accrued interest to the date fixed for redemption."

It is in the interest of the trust estate of your petitioners that they be authorized to obtain an extension of said loan and to extend said certificates as evidence of and security for said loan in order to insure against a default upon the said certificates when the principal thereof falls due on December 1, 1939. To consummate and fully authorize the extension [1730] of said loan it is necessary for your petitioners to make formal application for said extension to the Reconstruction Finance Corporation and to secure the approval thereof by the Interstate Commerce Commission.

IV.

Because of the possibility that your petitioners may not be able to arrange with the Reconstruction Finance Corporation for an extension of said loan it is advisable that the Court, in its order granting the authority herein asked for, reserve jurisdiction to authorize, by supplemental order made with or without notice, the issuance and sale by your petitioners of new certificates of indebtedness in the total amount of $10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of providing themselves with funds for the payment of said outstanding certificates at maturity.

V.

For the purpose of meeting the requirements of Section 4 of Public Act No. 35 of the Seventy-Third Congress of the United States, approved June 10, 1933, it will be necessary, if said extension of said loan is made, for your petitioners to enter into a supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit I.

Wherefore, your petitioners pray.

1. That upon the filing of this petition the Court set the same for hearing and prescribe the notice to be given thereof and authorize your petitioners forthwith to apply to the Reconstruction Finance Corporation for an extension [1731] of said loan to December 1, 1940, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental application to the Interstate Commerce Commission as may be required in respect to said extension of said outstanding certificates of indebtedness.

2. That upon the hearing of said petition the Court make its order whereby your petitioners will be authorized to extend to December 1, 1940, their outstanding certificates of indebtedness in the total amount of $10,000,000, as evidence of and security for the said extension of said loan, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said

certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by the Trustees by stamping or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

> "The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within [1732] certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had, and

obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of $10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

3. That your petitioners be further authorized by such order to make a supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto as Exhibit 1.

ALLAN P. MATTHEW
Counsel for Petitioners [1733]

State of California,
City and County of San Francisco—ss.

Charles Elsey, being first duly sworn, deposes and says that for more than six years last past he has been President of The Western Pacific Railroad Company and since the appointment of the Trustee of the properties of said company he has been their Agent in immediate charge of the railroad and other property of that company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY

Subscribed and sworn to before me this 10th day of October, 1939.

[Notarial Seal] FLORA HALL
Notary Public [1734]

EXHIBIT 1

....., 1939

Reconstruction Finance Corporation,
Washington, D. C.

SUPPLEMENTAL AGREEMENT

Dear Sirs:

Pursuant to the report and order of the Interstate Commerce Commission dated ....., 1939, in Finance Docket No. ....., approving an extension to December 1, 1940, by the Reconstruction Finance Corporation (hereinafter called Reconstruction) of the loan made by Reconstruction to the undersigned Trustees in Reorganization of The Western Pacific Railroad Company, a debtor, (hereinafter called the Trustees) in the total amount of $10,000,000 and maturing on December 1, 1939, the Trustee as such and not individually, in consideration of said extension of said loan, hereby agree with Reconstruction as follows:

The agreement made and entered into by and between Reconstruction and the Trustees on November 23, 1938, pursuant to the report and order of the Interstate Commerce Commission dated November 10, 1938, in Finance Docket No. 12,213, approving said loan by Reconstruction to the Trustees, shall be and is hereby extended and shall be and remain in full force and effect during the period of

said extension of said loan, or until December 1, 1940.

T. M. SCHUMACHER
SIDNEY M. EHRMAN
Trustees in Reorganization of The Western Pacific Railroad Company

[Endorsed]: Filed Oct. 10, 1939. [1735]

[Title of District Court and Cause.]

ORDER PROVIDING FOR HEARING UPON PETITION OF TRUSTEES FOR ORDER AUTHORIZING THEM TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF $10,000,000.

Upon due consideration of the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the Debtor above named, filed herein and praying for an order authorizing them to extend their certificates of indebtedness presently outstanding in the amount of $10,000,000.

It is hereby ordered as follows:

1. That said petition shall be and it hereby is set for hearing before this court on November 6, 1939, at 10 o'clock, A. M. [1736]

2. That the said Trustees be and they hereby are directed to give notice of the said hearing. That said notice be given by publication on or before October 13, 1939, of a notice substantially in the

following form in The Wall Street Journal (Pacific Coast Edition) and The Recorder, two newspapers of general circulation published in the City and County of San Francisco, State of California:

LEGAL NOTICE

In the District Court of the United States for the Northern District of California, Southern Division

No. 26591-S

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

NOTICE OF HEARING UPON PETITION OF TRUSTEES FOR ORDER AUTHORIZING THEM TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF $10,000,000

Notice is hereby given, pursuant to the order of the above named court, that a hearing will be held before the Honorable A. F. St. Sure, Judge of the above entitled court, at the Courtroom of the said Judge, in the United States Postoffice and Courthouse Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, on November 6, 1939, at 10 o'clock, A. M., or as soon thereafter as the same may be heard, upon the petition of

T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, praying that they be authorized:

To apply to the Reconstruction Finance Corporation for an extension to December 1, 1940, of the outstanding loan by the Reconstruction Finance Corporation to the said Trustees in the total amount of $10,000,000, and to extend as evidence of and security for said extension of said loan their outstanding certificates of indebtedness in said total amount, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semiannually as provided in said certificates (the said certificates having been issued and deposited at a discount from the par value thereof by an amount that, when added to the [1737] interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of the Trustees to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by the Trustees by stamping

or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

"The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of $10,000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

T. M. SCHUMACHER
SIDNEY M. EHRMAN
Trustees in Reorganization of The Western Pacific Railroad Company

And by mailing prior to October 14, 1939, a copy of this order and of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.
2. Irving Trust Company, as Trustee under indenture securing Debtor's General and Refunding Mortgage Bonds.
3. A. C. James Co. [1738]
4. Reconstruction Finance Corporation.
5. The Railroad Credit Corporation.
6. Fidelity-Philadelphia Trust Co.
7. The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates.
8. The Western Pacific Railroad Company.
9. The Western Pacific Railroad Corporation.
10. The Western Realty Company.
11. Central Hanover Bank and Trust Company, as Trustee under agreement dated February 1, 1937, covering Equipment Trust Certificates.

It is further ordered that said Trustees be and they are hereby authorized to make application to the Reconstruction Finance Corporation for said extension of said loan to December 1, 1940, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental application to the Interstate Com-

merce Commission as may be required in respect to said extension of said outstanding certificates of indebtedness.

Dated, October 10, 1939.

HAROLD LOUDERBACK

District Judge

[Endorsed]: Filed Oct. 10, 1939. [1739]

[Title of District Court and Cause.]

ORDER (1) AUTHORIZING REORGANIZATION TRUSTEES TO EXTEND THEIR CERTIFICATES OF INDEBTEDNESS PRESENTLY OUTSTANDING IN THE AMOUNT OF $10,000,000 AND (2) AUTHORIZING AGREEMENT BY REORGANIZATION TRUSTEES WITH RECONSTRUCTION FINANCE CORPORATION.

The petition of T. M. Schumacher and Sidney M. Ehrman, Trustees of the properties of the Debtor above named, filed October 10, 1939, for an order authorizing the said Trustees to extend to December 1, 1940, their certificates of indebtedness presently outstanding in the amount of $10,000,000, as evidence of and security for the proposed extension to said date of the outstanding loan by the Reconstruction Finance Corporation to the said Trustees in said Trustees [1740] and the Crocker First Na-

tional Bank of San Francisco and Samuel Armstrong, Trustees under the Indenture securing the Debtor's First Mortgage Bonds, appeared by their respective counsel, and no other person or party appeared. The said petition was heard and submitted to the court for its decision thereon. The Court being now fully advised, makes its findings and order with respect to said petition as follows:

The Court finds:

1. Notice of the hearing upon said petition was given to all parties interested as required by law and the previous order of this Court.

2. The extension of said certificates to December 1, 1940, upon the terms and in the manner stated in said petition, as evidence of and security for the extension of said loan, has been approved by the Interstate Commerce Commission by its supplemental order duly made on the 21st day of November, 1939.

3. All of the averments of said petition are true.

4. Pursuant to and in accord with the authority duly granted them by this Court, with the prior approval of the Interstate Commerce Commission, said Trustees have heretofore issued and there are now outstanding their certificates of indebtedness in the principal amount of $10,000,000, maturing and payable on December 1, 1939. The said certificates were issued to evidence and secure a loan in the sum of $10,000,000 from the Reconstruction Finance Corporation. The said Trustees borrowed the said sum of $10,000,000 from the Reconstruction Finance

Corporation for the purpose of paying at maturity their certificates of indebtedness then [1741] outstanding and maturing and payable on December 1, 1938. The proceeds of said loan were used for said purpose. The said certificates then outstanding and maturing and payable on December 1, 1938, represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain necessary work upon and acquiring certain necessary equipment for the railroad of the Debtor, and the proceeds realized by the incurrence of the indebtedness representd by said certificates were expended in the doing of said necessary work and the acquisition of said necessary equipment.

5. As more fully provided in said certificates of indebtedness now outstanding and maturing and payable on December 1, 1939, and in the orders of this Court authorizing the issuance of said certificates, said certificates rank as expenses of administration by the Court of the Debtor's property and as such are payable in due course of administration equally with other expenses of administration out of said property and constitute a charge and direct first lien upon all the said property, real, personal and mixed, and the earnings and income therefrom, prior in right to the debts and obligations of the Debtor and to any lien created by it, and said certificates were issued by said Trustees for value upon the representation that such was their character.

6. No payment on account of principal of said outstanding certificates of indebtedness, or any of

them, has been made. The funds of the Trustees on hand will provide the Trustees on December 1, 1939, with the funds to meet the interest charges on said certificates but will not [1742] provide the funds to pay the principal thereof, in whole or in part. It is necessary that said Trustees obtain an extension of said loan and that they extend the said certificates as evidence of and security for said loan, in order to insure against a default upon the said certificates.

7. It is in the interest of the trust estate of said Trustees that they be authorized to obtain an extension of said loan to December 1, 1940, from the Reconstruction Finance Corporation, and to extend the said certificates of indebtedness to December 1, 1940, upon the terms and in the manner stated in said petition, as evidence of and security for said extension of said loan.

Wherefore, It Is Hereby Ordered, Adjudged and Decreed that said Trustees be and they are hereby authorized to obtain from the Reconstruction Finance Corporation an extension of said outstanding loan to December 1, 1940, and as evidence of and security for the said extension of said loan, to extend to December 1, 1940, their outstanding certificates of indebtedness in the total principal amount of $10,000,000, the said certificates as extended to bear interest at the rate of four per cent (4%) per annum payable monthly in lieu of at the rate of three per cent (3%) per annum payable semi-annually as provided in said certificates (the said certificates having been issued and deposited at a

discount from the par value thereof by an amount that, when added to the interest at said rate of three per cent (3%) per annum from the date of issuance to the date of maturity of said certificates, equals the amount of interest on said certificates for the same period at a rate of four per cent (4%) per annum) and to be subject to a right of said Trustees to redeem [1743] upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said extension to be effectuated by said Trustees by stamping or writing upon each of the said outstanding certificates a legend or endorsement reading substantially as follows:

> "The holder thereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is extended to December 1, 1940, with interest at the rate of 4% per annum payable monthly and with the privilege of redemption by the Trustees of all but not less than all of the Trustees' Certificates of this issue on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserves jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of $10,-

000,000, dated December 1, 1939, and bearing interest at the rate of four per cent (4%) per annum or a higher rate of interest, for the purpose of meeting the principal of the said outstanding certificates at maturity.

It Is Further Ordered that, except as modified by this Order, all the terms and provisions of said certificates and the rights of the holder or holders of said certificates as such holder or holders be and they shall remain in full force and effect.

It Is Further Ordered that said Trustees be and they are hereby authorized to make an agreement with the Reconstruction Finance Corporation in the following, or substantially in the following form:

[1744]

December 1, 1939

Reconstruction Finance Corporation
1825 H Street, N. W.,
Washington, D. C.

Dear Sirs:

The undersigned Trustees of The Western Pacific Railroad Company are indebted to your Corporation on account of a certain loan represented by Trustees' Certificates in the principal amount of $10,000,000 which mature on December 1, 1939.

In consideration of the granting by your Corporation of an extension of the maturity date of the above mentioned Trustees' Certificates, authorized by the supplemental report and sup-

plemental order of the Interstate Commerce Commission, dated November 21, 1939, in Finance Docket No. 12158, the undersigned Trustees, as such and not individually, hereby agree with your Corporation as follows:

1. The term "compensation" as used in this Agreement shall include all salaries, fees, bonuses, commissions or other payments, direct or indirect, in money or otherwise, for personal services;

2. So long as they are indebted to your Corporation, the undersigned Trustees will not increase the compensation of any of their officers, directors or employees to any amount not permitted by the terms of the agreement dated November 23, 1938, between your Corporation and the undersigned Trustees, and any written consents given by your Corporation pursuant to the provisions of said agreement;

3. The undersigned Trustees hereby ratify, confirm and reaffirm the said agreement of November 23, 1938, and each and every covenant contained in said agreement.

Respectfully submitted,

.....

.....

As Trustees of The Western Pacific Railroad Company.

Attest:

.....

Agent for the Trustees of The
Western Pacific Railroad Company.

Dated, November 29, 1939.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Nov. 29, 1939. [1745]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEE, RECONSTRUCTION FINANCE CORPORATION, OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL.

Reconstruction Finance Corporation, an appellee in connection with the appeals taken by The Western Pacific Railroad Company, Debtor, The Western Pacific Railroad Corporation, A. C. James Co., a corporation, The Railroad Credit Corporation, and Irving Trust Company as trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, Debtor, dated January 1, 1932, pursuant to notices filed September 20, 1940, hereby designates, in accordance with Rule 75(a) of the Rules of Civil Procedure, the following portions of the record, proceedings and evidence to be included in the record on appeal to the Circuit

Court of Appeals for the Ninth Circuit, in addition to the portions of such record, proceedings and evidence designated by the appellants:

(1) Petition of The Western Pacific Railroad Company, Debtor, filed herein August 2, 1935, respecting the sale or disposition of collateral by Reconstruction Finance Corporation, The Railroad Credit Corporation, and A. C. James Co.

(2) Opinion and order of the above-entitled court dated November 9, 1935, confirming the appointment of trustees as appointed by the court and ratified by the Commission.

(3) Claim of Reconstruction Finance Corporation filed on or before September 12, 1935.

(4) Petition of Reconstruction Finance Corporation for leave to intervene before the Interstate Commerce Commission (hereinafter called the Commission), dated October 5, 1936.

[1746]

(5) Order of the Commission dated October 7, 1936 granting intervention to the Reconstruction Finance Corporation.

(6) Exhibits marked as Exhibits Nos. 127-148, both inclusive, incorporated in the record before the Commission in this matter, which is numbered "Finance Docket No. 10913", and has heretofore been certified to and filed in the above-named court.

(7) Reply of Reconstruction Finance Corporation, filed with the Commission on or about

October 6, 1937, to the exceptions of various parties to the proposed report of the Bureau of Finance of the Commission dated August 2, 1937.

(8) Petition of Reconstruction Finance Corporation filed with the Commission for rehearing and modification of the report and order of the Commission dated October 10, 1938, if that petition be not included in Appellants' Designation No. 25.

(9) Petition for leave to file petition of intervention of Reconstruction Finance Corporation and order granting such petition and fixing date of hearing on petition of intervention, both filed December 7, 1939, petition of intervention of Reconstruction Finance Corporation and notice of filing same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, and notice of making and entry of said order.

(10) Memorandum statement filed herein on or about December 8, 1939, in regard to plan of reorganization certified to the above court by the Commission, with objection and claim for equitable treatment in case that plan is not approved.

(11) Petition filed herein October 21, 1938, of reorganization Trustees for supplemental order authorizing them to borrow $10,000,000 from Reconstruction Finance Corporation and to evidence and secure said loan by the issuance of their certificates of indebtedness, and order and supplemental order entered thereon by the

above court on October 21, 1938 and November 7, 1938, respectively.

(12) Petition filed herein October 10, 1939, of Trustees for order authorizing them to extend their certificates of indebtedness presently outstanding in the amount of $10,000,000 and order and supplemental order entered thereon by the above court on October 10, 1939 and November 29, 1939, respectively.

(13) Copy of this additional designation.

(14) All endorsements of filing and all acknowledgments and other proofs of service of any of the aforesaid records or papers in the above court, or, in lieu thereof, memorandum by the Clerk showing the due filing and/or service of said records or papers.

Dated this 17th day of October, 1940.

BROBECK, PHLEGER & HARRISON,
Crocker Building,
San Francisco, California.

C. M. CLAY,
Assistant General Counsel
Reconstruction Finance Corporation,
Washington, D. C.
Attorneys for Appellee,
Reconstruction Finance Corporation.

[Endorsed]: Filed Oct. 19, 1940. [1747]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE IN CIRCUIT COURT OF APPEALS THE RECORD ON APPEAL FROM ORDER OF AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR, AND TO DOCKET ACTION IN THE CIRCUIT COURT OF APPEALS

It appearing to the Court that several appeals (all taken by Notice of Appeal filed herein September 20, 1940) have been taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court, made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, and that the parts of the record, proceedings and evidence in the above proceeding which have been designated for inclusion in the Record on Appeal in accordance with Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, are voluminous and it will be necessary for [1748] the Clerk of this Court to prepare for use on said appeals, a record on appeal, which shall include, without duplication, all of the matters designated for inclusion therein, by the various appellants and appellees on said appeals, and it is unlikely that such record on appeal can be prepared by the Clerk in time to permit the filing thereof in said Circuit Court of Appeals within the time limited by Rule 73(g) of said Rules of Civil Procedure;

Now, therefore, in consideration of the premises, and good cause appearing therefor, it is hereby ordered that, in accordance with said Rule 73(g) of said Rules of Civil Procedure, the time for filing said record on appeal in said Circuit Court of Appeals, and for docketing said action in said Circuit Court of Appeals, be and the same is hereby extended to and including November 30, 1940 (which date is seventy-one days from the date of the filing of the first Notice of Appeal from the aforesaid Order of August 15, 1940).

Dated: October 25, 1940.

A. F. ST. SURE
Judge

[Endorsed]: Filed Oct. 25, 1940. [1749]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE IN CIRCUIT COURT OF APPEALS THE RECORD ON APPEAL FROM ORDER OF AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR, AND TO DOCKET ACTION IN CIRCUIT COURT OF APPEALS

It appearing to the Court that the time allowed by law (as extended by the order of this Court made October 25, 1940) for the preparation and filing in the Circuit Court of Appeals for the Ninth

Circuit of the record on appeal on the several appeals heretofore taken to said last mentioned Court from the order of this Court made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, is insufficient to permit of the preparation and filing of said record on appeal and the docketing of said action within the time so allowed by law, as extended by said order of this Court.

Now, therefore, in consideration of the premises and good cause [1750] appearing therefor, it is hereby ordered that, (in accordance with Rule 73 [g] of the Rules of Civil Procedure for the District Courts of the United States), the time for filing said record on appeal and docketing said action in said Circuit Court of Appeals, be and the same is hereby extended to and including December 15, 1940 (which date is eighty-six days from the date of the filing of the first notice of appeal from the aforesaid order of August 15, 1940).

Dated: November 27, 1940.

A. F. ST. SURE
Judge.

[Endorsed]: Filed Nov. 27, 1940. [1751]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE IN CIRCUIT COURT OF APPEALS THE RECORD ON APPEAL FROM ORDER OF AUGUST 15, 1940, APPROVING PLAN OF REORGANIZATION OF DEBTOR, AND TO DOCKET ACTION IN CIRCUIT COURT OF APPEALS

It appearing to the Court that the time allowed by law (as extended by the orders of this Court made October 25, 1940, and November 27, 1940, respectively,) for the preparation and filing in the Circuit Court of Appeals for the Ninth Circuit of the record on appeal on the several appeals heretofore taken to said last mentioned Court from the order of this Court made, filed and entered herein on August 15, 1940, Approving Plan of Reorganization of the Debtor, is insufficient to permit of the preparation and filing of said record on appeal and the docketing of said action within the time so allowed by law, as extended by said Order of this Court,

Now, therefore, in consideration of the premises and good cause [1752] appearing therefor, it is hereby ordered that, (in accordance with Rule 73 [g] of the Rules of Civil Procedure for the District Courts of the United States), the time for filing said record on appeal and docketing said action in said Circuit Court of Appeals, be and the same

is hereby extended to and including December 19, 1940, (which date is ninety days from the date of the filing of the first notice of appeal from the aforesaid order of August 15, 1940).

Dated: December 12th, 1940.

A. F. ST. SURE
Judge.

[Endorsed]: Filed Dec. 12, 1940. [1752A]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE TRANSCRIPT OF RECORD ON APPEALS.

Good cause appearing therefor, it is hereby ordered that the time for filing the transcript of record on the appeals heretofore taken to this Court by The Western Pacific Railroad Company, A. C. James Co., The Western Pacific Railroad Corporation, The Railroad Credit Corporation and Irving Trust Company as Trustee under the General and Refunding Mortgage of the Debtor, from the order of the United States District Court for the Northern District of California, Southern Division, made, filed and entered August 15, 1940, approving the Plan of Reorganization of the above named Debtor, which said time (as fixed by Rule 73 of the Rules of Civil Procedure for the District Courts of the United States, and three orders of the Dis-

trict Court, dated October 25, 1940, November 27, 1940 and December 12, 1940, respectively), will expire December 19, 1940 (i.e., ninety days after the date upon which the Notices of Appeal on said appeals were filed in said District Court) be and the same is hereby extended to and including December 31, 1940.

Dated: December 18, 1940.

CURTIS D. WILBUR
Senior U. S. Circuit Judge.

[Endorsed]: Filed Dec. 18, 1940.

PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed Dec. 18, 1940. Walter B. Maling, Clerk.

A true copy.

Attest: December 18, 1940.

PAUL P. O'BRIEN,
Clerk. [1753]

[Title of District Court and Cause.]

ORDER PROVIDING FOR OMISSION OF COPIES OF CERTAIN ORIGINAL EXHIBITS FROM RECORD ON APPEAL AS MADE UP BY CLERK AND FOR THE TRANSMISSION OF SUCH ORIGINAL EXHIBITS TO THE CIRCUIT COURT OF APPEALS

It appearing to the Court that several appeals (all taken by notices of appeal filed herein on Sep-

tember 20, 1940) have been taken to the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made, filed and entered herein on August 15, 1940, approving plan of reorganization of the Debtor;

And it further appearing that (1) the original exhibits (except those numbered 1, 42, 76 and 127-148, both inclusive) which were offered in evidence on the hearing in the above matter before the Interstate Commerce Commission of the United States (hereinafter called "Commission") in the proceeding designated by the Commission as Finance Docket No. 10913, as shown by the transcript and record of the proceedings before the Commission heretofore certified by it to [1754] this Court and filed herein, and (2) the original exhibits (except the "Stipulation as to Facts not in Dispute" and the memorandum of corrections therein, identified by the witness Charles Elsey, which said stipulation and memorandum were offered in evidence and filed on the hearing next mentioned, and the exhibits which are annexed to said "Stipulation as to Facts not in Dispute", or were filed as a part thereof) which were offered in evidence on the hearing in this Court, on January 22, 1940, of the Objections to the plan of reorganization of the Debtor certified to this Court by the Commission, are of such character and form as to be unsuitable for inclusion in the record on appeal to be prepared by the Clerk of this Court as required by the Rules of Civil Procedure for the District Court

of the United States, but that it is necessary that said original exhibits be inspected and considered by said Circuit Court of Appeals in connection with said appeals as part of the Record on Appeal thereon,

Now, therefore, in consideration of the premises, and good cause appearing therefor,

It is hereby ordered that all of the original exhibits (other than those excepted as aforesaid) which were received in evidence on the hearing in the above matter before the Commission as shown by the transcript and record of the proceedings before the Commission heretofore certified by it to this Court and filed herein, and all of the original exhibits (other than those excepted as aforesaid) which were received in evidence on said hearing, in this Court on January 22, 1940, shall be transmitted by the Clerk to the appellate court, in lieu of copies of such exhibits, and shall constitute a part of the record on appeal on said appeals.

Dated: November 27, 1940.

A. F. ST. SURE
Judge.

[Endorsed]: Filed Nov. 27, 1940. [1754-A]

Before the
Interstate Commerce Commission
Finance Docket 10913.
Western Pacific Railroad Company Reorganization
TESTIMONY
Hearing Room C, I.C.C. Building,
Washington, D. C.
Monday, March 23, 1936.

Met pursuant to notice at 10:00 o'clock a. m.

Before:

R. T. Boyden and
Harvey H. Wilkinson, Examiners.

Appearances:

Frank C. Nicodemus, Jr., 37 Wall Street, New York City, appearing for the Western Pacific Railroad Company.

Robert E. Coulson, 40 Wall Street, appearing for A. C. James Company.

James B. Alley, C. C. McChord, and C. M. Clay, Washington, D. C., appearing for Reconstruction Finance Corporation.

Daniel Willard, Jr., Transportation Building, Washington, D. C., appearing for the Railroad Credit Corpora- [1756] tion.

Robert T. Swaine, 15 Broad Street, New York City, appearing for Metropolitan Life Insurance Company; Prudential Life Insurance Company; New York Life Insurance Company; Mutual Benefit Life Insurance Company; John Hancock Life

Insurance Company; Travellers Life Insurance Company; Home Life Insurance Company and Chase National Bank, (Pledgee), holding $16,941,400 First Mortgage Bonds of Debtor, acting through Frederick H. Ecker, John W. Stedman and Reeve Schley, as an Executive Committee.

Orville W. Wood, 15 Broad Street, New York City, appearing for Trustees under Debtor's First Mortgage and trustee under Debtor's General and Refunding Mortgage. [1757]

PROCEEDINGS

Examiner Boyden: The Interstate Commerce Commission has assigned for hearing at this time and place, Finance Docket No. 10913, proceeding for reorganization of the Western Pacific Railroad Company.

Evidence will be received in support of and in opposition to the plan of reorganization which has been filed by the Western Pacific Railroad Company, and other plans of reorganization also will be received by parties having the requisite interest in the proceedings, and evidence in support of and in opposition to those claims.

Who appears for the Western Pacific Railroad Company?

Mr. Nicodemus: Frank C. Nicodemus, Jr.

Examiner Boyden: Are there other appearances?

Mr. Swaine: I appear for the Metropolitan Life Insurance Company, Prudential Life Insurance Company, New York Life Insurance Com-

pany, Mutual Benefit Life Insurance Company, John Hancock Life Insurance Company, Travellers Life Insurance Company, Home Life Insurance Company and Chase National Bank, the latter as Pledgee, together representing $16,941,400 principal amount of First Mortgage Bonds of the Debtor.

Examiner Boyden: Have you filed a petition of intervention, Mr. Swaine?

Mr. Swaine: No, I have not. [1760]

Examiner Boyden: Do you expect to do so?

Mr. Swaine: Probably.

Examiner Boyden: Are there other appearances?

Mr. Coulson: I am appearing on behalf of A. C. James Company, security creditor. Robert E. Coulson, 40 Wall Street, New York City.

Examiner Boyden: Have you filed a petition?

Mr. Coulson: I have not, sir, but probably will.

I might say that the court has classified the claim of this creditor as a separate class in the order entered in the proceeding in the California court.

Examiner Boyden: Have you been admitted to practice before the Commission?

Mr. Coulson: Yes.

Examiner Boyden: Are there other appearances?

Mr. Willard: The Railroad Credit Corporation appears by D. Willard, Junior, counsel. Petition of intervention has been granted by the Commission by order dated March 14th.

Mr. Boyden: Are there any other appearances?

(No response.)

Since the filing of its petition in the United States District Court for the Northern District of California, southern division, the Western Pacific Railroad Company has filed in the proceedings before the court various [1761] petitions and accounting records. Other documents have also been filed by other parties.

Pursuant to the rules of the United States Supreme Court, many of those documents have been transmitted to the Commission and filed in Finance Docket 10913. They are open to public inspection. May it be understood that those documents heretofore filed in the court proceedings and those which may hereafter be filed in such proceedings and transmitted to the Commission will constitute a part of the record in this proceeding?

Mr. Nicodemus: Debtor so stipulates.

Examiner Boyden: You may proceed, Mr. Nicodemus.

Mr. Nicodemus: In the interest of brevity we will omit any preliminary statements and go right ahead with the witnesses.

We will call as the first witness, Mr. Michael J. Curry.

MICHAEL J. CURRY

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Will you state your connection with the Western Pacific Railroad Company?

A. I am vice president and assistant secretary of the Western Pacific Railroad Company.

Q. You also are an officer of the corporation?

[1762]

A. I am secretary and treasurer of the Western Pacific Railroad Corporation.

Q. Mr. Curry, before we proceed further, the order of the Commission fixing a hearing at this time and place requires notice to be published. Have you evidence of the publication of that?

A. I have evidence of the publication.

Mr. Nicodemus: May we file this as a part of the record? That is an affidavit of the publication of the notice in the Wall Street Journal at San Francisco and the New York Herald-Tribune in New York. You need not give it an exhibit number, because I have none to distribute.

Examiner Boyden: It may be filed as part of the record.

(The documents referred to were thereupon filed.)

Q. (By Mr. Nicodemus) Are you custodian of

(Testimony of Michael J. Curry.)

the record of the action of the Executive Committee of the Railroad Company? A. I am.

Q. You also have duplicate records of the action of the board of directors when held in San Francisco? A. I have.

Q. The plan of reorganization pursuant to which this hearing has been held was filed on the 8th of February in the United States Court at San Francisco and on the same [1763] date with the Interstate Commerce Commission? A. It was.

Q. Can you identify that as a counterpart of the plan so filed?

A. I do identify it as such plan.

Q. On what date was that plan submitted to the board of directors of the railroad company?

A. On February 7, 1936.

Q. Have you a certified copy of the minutes adopted by the board of directors on that date pertaining to the plan? A. I have.

Q. Can you produce it?

A. I identified it as a certified copy of the action taken at meeting of the board of directors of the Western Pacific Railroad Company, held on February 7, 1936, at its office in San Francisco, California.

Mr. Nicodemus: I offer those documents in evidence.

Examiner Boyden: Is there any objection?

(Testimony of Michael J. Curry.)

The plan of reorganization will be received as exhibit 1, and the copy of the minutes will be received as exhibit 2.

(Exhibits 1 and 2, Witness Curry, received in evidence.)

[Printer's Note: Exhibit 1 (Plan of Reorganization effective January 1, 1936) is not set out here as it already appears at page 19 of this printed record.]

Mr. Nicodemus: That finishes this witness.

[1764]

Examiner Boyden: Is there any examination of this witness? The witness is excused.)

(Witness excused.)

Mr. Nicodemus: Charles Elsey.

CHARLES ELSEY

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Mr. Elsey, what is your name and residence?

A. Charles Elsey, Oakland, California.

Q. And your occupation?

A. President of the Western Pacific Railroad Company.

Q. How long have you been connected with the Western Pacific Railroad Company?

A. Since 1907.

(Testimony of Charles Elsey.)

Q. The present company was reorganized in 1916, so that your connection goes back to the predecessor company, is that correct?

A. That is correct.

Q. When did the predecessor company commence operations? A. July 1, 1911.

Q. So you went with the Company when it was a paper company and was not operating then?

A. No, the company was incorporated on March 3, 1903. [1765]

Q. But had not started formal operations?

A. Commenced formal operations, as I said before, on July 1, 1911.

Q. You started in with the predecessor company as assistant treasurer, is that correct?

A. That is correct.

Q. You later became treasurer?

A. Yes, sir.

Q. And subsequently vice president. In what year was that? A. 1921.

Q. Vice president in charge of finance in 1921?

A. Yes, sir.

Q. And continued in that office until 1929. Is that correct? A. Yes, sir.

Q. When you became executive vice president and afterwards president? A. Yes, sir.

Q. And you were elected president in 1932, and have held that position continuously?

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Throughout the entire period of your service, you have been more or less identified with the financial end of the property? [1766]

A. That is correct.

Q. To complete the record, will you give the date of the prior receivership, its inception and its termination?

A. Went into receivership on March 4, 1915; was in the hands of a receiver until July 14, 1916.

Q. That was a model of brevity, then, as to that receivership? A. Yes, sir.

Q. Mr. Elsey, will you give a brief description of the present lines of railroad of the debtor, the Western Pacific Railroad Company?

A. The main line of the Western Pacific extends from Oakland, California, to Salt Lake City, a distance of 924.17 miles; another main line from Keddie, California to Bieber, California, a distance of 111.81 miles—a total main line mileage of 1035.98.

The main line from Oakland to Salt Lake City serves the principal cities in northern California, such as San Francisco, Oakland, Stockton, Sacramento, Marysville and Oroville, also the main shipping points in Nevada.

The principal branch lines are the San Jose Branch, which takes off the main line at Niles and terminates at San José, a city of 57,000 population.

This line serves the Santa Clara Valley, one of the richest agricultural territories in the state, a distance [1767] of 23.07 miles.

(Testimony of Charles Elsey.)

The Terminous branch takes off the main line at Terminous Junction and terminates at Terminous, a distance of 7.92 miles.

This branch line serves a territory, the principal commodities of which are celery, asparagus and other vegetables.

The Calpine Branch, 12.62 miles and the Loyalton Branch, 12.79 miles—both of these branches serve a lumber territory in Plumas County.

The Reno Branch takes off the main line at Reno Junction and runs to Reno, a distance of 33.11 miles.

A branch of Burmester to Warner cuts off the main line at Burmester and connects with the Toole Valley Railroad at Warner, which latter railroad serves the International Smelter, a distance of 15.52 miles.

Miscellaneous branches, 72.14.

Total branches of 177.17 miles. Grand Total, 1213.15 miles, with the water mileage between San Francisco and Oakland of 4.20 or a total mileage of 1217.35.

Q. Summing it all up, the roads traverse at least three states, California, Nevada and Utah, and the carrier is engaged in interstate commerce. Is that correct? A. That is correct.

Q. You have referred to a line to Bieber. Will you state [1768] briefly the history of the construction of that line, which is referred to from time to time as the northern California extension?

A. That line takes off of our Salt Lake-San Francisco Line at Keddie, California, and runs in

(Testimony of Charles Elsey.)

a northwesterly direction to Bieber, where we have a connection with the Great Northern Railroad. This line serves a very important lumber district, and at Westwood is located the largest lumber mill in California, which this line serves.

Q. When was the line constructed?

A. It was commenced in 1929 and completed in November, 1931.

Q. When did you start to carry its operations in the accounts of the parent company?

A. In November, 1931.

Q. So the accounts prior to that are somewhat distorted by the fact that the earnings of that line are not included. Is that correct?

A. Yes, sir.

Q. How was that financed, Mr. Elsey?

A. The total cost was approximately ten million dollars. It was financed 50 per cent by the issuance of our first mortgage bonds. Our first mortgage bond is a closed issue of $50,000,000 and this $5,000,000 exhausted our ability to issue bonds under this mortgage. It was therefore [1769] necessary to finance the balance of the line by the issuance of debentures, which were sold to the A. C. James Company.

Q. And the A. C. James Company took a junior position in respect of half of the cost of that construction?

A. Yes, sir. I might say in connection with the northern California extension that we have a full

(Testimony of Charles Elsey.)

line of rates with the Great Northern Railway, and the Santa Fe connects with our line at Stockton, with which company we also have a full line of rates, making a north and south route serving all the points on the Great Northern in Washington and Oregon and all points on the Santa Fe System.

Q. Mr. Elsey, coming to the plan of reorganization in support of which you are appearing as a witness, will you state in the order substantially of their importance what you regard as the outstanding features of this plan? I take it that the feature of outstanding and primary importance is the reduction of fixed charges? A. Yes, sir.

Q. The extent of that reduction is indicated by the plan itself, is it not? Will you, however, state those figures again so that this will appear in your testimony?

A. Our present fixed charges amount to $3,180,053, and under the plan of reorganization our fixed charges will [1770] be $1,027,036.

Q. So substantially 66⅔ per cent of the fixed charges have been eliminated?

A. Yes, sir.

Q. The amended section 77 of the Bankruptcy Act describes in paragraph C of section 77 that a plan approved under the Act shall provide for interest charges in such an amount that after due consideration of the probable prospective earnings of the property in the light of its earnings experience and all other relevant facts, there shall be adequate coverage for such fixed charges by the probable

(Testimony of Charles Elsey.)

earnings available for the payment thereof.

Do you feel and are you prepared to give the reasons why you feel that this plan meets that test?

A. Yes, sir.

Q. Looking into the immediate past, Mr. Elsey, the period from 1929 to 1935 was a very severe period for successful railroad operation, was it not?

A. Yes, sir.

Q. Do you think a period of stress equally severe may reasonably be anticipated within the next quarter of a century? A. I would not think so.

Q. So that a first mortgage bond with a 30-year maturity put out under this plan, if it would have stood up [1771] during that period, would in all probability stand up during the 30-year period of its life? Is that correct? A. Yes, sir.

Q. Have you prepared a statement showing the interest available for fixed charges during that period? A. Yes, sir.

Q. 1929 to 1935? A. Yes, sir.

Q. That was prepared at your request in the regular course of business from the records of the company? A. Yes, sir.

Q. You believe it to be correct?

A. Yes, sir.

Mr. Nicodemus: I offer it in evidence.

Examiner Boyden: Is there any objection?

The exhibit will be marked exhibit 3, for identification.

(Exhibit 3, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Q. (By Mr. Nicodemus) In connection with that exhibit, the plan provides for a contingency reserve fund of $500,000 to be applied to the payment of interest in any lean year that we might encounter? A. That is correct.

Q. That application of that contingency reserve fund is [1772] also shown by this statement?

A. Yes, sir.

Q. It would have been applied to make up the deficiency in the years 1930 and 1931?

A. 1931 and 1932.

Q. Mr. Elsey, the next feature of the plan which you wish to comment on is what?

A. The next most important point is putting the property into good operating condition. The plan of reorganization provides for an expenditure of $9,500,000 on road and equipment over a period of three years.

It is my opinion that with this expenditure the road will be brought to normal efficiency and we will be able to operate the property in the future without any abnormal expenditures as far as maintenance of way and structures is concerned, and also maintenance of equipment. The program will provide that during these three years, all the old rail will have been relaid, a considerable portion of the road ballasted, and taking up the deferred maintenance on our equipment, particularly freight equipment.

Q. Do you feel that after that $9,500,000 is expended, the road will be in A-1 condition for opera-

(Testimony of Charles Elsey.)

tion and will not require any extraordinary maintenance in the future, barring floods, and acts of God, or something of that sort?

A. Yes, sir. [1773]

Q. Arrangements have been perfected, as I understand it, subject to the approval of the Commission, for the borrowing of that ten million dollars?

A. Yes, sir.

Q. I say ten million dollars because $500,000 of the $10,000,000 is to be applied to the creation of the contingency reserve fund to which you have already referred, so you have net capital available for completing this rehabilitation program of $9,500,000. That is being obtained from the Reconstruction Finance Corporation on what you regard as favorable terms? A. Very favorable.

Q. You can draw the money down over a three year period as and when you need it?

A. Yes, sir.

Q. And you can call on the Reconstruction Finance Corporation to buy, regardless of the then market conditions, is that correct?

A. That is correct.

Q. Will you state the condition upon which the Reconstruction Finance Corporation made that undertaking? They required that the present indebtedness of the railroad company to the Reconstruction Finance Corporation be advanced and given the same rank that the first mortgage bonds hold; is that the condition? [1774]

(Testimony of Charles Elsey.)

A. That was the condition on which they agreed to purchase this $10,000,000 of our new first mortgage bonds.

Q. We will pass to the next feature of the plan as to which you propose to comment. My memorandum indicates that in that connection you wish to speak about the contingent interests, the bonded debt that will be created under the plan carrying only the contingent interest.

A. That is covered by our income bonds, and that is contingent for two years, or eleven per cent.

Q. You mean, it is cumulative for two years?

A. Yes, sir.

Q. So that maximum accumulation will never be more than approximately 11 per cent. But before we get to that, the aggregate of the fixed charge bonds and the income bonds is greater than the present bonded debt of the reorganized company, and that has been commented on somewhat in connection with the public discussions of this plan.

Will you explain that increase to the Commission?

A. Our present outstanding debt exclusive of equipment trust obligations is $49,290,100 of first mortgage bonds. Under the plan of reorganization the mortgage debt of all classes will total $75,543,405, an increase of $25,253,305.

This increase is more than offset by the uncapitalized expenditures. For example, A. C. James Com-
[1775] pany contributed $4,999,800 to finance the

(Testimony of Charles Elsey.)

construction of the Northern California extension and took a junior position.

In addition to this, the company's uncapitalized capital expenditures down to September 30, 1935, amounted to $22,275,780.

New capital expenditures under the rehabilitation program are estimated at $3,085,323, making a total of $30,360,903, which is approximately $5,000,000 more than the increase is funded debt.

But only a relatively small portion of this funded debt is of fixed interest obligations.

To further explain this situation, there was invested in the property by the predecessor company, the Western Pacific Railway Company, to July 14, 1916, the date that the company went into the hands of the receiver, $82,398,852. The present company invested in the property from July 14, 1916 to December 31, 1935, $76,967,015, making a total of $159,365,867.

With the capital expenditures in round figures around $3,000,000, it is a grand total of $162,365,867. This is against a fixed interest debt under the plan of reorganization of only $25,675,900. This latter figure includes the $10,000,000 of new bonds which we propose to sell to the Reconstruction Finance Corporation. [1776]

Q. Mr. Elsey, before there is any definite obligation to pay contingent interest on income bonds, do you feel that adequate working funds will be available to you to enable you to properly operate and maintain the property? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Will you explain that feature of the plan?

A. In the plan of reorganization there is set up what is called the capital fund. Money from the capital fund can be spent for additions and betterments or for the payment of principal and installments on equipment trust notes before any money is allocated to the income bondholder, either as interest or for sinking fund.

Q. The amount of that fund during the first five-year period of the plan is what?

A. $500,000 a year.

Q. Is that subsequently increased to a larger amount?

A. Yes, sir. For the next five years it is increased to a million dollars a year, and thereafter, 3 per cent of our gross operating revenues.

Q. So you feel there is no danger whatever of the property being starved under this plan?

A. None whatever.

Q. So much for that. You have already adverted to the limited accumulative feature of the income bonds. Do you wish to add anything to what you have already said on [1777] that subject?

A. No, I cannot say that I do.

Q. That is, there is no danger under this plan of heavy accumulations, such as have been criticised in other reorganizations, where income bonds were the feature? A. No, sir.

Q. A small issue of junior lien bonds is allocated to the A. C. James Company and the Railroad

(Testimony of Charles Elsey.)

Credit Corporation under this plan. Is the interest cumulative or non-cumulative?

A. Non-cumulative entirely.

Q. That is entirely non-cumulative, so there is no problem in connection with that?

A. None whatever.

Q. Mr. Elsey, the director of the Bureau of Finance communicated with the Railroad Corporation and requested that certain exhibits be assembled. Have you taken up that request?

A. Yes, sir.

Q. First on the list is the articles of incorporation and by-laws. That is a formal exhibit which I offer without any comment. It speaks for itself.

Examiner Boyden: Let the exhibit, including the articles of incorporation of the Western Pacific Railroad Company be marked exhibit 4. [1778]

(Exhibit 4, Witness Elsey, marked for identification.)

Mr. Nicodemus: We next offer the first mortgage of the Western Pacific Railroad Company to the First Federal Trust Company and Henry E. Cooper, Trustees, dated June 26, 1916.

Q. Mr. Elsey, in connection with this exhibit has the name of the corporate trustee been changed?

A. Yes, sir.

Q. What is the present name of the corporate trustee?

A. Crocker First National Bank of San Francisco.

(Testimony of Charles Elsey.)

Q. Has Henry E. Cooper, originally the individual trustee, continued to serve as such, or has he been superseded? A. Yes, sir.

Q. He has been superseded? A. Yes, sir.

Q. By Samuel Armstrong?

A. That is correct.

Q. The papers incident to the substitution of Mr. Armstrong are annexed? A. Yes, sir.

Mr. Nicodemus: I offer the mortgage and the accompanying papers as exhibit 5.

Examiner Boyden: Let it be marked exhibit 5.

(Exhibit 5, Witness Elsey, marked for identi- [1779] fication.)

Mr. Nicodemus: We next offer the general refunding mortgage of the Western Pacific Railroad Company to the Chase National Bank of the City of New York, trustee, dated as of January 1, 1932.

Examiner Boyden: Let it be marked Exhibit 6.

(Exhibit 6, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) With reference to the exhibit just introduced, Mr. Elsey, that mortgage was created quite recently. Will you state the amount of bonds that have been authenticated under that mortgage? Certain bonds were authenticated by the trustee in place of the treasurer of the company. Will you state the position of those bonds at the present time?

(Testimony of Charles Elsey.)

A. Those bonds amount to $18,999,500, and are pledged as collateral under notes of the A. C. James Company, Reconstruction Finance Corporation, and the Railroad Credit Corporation.

Q. None of the bonds of that issue is outstanding in the hands of the public and the other issue is canceled under the plan? Is that correct?

A. Yes, sir.

Mr. Nicodemus: I next offer the certificate for common stock of the debtor. [1780]

Examiner Boyden: Let it be marked exhibit 7.

(Exhibit 7, Witness Elsey, marked for identification.)

Mr. Nicodemus: We then offer the certificate for preferred stock of the debtor.

Examiner Boyden: Let it be marked exhibit 8.

(Exhibit 8, Witness Elsey, marked for identification.)

Mr. Nicodemus: The next exhibit which we offer pursuant to the request of the Commission is a complete and detailed statement of the short term obligations of the carrier, the three issues of notes to which the witness has just referred, and the schedules of collateral therefor, and we believe all the information necessary to enable the Commission to determine the status of these short term notes.

Examiner Boyden: Let it be marked exhibit 9.

(Exhibit 9, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Mr. Nicodemus: Exhibit 9 is supplemented by a brief statement of data pertaining to other securities of the company, which might go in as exhibit 10. This shows the status of the equipment trusts and unsecured indebtedness, and like items.

Examiner Boyden: Let it be marked exhibit 10.

[1781]

(Exhibit 10, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Mr. Elsey, have you caused to be prepared an analysis of the road's available balance sheet? A. Yes, sir.

Q. What date has been selected for that purpose? A. December 31, 1935.

Q. The plan of reorganization contemplates that the old company will pass out as of midnight of that date, and that the new company will start to function on January 1, 1936?

A. That is the reorganized company.

Mr. Nicodemus: We offer that in evidence.

Examiner Boyden: Let the analysis of the balance sheet be marked exhibit 11.

(Exhibit 11, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you prepared or caused to be prepared a similar analysis of the investment account as of the same date?

A. Yes, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: We offer that analysis in evidence.

Examiner Boyden: Let it be marked exhibit 12.

(Exhibit 12, Witness Elsey, marked for identi- [1782] fication.)

Mr. Nicodemus: Mr. Examiner, the Commission requested traffic density charts. We have a traffic density chart for 1934. It has very little significance in this proceeding, because there are no divisional liens or anything of that character.

However, we offer it in evidence. We could supply years if needed, but we think it would serve no particular useful purpose. It will be substantially the same as 1934.

The Witness: Yes.

Examiner Boyden: Let the 1934 traffic density chart be marked exhibit 13.

(Exhibit 13, Witness Elsey, marked for identification.)

Mr. Nicodemus: We also have prepared at the request of the Commission a brief reference to the corporation laws under which the debtor is organized.

Examiner Boyden: Let it be marked exhibit 14.

(Exhibit 14, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you caused to be prepared, Mr. Elsey, a statement showing the pres-

(Testimony of Charles Elsey.)

ent status of equipment with regard to its age, condition, ledger value, and accrued depreciation as of December 31st? [1783]

A. Yes, sir.

Q. That was prepared by you and for you in the usual course of business by the auditor or superintendent of motive power?

A. The superintendent of motive power.

Q. Examiner Boyden: Let it be marked exhibit 15.

(Exhibit 15, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you any comment to make on that exhibit?

A. None other than the fact that under our plan of reorganization with the expenditure of a portion of our $9,500,000 for equipment we feel that it will bring our equipment up to good operating condition.

Q. Mr. Elsey, in view of the fact that the plan of reorganization is proposed to be made effective as of January 1, 1936, have you requested the auditor to prepare and has he prepared a pro forma balance sheet for the reorganization company?

A. Yes, sir.

Q. Is the auditor available for examination should anyone present care to make inquiry as to the method by which this was prepared?

A. Yes, sir.

Q. That is also true as to the other financial exhibits, [1784] the analysis of investment account and the analysis of balance sheet?

(Testimony of Charles Elsey.)

A. That is correct.

Q. Have you any comment to make on this pro forma balance sheet? A. No, sir.

Mr. Nicodemus: It is offered in evidence.

Examiner Boyden: Let the pro forma general balance sheet be marked as exhibit 16.

(Exhibit 16, Witness Elsey, marked for identification.)

Mr. Nicodemus: In order to make the plan of reorganization effective, it is necessary to execute certain new instruments. First among these is the first mortgage, next in importance the income mortgage, then the junior lien mortgage, escrow agreement, and the voting trust agreement.

Drafts of these five instruments have been prepared.

Under the plan the so-called Ecker Committee, the committee of which Mr. Frederick H. Ecker is Chairman, have reserved the right to review these documents, and we offer them with the understanding that they are subject to revision by counsel for the committee. There is nothing sacrosanct about these documents. We will be glad to have the suggestions of any of the interested counsel. [1785]

We now tender them as the documents that we are required to execute under the plan.

First, I will offer the first mortgage.

Examiner Boyden: Let it be marked Exhibit 17.

(Exhibit 17, Witness Elsey, marked for identification.)

(Testimony of Charles Elsey.)

Q. (By Mr. Nicodemus) Have you any comments to make on the first mortgage, Mr. Elsey?

A. The first mortgage will be dated January 1, 1936, and will be a closed mortgage of $50,000,000. Under the plan of reorganization there will be $15,675,900 of these bonds issued to the present first mortgage bondholders and the Reconstruction Finance Corporation.

$10,000,000 will be sold to the Reconstruction Finance Corporation to provide funds for the contingency reserve fund and the improvement program. $1,000,000 will be issued and placed in the treasury. The balance of $23,324,100 will be reserved for future additions and betterments. The bonds or deposited cash can only be drawn down to the extent of 75 per cent of the actual net expenditures.

Q. Is that a conservative mortgage, in your judgment, in respect to the limitations on the issuance of future bonds? A. Yes, sir. [1786]

Q. The trustees under that mortgage are the Crocker First National Bank of San Francisco and Samuel Armstrong? A. Yes, sir.

Mr. Nicodemus: We next offer the proposed income mortgage to the United States Trust Company, Trustee.

Examiner Boyden: Let it be marked exhibit 18.

(Exhibit 18, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) Have you any comment to make on the income mortgage?

(Testimony of Charles Elsey.)

A. The income mortgage is dated January 1, 1936. It has a life of 75 years. It consists of two series, series A and series B.

Q. Fifty years, that is?

A. Pardon me; fifty years.

Series A is to be issued in the amount of $20,887,398, and Series B in a like amount, making a total of $41,774,796. It will be a closed mortgage.

Q. The interest is wholly contingent upon available net income? A. Yes, sir.

Q. The subject of available net income has been negotiated at considerable length with the representatives of the insurance companies and the Ecker Committee? A. Yes, sir. [1787]

Q. You have already referred to the fact that it is cumulative for two years' interest only?

A. Yes, sir.

Mr. Nicodemus: We next offer the proposed junior lien mortgage to the Chase National Bank of the City of New York.

Q. Have you any comment to make upon that?

A. It is dated January 1, 1936. It is for a period of 75 years. The total amount to be issued under this mortgage is $8,092,709. It is a closed mortgage at that figure. The bonds under this mortgage are to go to the A. C. James Company and the Railroad Credit Corporation.

Q. In accordance with the plan?

A. Yes, sir.

(Testimony of Charles Elsey.)

Examiner Boyden: Let it be marked exhibit 19.

(Exhibit 19, Witness Elsey, marked for identification.)

Mr. Nicodemus: Under the provisions of the plan, one-half of the equity is placed in escrow as security for the payment of interest at a future income period. Such an instrument has been prepared and we now offer the escrow agreement.

Examiner Boyden: Let it be marked exhibit 20.

(Exhibit 20, Witness Elsey, marked for identification.) [1788]

Mr. Nicodemus: Last of all, we offer the proposed voting trust agreement.

Q. I call your attention to the fact, Mr. Elsey, that the names of the voting trustees are not inserted in the voting trust agreement. The plan of reorganization provides in substance that at or before the hearing on the plan, which is this hearing, three voting trustees shall be appointed, which will be nominated by the railroad company and acceptable to the bondholders committee; that is, the Ecker Committee.

Has the railroad company made its nominations?

A. Yes, sir.

Q. Have the voting trustees been selected?

A. Two.

Q. What has happened to the third?

A. There was disagreement as to the third.

Q. That is still in negotiation, then?

(Testimony of Charles Elsey.)

A. Yes, sir.

Mr. Nicodemus: I will pass that.

We offer the voting trust agreement with the understanding that the name of the third trustee will be supplied at the earliest practicable date. We regret very much that it has not been already.

Examiner Boyden: Let it be marked exhibit 21.

(Exhibit 21, Witness Elsey, marked for identi- [1789] fication.)

Q. (By Mr. Nicodemus) Mr. Elsey, you have already offered an exhibit showing how this plan would work if applied retroactively. Have you any exhibit now that will show how it will operate in the future, according to the best estimates?

A. Yes, sir.

Q. What have you prepared in the nature of a forecast?

A. I have prepared an estimate of revenues and income account for the five year period, 1936 to 1940, inclusive. This information that is disclosed in this estimate was prepared in the regular same manner that we prepare our ordinary estimates in preparation of our forecast.

Q. You have reviewed this personally with care?

A. Yes, sir.

Q You believe it to be reasonably conservative?

A. Yes, sir; I think it is very conservative, particularly as far as our estimates on operating revenues are concerned.

(Testimony of Charles Elsey.)

Q Witnesses are available to testify as to the details of this statement should anyone desire to analyze the estimates? A. That is correct.

Q. Who will testify as to the assumed operating revenues?

A. Mr. John F. Bon, freight traffic manager.

[1790]

Q. And another witness will testify as to the operating expenses?

A. Yes, sir. Mr. Edward W. Engelbright, consulting engineer on my staff, will testify as to the operating expenses.

Examiner Boyden: Let the forecast be marked as exhibit 22.

(Exhibit 22, Witness Elsey, marked for identification.)

Q. (By Mr. Nicodemus) In a telephone talk I had with one of the Examiners, he indicated that the Commission would like to have some information about the present condition of structures and equipment. Do you feel that the testimony you have already given covers those points, or do you wish to add anything?

A. We have referred maintenance on our way and structures, particular rail. The program of rehabilitation provides that all of that rail will be taken out of track in three years. We also have some deferred maintenance on our freight equipment. That also will be taken care of out of our rehabilitation fund.

(Testimony of Charles Elsey.)

Q. Do you think that is covered by your previous statement that at the end of the three-year period you will have a reasonably satisfactory road that can be operated without extraordinary maintenance? [1791] A. That is correct.

Mr. Nicodemus: I have finished with this witness, Mr. Examiner.

Cross Examination

Q. (By Mr. Swaine) Mr. Elsey, in exhibit 3, which is headed "The Western Pacific Railroad Company's Plan of Reorganization, Annual Fixed Charges under Plan, $1,027,036, Record of Present Company," are the figures contained in the second vertical column under the caption "Available for Interest" the figures of the Western Pacific Railroad Company as a separate entity or are they the consolidated figures of that company and all of the companies of which it owns a majority or more of the capital stock?

A. That is just the figures of the Western Pacific Railroad Company.

Q. They are the figures of the Western Pacific Railroad Company only? A. Yes, sir.

Q. Are they the figures of net railway operating income, or do they include items for interest from subsidiaries? A. Yes, sir.

Q. Which is it?

A. It includes interest received from subsidiaries.

(Testimony of Charles Elsey.)

Q. Is the interest which is there stated interest which was [1792] received in cash or interest received in obligations?

A. It was received in obligations during certain portions of the period.

Q. Will you please state the amount for each of the years which represents interest credited on the books of the Western Pacific Railroad Company to paid-in obligations, and state the companies whose obligations represent that interest?

A. Approximately $600,000 a year obligations of the Sacramento Northern Railway.

Q. Have you prepared a statement of the net railway operating income of the Sacramento Northern? A. No, sir.

Q. Can you state to the Examiner what the amount of the net railway operating income has been over this period of time?

A. No, sir, I have not the figures with me.

Q. Has it approximated this $60,000 annually of interest? A. I could not say, Mr. Swaine?

Q. How much do you think if would be?

A. I do not want to guess at the figures.

Mr. Swaine: I think, Mr. Examiner, it is rather relevant: He has now testified that in these figures "Available for Interest" is an item of $600,000 a year—is that right?

The Witness: Yes, sir. [1793]

Mr. Swaine: —is an item of interest accrued to the Western Pacific Railroad Company from the

(Testimony of Charles Elsey.)

Sacramento Northern. I think it is relevant to the Commission and certainly to the first mortgage bond holders to know how good that item is.

May we therefore ask the witness to submit as an exhibit a statement of the net railway operating income, or perhaps we had better make it the total income of the Sacramento Northern, for this period, so that we can see to what extent that $600,000 per year has been earned.

Examiner Boyden: You mean for the period covered in——

Mr. Swaine: 1929 to 1935.

Examiner Boyden: Would it not be better to have the total income account shown for that period?

Mr. Swaine: I agree. You get my point, do you not?

Mr. Nicodemus: Surely. We will do that.

Examiner Boyden: Will you have such an exhibit prepared, Mr. Nicodemus?

Mr. Nicodemus: We will be very glad to.

Q. (By Mr. Swaine) Turning to page 2 of the analysis of balance sheet, under "Investments in Affiliated Companies," the first item is those pledged under the first mortgage, and the first item under that is capital stock of the Salt Lake City Union Depot & Railroad Company.

Will you please explain what that company is?

[1794]

A. That is the depot company at Salt Lake City for our passenger terminal.

(Testimony of Charles Elsey.)

Q. Do you own all of the capital stock of that company? A. No, sir; 50 per cent.

Q. The next item is "Capital Stock of Sacramento Northern Railway, $999,500."

I notice further down, pledged under general and refunding mortgage, $500 in stock of the same company. Does that $1,000,000 aggregate represent the entire stock of that company? A. Yes, sir.

Q. What is the Sacramento Northern Railway Company?

A. The Sacramento Northern Railway is an electrically operated company property approximately 275 miles in length, operating from San Francisco to Oakland, Sacramento, Marysville, Oroville and Chico, with branch lines to Woodland, in the Holland district, and to Vacaville.

Q. When did it go into operation?

A. I could not tell you.

Q. Before the Western Pacific Railroad Company? A. Yes, a portion of it.

Q. Is it actually paying any cash return, either by way of interest or dividends to the Western Pacific Railroad Company? A. No, sir. [1795]

Q. Is the Western Pacific Railroad Company making advances to it from time to time?

A. Yes, sir, for nominal amounts.

Q. Since in exhibit 3 the item "Available for Interest" included $600,000 a year interest on advances to that company, I assume that those figures did not deduct the amount of advances to the company annually. Is that correct?

(Testimony of Charles Elsey.)

A. That is correct.

Q. Can you state the average amount of those advances? A. No, I cannot.

Q. Would it be as much as $100,000 a year?

A. Oh, it might run slightly over $100,000 a year.

Q. Does that mean, then, that this item "Available for Interest" is larger by about $700,000 than the actual amount of cash which you would have had available for interest?

A. Approximately so. Mr. Swaine, I do not consider those debts of the Sacramento Northern a bad obligation. The Sacramento Northern, as I have figured, has quite a future. In the first place, the Sacramento Northern is the only interurban railroad that will operate over the new bridge from Oakland to San Francisco. We expect that our passenger revenue will increase very materially.

The Sacramento Northern recently constructed the [1796] Holland Branch, which taps a very rich agricultural district, and is showing very large improvements in traffic.

Q. All I want to do is to bring out the facts as to what cash we would have to collect this interest out of, that is all.

Do you think that the obligations which you have received could have been sold for cash, at par, so that you would have had this amount of cash available to pay this interest? A. No, sir.

(Testimony of Charles Elsey.)

Q. Do you think they could have been placed with banks to realize this amount of cash, so that this amount that you have entitled "Available for Interest" would really have been available for interest? A. I cannot answer that question.

Q. The answer to that question will somewhat be given by the income statement of the Sacramento Northern, will it not? A. Yes, sir.

Q. What is the next company, the Deep Creek Railroad Company?

A. The Deep Creek Railroad is a road approximately 40 miles in length, running from the main line at Wendover in Utah to the point of Gold Hill.

Q. Is the company paying any dividends? [1797]

A. No, sir.

Q. Do you have to make advances to it?

A. Very small.

Q. What do you mean by "very small"?

A. $20,000 a year.

Q. Will you produce an income statement of the Deep Creek Railroad Company also?

A. We can, yes.

Q. Is that a wholly-owned company?

A. Yes, sir.

Examiner Boyden: For what years, Mr. Swaine?

Mr. Swaine: For the years 1929 to 1935, inclusive.

Q. What is the Standard Realty & Development Company?

A. The Standard Realty & Development Company is a wholly-owned subsidiary of the Western

(Testimony of Charles Elsey.)

Pacific, and is simply a convenience company for the handling of miscellaneous pieces of real estate.

Q. Does it return any dividends or interest?

A No, sir.

Q. Has its income been such as to require the making of advances to it?

A Practically nothing.

Q. There have been some?

A. Very small amounts, at times; might be two or three thousand dollars, something of that kind.

[1798]

Q. To complete the record, might it not be well similarly to produce its income statement for 1929 to 1935?

Examiner Boyden: Will you do so, Mr. Nicodemus?

Mr. Nicodemus: Yes.

Q. (By Mr. Swaine) The next item, "Sacramento Northern Railroad 5 per cent 20-year Gold Bonds, $3,975,456.13".

Were those bonds issued for additions and betterments to the Sacramento Northern?

A. Yes, sir, and the purchase of the property.

Q. What?

A. Additions and betterments, and also for the purchase of the property before the Western Pacific became interested in the property.

Q. What is the item "Notes Receivable" under that? As this is printed in this "Analysis of Bal-

(Testimony of Charles Elsey.)

ance Sheet" the words "Notes Receivable" are indented correspondingly with the "Sacramento Northern" and not correspondingly with the "5 per cent 20-year Gold Bonds." I do not know whether that is intentional or whether those notes receivable really belong to the Sacramento Northern.

A. Those notes receivable are separate, Mr. Swaine.

Q. Whose notes receivable are they?

A. In favor of the Western Pacific.

Q. I know, but are they Sacramento Northern? I do not understand from the way it is indented if those are [1799] Sacramento Northern notes receivable, or are they notes receivable of other companies?

A. No, the Sacramento Northern.

Q. They are all Sacramento Northern?

A. Yes.

Q. What were they issued for by the Sacramento Northern?

A. Oh, for various purposes, additions and betterments of the Sacramento Northern, and advances of the——

Q. Advances to incurred deficits in operation?

A. Yes, sir.

Q. Can you state what part of the $4,524,744 represents deficits in operation?

A. No, sir, I cannot.

(Testimony of Charles Elsey.)

Q. Would you get that figure and supply it for the record, please?

Examiner Boyden: Will you supply for the record, Mr. Nicodemus, an analysis of the item of "Notes Receivable" under the "Sacramento Northern" as an exhibit?

Mr. Nicodemus: We will.

Q. (By Mr. Swaine) The next items seem to be "Pledged Under General and Refunding Mortgage."

So far as the physical properties are concerned, the general and refunding mortgage is a lien junior to the first mortgage upon all the properties, is it not? A. That is correct. [1800]

Q. Are these items now listed under "Investments" only items in respect of which the general and refunding mortgage is a lien superior to the First Mortgage? A. That is correct.

Q. What is the Tidewater Southern Railway Company?

A. The Tidewater Southern Railroad is a feeder property that operates from Stockton southerly through the San Joaquin Valley for a distance of approximately 75 miles, serving the towns of Manteca, Modesto, Turlock, and Hilmar.

Q. Does it pay dividends to the Western Pacific Railroad Company? A. No, sir.

Q. Does it make any return by way of interest?

A. It is paying its interest and paying princi-

(Testimony of Charles Elsey.)

pals on the advances that have been made in the past.

Mr. Swaine: Will you produce also the income account of that road from 1929 to 1935, inclusive?

Examiner Boyden: Will you do so, Mr. Nicodemus?

Mr. Nicodemus: All that data is shown by the reports that we file annually with the Commission, which we stipulate may be referred to, so it is not necessary to offer these as exhibits, that we prepare a statement assembling the information that Mr. Swaine requests, but refer to those annual reports, if that is satisfactory.

Q. (By Mr. Swaine) As to this particular item there really [1801] is income coming in?

A. Yes, sir.

Q. That income is in the amount "Available for Interest" in exhibit No. 3?

A. No, sir. The interest on any advances that the Western Pacific has made to the Tidewater Southern will be included.

Q. The income received from the Tidewater Southern Railway Company by the Western Pacific Railroad Company is in the item "Available for interest"? in the second column of exhibit 3?

A. That is correct.

Q. Do you know how much that has been in the aggregate over that period?

A. I could not give you that.

Q. As much as $100,000?

(Testimony of Charles Elsey.)

A. No, the interest is not that much.

Q. It is a relatively small item?

A. Yes, sir.

Q. What I am trying to get at is whether the actual interest items that you have gotten in any measure offset these deficits that are also included in there as income. You think it is materially less than $100,000? A. Yes, sir.

Q. What is the Central California Traction Company? [1802]

A. The Central California Traction Company is a line operating between Stockton and Sacramento, serving a very rich agricultural district, the principal commodities being Tokay grapes. It is owned jointly by the Southern Pacific, Santa Fe, and Western Pacific in equal proportions.

Q. By the way, I think I forgot to ask you whether the Tidewater Southern was wholly owned by the Western Pacific.

A. No, sir. The Western Pacific owns approximately 98 per cent of the stock.

Q. Does the Central California Traction Company return income? A. No, sir.

Q. Do you have to make advances to it from time to time? A. Yes, sir.

Q. The advances that you have to make to it have not been deducted from the item "Available for Interest" as shown on exhibit 3?

A. That is correct.

Q. They have not been deducted?

A. No, sir.

(Testimony of Charles Elsey.)

Q. What is the Alameda Belt Line?

A. The Alameda Belt Line is property that is jointly owned by the Western Pacific, and Santa Fe, and serves the [1803] southerly arm of the estuary and reaches the larger terminals of the Encinal Terminals in Alameda.

Q. Has it paid dividends over this period, 1929 to 1935? A. No, sir.

Q. You have to make advances to it?

A. Practically none at all; very small.

Q. Such as you have made have not been deducted from the item "Available for Interest" under exhibit 3? A. No, sir.

Q. Do you have to make advances to the Salt Lake City Union Depot & Railroad Company?

A. Yes, sir.

Q. And similarly they have not been deducted?

A. No, sir.

Q. Those advances are to pay for operating expenses that the terminal itself is unable to earn?

A. Yes, sir, and they are pro rated on a wheelage basis between the two companies.

Q. What is the item of "Notes receivable" pledged under the general and refunding mortgage? A. I could not say.

Q. Could you prepare or have prepared an analysis of that item, please?

Examiner Boyden: Will you do so, Mr. Nicodemus?

(Testimony of Charles Elsey.)

Mr. Nicodemus: We will. [1804]

Mr. Swaine: I suggest, Mr. Examiner, that in the light of this testimony it would be very helpful, not only to the Commission but to the security holders if we could have a consolidated income statement of the company and all its subsidiaries prepared, so that we can see what really is available for interest.

Examiner Boyden: For how many years, Mr. Swaine?

Mr. Swaine: For 1929 to 1935. I think it ought to parallel this other exhibit. I would suggest that similarly a consolidated statement be made covering the period for which a forecast was prepared. I do not remember the number of the exhibit.

Examiner Boyden: Exhibit 22.

Mr. Swaine: 1936 to 1940.

Q. Perhaps I *may in* error. Was that forecast 1936 to 1940 prepared on the basis of the Western Pacific Railroad Company as a separate entity, or is that a consolidation? A. Separate.

Q. As a separate entity? A. Yes, sir.

Q. So you have taken in here as part of your income the accruals of interest on the Sacramento Northern? A. No, sir.

Q. You did not as to that one? [1805]

A. No, sir.

Q. Have you made any deductions for prospective advances to these subsidiaries that have not earned their way?

(Testimony of Charles Elsey.)

A. No, sir. It would not come into that kind of a statement.

Mr. Swaine: I think it might be well if we had also a forecast of the prospective operating deficits of the various subsidiaries for which the Western Pacific Railroad Company will be required to make advances during this 1936 to 1940 period.

Examiner Boyden: Mr. Elsey, do you believe you can prepare such a forecast of operating deficits?

The Witness: It is rather difficult to prepare a forecast, for instance, of the Salt Lake City Union Depot & Railroad Company, and the Alameda Belt Line, as strictly operating units. We can prepare a statement for the Sacramento Northern and Tidewater Southern.

Mr. Swaine: They are the only two really important ones, are they not? The others are comparatively small?

The Witness: Yes.

Mr. Swaine: I think it would be helpful if we could see what you estimate as the financial burden upon this property by reason of carrying these subsidiaries over the next five years.

Mr. Nicodemus: I agree with you. I think we will under- [1806] take to do that.

Mr. Swaine: I do not want to ask anything that is the least bit unreasonable, but I do think we should have it.

(Testimony of Charles Elsey.)

Mr. Nicodemus: We may have the data here in Washington. I think we have. I think we can find it in the Commission's files.

Examiner Boyden: How soon could you prepare that statement?

Mr. Nicodemus: I cannot make a forecast of that. We will get right at it. We will undertake to do that.

Examiner Boyden: Will you prepare a consolidated income account for the years 1929 to 1935 for the Western Pacific, and a forecast of the deficits?

Mr. Nicodemus: We will undertake to annex to those two exhibits, supplementary statements covering this piece of information that Mr. Swaine asks.

Examiner Boyden: Please do so.

Q. (By Mr. Swaine) I notice, continuing on the balance sheet, under the item "Unpledged," $3,338,356.42 advances to the Sacramento Northern Railway. Those are advances for operating deficits, are they? A. Not altogether.

Q. To what extent?

A. I could not say offhand. Of course, you understand, Mr. Swaine, that these various subsidiaries of ours are [1807] contributors of traffic to our main line. It is a principle on which we purchased these properties.

Q. I understand that perfectly. Of course, the revenues from the traffic which they have contrib-

(Testimony of Charles Elsey.)

uted to the main line are reflected in the amount available for interest? A. That is correct.

Q. But the deficit is not reflected?

A. No, sir.

Q. On page 4 of the balance sheet under Account No. 717 you have a total of current assets of $413,679.59. What principle did you apply in determining these interest and dividends receivable were current assets?

Let me put it another way:

Are they included in that item because they are less than six months old, or are they included in that item because you really expect to be able to collect them?

A. I could not say. The auditor is here to explain these details, Mr. Swaine.

Q. Is it an arbitrary allocation under some accounting principle, or are they really items on which you expect to be able to realize cash within the reasonably near future?

A. I cannot answer that question.

Q. The auditor is here; perhaps he could supply the answer.

Mr. DeGraff: I do not know just what item that is you [1808] refer to.

Mr. Swaine: Take the big one, for example, "Accrued Interest on Sacramento Northern Railroad Bonds," "Accrued on Sacramento Northern Railroad Notes Receivable," "Accrued Interest on Sacramento Northern Railway Advances."

(Testimony of Charles Elsey.)

Those items comprise most of the item of $413,679 current assets.

Examiner Boyden: Do you expect to have the auditor testify later on, Mr. Nicodemus?

Mr. Nicodemus: I intend to, yes.

Examiner Boyden: Can we save that question until he is on the stand?

Mr. Swaine: Yes. I thought we might have it in juxtaposition.

Q. Mr. Elsey, you stated the Reconstruction Finance Corporation had undertaken to provide $10,000,000 of new money, conditioning the undertaking upon having its present obligations receive under the plan security pari passu with the first mortgage bonds. Is that undertaking of the Reconstruction Finance Corporation evidenced by any instrument in writing?

A. That is my understanding.

Mr. Nicodemus: It is evidenced by a letter which I think is already in evidence in connection with the corporate action of the debtor. I think Mr. Jones' letter [1809] stating this undertaking is in exhibit No. 1.

Q. (By Mr. Swaine) You are referring to a letter signed "Jesse H. Jones, Chairman," under date of July 20, 1935, addressed, "Dear Mr. Schumacher"?

A. I stated it was my understanding, Mr. Swaine, that the——

Q. Is that the only commitment?

(Testimony of Charles Elsey.)

Mr. Nicodemus: That is what I have in mind.

Mr. Swaine: That is the only commitment?

Mr. Nicodemus: In other words, some other correspondence, I think, preceded that.

Examiner Boyden: Please explain, Mr. Swaine, from what paper you were reading.

Mr. Swaine: I was reading from a copy of a letter dated July 20, 1935, which appears as an exhibit to a document which is called "Extracts Minutes Meetings Board of Directors, The Western Pacific Railroad Company in re Reorganization Plan."

Mr. Nicodemus: That was part of exhibit 2.

Mr. Swaine: I think this letter speaks for itself. It makes this commitment not upon the condition stated by Mr. Elsey but upon the condition that the Reconstruction Finance Corporation shall receive for its present indebtedness, 30 per cent in first mortgage bonds and 70 per cent in income mortgage bonds.

Mr. Nicodemus: That is correct. [1810]

Mr. Swaine: There is no commitment other than this on the part of the Reconstruction Finance Corporation, is that right?

Mr. Nicodemus: No, none at all.

Mr. Swaine: I suppose, Mr. Examiner, that this would be, as a matter of technical procedure, much better stated at the time of argument on the plan, but so that you will get the point, the institutional holders which I represent, who are acting through the so-called Ecker Committee, accept or are will-

(Testimony of Charles Elsey.)

ing to accept this plan provided the plan is desired by the Reconstruction Finance Corporation and provided the Reconstruction Finance Corporation does undertake a commitment to supply the new money and accept the treatment provided in the plan.

Our committee would oppose giving the Reconstruction Finance Corporation this character of treatment independently of the covenant to supply the $10,000,000 or independently of corresponding treatment to the other securities.

The Reconstruction Finance Corporation letter does not refer either to the plan itself or to the treatment to be given to the other securities, therefore, our willingness to accept the plan is a relative matter and not an absolute one.

Examiner Boyden: Mr. Elsey, did you work out the details [1811] of this plan or were you involved in working out the details of the plan and the distribution of securities or allocation of securities to various creditors which is there proposed?

The Witness: To a certain extent, yes, sir.

Examiner Boyden: I notice that you used the term that the Reconstruction Finance Corporation's position was advanced as a result of their agreement to lend money for the reorganization. Did you mean by that that under the plan which you are presenting here the securities which they were to receive were more than they would have received if such an agreement had not been made?

The Witness: Yes, that is correct.

(Testimony of Charles Elsey.)

Mr. Swaine: Following that out, Mr. Examiner, the Reconstruction Finance Corporation's present indebtedness is secured by bonds which are wholly junior to the first mortgage bonds except for a few of these stocks. That is why I went over the balance sheet to show that those were not really earning properties. So that the Reconstruction Finance Corporation's present position is one wholly junior to that of the first mortgage bonds.

Our institutions, however, are willing that if the Reconstruction Finance Corporation supplies $10,000,000 of new money on the basis indicated in the plan, it shall in part consideration for the supplying of new money be [1812] treated in respect of its existing indebtedness on a basis pari passu with the first mortgage bonds.

It is important to state it that way rather than to state it the way that it is stated in the letter, because should the Commission change the plan as an entirety, treatment pari passu of the Reconstruction Finance Corporation's present debt with the company's first mortgage bonds might be something wholly different from the securities which are stated in the Reconstruction Finance Corporation letter of July 20th.

Examiner Boyden: Then it is the position of the creditors whom you represent, Mr. Swaine, that the action of the Reconstruction Finance Corporation in lending new money to the new company under this reorganization and taking first mortgage

(Testimony of Charles Elsey.)

bonds as security or purchasing those bonds, is such action that it justifies this advanced treatment under the plan, is that correct?

Mr. Swaine: It supplies a consideration for the new money, which is satisfactory to us. In other words, let me put in this way:

We doubt very much that anybody else would supply the money, ten million dollars, at 4 per cent. That ten million dollars is ranking pari passu with 30 per cent of our position. We get under the plan 30 per cent in new money, so as an additional consideration to the 4 per cent [1813] interest it is agreeable to us that their present position shall be advanced. The two things go together, that is, the new money has to be supplied first at 4 per cent, and secondly, for a security which ranks equal with our best 30 per cent; and the treatment of the existing debt must be pari passu.

Let me give a radical illustration to show how the thing might be changed:

Suppose that the Commission, in the light of the testimony here this morning, should decide that this property could not stand even $25,000,000 fixed charge obligation and should say that for our bonds we would have to take 20 per cent instead of 30 per cent in new first mortgage bonds.

Suppose the Commission should also say, to take an extreme illustration which I am sure the Commission will not take, for the remaining 80 per cent we would have to take common stock.

(Testimony of Charles Elsey.)

Then our understanding of the arrangement with the Reconstruction Finance Corporation—unfortunately, we have not had very much contact with the Reconstruction Finance Corporation; this has all been through Mr. Schumacher—is that under a situation where we would get 20 per cent of new bonds and 80 per cent in common stock, the Reconstruction Finance Corporation would have to advance the [1814] money against 66-2/3 per cent in bonds and 33-1/3 per cent in common stock, and would then have to take for its present position 20 per cent in bonds and 80 per cent in common stock.

I have substantial doubt—I do not know whether counsel for the Reconstruction Finance Corporation is here; they have not entered an appearance—that the Reconstruction Finance Corporation would be willing to go ahead on that kind of a basis.

Therefore, I want to make it perfectly clear that this thing is entirely relative so far as ourselves and the Reconstruction Finance Corporation are concerned.

Examiner Boyden: We will take a short recess.

(Whereupon a short recess was taken.)

Examiner Boyden: Have you any further questions, Mr. Swaine?

Mr. Swaine: No.

Examiner Boyden: Are there further questions?

Mr. Willard: Will there be another witness to go into the basis of conversion under the plan?

(Testimony of Charles Elsey.)

Mr. Nicodemus: You mean conversion of securities?

Mr. Willard: Yes, from old to new.

Mr. Nicodemus: The plan shows that, Mr. Willard.

Mr. Willard: Will you have a witness to tell how you arrived at it, whether it was by mathematics or intuition [1815] or compromise, valuation, or whatever it was?

Mr. Nicodemus: I will not, no. The plan speaks for itself on that. I do not think there is any witness that can testify as to that. That is a matter of negotiation over a long period of time. Different percentages were discussed, and the ones shown in the plan were finally arrived at. It is mathematical, however, because each creditor gets 100 per cent of his claim.

Mr. Willard: But you did not work out the values of the old obligations and allocate new securities based on those values?

Mr. Nicodemus: I have no witness that can testify how that was worked out except by a process of negotiation.

Mr. Willard: You do not intend to put in any evidence of that character?

Mr. Nicodemus: No.

Examiner Boyden: Mr. Elsey, did you prepare the estimates of future railway operating revenues which are set out in exhibit 22?

The Witness: No, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: The next witness will testify to that.

Q. (By Examiner Boyden) Have you made a comparison of those with railway operating revenues during years prior to 1936?

A. I think you will find out that is the basis of our [1816] estimate, Mr. Examiner.

Q. On page 4 of your plan you show that total fixed and contingent charges under the plan for the new company will be $3,931,892. That is in excess of the fixed charges of the company in the past, is it not? A. That is correct.

Q. Have you reviewed the past operations of the company with a view to determining to what extent they have been able to earn their fixed charges in the past? A. Yes, sir.

Q. Have you any information you can state for the record now with respect to that?

A. I can give you the figures showing the amount available for interest from 1922 to date.

Q. Could you give us the average amount available from 1922 to 1930, inclusive?

A. The amount available for interest in 1922 was in round figures, $2,320,000.

Q. Have you an average there for the figures from 1922 to 1930?

A. No, I have not. I would say offhand it would be in excess of $2,500,000.

Q. In other words, the carrier in the past has failed on the average to earn its fixed charges,

(Testimony of Charles Elsey.)

which are less than those which you propose to have for fixed and contingent [1817] charges in the reorganized company, is that correct?

A. That is correct, but you must remember that the Northern California extension did not start to operate until the latter part of 1931.

Q. Does your forecast, exhibit 22, include revenues from the Northern California extension?

A. Yes, sir.

Q. Can you state now how much those amount to? A. No, I could not.

Q. The other witnesses will be able to give us that information? A. Yes, sir.

Mr. Coulson: Mr. Examiner, it might be helpful if in that case Mr. Elsey would prepare an exhibit when he breaks down that future forecast as Mr. Swaine suggested, which shall have also the amount allocated to new elements of earning property, like the Northern California extension, for the forecast years, the amount of gross necessary.

Examiner Boyden: Gross railway operating revenues?

Mr. Coulson: Yes.

Examiner Boyden: Will you show that separately?

Mr. Nicodemus: I think perhaps that will be shown by the next witness, to some extent.

The Witness: Yes, sir, it will.

Q. (By Mr. Swaine) In the figures which you gave to the [1818] Examiner just a minute ago,

(Testimony of Charles Elsey.)

had you included interest accrued but not paid by subsidiary lines?

A. Yes, that can be furnished.

Q. No. When you said the income had averaged about two and one-half million dollars during that ten-year period, did that include as credit to income account the interest accrued but not actually paid? A. Yes, sir.

Q. To what amount?

A. I could not say. It varies from year to year, Mr. Swaine.

Q. Could you tell us about the average? Half a million dollars? You said it was $600,000 in this period. A. That would be the maximum.

Q. You said it averaged $600,000 in the period 1929 to 1935. A. Yes.

Q. I just wondered what proportion of the $2,500,000 is represented by that.

A. No, I could not.

Q. Had you deducted advances to meet deficits of operating income of subsidiaries in that figure?

A. Your advances to subsidiaries do not come into your income account.

Q. I rather imagined it did not. That is what I wanted to [1819] bring out.

Q. How much were *you* advances to subsidiaries over that period? A. I could not say.

Q. If the figure is to be supplied, may it be supplied with a breakdown which will show what portion of the income is represented by interest ac-

(Testimony of Charles Elsey.)

crued but not paid in cash, and may there be a corresponding exhibit showing advances to subsidiaries to cover operating deficits?

Examiner Boyden: Will you furnish that information, Mr. Nicodemus, for the period 1922 to 1928, inclusive?

Mr. Nicodemus: He wants consolidated operations for that period, I take it?

Examiner Boyden: As I understand his request, it is merely to show the interest accrued but not collected, which is set out in the income account during that period.

Mr. Swaine: That is right.

Examiner Boyden: And the advances made to those companies to make up operating deficits during the same period, 1922 to 1928, inclusive.

The other exhibit which you are going to furnish will show the consolidated income account from 1929 to 1935, inclusive.

Mr. Nicodemus: Now you want to take that back to 1922?

Examiner Boyden: Not the consolidated income account, [1820] just merely the interest accrued and unpaid. Is that satisfactory?

Mr. Swaine: That is right.

Mr. Nicodemus: That is all right.

Q. (By Examiner Boyden) You stated, I believe, Mr. Elsey, that you would require $9,000,000

(Testimony of Charles Elsey.)

of cash to place the railroad, the Western Pacific, in normal operating condition. Did you use that term? A. Yes, sir.

Q. In how many years would you spend the $9,000,000? A. Three years.

Q. $3,000,000 a year?

A. Practically about that. The heaviest expenditures—it is about that. It will average about that. We have laid the program out on the basis of the most economical method of handling the rehabilitation work.

Q. Are you familiar with the underlying details of the computations by which you arrived at the figure of $9,000,000? A. Yes, sir.

Q. How did you obtain the figure?

A. From our survey made by our operating department, chief engineer and superintendent of motive power.

Q. Are the details of that survey available for us? A. Yes, sir. [1821]

Examiner Boyden: There will be a witness to present those, will there, Mr. Nicodemus?

Mr. Nicodemus: We had not intended to, but we will if you desire.

That is a breakdown of the program, the exhibit, covering the three-year period?

The Witness: Yes, sir, we have.

Mr. Nicodemus: We have one available?

The Witness: Yes, sir.

(Testimony of Charles Elsey.)

Mr. Nicodemus: It is already prepared, is it not?

The Witness: Yes, sir.

Mr. Nicodemus: We can offer it in connection with your testimony now?

The Witness: Yes, sir.

Mr. Nicodemus: We tried to reduce the number of exhibits to a minimum. This may be useful.

We offer this in evidence as a statement prepared at the request of President Elsey.

Examiner Boyden: Let the exhibit entitled "Program of Work for Rehabilitation During Approximately Three Years, 1936, 1937 and 1938," be marked exhibit No. 23.

(Exhibit 23, Witness Elsey, marked for identification.)

Q. (By Examiner Boyden) Right in that connection, does your exhibit 22, which is your forecast, reflect the [1822] amounts that you expect to spend for rehabilitation? A. No, sir.

Q As charged to operating expense?

A. No, sir. Part of the plan is to request the Commission to charge all operating expenses in connection with the rehabilitation program to profit and loss.

Q. If the Commission does not agree to that, then this exhibit would have to be readjusted?

A. That is correct.

Q. (By Mr. Swaine) Mr. Elsey, I notice that each one of the items is headed "Extraordinary—

(Testimony of Charles Elsey.)

1936, 1937 and 1938," and the total is "Three-year Total Extraordinary," $9,269,777. How much of that would you say represented deferred maintenance? Is it the difference between the $9,269,777——

A. That is the total cost of the whole program, Mr. Swaine, $9,509,777.

Q. Yes, but how much of that is deferred maintenance?

A. The maintenance of way and structures, outside of a few items such as on line No. 10, "Roadway machines and tools," $40,000, and line No. 19, "Passing track extensions," "Turn-table" on line 20, Section facilities on line 28, "Roundhouse" on line 29, and "Turntable" on line 30, all the balance of it is deferred maintenance.

Q. Those items, looked at very, very hurriedly, do not [1823] amount to a million dollars, do they, in the aggregate? A. No.

Q. Then would you say that it was upwards of eight million dollars of deferred maintenance?

A. The proposition is that included in this total proposition is your capital charges on the——

Q. There are $3,085,000 of capital charges, are there not? A. That is net, yes, sir.

Q. Does that mean that approximately $6,500,000 would, if it were not for this extraordinary arrangement that has been suggested, be chargeable to operation?

(Testimony of Charles Elsey.)

A. There would be chargeable to operation, $5,036,000.

Q. That is what I wanted to get at, $5,036,000. That is really the deferred maintenance figure that is being made up? A. Yes, sir.

Q. In this compilation from 1929 to 1935, has the $5,076,000 been deducted in determining the amount of income available for interest?

A. As I say, part of the plan is to charge those operating expenses to profit and loss.

Q. I understand; I am merely asking whether it has been deducted in the plan, or whether you deducted only actual maintenance of way and actual maintenance of equipment. I assume it is the latter.

[1824]

A. All of our expenses in the past have been chargeable to operating expenses.

Q. I have not made my point clear, I am afraid: You are now testifying that your actual expenses of maintenance of way and maintenance of equipment over some period, I do not know what it is, have been five million dollars less than it really should have been, is that right? To have kept your property in what you regard as a normal condition, you ought to expend approximately five million dollars more than you did spend? That is what you mean when you say it is deferred maintenance?

A. Certainly.

Q I want to be sure that I am correct in that as-

(Testimony of Charles Elsey.)

sumption, that the $5,000,000 has not been deducted in these figures on exhibit 3. A. No, sir.

Q. Over what period of time has that $5,000,000 accrued? A. I could not say.

Q. When did you begin to have the first maintenance?

A. We started an improvement program in 1927.

Q. When did you stop it? A. 1930.

Q. At the end of 1930?

A. Yes, sir. There might have been a few charges run [1825] over into 1931.

Q. So that means that that five million dollars of deferred maintenance has accrued over the last five years?

A. It is pretty hard to say that. The proposition is, as far as your rail is concerned,——

Q. If you had kept your property up to normal, what you are now testifying to really means that you should have spent a million dollars a year more on maintenance during those years?

A. That is correct.

Mr. Swaine: I am a little puzzled by the place we come out. If he should have spent a million dollars a year more than you did spend, and if you have in exhibit No. 3 an average of $600,000 a year of uncollectible interest from the Sacramento Northern and others, and also have failed to deduct about $100,000 a year of advances to meet operating deficits of subsidiaries, it looks to me as if you would have a red figure in every one of the five

(Testimony of Charles Elsey.)

years, and that is the thing that puzzles me. I am not arguing, I am just trying to get at the facts.

Q. (By Mr. Coulson) I am not clear, Mr. Elsey, as to this prior rehabilitation program: I understand you to say that was authorized in 1926 and discontinued in 1930. Is that correct?

A. Yes, sir. [1826]

Q. What was the total of rehabilitation expenditures contemplated by that program?

A. I could not say offhand, Mr. Coulson.

Q. You cannot tell us what part of the expenditures contemplated by that program had been completed at the time the program was discontinued at 1930? A. No, sir.

Q. Can you supply the Commission with that information in the form of a statement of the original program and a statement of the amount of work done to the date of abandonment of the program at the beginning of the depression?

A. That can be done, yes, sir.

Mr. Coulson: I would like to ask, Mr. Examiner, that that be done. I think it will clear up the point that puzzles Mr. Swaine as to the extent to which the deferred maintenance as to which expenditures are now contemplated and in part authorized by the Commission and the court accrued during the five years just past.

Examiner Boyden: Mr. Nicodemus, is it clear to you from the statement on the record just what counsel has asked for?

(Testimony of Charles Elsey.)

Mr. Nicodemus: It is.

Examiner Boyden: Will you prepare such a statement?

Mr. Nicodemus: I will undertake to prepare it.

[1827]

Q. (By Examiner Wilkinson) Mr. Elsey, to clarify my understanding of your plan, this $10,000,000 to be supplied by the Reconstruction Finance Corporation is to be used primarily for rehabilitation. $500,000 is to be put into the contingency fund, which would leave you $9,500,000.

Does not the plan also contemplate that out of the $9,500,000, any deficiency in fixed charges may be made good? A. That is correct.

Q. In other words, the $10,000,000 may not be used for rehabilitation, but may be used to pay interest?

A. That is the way the plan reads, but in view of the fact that this program is going to be finished in three years, I cannot see from our past experience that we will ever call on any portion of that $9,500,000 for anything other than the rehabilitation program.

Mr. Coulson: May I ask Mr. Elsey one question, Mr. Examiner?

Examiner Boyden: Yes.

Q. (By Mr. Coulson) Has any part of the expenditures shown by your exhibit 23 for the purpose of rehabilitation of the property already been authorized by the Commission or the court?

(Testimony of Charles Elsey.)

A. Yes, sir, all of the expenditures we propose to do, [1828] in the year 1936, have been authorized by the court, and the Commission has already authorized issuance of trustee's certificates to take care of that amount of work.

Q. Has the court acted as yet on the issuance of those trustee's certificates? A. No, sir.

Mr. Nicodemus: Not so far as we are advised. They may have entered an order, but they would not have done it yet. They may enter an order today.

The Witness: We expect the order today.

Examiner Boyden: Will you explain, please, Mr. Elsey, what treatment you propose to give the certificates issued in connection with the rehabilitation program and the plan of reorganization?

The Witness: The proposition is that the Reconstruction Finance Corporation has agreed to purchase the $3,000,000 of trustee's certificates, and exchange those trustee's certificates for the 4 per cent first mortgage bonds of which the Reconstruction Finance Corporation has agreed to purchase the $10,000,000.

Examiner Boyden: On a dollar-for-dollar basis?

The Witness: Yes, sir.

Mr. Clay: We were detained at another hearing across the hall this morning, involving an issue of the Missouri Pacific. May I enter the appearance of Mr. Alley, Gen- [1829] eral Counsel for the Reconstruction Finance Corporation; Judge McChord, Special Counsel; and myself, C. M. Clay, for the Reconstruction Finance Corporation.

(Testimony of Charles Elsey.)

I would like to ask a question at this time:

Q. Mr. Elsey, has there been any letter or other writing given, binding the Reconstruction Finance Corporation to take first mortgage bonds for any part of these trustee's certificates?

A. I could not say. I have been advised by our chairman of the executive committee that that was the arrangement.

Q. Are you not president of the road?

A. What is that?

Q. Would you not know if any had been given?

A. Not as a definite proposition.

Q. That is, it might be done in New York and therefore you would not know about it?

Mr. Nicodemus: There is such a letter.

Mr. Swaine: I would like to see the letter, too, if there is one.

Mr. Nicodemus: I do not know whether we brought it along.

Mr. Clay: I know of none.

Mr. Nicodemus: Mr. Jones wrote it.

Mr. Clay: Not to take first mortgage bonds for the trustee's certificates. [1830]

Mr. Swaine: They agreed to take the certificates. They did not agree to make the exchange. That bears on the point I made before.

Mr. Clay: That letter was not a commitment for $10,000,000 but it was a commitment to underwrite three million dollars, was it not, Mr. Elsey?

(Testimony of Charles Elsey.)

Mr. Nicodemus: He says he has not seen the letter, it was written to the trustees. But we will put that letter in evidence.

Mr. Clay: Can we call for that, to have it put in evidence?

Mr. Nicodemus: Yes, if we have if with us; otherwise you can put in a copy.

Examiner Boyden: Let us have the letter, if there is one.

Mr. Willard: Will you put in the letter of June 24th, also, that is referred to in the letter of July 20th?

Mr. Nicodemus: We will produce those original letters after lunch. It will take some time to dig them up. I think it will delay the proceedings unnecessarily.

Examiner Boyden: Shall we pass that now, Mr. Clay, until this afternoon?

Mr. Clay: Yes.

Q. (By Examiner Boyden) Mr. Elsey, I believe you made reference to approximately $30,000,000 of uncapitalized [1831] capital expenditures of the Western Pacific. Have you the computations of that figure with you? A. I think we have.

Q. Will you produce them for the record, please?

A. Yes, sir. That is $22,000,000, and the $3,000,000 is for the improvement program, and the $5,000,000 is the amount of money that the A. C. James Company put into the Northern California Extension, making a total of $30,000,000.

(Testimony of Charles Elsey.)

Mr. Swaine: That latter item was capitalized, was it not? It is the very note for which the securities are given under this plan.

The Witness: This is simply a switch, so far as the A. C. James Company is concerned.

Mr. Swaine: But it is capitalized?

The Witness: Yes.

Mr. Coulson: Only in a temporary form. It is not permanently capitalized.

Examiner Boyden: You will furnish a statement of the figure, $22,000,000, then?

The Witness: Yes, sir.

Mr. Nicodemus: If counsel are through, our next witness will be the freight traffic manager.

Examiner Boyden: Are there any further questions of Mr. Elsey? [1832]

Do counsel agree that the additional exhibits which we have requested may be presented for the record without further examination of Mr. Elsey?

Mr. Swaine: Yes, as far as I am concerned.

Mr. Willard: We may desire an opportunity to examine him on them later, after we have seen them.

Examiner Boyden: Mr. Elsey is temporarily excused, then.

(Witness temporarily excused.)

Examiner Boyden: Is there any objection to the exhibits numbered 4 to 23, inclusive, which are offered by the Debtor through Mr. Elsey?

(Testimony of Charles Elsey.)

Mr. Willard: There again, Mr. Examiner, we have not seen this material before today, and we have not had an opportunity to go through it carefully. We would like to have an opportunity to do it before the witnesses are finally excused.

Examiner Boyden: You may do that, but have you any objection to the receipt of the exhibits in evidence now?

Mr. Willard: No.

Examiner Boyden: They are received as marked.

(Exhibits 4 to 23, inclusive, Witness Elsey, received in evidence.)

1922

1922

F.D. 10913
Exhibit No. 22
Witness: Elsey
Filed March 23, 1936

THE WESTERN PACIFIC RAILROAD COMPANY
REORGANIZATION PLAN
A FORECAST OF REVENUES, EXPENSES AND INCOME

		1936	1937	1938	1939	1940
1	ASSUMED OPERATING REVENUES - The Western Pacific Railroad Company					
2	Freight Revenue	$12,636,000	$13,831,000	$15,037,000	$16,338,000	$17,930,000
3	Passenger Revenue	665,000	806,000	1,008,000	1,211,000	1,320,000
4	Mail, Express, Dining & Buffet and other Passenger Train Revenues	172,000	237,000	289,000	384,000	399,000
5	Miscellaneous Other Revenues - Net	166,000	180,000	194,000	210,000	227,000
6	Total Railway Operating Revenues	13,439,000	15,054,000	16,508,000	18,383,000	19,686,000
7	OPERATING EXPENSES (Excluding Operating Expense of Rehabilitation Program)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work - Note 1.)	2,180,000	2,180,000	2,250,000	2,400,000	2,575,000
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work - Note 1.)	2,088,000	2,226,000	2,360,000	2,700,000	3,100,000
10	Traffic Expense	663,000	685,000	715,000	750,000	780,000
11	Transportation Expense	5,063,000	5,419,000	5,778,000	6,250,000	6,990,000
12	Miscellaneous Expense	98,000	100,000	100,000	115,000	125,000
13	General Expense	450,000	478,000	500,000	525,000	550,000
14	Transportation for Investment - Credit	(75,000)	(75,000)	(75,000)	(30,000)	(80,000)
15	Total Railway Operating Expenses (As qualified above)	10,971,000	10,979,000	11,618,000	12,670,000	13,340,000
16	Railway Tax Accruals - Regular Items	446,000	650,000	750,000	850,000	1,050,000
17	Excise Taxes (Ordinary Expense Payrolls, Railroad Retirement and Social Security)	327,000	368,000	450,000	485,000	518,000
18	Excise Taxes (Rehabilitation Program Payrolls, Railroad Retirement and Social Security)	28,000	36,000	41,000	--	--
19	Hire of Equipment - Net Debit	1,030,000	1,100,000	1,180,000	1,175,000	1,200,000
20	Joint Facility Rents - Net Credit	(168,000)	(180,000)	(198,000)	(210,000)	(255,000)
21	NET RAILWAY OPERATING INCOME	1,804,000	2,114,000	2,697,000	3,423,000	3,785,000
22	OTHER INCOME (Assuming Plan of Reorganization is effective January 1, 1936)					
23	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company)	322,000	287,000	229,000	184,000	171,000
24	Miscellaneous Interest and Other Rents from Road and Equipment	141,000	143,000	147,000	151,000	154,000
25	Total Other Income (Note 2)	463,000	430,000	376,000	335,000	325,000
26	TOTAL INCOME	1,747,000	2,544,000	3,073,000	3,758,000	4,110,000
27	MISCELLANEOUS DEDUCTIONS FROM INCOME					
28	All items other than interest on Funded Debt	121,000	120,000	117,000	118,000	113,000
29	Balance Available for Interest on Funded Debt	1,626,000	2,424,000	2,956,000	3,643,000	3,997,000
30	Deduct Interest on Equipment Trusts and Lease-Conditional Sale Agreement (Note 3)	121,680	92,875	45,215	24,772	17,976
31	Deduct Interest on $10,875,000 of 4% Bonds (Exchanged Series)	427,056	427,056	427,056	427,056	427,056
32	Deduct Interest at 4% on new Bonds sold to finance 3-Year Rehabilitation Program (Note 4)	65,000	190,000	330,000	400,000	400,000
33	Total Fixed Interest on Funded Debt	613,716	899,911	1,002,251	1,051,828	1,045,012
34	AVAILABLE NET INCOME AS DEFINED BY PLAN OF REORGANIZATION	812,284	1,524,089	1,953,749	2,591,192	2,951,988
35	Deduct amount required for maintenance of Contingency Reserve Fund (Note 5)	--	--	--	--	--
36	Deduct disbursements through Capital Fund (Note 6)	500,000	500,000	500,000	500,000	500,000
37	Balance Available for Interest on Income Bonds - Series "A" and Series "B"	312,284	1,024,089	1,453,749	2,091,192	2,451,988
38	Deduct for interest earned and payable on Series "A" and Series "B" Bonds (Note 7)	312,284	1,024,089	1,453,749	2,091,192	2,297,612
39	Deduct remainder available to apply against unpaid interest accumulation on Income Bonds	--	--	--	--	154,376
40	Balance Available for Sinking Fund ($104,424 required annually)	--	--	--	--	--
41	Deduct Sinking Fund Payments (1/2% on $20,887,988 Series "A" Bonds)	--	--	--	--	--
42	Balance Available for Interest on Junior Lien Bonds	--	--	--	--	--
43	Deduct Interest at 6% on $8,092,700 Junior Lien Bonds	--	--	--	--	--
44	Balance Available for Interest Fund	--	--	--	--	--
45	Deduct for Interest Fund (10% of balance shown by Line 44)	--	--	--	--	--
46	NET INCOME - Available for Dividends and General Corporate Purposes	--	--	--	--	--

Note: Figures in parentheses, viz: ( ) denote red.

Office of the President,
San Francisco, Calif.,
March 10th, 1936.

GENERAL

This estimate based on Plan of Reorganization filed with United States District Court and the Interstate Commerce Commission on February 8, 1936.

NOTE 1

Maintenance costs shown for 1936, 1937 and 1938 do not include operating charges incident to the Rehabilitation Program. Plan of Reorganization contemplates such expense will be charged to Profit and Loss during those years.

NOTE 2

"Other Income" does not include income from certain obligations issued by the Sacramento Northern Railway, Tidewater Southern Railway Company, and Deep Creek Railroad Company (subsidiaries of Western Pacific), which is currently reported by Western Pacific, since it is proposed to convert such obligations to non-interest bearing status.

NOTE 3

Interest shown for Equipment Trusts and Lease-Conditional Sale Agreement provides only for present obligations. No charges for new equipment obligations can be included herein since definite plans are not at present available.

NOTE 4

Bonds will be sold to provide funds for Rehabilitation Program as needs arise and are herein considered as shown below:

Year	Bonds Sold During Year	Outstanding End of Year	Average for the Year	4% Interest on Average
1936	$3,000,000	$ 3,000,000	$ 1,625,000	$ 65,000
1937	3,800,000	6,800,000	4,750,000	190,000
1938	3,800,000	10,000,000	8,250,000	330,000
1939 and subsequently.	None	10,000,000	10,000,000	400,000

NOTE 5

No resort to the Contingency Reserve Fund set up by the Plan of Reorganization is expected to be necessary during periods shown.

NOTE 6

Capital Fund disbursements up to limit set by Plan of Reorganization are expected to be required for payments on Equipment Trusts, advances to subsidiaries for deficits or Additions and Betterments thereon, Western Pacific routine Additions and Betterments, etc.

NOTE 7

Full 5-1/2% interest on Income Bonds Series "A" and Series "B" amounts to $2,297,612 annually on basis of no conversions of Series "B".

Such interest is to be payable each six month period in fractions of 1/4% or multiples thereof, but, for simplicity, entire amounts available have here been allocated and on an annual basis.

(Exhibit No. 22—continued)

The Western Pacific Railroad Company

PLAN OF REORGANIZATION

RATIOS OF OPERATING EXPENSES TO OPERATING REVENUES

Operating Expenses (Excluding Operating Expenses of Rehabilitation Program)	1936		1937		1938		1939		1940	
Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 1.)	$2,120,000	(15.8%)	$2,150,000	(14.3%)	$2,250,000	(13.6%)	$2,400,000	(13.1%)	$2,575,000	(13.1%)
Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 1.)	2,058,000	(15.3%)	2,225,000	(14.8%)	2,350,000	(14.3%)	2,700,000	(14.7%)	3,100,000	(15.8%)
Traffic Expense	663,000	(04.9%)	685,000	(04.6%)	715,000	(04.3%)	730,000	(04.0%)	750,000	(03.8%)
Transportation Expense	5,063,000	(37.7%)	5,419,000	(35.9%)	5,778,000	(35.1%)	6,250,000	(34.0%)	6,290,000	(32.1%)
Miscellaneous Expense	92,000	(00.6%)	100,000	(00.6%)	100,000	(00.6%)	115,000	(00.6%)	125,000	(00.6%)
General Expense	450,000	(03.4%)	475,000	(03.2%)	500,000	(03.0%)	525,000	(02.8%)	550,000	(02.8%)
Transportation for Investment—Credit	75,000•	(00.5%)•	75,000•	(00.5%)•	75,000•	(00.5%)•	50,000•	(00.3%)•	50,000•	(00.3%)•
Total Railway Operating Expenses (As qualified above)	10,371,000	(77.2%)	10,979,000	(72.9%)	11,618,000	(70.4%)	12,670,000	(68.9%)	13,340,000	(67.9%)

Note 1—Maintenance shown excludes Operating Expenses due to 3 year Rehabilitation Program which are expected to be charged to Profit and Loss.

•Denotes red figures.

[Endorsed]: F. D. 10913. Exhibit 22. Witness Elsey. Filed Mar. 23, 1936.

Examiner Boyden: We will adjourn now until 2 o'clock.

(Whereupon, at 12:25 o'clock p. m. a recess was taken until 2 o'clock p. m. of the same day.) [1833]

PROCEEDINGS

Examiner Boyden: Are there any additional appearances?

Mr. Wood: W. L. Wood for Milbrook, Tweed, Soper & Webb, New York City, representing the trustees of the first mortgage and the trustee of the general and refundnig mortgage.

Examiner Boyden: Mr. Wood, you will arrange to file application for leave to practice before the Commission?

Mr. Wood: Yes, sir.

Examiner Boyden: Are there any other appearances?

(No response.)

You may proceed, Mr. Nicodemus.

Mr. Nicodemus: I call Mr. Bon.

CLERK'S COPY.

Vol. V 163

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. MOSER, JOHN W. FEDDMAN AND REEVE SCHLEY, CONSTITUTING THE BONDHOLDERS' PROTECTIVE COMMITTEE, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 1, 1910, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. MOSER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED: DECEMBER 26, 1941. JANUARY 17, 1942. FEBRUARY 25, 1942. MARCH 24, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

TRANSCRIPT OF RECORD
In Eight Volumes

FILED
DEC 29 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1941

No. 819 - 820 & 885

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation.

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,

Respondents.

VOLUME V

Pages 1927 to 2238

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

...KER PRINTING COMPANY, 548 SANSOME STREET, SAN FRANCISCO

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation. Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME V

Page 1927 to 2238

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

J. F. BON

was sworn and testified as follows:

Mr. Nicodemus: Mr. Examiner, counsel for the Reconstruction Finance Corporation has asked that we introduce the commitments so far as made by the Reconstruction Finance Corporation. A letter is already in evidence as part of Exhibit No. 2. That Exhibit referred to a prior letter dated June 24, 1935. Mr. Willard asked that they be introduced. I have copies but I have not got the original.

Mr. Clay: What date is that?

Mr. Nicodemus: June 24, 1935. These are offered at [1834] the request of counsel, but they are not proved as the originals; they are subject to check.

Mr. Clay: The letter I have is dated July 20th.

Mr. Nicodemus: The July 20th letter refers to this letter (indicating).

Mr. Clay: You are putting in the July 20 letter, also?

Mr. Nicodemus: It is already in; it shows the history of the transactions.

Mr. Clay: May I have a copy of your letter of June 20th?

Mr. Nicodemus: July 20.

Mr. Clay: Yes, just let me see it.

(Counsel hands letter to Mr. Clay.)

Mr. Clay: This refers to a different proposal from the July 20 letter.

Mr. Nicodemus: I agree with you; it is referred to in the July 20th letter, and for that reason counsel requests it be put in.

(Testimony of J. F. Bon.)

Mr. Clay: You are putting it in to show the background of the July 20 letter?

Mr. Nicodemus: Correct.

Mr. Clay: I don't object to this going in, but I would like to call your attention to the fact that this letter is a letter from Mr. Jones to Mr. Schumacher. It says, "With the approval of the Interstate Commerce Com-,[1835] mission and, in lieu of our proposal, that we will do so and so."

In that connection I want to say that the Reconstruction Finance Corporation is not satisfied with the treatment which is accorded it in the plan and, while we are not willing at this time to say what specific terms will be satisfactory to us, we do leave it to the discretion of the Commission to look after the interests of the Reconstruction Finance Corporation. This letter is of no binding effect without the Commission's approval.

Under this proposal we are asked to put up $10,000,000, which is practically 400 per cent assessment on the present investment that the Reconstruction Finance Corporation has in the road and, most emphatically, the proposal is not satisfactory to us.

For one thing, the letter of July 20th says that we will take 70 per cent in income bonds. It was the understanding that we would be given the income bonds of series A which carried a sinking fund; this plan calls for 35 per cent in income bonds and 35 per cent of other income bonds with a sinking fund.

That is just one feature in which the plan is not

(Testimony of J. F. Bon.)

acceptable to the Reconstruction Finance Corporation.

Mr. Nicodemus: I have the June 24, 1935, letter, Mr. Examiner. [1836]

Examiner Boyden: Is there any objection to the receipt of this letter in evidence? (No response.) It will be received in evidence as Exhibit No. 24.

(Exhibit No. 24, Counsel Nicodemus, received in evidence.)

Mr. Nicodemus: Mr. Examiner, we now have copies of the letter addressed to the Reconstruction Finance Corporation by Mr. T. M. Schumacher, and reply thereto of Mr. Jesse H. Jones, Chairman of the Reconstruction Finance Corporation, both dated March 4, 1936, embodying the commitment of the Reconstruction Finance Corporation with respect to the purchase of $3,000,000 of trustees' certificates.

Mr. Clay: May I see copies of this before it goes into the record?

Mr. Nicodemus: Surely.

Mr. Clay: With respect to these letters, Mr. Examiner, I merely call attention also to the fact that there are other commitments subject to the approval of the Interstate Commerce Commission, which I understand has been obtained, and of course, will have to be obtained before the loan can be made, and they will not be binding, of course, until the approval of the Commission is secured.

(Testimony of J. F. Bon.)

Mr. Nicodemus: This hearing is directed to that end, [1837] Mr. Clay—securing that authority.

Mr. Clay: That will have to be an application, according to my understanding of the Act,—under the Reconstruction Finance Corporation Act—because it calls for a loan on the Reconstruction Finance Corporation.

Examiner Boyden: The letter of March 4, 1936, from Mr. T. M. Schumaker to the Reconstruction Finance Corporation is offered in evidence as Exhibit No. 25; is there any objection? (No response.) It will be received in evidence.

(Exhibit No. 25, Counsel Nicodemus, received in evidence.)

Examiner Boyden: The letter of March 4, 1936, from Mr. Jesse H. Jones to the trustees of the Western Pacific Railroad is offered in evidence as Exhibit No. 26; is there any objection? (No response.) It will be received.

(Exhibit No. 26, Counsel Nicodemus, received in evidence.)

Direct Examination

Q. (By Mr. Nicodemus) Mr. Bon, will you please state your full name, your residence, and your occupation?

A. J. F. Bon, residence Oakland, California; Freight Traffic Manager of the Western Pacific Railroad [1838] Company.

Q. How long have you been identified with the Western Pacific Railroad Company?

A. Since 1910, with the exception of two years.

(Testimony of J. F. Bon.)

Q. President Elsey and the preceding witness testified that you would be prepared to support the assumed operating revenues set forth in Exhibit No. 22, which has already been received in evidence. Are you prepared to do so? A. Yes, sir.

Q. Have you, yourself, prepared an exhibit or group of exhibits designed to support that section of Exhibit No. 22? A. I have.

Q. It has already been handed to the Commission?

Examiner Boyden: Off the record.

(Discussion off the record.)

Mr. Nicodemus: I now offer a document presented by the witness, consisting of statements indicating operating revenues of the Western Pacific Railroad Company preceding the year 1936, and the forecast of those revenues for the year 1936 to 1940, inclusive, and I offer it in evidence, subject to the detailed testimony of the witness in support of the several tables which this exhibit contains. [1839]

Examiner Boyden: Mark it Exhibit No. 27.

(Exhibit No. 27, Witness Bon, was marked for identification.)

Q. (By Mr. Nicodemus) Mr. Bon, will you please proceed to explain in detail Exhibit No. 27?

A. The forecast of operating revenues of the Western Pacific Railroad Company for the years 1936, to 1940, inclusive, was made after analyzing the traffic of the railroad from 1920 to 1935, inclusive, and what we might reasonably expect in the

(Testimony of J. F. Bon.)

future if the upward trend of business continues.

The consensus of opinion of our traffic representatives and business men is that the depression from which we have suffered is definitely behind us and that we are now entering an era of prosperity.

During previous depressions or hard times the railroads have only suffered to the same extent as other business, but during the past depression the railroads have also suffered loss of traffic due to other forms of transportation entering the field and cutting rates, taking an immense volume of traffic from the railroads. I refer to highway trucking and inland water and canal transportation.

The Federal Government, through the Interstate Commerce Commission, is now endeavoring to regulate [1840] interstate highway transportation. Likewise, the state of California is now regulating practically all highway transportation agencies, and when the regulation really becomes effective, it will have the effect of eliminating some highway transportation agencies from the field and those that remain will be better organized and maintain a reasonable basis of rates, which has not been the practice in the past.

It is felt that federal and state regulation of these transportation agencies will bring about a better and more reliable rate structure, and on a higher basis than at present.

The Western Pacific Railroad and other lines with whom it has a joint freight rate structure, has water competition as follows:

(Testimony of J. F. Bon.)

1. On transcontinental traffic via the Panama Canal between the Pacific Coast and Atlantic and Gulf ports, and also in connection with canal lines and inland waterways, such as the Mississippi and Ohio Rivers and the Great Lakes.

2. Coastwise between California and Oregon and Washington.

3. Inland waterways in California.

Some time ago the canal water carriers informed us they had to have more money per ton to meet their [1841] increased operating expenses due to the San Francisco Longshoremen's Adjustment and increased wages given the seamen. Some increase in coastwise water rates has already taken place and others are in progress.

One of the large California inland waterway carriers is now before the California Railroad Commission asking that body to authorize an increase in their rates and to compel their competitors, the rail lines and the truck lines, to also increase their rates.

The transcontinental rail lines and Panama Canal water carriers meet at least four times a year to discuss changes in freight rates, the particular object being to cooperate and not unnecessarily reduce rates.

The Canal lines the latter part of last year made a blanket increase in their rates, and I think even today their rate structure is entirely too low.

The Interstate Commerce Commission and the Shipping Board have jointly interested themselves

(Testimony of J. F. Bon.)

in seeing that the rate structure is not unnecessarily reduced. I have in mind the recent conference in Washington between the Commission, the Shipping Board, the canal lines and the transcontinental carriers, which resulted in the railroads withdrawing a reduction in their rates on liquors and the water lines increasing their rates.

It is my judgment that railroad freight rates as a [1842] whole are as low today as they will be for a number of years to come, and the tendency in the immediate future will be towards a higher level of rates than today, due to conditions above indicated.

In connection with truck competition, due to good highways in California, Nevada and Utah, and in the past no regulation of those carriers, we have suffered a tremendous loss in traffic and revenue.

Prior to the advent of motor truck competition between California and Utah practically of our movement was under the class rates, the first four being between San Francisco and Utah common points $2.16½, $1.84½, $1.62½ and $1.35 per 100 pounds.

The motor truck competition made it necessary for us to publish pick-up and delivery rates of $1. and $1.25 per 100 pounds, on a great many commodities, so today at least 90 per cent of our movement, above referred to, is under these reduced rates.

When regulation becomes effective there is no doubt in my mind that the rates between Califor-

(Testimony of J. F. Bon.)

nia and Utah will be increased; in fact, the truck lines have already approached the railroads with that in view.

All of these things should result in the railroads securing a greater share of the traffic moving in the future than they have in the past five years, and at [1843] rates somewhat higher than today.

Our northern California extension from Keddie, on the main line, to Bieber, California, makes connection with the Great Northern Railway, extending south from Klamath Falls. The Hambone Line, extending westerly from Lookout, California, connects with the McCloud River Railroad.

This line was placed in operation on November 10, 1931, and the traffic has increased tremendously since the first full year of operation. For that reason I have found it necessary, so far as freight traffic is concerned, to consider separately traffic moving via the Northern California extension and that moving via the balance of the system for the years 1932 to 1935, inclusive.

I did not make any segregation of freight revenue as between the extension and the balance of the system for the one and three-quarters months the extension was in operation during 1931.

It is my belief that if business normalcy had prevailed during the year 1935 our freight revenue, exclusive of the northern California extension would have been about the average for the years 1926 and 1927, or approximately twelve and one-half million

(Testimony of J. F. Bon.)

dollars, which, plus the actual freight revenue earned on traffic [1844] transported via the northern California extension, would have made our total freight revenue approximately fourteen and three-quarter million dollars.

Examiner Boyden: Off the record.

(Discussion off the record ensued.)

The Witness: Shall I proceed?

Q. (By Mr. Nicodemus) Proceed, and if you will, explain statement No. 1.

A. Exhibit No. 27 consists of 14 statements, and are so numbered.

Statement No. 1 indicates the cars handled by the Western Pacific Railroad from Roville, California, to Weso, Nevada, for the Southern Pacific Company.

The Western Pacific Railroad and its subsidiary, the Sacramento Northern Railway, had an agreement with the Southern Pacific Company for the transportation for the Southern Pacific of certain carload traffic between Chico, California, and Weso, Nevada, for $60. per car, of which the Western Pacific received $54. per car. The statement shows the number of cars transported and the revenue the Western Pacific received therefrom. This Chico-Weso bridge revenue will be referred to later or in some of the other statements in this exhibit.

That arrangement was terminated at the end of 1929.

Q. That is when the traffic ceased to move?

[1845]

(Testimony of J. F. Bon.)

A. Yes.

Q. Will you pass to statement No. 2.

A. Statement No. 2 was prepared to indicate to the Commission why account 143 for the year 1935 showed such a marked decrease as compared with previous years.

In years prior to 1935, money received by us from the sale of ice and salt was credited to account 143, but in 1935, on instructions of the Commission, it was credited to account 402.

Q. Account No. 402 is inflated accordingly,—is that the idea? A. Yes, sir.

Q. Will you explain statement No. 3.

A. Statement No. 3 shows the population, actual and estimated, for the years 1920, 1930 and 1935, for the states of California, Nevada and Utah; also the counties and cities in those states in which we and our subsidiaries operate.

Q. What do you have in mind in offering that statement?

A. To show that the states of California, Nevada, and Utah, and especially California are increasing in population quite rapidly.

Q. Thank you. Will you please explain statement No. 4.

A. Statement No. 4 indicates the traffic which we [1846] interchanged with our subsidiaries and certain of our other connections, the other connections being the Denver & Rio Grande Western, Great Northern, Oregon Short Line and Union Pacific.

(Testimony of J. F. Bon.)

I selected the Denver & Rio Grande Western, Great Northern, Oregon Short Line and Union Pacific, because the freight we interchange with those carriers, particularly the Denver & Rio Grande Western, Oregon Short Line and Union Pacific is freight on which we secure practically our maximum haul.

It will be noted our interchange with the Denver & Rio Grande Western was greater in 1935 than in any other year shown in the exhibit; with the Oregon Short Line greater in 1935 than in 1927, but less in 1935 than some of the other years; with the Union Pacific the 1935 interchange was greater than in any other year shown, except for 1930.

Q. Statement No. 5 is the next statement.

Q. (By Examiner Boyden) What reason do you give for the statement you just made about the comparison of interchange with various roads in 1935, as compared with the present year?

A. We have more than held our own on so-called long haul traffic, and transcontinental freight; we have lost considerable short haul freight, but we maintain our [1847] position on the long haul freight; the earnings per ton mile are low, but the earnings per ton themselves are reasonably high.

Statement No. 5 shows the revenues earned for passengers, mail, express and other related accounts for the years 1923 to 1935, inclusive. There is also shown on the bottom of the statement data indicating the passenger trains operated. The greatest

(Testimony of J. F. Bon.)

revenue earned was for the year 1923 and the lowest that for the year 1933.

Mr. Nicodemus: Will you proceed with statement No. 6.

A. Statement No. 6 is the forecast for the years 1936 to 1940, inclusive, of revenues to be earned from passenger, mail, express and the other accounts indicated.

At the present time we have only one passenger train daily between San Francisco, California, and Salt Lake City, Utah. We expect to inaugurate additional passenger service effective on May 1, 1937.

During the early part of 1937, schedules between San Francisco Bay on the one hand, and Chicago, St. Louis and the Missouri River on the other, should be shortened, and this will enable us to more nearly meet the service of competing railroads. The improved [1848] service of the Denver & Rio Grande Western Railroad via the Dotsero Cut-off as it becomes better known, and the fact that the Denver & Rio Grande Western and the Western Pacific offer the most scenic trip between California and the East, will enable us to materially increase our passenger revenues.

The San Francisco Bay exposition is to be held during the year 1939. Naturally, the greatest revenue is shown for that year. That revenue, however, will be $880,000 less than the average for the years 1923 to 1927, inclusive.

Statement No. 7 indicates how revenues for pass-

(Testimony of J. F. Bon.)

enger, mail, express and other related accounts indicated in statement No. 6 were arrived at.

Q. This statement very largely speaks for itself?

A. No comments are necessary, I think.

Q. Correct. Will you take up statement No. 8?

A. Statement No. 8 indicates the freight traffic moved via the Western Pacific Railroad Northern California Extension, together with the revenue earned.

The revenue from products of the forest is greater than any other group for any of the years, and for the year 1935, represents 42 per cent of the total revenue. During the year 1934, the total traffic increased very materially due to the San Francisco Bay waterfront [1849] difficulties which prevented shippers from using the competitive water route, particularly on northbound freight. It did not seem to affect to the same extent southbound freight, particularly forest products.

During the year 1935, the movement of forest products from the Pacific Northwest was hampered due to labor troubles in sawmills and forests, which accounts for the smaller increase in the movement of products of the forest for the year 1935 over 1934.

It will be noticed the total revenue for the year 1935 increased 108½ per cent over the year 1932, which is a three-year period. I realize there is a saturation point some place, but my judgment is the

(Testimony of J. F. Bon.)

revenue which we will earn during the next five years will be about double that for 1935, but statement No. 12 will show a lesser increase.

We still have water competition, but those carriers must secure more money per ton and their rates are generally being put on a higher basis than on a lower level. If we do not advance the rail rates when the water rates are increased we can expect more traffic.

However, on the other hand if the rail rates are advanced, then we can expect about the same relative amount of traffic as we formerly handled, but will earn more revenue. [1850]

At the present time we only have a very few joint rates with the SP&S System.

Q. What is that SP&S?

A. That is the Spokane, Seattle & Portland Railway System,—and none with the Northern Pacific Railway. It now appears likely that sometime in the very near future we will have a complete line of freight rates with the SP&S System and possibly with the Northern Pacific.

Manufacturing in California is on the increase and we can look for additional traffic from California to the Northwest. There has recently been established in Southern California automobile assembling plants of General Motors and the Studebaker people, in addition to existing plants of Chrysler, Willys and Ford.

(Testimony of J. F. Bon.)

The Northern California Extension was placed in operation on November 10, 1931, at almost the bottom of the depression, which we did not begin to come out of until 1935, yet we have made a remarkable showing.

Since completion of the line we have experienced material increases in revenue each year which indicates the line is now well established in the minds of shippers and that they have confidence in our ability to render satisfactory service, hence we can expect a steady increase in that traffic and the revenue for a number of years to come. [1851]

Q. Will you explain statement No. 9, Mr. Bon?

A. Statement No. 9 is a showing by groups of commodities of Western Pacific Railroad freight traffic and revenue for the years 1923 to 1935, inclusive. It does not include any traffic moved via the Northern California extension, nor any money earned from the Chico-Weso bridge service.

Q. (By Mr. Nicodemus) What is the purpose of that statement, and what have you particularly in mind as to it?

A. I wanted the Commission to know what the Northern California extension has done since 1923 to and including 1935 and the period for the first five years above mentioned. This, together with my informed judgment, is how I computed my final forecast.

Q. What is statement No. 10?

(Testimony of J. F. Bon.)

A. Statement No. 10 indicates the freight revenues of The Western Pacific Railroad for the years 1920 to 1935, inclusive.

The average for the years 1923 to 1927, inclusive, was $11,552,481, and the average for the years 1926 and 1927 was $12,475,087, the latter being approximately $1,800,000 less than the peak calendar year of 1929.

The years 1927, 1928, 1929 and 1930, produced greater freight revenues than the average for the years 1926 [1852] and 1927.

The forecast of freight revenues for the year 1940, as shown by statement No. 12 is $17,919,621. The 1940 forecast for the Northern California extension of $4,171,625, plus the average for the years 1926 and 1927 for the balance of the system, equals $16,646,712.

The 1940 forecast for the Northern California extension, plus the 1929 actual freight revenue for the balance of the system equals $18,458,875. This is approximately ½ million dollars more than the forecast of freight revenues for the year 1940.

Q. Will you explain statement No. 11?

A. Statement No. 11 shows the freight revenue by months for the years 1928 and 1929; also the revenue earned the last six months of 1928 and the first six months of 1929. The results of the depression did not affect us until July, 1929; in August of that year we again improved our position, but from there on to the end of the year the revenues declined steadily.

(Testimony of J. F. Bon.)

Q. Statement No. 11 indicates the forecast of revenues by groups or grouped commodities for the years 1936 and 1940?

The Witness: That is exhibit No. 12, Mr. Nicodemus.

Mr. Nicodemus: Is that No. 12? [1853]

The Witness: Yes.

Mr. Nicodemus: 12; all right.

The Witness: Products of agriculture—Northern California extension—I increased our 1933 revenue by 80 per cent for the next five years. Our 1935 revenue was 128 per cent of that for 1932, or an increase of 43 per cent a year.

For the balance of system, I increased our 1935 revenue by 25 per cent for the next five years, but have shown no increase for the year 1936, because we have made a poor start during the months of January and February due to a freeze which occurred in December, partially destroying our celery crop which would have moved in January; also heavy rains during February increasing our loss due to picking, packing and shipping of California vegetables being retarded.

Q (By Examiner Boyden) Just what do you mean by increasing 25 per cent for the next five years? Is that a total of 25 per cent for the next five years divided equally?

A. Divided equally between the next five years. I did not increase 1936 any—that is, the 1940 revenue will be 125 per cent of the revenue of 1935.

(Testimony of J. F. Bon.)

Animals and products—Northern California extension—each year's revenue has been increased $2,000, [1854] which has been about our experience since the line was opened for operation.

Balance of system—I have increased the revenue for the next five years 25 per cent over the year 1935, or an average increase of 5 per cent a year. The tonnage and revenues we have enjoyed the last few years of this class of freight has been disappointing due to several drought years in the West and other conditions, but I look for an improvement.

The estimated revenue for the system (outside of Northern California extension) for the year 1940, is $600,000, and which is approximately the average of the years 1923 to 1927, inclusive, but considerably less than we earned in the years 1929, 1930 and 1931.

For the products of mines on the Northern California extension, I have increased the 1935 revenue by 50 per cent for the next five years. Our 1935 revenue was 64 per cent greater than for 1932.

For the balance of the system, an increase of 30 per cent over 1935 has been taken for the next five years. This is a larger increase than we have experienced in the past few years, but the year 1935 revenue increased 20 per cent over 1934. There is a revival of mining in our territory; two large copper mines having recently opened, the ore moving to the Utah smelters. [1855]

(Testimony of J. F. Bon.)

Products of the forest—The McCloud River Lumber Company, with a mill at McCloud, California, located on the McCloud River Railroad, with whom we have a connection, anticipate their cut of lumber for the year 1936 will be 25 per cent greater than in the year 1935, and state there will be a continued increase in future years if economic conditions keep on improving.

The Red River Lumber Company, who have the largest mill in the State of California, and which is located at Westwood, California, on our Northern California extension, make approximately the same prediction.

One of the large mill operators in the Klamath Falls District states he considered their business for the year 1928, was normal and that 1935 was 40 per cent below normal, due mostly to credit conditions. He anticipates their 1936 business will be in excess of 25 per cent better than in 1935.

In that connection the World Almanac, published by the New York World-Telegram, for the year 1936, reproduces on page 440 some statistics furnished by the U. S. Department of Labor in connection with the estimated expenditures for building construction and families provided for in 250 identical cities, that the year 1921 was 100 per cent, and the following percentages obtained for the class of buildings indicated [1856] for the year 1934:

New residential buildings	8.1%
New non-residential buildings	25.9%

(Testimony of J. F. Bon.)

Additions, alterations and repairs	48.0%
Total building operations	20.3%
Families provided for	9.8%

On the Northern California extension, I have increased the 1935 revenue by 90 per cent for the next five years. The Northern California extension has been in operation four full years, our revenue on this group of commodities in 1935 being 121 per cent of that for 1932, or an increase of 40 per cent a year.

It can be anticipated that several additional mills will be constructed on our Northern California extension because the large timber owners, due to taxes and maturity of the timber, now find it unprofitable to hold this timber much longer.

For the balance of the system, I have increased our 1935 revenue by 80 per cent for the next five years. We have on that part of our system ten lumber mills, we having lost one mill by a fire in 1927, which has not been replaced, but the owners of the timber are contemplating the construction of another mill.

The estimated revenue for the balance of the system for the year 1940, will be approximately that which we earned in 1930, and we estimate that it [1857] will be approximately $400,000 less than the average for the years 1923 to 1927, inclusive.

(Testimony of J. F. Bon.)

Manufactures and miscellaneous—Northern California extension—the revenue for the next five years has been increased 90 per cent over that for the year 1935, or an average increase per year of less than 20 per cent. Our actual increase in 1935 over 1932, was 132 per cent, or 44 per cent a year.

For the balance of the system, the revenue for the next five years has been increased 50 per cent over that for 1935, or 10 per cent a year. We have done better than that the last three years, our 1935 revenue being 153 per cent greater than 1932.

Regulation of highway trucking and the necessity of the Panama Canal steamship lines for greater revenue per ton should assure us this estimate.

For the less than carload traffic on the Northern California extension, I have taken an increase of 90 per cent of our 1935 revenue for the next five years. Our 1935 revenue was 108 per cent greater than that for the year 1932, or an increase of 35 per cent a year.

For the balance of the system, I anticipate the revenue for the next five years will be at least 25 per cent greater than in 1935, due to the improvement in general conditions, the regulation of highway trucking [1858] and the desire of the Panama Canal steamship lines to secure greater revenue per ton.

Q. (By Mr. Nicodemus) You have no comment to make on statement No. 13?

A. It is self-explanatory.

(Testimony of J. F. Bon.)

Q. Will you proceed with statement No. 14.

A. Statement No. 14 is the complete forecast of all railroad operating revenues for the years 1936 to 1940, inclusive.

Q. That is, it is based on the first five blocks on exhibit No. 22—total operating revenues?

A. Yes, sir.

Q. For the years 1936 to 1940?

A. I have already explained how the forecast was made on the principal items and will now cover the balance of them.

Accounts Nos. 110 and 143: I used the same percentage of freight revenue for the next five years as those revenues bore to the freight revenue for the year 1935.

Accounts Nos. 135, 137 and 142: I used the same revenue for the ensuing years as we earned in 1935, because the percentages of those revenues to the freight revenue in 1935, was less than one tenth of 1 per cent. [1859]

Accounts Nos. 151 and 152 (Joint Facilities-Credit): I used the same credit as is shown for the year 1927 and which was less than in the year 1925.

Q. For the reasons stated, you predict for 1936, railway operating revenues of $13,438,000?

A. Yes, sir.

Q. For 1937, $15,054,000? A. Yes, sir.

Q. For 1938, $16,508,000? A. Yes, sir.

Q. For 1939, $18,383,000? A. Yes, sir.

Q. And for 1940, $19,655,000?

(Testimony of J. F. Bon.)

A. That is correct.

Q. Do you consider those estimates conservative and reasonably to be expected for those years?

A. I do.

(Exhibit No. 27, Witness Bon, received in evidence.)

[Here follows Exhibit No. 27 continuing to page 1973.]

EXHIBIT No. 27

STATEMENTS INDICATING OPERATING REVENUES OF THE WESTERN PACIFIC RAILROAD COMPANY

Preceding the year 1936
and a
Forecast of those revenues for
the years 1936 to 1940, inclusive.

Office of Vice President-Traffic,
The Western Pacific Railroad Co.,
San Francisco, California.
March 5, 1936.

(Testimony of J. F. Bon.)

Statement No. 1

The Western Pacific Railroad Company

STATEMENT OF CARS HANDLED BY W. P. RR. FROM OROVILLE, CALIF., TO WESO, NEVADA (331 MILES), FOR SOUTHERN PACIFIC COMPANY AND REVENUE DERIVED THEREFROM

Year	Cars	W. P. Railroad Revenue
1924	7,628	$ 411,912.00
1925	11,123	600,642.00
1926	13,133	709,182.00
1927	13,452	726,408.00
1928	14,057	759,078.00
1929	11,862	640,548.00
1930	8	432.00
1931	8	432.00
Total	71,271	$3,848,634.00

Statement No. 2

The Western Pacific Railroad Company

AMOUNTS CREDITED TO ACCOUNT 143 FOR ICE AND SALT SALES

Year	Amount
1927	$ 476,637.28
1930	595,381.12
1931	413,538.10
1932	356,755.82
1933	284,321.34
1934	395,196.67
1935	
Total	$2,521,830.33
Average per year	420,305.05

For year 1935 amount is credited to Item 402.

Statement No. 3

The Western Pacific Railroad Company

STATEMENT SHOWING
POPULATION OF TERRITORY SERVED BY
THE WESTERN PACIFIC RAILROAD COMPANY
AND
SUBSIDIARIES

Territory	Period			Percentage Change		
	1920 (From U. S. Dept. of Commerce—Bureau of Census)	1930 (From U. S. Dept. of Commerce—Bureau of Census)	1935 (Estimated)	1930 vs. 1920	1935 vs. 1930	1935 vs. 1920
I. States	3,953,664	6,276,156	—	+ 58.7	—	—
(a) California	3,426,861	5,677,251	6,367,860 (1)	+ 65.7	+ 12.2	—
(b) Nevada	77,407	91,058	•	+ 17.6	—	—
(c) Utah	449,396	507,847	•	+ 13.0	—	—
II. Counties	1,433,995	1,886,646	2,018,220	+ 31.6	+ 7.0	+ 40.7
(a) California	1,230,728	1,636,519	1,760,970 (1)	+ 33.0	+ 7.6	+ 43.1
1. Alameda	344,177	474,883	493,120 (1)	+ 38.0	+ 3.8	+ 43.3
2. Butte	30,030	34,093	40,140 (1)	+ 13.5	+ 17.7	+ 33.7
3. Lassen	8,507	12,589	13,030 (1)	+ 48.0	+ 3.5	+ 53.2
4. Plumas	5,681	7,913	10,010 (1)	+ 39.3	+ 26.5	+ 76.2
5. Sacramento	91,029	141,999	159,230 (1)	+ 56.0	+ 12.1	+ 74.9
6. San Francisco	506,676	634,394	673,960 (1)	+ 25.2	+ 6.2	+ 33.0
7. San Joaquin	79,905	102,940	115,960 (1)	+ 28.8	+ 12.6	+ 45.1
8. Santa Clara	100,676	145,118	159,510 (1)	+ 44.1	+ 9.9	+ 58.4
9. Stanislaus	43,557	56,641	63,730 (1)	+ 30.0	+ 12.5	+ 46.3
10. Sutter	10,115	14,618	17,320 (1)	+ 44.5	+ 18.5	+ 71.2
11. Yuba	10,375	11,331	14,960 (1)	+ 9.2	+ 32.0	+ 44.2
(b) Nevada	36,020	46,612	50,750	+ 29.4	+ 8.9	+ 40.9
1. Elko	8,083	9,960	11,000 (2)	+ 23.2	+ 10.4	+ 36.1
2. Eureka	1,350	1,333	1,450 (2)	— 1.3	+ 8.8	+ 7.4
3. Humboldt	3,743	3,795	3,800 (2)	+ 1.4	+ 0.1	+ 1.5
4. Lander	1,414	1,714	1,800 (2)	+ 21.2	+ 5.0	+ 27.3
5. Pershing	2,803	2,652	2,700 (2)	— 5.4	+ 1.8	+ 3.7
6. Washoe	18,627	27,158	30,000 (2)	+ 45.8	+ 10.5	+ 61.1
(c) Utah	167,247	203,515	206,500	+ 21.7	+ 1.5	+ 23.5
1. Salt Lake	159,282	194,102	197,000 (3)	+ 21.9	+ 1.5	+ 23.7
2. Tooele	7,965	9,413	9,500 (3)	+ 18.2	+ 0.9	+ 19.3
III. Cities	1,152,483	1,491,554	1,641,261	+ 29.4	+ 10.0	+ 42.4
(a) California	1,020,184	1,329,541	1,473,761	+ 30.3	+ 10.8	+ 44.5
1. Chico	9,339	7,961	•	— 14.8	—	—
2. Colusa	1,846	2,116	2,360 (4)	+ 14.6	+ 11.5	+ 27.8
3. Marysville	5,461	5,763	6,000 (4)	+ 5.5	+ 4.1	+ 9.9
4. Modesto	9,241	13,842	15,000 (4)	+ 49.8	+ 8.4	+ 62.3

2. Butte	30,030	34,093	40,140 (1)	+ 13.5	+ 17.7	+ 33.7
3. Lassen	8,507	12,589	13,030 (1)	+ 48.0	+ 3.5	+ 53.2
4. Plumas	5,681	7,913	10,010 (1)	+ 39.3	+ 26.5	+ 76.2
5. Sacramento	91,029	141,999	159,230 (1)	+ 56.0	+ 12.1	+ 74.9
6. San Francisco	506,676	634,394	673,960 (1)	+ 25.2	+ 6.2	+ 33.0
7. San Joaquin	79,905	102,940	115,960 (1)	+ 28.8	+ 12.6	+ 45.1
8. Santa Clara	100,676	145,118	159,510 (1)	+ 44.1	+ 9.9	+ 58.4
9. Stanislaus	43,557	56,641	63,730 (1)	+ 30.0	+ 12.5	+ 46.3
10. Sutter	10,115	14,618	17,320 (1)	+ 44.5	+ 18.5	+ 71.2
11. Yuba	10,375	11,331	14,960 (1)	+ 9.2	+ 32.0	+ 44.2
(b) Nevada	36,020	46,612	50,750	+ 29.4	+ 8.9	+ 40.9
1. Elko	8,083	9,960	11,000 (2)	+ 23.2	+ 10.4	+ 36.1
2. Eureka	1,350	1,333	1,450 (2)	— 1.3	+ 8.8	+ 7.4
3. Humboldt	3,743	3,795	3,800 (2)	+ 1.4	+ 0.1	+ 1.5
4. Lander	1,414	1,714	1,800 (2)	+ 21.2	+ 5.0	+ 27.3
5. Pershing	2,803	2,652	2,700 (2)	— 5.4	+ 1.8	+ 3.7
6. Washoe	18,627	27,158	30,000 (2)	+ 45.8	+ 10.5	+ 61.1
(c) Utah	167,247	203,515	206,500	+ 21.7	+ 1.5	+ 23.5
1. Salt Lake	159,282	194,102	197,000 (3)	+ 21.9	+ 1.5	+ 23.7
2. Tooele	7,965	9,413	9,500 (3)	+ 18.2	+ 0.9	+ 19.3
III. Cities	1,152,483	1,491,554	1,641,261	+ 29.4	+ 10.0	+ 42.4
(a) California	1,020,184	1,329,541	1,473,761	+ 30.3	+ 10.8	+ 44.5
1. Chico	9,339	7,961	•	— 14.8	—	—
2. Colusa	1,846	2,116	2,360 (4)	+ 14.6	+ 11.5	+ 27.8
3. Marysville	5,461	5,763	6,000 (4)	+ 5.5	+ 4.1	+ 9.9
4. Modesto	9,241	13,842	15,000 (4)	+ 49.8	+ 8.4	+ 62.3
5. Oakland Area	334,288	465,861	490,943 (4)	+ 36.7	+ 7.5	+ 46.8
6. Oroville	3,340	3,698	5,000 (4)	+ 10.7	+ 35.2	+ 49.7
7. Sacramento	65,908	93,750	102,000 (4)	+ 42.2	+ 8.8	+ 54.8
8. San Francisco	506,676	634,394	703,233 (4)	+ 25.2	+ 19.9	+ 38.8
9. San Jose	39,642	57,651	87,500 (4)	+ 45.4	+ 51.8	+120.7
10. Stockton	40,296	47,963	55,525 (4)	+ 19.0	+ 15.8	+ 37.8
11. Woodland	4,147	5,542	6,200 (4)	+ 33.6	+ 11.9	+ 49.5
(b) Nevada	14,189	21,746	25,500	+ 53.3	+ 17.3	+ 79.7
1. Elko	2,173	3,217	4,500 (2)	+ 48.0	+ 39.9	+107.1
2. Reno	12,016	18,529	21,000 (2)	+ 54.2	+ 13.3	+ 74.8
(c) Utah	118,110	140,267	142,000	+ 18.8	+ 1.2	+ 20.2
1. Salt Lake City	118,110	140,267	142,000 (3)	+ 18.8	+ 1.2	+ 20.2

•No estimate available.

(1) Estimated by California Taxpayer's Association, Los Angeles, January 1, 1935.

(2) From G. I. Martin, General Agent, Western Pacific Railroad, Reno, Nevada.

(3) From P. J. Peckens, General Agent, Western Pacific Railroad, Salt Lake City, Utah.

(4) Local Chamber of Commerce.

Office of Vice Pres.—Traffic
San Francisco, California
February 27, 1936

1952

(Testimony of J. F. Bon.)

Statement No. 4

The Western Pacific Railroad Company

W. P. R. R. INTERCHANGE OF FREIGHT TRAFFIC, AND REVENUE DERIVED THEREFROM, WITH OTHER LINES AS INDICATED.

SACRAMENTO NORTHERN RAILWAY
(A subsidiary of W. P. RR.)

	Year	Cars	Tons	W. P. RR. Revenue
Received from S. N. Ry.	1927	.....	131,144	$ 585,554.50
	1930	.....	314,910	854,608.63
	1931	.....	308,096	641,709.98
	1932	10,328	294,058	620,525.03
	1933	11,848	357,997	648,844.52
	1934	12,962	395,411	726,980.80
	1935	9,960	272,527	665,305.90
Delivered to S. N. Ry.	1927	.....	67,198	$ 196,081.48
	1930	.....	312,173	273,657.21
	1931	.....	91,916	206,084.58
	1932	3,141	107,170	204,573.01
	1933	3,283	91,278	202,884.68
	1934	3,332	90,277	195,977.24
	1935	3,433	95,079	227,207.43
Total	1927	.....	198,342	$ 781,635.98
	1930	.....	627,083	1,128,265.84
	1931	.....	400,012	847,794.56
	1932	13,469	401,228	825,098.04
	1933	15,131	449,275	851,729.20
	1934	16,294	485,688	922,958.04
	1935	13,393	367,606	892,513.33

Sacramento Northern Railway is 275 miles in length.

Office of Vice Pres.—Traffic
San Francisco, Calif.
February 27, 1936

(Testimony of J. F. Bon.)

TIDEWATER SOUTHERN RAILWAY COMPANY
(A subsidiary of W. P. RR.)

	Year	Cars	Tons	W. P. RR. Revenue
Received from T. S. Ry.	1927	.....	82,562	$ 559,661.09
	1930	.....	99,198	684,445.05
	1931	.....	66,954	387,072.38
	1932	3,635	66,859	338,357.00
	1933	2,877	55,783	297,420.52
	1934	4,128	71,115	433,493.63
	1935	4,283	77,388	455,676.79
Delivered to T. S. Ry.	1927	.....	70,867	$ 69,571.47
	1930	.....	65,643	71,857.86
	1931	.....	107,322	87,485.49
	1932	4,187	163,198	110,996.06
	1933	4,671	189,540	125,471.80
	1934	4,236	172,303	115,575.56
	1935	2,928	108,867	89,071.72
Total	1927	.....	153,429	$ 629,232.56
	1930	.....	164,841	756,302.91
	1931	.....	174,276	474,557.87
	1932	7,822	230,057	449,353.06
	1933	7,548	245,323	422,892.32
	1934	8,364	243,418	549,069.19
	1935	7,211	186,255	544,748.51

Tidewater Southern Railway is 63 miles in length.

THE DENVER AND RIO GRANDE WESTERN RAILROAD

	Year	Cars	Tons	W. P. RR. Revenue
Rec'd from D&RGW RR.	1927	.....	694,595	$2,977,036.23
	1930	.....	712,913	2,992,135.07
	1931	.....	532,935	2,531,887.59
	1932	12,157	416,423	2,008,408.58
	1933	13,126	433,158	2,276,905.89
	1934	14,602	435,491	2,390,393.61
	1935	15,990	492,412	2,666,861.64

(Testimony of J. F. Bon.)

Delivered to D&RGW RR.	1927	.....	414,852	$2,363,055.08
	1930	.....	491,861	2,334,540.04
	1931	.....	375,987	2,548,631.86
	1932	16,484	338,405	2,316,012.45
	1933	17,279	369,851	2,417,426.64
	1934	20,640	448,175	2,807,860.06
	1935	22,165	508,687	3,059,030.70
Total	1927	.....	1,109,447	$5,340,091.31
	1930	.....	1,204,774	5,326,675.11
	1931	.....	908,922	5,080,519.45
	1932	28,641	754,828	4,324,421.03
	1933	30,405	803,009	4,694,332.53
	1934	35,242	883,666	5,198,253.67
	1935	38,155	1,001,099	5,725,892.34

GREAT NORTHERN RAILWAY

	Year	Cars	Tons	W. P. RR. Revenue
Received from G. N. Ry.	1931	.....	19,676	$ 52,907.74
	1932	6,701	154,441	495,043.23
	1933	7,517	176,856	657,388.29
	1934	11,262	261,112	919,893.19
	1935	12,822	297,630	1,081,957.27
Delivered to G. N. Ry.	1931	.....	14,741	$ 36,543.14
	1932	3,625	101,165	340,963.64
	1933	4,536	125,148	450,276.45
	1934	8,604	222,116	758,014.23
	1935	7,869	194,932	661,780.86
Total	1931	.....	34,417	$ 89,450.88
	1932	10,326	255,606	836,006.87
	1933	12,053	302,004	1,107,664.74
	1934	19,866	483,228	1,677,907.42
	1935	20,691	492,562	1,743,738.13

(Testimony of J. F. Bon.)

OREGON SHORT LINE RAILROAD

	Year	Cars	Tons	W. P. RR. Revenue
Received from O.S.L. RR.	1927	.....	30,841	$ 174,154.49
	1930	.....	64,958	427,331.89
	1931	.....	48,649	307,711.76
	1932	2,369	53,023	297,794.47
	1933	2,293	44,311	272,627.11
	1934	1,245	24,026	162,758.80
	1935	1,598	29,953	191,099.01
Delivered to O.S.L. RR.	1927	.....	35,821	$ 147,917.59
	1930	.....	32,802	181,935.76
	1931	.....	34,275	173,279.16
	1932	1,418	31,084	186,443.96
	1933	855	20,532	139,495.58
	1934	868	24,246	197,045.23
	1935	1,100	27,584	213,973.48
Total	1927	.....	66,662	$ 322,072.08
	1930	.....	97,760	609,267.65
	1931	.....	82,924	480,990.92
	1932	3,787	84,107	484,238.43
	1933	3,148	64,843	412,122.69
	1934	2,113	48,272	359,804.03
	1935	2,698	57,537	405,072.49

UNION PACIFIC RAILROAD

	Year	Cars	Tons	W. P. RR. Revenue
Received from U.P. RR.	1927	.....	75,893	$ 606,968.83
	1930	.....	103,981	901,991.21
	1931	.....	29,806	758,918.38
	1932	2,952	61,737	489,008.63
	1933	2,971	65,590	496,066.37
	1934	3,021	62,999	524,186.82
	1935	3,277	68,749	618,573.66

(Testimony of J. F. Bon.)

Delivered to U.P. RR.	1927	.....	216,691	$1,752,575.46
	1930	.....	231,469	1,890,815.95
	1931	.....	172,575	1,372,340.99
	1932	9,590	145,141	1,136,961.59
	1933	10,030	164,180	1,251,065.65
	1934	12,177	208,072	1,469,290.83
	1935	14,407	253,801	1,760,687.77
Total	1927	.....	292,584	$2,359,544.29
	1930	.....	335,450	2,792,807.16
	1931	.....	265,381	2,131,259.37
	1932	12,542	206,878	1,625,970.22
	1933	13,001	229,770	1,747,132.02
	1934	15,198	271,071	1,993,477.65
	1935	17,684	322,550	2,379,261.43

Statement No. 5

The Western Pacific Railroad Company

W. P. R. R. PASSENGER, MAIL, EXPRESS AND OTHER REVENUES
AS INDICATED FOR YEARS 1923 TO 1935, INCLUSIVE.

	ACCOUNT NUMBERS							
	102	103	106	107	131	132	108, 135, 134 and 136	
Year	Passenger	Excess Baggage	Mail	Express	Dining and Buffet	Hotel and Restaurant	Other Passenger TrainPrivileges Parcel-Room Storage-Baggage	TOTAL
1923	$2,424,229.05	$15,938.53	$ 67,901.26	$464,365.79	$132,823.97	$120,061.16	$25,357.11	$3,250,676.87
1924	2,082,199.76	11,951.13	64,513.51	453,300.13	128,262.97	115,811.41	35,097.67	2,891,136.58
1925	1,979,760.46	10,368.82	63,599.81	358,237.54	120,573.82	117,527.24	47,831.21	2,697,898.90
1926	1,851,026.66	9,756.71	63,990.26	318,899.68	118,241.96	113,156.94	40,827.38	2,515,899.59
1927	1,672,642.19	7,653.44	63,289.67	323,088.71	121,006.42	123,323.75	39,315.41	2,350,319.59
Average	$2,001,971.62	$11,133.73	$ 64,658.90	$383,578.37	$124,181.83	$117,976.10	$37,685.76	$2,741,186.31
1928	$1,494,645.05	$ 7,125.75	$ 67,673.25	$362,110.97	$132,923.73	$120,568.35	$32,374.37	$2,217,421.47
1929	1,370,103.71	6,551.25	105,087.78	381,594.63	141,657.01	102,011.14	28,822.94	2,135,828.46
1930	1,081,137.61	5,059.48	74,560.92	338,240.78	117,486.81	101,128.48	21,267.24	1,738,881.32
1931	772,731.63	4,348.72	68,641.18	259,820.85	90,808.15	83,474.65	8,267.39	1,288,092.57
1932	382,055.27	2,495.98	59,356.86	104,808.76	43,353.84	48,137.42	5,551.64	645,759.77
1933	279,937.17	1,655.07	49,332.05	44,869.32	29,004.20	27,241.48	1,919.95	433,959.24
1934	288,513.14	1,406.60	47,694.46	64,806.13	38,428.11	14,552.94	2,079.87	457,481.25
1935	371,757.70	1,614.25	46,377.01	76,424.80	46,851.98	14,070.56	2,719.26	559,815.56

1929 Mail revenue account 106, of $105,087.78, includes payment of $30,693.31 which is a 15% increase in mail rate granted by I. C. C. retroactive to July 24, 1925, and covering period to July 21, 1928, date of I. C. C. order.

Account 102, passenger revenue, includes Pullman surcharge earnings of $1,077,261.00 for period January, 1923, to November 30th, inc., 1933.

Train Service: January 1, 1923, to April 23, inclusive, 1932, two trains were operated in each direction between San Francisco, California, and Salt Lake City, Utah.

April 24, 1932, to date, one train was operated in each direction between San Francisco, California, and Salt Lake City, Utah.

In addition to the above—

January 4, 1931, to August 29, inclusive, 1931, one train in each direction was operated between San Francisco, California, and Reno, Nevada.

April 24, 1932, to June 18, 1932, one train was operated in each direction between San Francisco, California, and Portola, California.

May 10, 1933, to July 8, 1933, one train was operated in each direction between San Francisco, California, and Portola, California.

Office of Vice Pres—Traffic
San Francisco, California
February 27, 1936

(Testimony of J. F. Bon.)

Statement No. 6

The Western Pacific Railroad Company

FORECAST OF PASSENGER, MAIL, EXPRESS AND OTHER REVENUES AS INDICATED

Account No.	Item or Account	1936	1937	1938	1939	1940
102	Passenger	$ 464,696	$ 806,015	$1,007,517	$1,511,265	$1,209,020
103	Excess Baggage	2,323	4,030	5,037	7,556	6,045
106	Mail	46,400	62,408	68,641	68,641	68,641
107	Express	80,245	95,961	102,116	107,221	112,581
108	Other Passenger Train	1,782	2,227	2,782	4,173	3,338
131	Dining and Buffet	41,823	72,541	90,676	136,014	108,812
132	Hotel and Restaurant	15,477	17,024	18,726	20,598	22,657
133	Station, Train-Boat Privileges	1,147	1,434	1,792	2,688	2,150
134	Parcel Room	167	290	363	544	435
136	Storage-Baggage	650	1,128	1,410	2,115	1,693
	Total	$ 654,710	$1,063,058	$1,299,060	$1,860,815	$1,535,372

Office of Vice Pres.—Traffic
San Francisco, Calif.
February 27, 1936

(Testimony of J. F. Bon.)

Statement No. 7

The Western Pacific Railroad Company

BASIS FOR FORECAST OF PASSENGER, MAIL, EXPRESS AND OTHER REVENUES AS INDICATED.

It is believed there will be a substantial increase in passenger travel during the next five years because of improved economic conditions and air-conditioning and improvement in passenger equipment. Special consideration has been given to what the passenger traffic will be during the year 1939, during which year there will be an Exposition in San Francisco.

This forecast is also predicated on the inauguration by the Western Pacific Railroad of an additional passenger train in each direction between San Francisco, California, and Salt Lake City, Utah, effective May 1, 1937, scheduled through the Feather River Canyon in each direction during daylight hours.

ACCOUNT No. 102
PASSENGER REVENUE

Year	Basis for Forecast
1936	Increased 25% over year 1935.
1937	Forecast is predicated on one additional train in each direction between San Francisco and Salt Lake City effective May 1, 1937, and based on 25% increase over year 1936. Revenue, divided between trains, is as follows: Trains 1 and 2 ..... $534,169.00—8 month period Trains 3 and 4 ..... 271,846.00 Total $806,015.00

(Testimony of J. F. Bon.)

1938	25% increase over year 1937, predicated on two trains in each direction between San Francisco and Salt Lake City.
1939	San Francisco Exposition year. 50% increase over year 1938, on basis of operation of two trains in each direction between San Francisco and Salt Lake City.
1940	20% increase over year 1938, on basis of operation of two passenger trains in each direction between San Francisco and Salt Lake City.

Account No.	Item or Account	Basis for Forecast
103	Excess Baggage	Excess baggage figures based on relation of excess baggage revenue to passenger revenue, using years 1926 to 1935, incl., which was approximately .005%.
106	Mail	Year 1936 same as year 1935. Year 1937 estimate predicated on one additional train in each direction between San Francisco and Salt Lake City effective May 1, 1937. Estimate based on 1931 earnings, less revenue accruing to Trains 1 and 2 during period January to April, inclusive, 1931. Years 1938, 1939 and 1940 same as year 1931.
107	Express	Year 1936. An increase of 5% over year 1935. Year 1937. An increase of 5% over 1936, plus $11,704.00 for additional express handled on second train for eight months' period May 1 to December 31, 1937. This $11,704.00 is approximately the amount of revenue derived from express handled on Trains 1 and 2 during period May to December, inclusive, 1931. Year 1938. An increase of 5% over 1937, plus $1,357.00 for months January to April, inclusive, 1938, which was approximately the amount of revenue accruing to Trains 1 and 2 during these months in 1931, plus 5%. Year 1939. An increase of 5% over year 1938. Year 1940. An increase of 5% over year 1939.

(Testimony of J. F. Bon.)

Account No.	Item or Account	Basis for Forecast
108	Other Passenger Train Revenues	This account includes Pullman car earnings, miscellaneous revenue from tickets reported by foreign lines but not honored on our trains, and checking of baby carriages, golf bags, bicycles and other items not chargeable to other accounts. Year 1936. An increase of 25% over preceding year Year 1937. An increase of 25% over preceding year Year 1938. An increase of 25% over preceding year Year 1939. An increase of 50% over preceding year Year 1940. An increase of 20% over year 1928.
131	Dining and Buffet	Revenue figures based on relation of dining and buffet revenue to passenger revenue, using years 1926 to 1935, inclusive, which was approximately 11%.
132	Hotel and Restaurant	10% over each preceding year.
133	Station, Train and Boat Privileges	Year 1936. 25% over preceding year. Year 1937. 25% over preceding year. Year 1938. 25% over preceding year. Year 1939. 50% over preceding year. Year 1940. 20% over year 1928.
134	Parcel Room	Parcel room figures based on relation of parcel room revenue to passenger revenue, using years 1926 to 1935, inclusive, which was approximately .00036%.
136	Storage-Baggage	Storage-baggage figures based on relation of storage-baggage revenue to passenger revenue, using years 1926 to 1935, inclusive, which was approximately .0014%.

Statement No. 8

FREIGHT TRAFFIC MOVED VIA WESTERN PACIFIC RAILROAD NORTHERN CALIFORNIA EXTENSION AND WESTERN PACIFIC RAILROAD REVENUE DERIVED THEREFROM.

Commodity	Year	Cars	Tons	W.P. R.R. Revenue	W.P. R.R. Revenue Per Ton	Percentage Change with Respect to 1932 Revenue	Percentage Change with Respect to Preceding Year: Tons	Percentage Change with Respect to Preceding Year: Revenue
Products of Agriculture (18.8%)	1932	2,798	52,410	$ 189,635.	$ 3.62			
	1933	2,931	54,222	226,663.	4.18	+ 19.5	+ 3.5	+ 19.5
	1934	5,164	95,450	379,376.	3.96	+ 99.5	+ 76.0	+ 66.9
	1935	5,765	108,305	432,926.	4.00	+128.3	+ 13.5	+ 14.4
Animals and Products (4.3%)	1932	1,577	20,609	$ 96,171.	$ 4.67			
	1933	1,282	17,182	96,327.	5.61	+ 0.2	— 16.6	+ 0.2
	1934	1,576	20,994	112,809.	5.37	+ 17.3	+ 22.2	+ 17.1
	1935	1,470	19,101	98,367.	5.15	+ 2.3	— 9.0	— 12.8
Products of Mines (7.5%)	1932	1,072	43,102	$ 104,287.	$ 2.42			
	1933	1,396	57,793	146,079.	2.53	+ 40.1	+ 34.1	+ 40.1
	1934	1,238	51,783	126,737.	2.45	+ 21.5	— 10.4	— 13.2
	1935	1,690	71,724	170,704.	2.38	+ 63.7	+ 38.5	+ 34.7
Products of Forests (42.0%)	1932	6,143	160,114	$ 434,423.	$ 2.71			
	1933	7,652	188,958	651,270.	3.45	+ 49.9	+ 18.2	+ 49.9
	1934	9,381	230,958	757,171.	3.28	+ 74.3	+ 22.2	+ 16.3
	1935	11,615	293,330	961,021.	3.28	+121.2	+ 27.8	+ 26.9
Manufactures and Miscellaneous (22.9%)	1932	2,169	59,611	$ 225,692.	$ 3.79			
	1933	2,745	73,491	309,885.	4.22	+ 37.3	+ 23.3	+ 37.3
	1934	7,194	184,703	624,697.	3.38	+176.8	+151.3	+101.6
	1935	6,048	137,716	523,555.	3.80	+132.0	— 25.4	— 16.2
Less Than Carload (4.5%)	1932	—	4,261	$ 47,808.	$11.22			
	1933	—	5,216	61,242.	11.74	+ 28.1	+ 22.4	+ 28.1
	1934	—	12,490	119,637.	9.58	+150.2	+139.5	+ 95.4
	1935	—	9,804	103,285.	10.53	+116.0	— 21.5	— 13.7
Total	1932	13,759	340,107	$1,098,016.	$ 3.23			
	1933	16,006	396,862	1,491,466.	3.76	+ 35.8	+ 16.7	+ 35.8
	1934	24,553	596,378	2,119,427.	3.55	+ 93.0	+ 50.3	+ 42.1
	1935	26,488	639,980	2,289,858.	3.58	+108.5	+ 7.3	+ 8.0

Bracketed figures represent percentage of revenue for 1935 which the revenue for that group bears to the total.

Office of Vice Pres.—Traffic
San Francisco, California
February 27, 1936

Statement No. 9

The Western Pacific Railroad Company

W.P. R.R. FREIGHT TRAFFIC AND FREIGHT REVENUE
(Account No. 101)

(Does not include any traffic handled or revenue thereof:
(1) Under Chico-Weso Bridge Agreement.
(2) Via Northern California Extension, years 1932 to 1935, inclusive.)

Commodity	Year	Cars	Tons	W.P. R.R. Revenue	W.P. R.R. Revenue Per Ton	Percent of Increase or Decrease over or under preceding year: Tons	Revenue
	1923	19,540	396,631	$2,193,048.	$5.53	—	—
	1924	21,630	424,566	2,283,850.	5.38	+ 7.0	+ 4.1
	1925	24,666	482,261	2,516,389.	5.21	+13.6	+10.2
	1926	27,408	516,714	2,739,314.	5.30	+ 7.1	+ 8.9
	1927	27,944	517,408	2,908,301.62	5.62	+ 0.1	+ 6.2
Products of Agriculture	Average	24,238	467,516	$2,528,181.	$5.41		
	1928	31,970	592,495	$3,309,023.	$5.58	+14.5	+13.8
	1929	31,099	588,217	3,013,607.	5.12	— 0.7	— 8.9
	1930	45,256	915,974	4,129,420.	4.51	+55.7	+37.0
	1931	35,967	770,288	3,094,794.	4.02	—15.9	—25.1
	1932	32,693	679,776	2,877,199.	4.23	—11.8	— 7.0
	1933	33,277	727,787	2,675,679.	3.68	+ 7.1	— 7.0
	1934	36,222	789,591	2,980,986.	3.78	+ 8.5	+11.4
	1935	33,997	696,549	2,975,200.	4.27	—11.8	— 0.2
	1923	5,254	64,207	$ 534,641.	$8.32	—	—
	1924	6,203	73,753	581,501.	7.88	+14.9	+ 8.8
	1925	6,611	77,742	655,723.	8.44	+ 5.4	+12.8
	1926	5,808	72,583	596,113.	8.21	— 6.6	— 9.1
	1927	5,853	77,158	572,305.78	7.42	+ 6.3	— 4.0
Animals and Products	Average	5,946	73,089	$ 588,057.	$8.05		
	1928	6,824	84,224	$ 687,427.	$8.16	+ 9.2	+20.1
	1929	6,855	85,516	704,396.	8.24	+ 1.5	+ 2.5
	1930	6,565	96,484	734,417.	7.61	+12.8	+ 4.3
	1931	6,565	96,935	724,609.	7.48	+ 0.5	— 1.3
	1932	5,599	73,465	552,583.	7.52	—24.2	—23.7
	1933	5,091	69,293	531,757.	7.67	— 5.7	— 3.8
	1934	7,043	88,616	623,015.	7.03	+27.9	+17.2
	1935	5,410	70,457	480,130.	6.81	—20.5	—22.9
	1923	27,813	1,278,309	$2,766,362.	$2.16	—	—

Commodity	Year	Cars	Tons	W. P. R. R. Revenue	Revenue Per Ton	Tons	Revenue
	1923	19,540	396,631	$2,193,048.	$5.53	—	—
	1924	21,630	424,566	2,283,850.	5.38	+ 7.0	+ 4.1
	1925	24,666	482,261	2,516,389.	5.21	+13.6	+10.2
	1926	27,408	516,714	2,739,314.	5.30	+ 7.1	+ 8.9
	1927	27,944	517,408	2,908,301.62	5.62	+ 0.1	+ 6.2
Products of Agriculture	Average	24,238	467,516	$2,528,181.	$5.41		
	1928	31,970	592,495	$3,309,023.	$5.58	+14.5	+13.8
	1929	31,099	588,217	3,013,607.	5.12	— 0.7	— 8.9
	1930	45,256	915,974	4,129,420.	4.51	+55.7	+37.0
	1931	35,967	770,288	3,094,794.	4.02	—15.9	—25.1
	1932	32,693	679,776	2,877,199.	4.23	—11.8	— 7.0
	1933	33,277	727,787	2,675,679.	3.68	+ 7.1	— 7.0
	1934	36,222	789,591	2,980,986.	3.78	+ 8.5	+11.4
	1935	33,997	696,549	2,975,200.	4.27	—11.8	— 0.2
	1923	5,254	64,207	$ 534,641.	$8.32	—	—
	1924	6,203	73,753	581,501.	7.88	+14.9	+ 8.8
	1925	6,611	77,742	655,723.	8.44	+ 5.4	+12.8
	1926	5,808	72,583	596,113.	8.21	— 6.6	— 9.1
	1927	5,853	77,158	572,305.78	7.42	+ 6.3	— 4.0
Animals and Products	Average	5,946	73,089	$ 588,057.	$8.05		
	1928	6,824	84,224	$ 687,427.	$8.16	+ 9.2	+20.1
	1929	6,855	85,516	704,396.	8.24	+ 1.5	+ 2.5
	1930	6,565	96,484	734,417.	7.61	+12.8	+ 4.3
	1931	6,565	96,935	724,309.	7.48	+ 0.5	— 1.3
	1932	5,599	73,465	552,583.	7.52	—24.2	—23.7
	1933	5,091	69,293	531,757.	7.67	— 5.7	— 3.8
	1934	7,043	88,616	623,015.	7.03	+27.9	+17.2
	1935	5,410	70,457	480,130.	6.81	—20.5	—22.9
	1923	27,813	1,278,309	$2,766,362.	$2.16	—	—
	1924	26,987	1,232,685	2,477,913.	2.01	— 3.6	—10.4
	1925	27,455	1,229,888	2,465,147.	2.00	— 0.2	— 0.5
	1926	25,571	1,157,813	2,240,403.	1.94	— 5.9	— 9.1
	1927	29,353	1,356,857	2,453,642.29	1.81	+17.2	+ 9.5
Products of Mines	Average	27,436	1,251,110	$2,480,693.	$1.98		
	1928	27,994	1,290,817	$2,203,089.	$1.71	— 4.9	—10.2
	1929	28,975	1,359,427	2,539,154.	1.87	+ 5.3	+15.3
	1930	27,773	1,331,107	1,875,567.	1.41	— 2.1	—26.1
	1931	21,833	1,038,477	1,497,062.	1.44	—22.0	—20.2
	1932	15,810	722,435	1,184,721.	1.64	—30.4	—20.9
	1933	13,964	668,791	958,995.	1.43	— 7.4	—19.1
	1934	15,393	772,341	887,145.	1.15	+15.5	— 7.5
	1935	13,634	647,819	1,061,970.	1.64	—16.1	+19.7

Office of Vice Pres.—Traffic
San Francisco, California
February 27, 1936

Commodity	Year	Cars	Tons	W.P. R.R. Revenue	W.P. R.R. Revenue Per Ton	1932 Revenue	Percentage Change with Respect to Preceding Year: Tons	Revenue
	1923	20,857	519,181	$ 991,239.	$ 1.91		—	—
	1924	16,301	384,775	946,797.	2.46		—25.9	— 4.5
	1925	23,069	527,030	1,164,987.	2.21		+37.0	+23.0
	1926	25,705	609,837	1,243,445.	2.04		+15.7	+ 6.7
	1927	21,685	517,326	1,186,820.47	2.29		—15.2	— 4.6
Products of Forest	Average	21,523	511,639	$1,106,658.	$ 2.16			
	1928	12,565	309,551	$ 968,476.	$ 3.13		—40.2	—18.4
	1929	11,467	281,911	825,256.	2.93		— 8.9	—14.8
	1930	10,052	246,348	644,030.	2.61		—12.6	—22.0
	1931	8,549	203,923	540,387.	2.65		—17.2	—16.1
	1932	5,680	129,969	351,397.	2.70		—36.3	—35.0
	1933	4,835	111,832	331,880.	2.97		—14.0	— 5.6
	1934	4,498	105,799	294,274.	2.78		— 5.4	—11.3
	1935	5,638	134,289	384,978.	2.87		+26.9	+30.8
	1923	23,067	558.815	$3,233,928.	$ 5.79		—	—
	1924	27,176	679,043	3,469,936.	5.11		+21.5	+ 7.3
	1925	31,832	815,670	4,044,033.	4.96		+20.1	+16.5
	1926	36,053	899,117	4,488,977.	5.00		+10.2	+11.0
	1927	36,236	943,841	4,599,299.83	4.87		+ 5.0	+ 2.5
Manufactures and Miscellaneous	Average	30,873	779,297	$3,967,235.	$ 5.09			
	1928	44,757	1,215,833	$5,682,542.	$ 4.67		+28.8	+23.6
	1929	45,785	1,228,686	6,116,827.	4.98		+ 1.1	+ 7.6
	1930	41,596	1,121,948	5,445,472.	4.85		— 8.7	—11.0
	1931	33,407	908,790	4,346,344.	4.78		—19.0	—20.2
	1932	23,767	681,691	2,858,679.	4.19		—25.0	—34.2
	1933	26,790	743,624	3,413,385.	4.59		+ 9.1	+19.4
	1934	29,959	815,518	3,759,790.	4.61		+ 9.7	+10.1
	1935	34,223	890,977	4,380,713.	4.92		+ 9.3	+16.5
	1923		57,965	$ 794,237.	$13.70		—	—
	1924		59,780	802,343.	13.42		+ 3.1	+ 1.0
	1925		65,623	890,155.	13.56		+ 9.8	+10.9
	1926		70,573	943,937.	13.38		+ 7.5	+ 6.0
	1927		74,078	977,615.08	13.20		+ 5.0	+ 3.6
I. C. L.	Average		65,604	$ 881,657	$13.44			

	1924	27,176	679,043	3,469,936.	5.11	+21.5	+ 7.3
	1925	31,832	815,670	4,044,033.	4.96	+20.1	+16.5
	1926	36,053	899,117	4,488,977.	5.00	+10.2	+11.0
	1927	36,236	943,841	4,599,299.83	4.87	+ 5.0	+ 2.5
Manufactures and Miscellaneous	Average	30,873	779,297	$3,967,235.	$ 5.09		
	1928	44,757	1,215,833	$5,682,542.	$ 4.67	+28.8	+23.6
	1929	45,785	1,228,686	6,116,827.	4.98	+ 1.1	+ 7.6
	1930	41,596	1,121,948	5,445,472.	4.85	— 8.7	—11.0
	1931	33,407	908,790	4,346,344.	4.78	—19.0	—20.2
	1932	23,767	681,691	2,858,679.	4.19	—25.0	—34.2
	1933	26,790	743,624	3,413,385.	4.59	+ 9.1	+19.4
	1934	29,959	815,518	3,759,790.	4.61	+ 9.7	+10.1
	1935	34,223	890,977	4,380,713.	4.92	+ 9.3	+16.5
	1923		57,965	$ 794,237.	$13.70	—	—
	1924		59,780	802,343.	13.42	+ 3.1	+ 1.0
	1925		65,623	890,155.	13.56	+ 9.8	+10.9
	1926		70,573	943,937.	13.38	+ 7.5	+ 6.0
	1927		74,078	977,615.08	13.20	+ 5.0	+ 3.6
L. C. L.	Average		65,604	$ 881,657.	$13.44		
	1928		74,878	$1,037,396.	$13.85	+ 1.1	+ 6.1
	1929		73,170	1,088,010.	14.87	— 2.3	+ 4.9
	1930		64,185	967,219.	15.07	—12.3	—11.1
	1931		52,164	875,695.	16.79	—18.7	— 9.5
	1932		43,169	733,630.	16.99	—17.2	—16.2
	1933		38,483	608,619.	15.82	—10.9	—17.0
	1934		44,317	627,905.	14.17	+15.2	+ 3.2
	1935		49,182	627,395.	12.76	+11.0	— 0.1
	1923	96,531	2,875,108	$10,513,455.	$ 3.66	—	—
	1924	98,297	2,854,602	10,562,340.	3.69	— 0.7	+ 0.5
	1925	113,633	3,198,214	11,736,434.	3.67	+12.0	+11.1
	1926	120,545	3,326,637	12,252,189.	3.68	+ 4.0	+ 4.4
	1927	121,071	3,486,668	12,697,985.07	3.64	+ 4.8	+ 3.6
Total	Average	110,016	3,148,246	$11,552,481.	$ 3.67		
	1928	124,110	3,567,798	$13,887,953.	$ 3.89	+ 2.3	+ 9.4
	1929	124,181	3,616,927	14,287,250.	3.95	+ 1.4	+ 2.9
	1930	131,242	3,776,046	13,796,125.	3.65	+ 4.4	— 3.4
	1931	106,321	3,070,577	11,078,891.	3.61	—18.7	—19.7
	1932	83,549	2,330,505	8,558,209.	3.67	—24.1	—22.8
	1933	83,957	2,359,810	8,520,315.	3.61	+ 1.3	— 0.4
	1934	93,115	2,616,182	9,173,115.	3.51	+10.9	+ 7.7
	1935	92,902	2,489,273	9,910,386.	3.98	— 4.9	+ 8.0

Note: Years prior to 1928 did not show any adjustments or absorptions from Gross. Absorptions and Adjustments for 1928 and subsequent years have been distributed over the various commodity groups by the ratio which the revenue for the group bears to the total revenue before absorptions. Adjustments of cars and tons accruing in 1933 have been similarly distributed on the basis of cars and tons.

(Testimony of J. F. Bon.)

Statement No. 10

The Western Pacific Railroad Company

STATEMENT SHOWING

WESTERN PACIFIC RAILROAD FREIGHT REVENUE

Year	Derived from traffic moved via Northern California Extension	Derived from other traffic	Total	Percent of increase over or decrease under preceding year
1920	———	$12,028,916.73	$12,028,916.73	———
1921	———	8,974,264.48	8,974,264.48	—25.4
1922	———	9,476,588.20	9,476,588.20	+ 5.6
1923	———	10,513,455.48	10,513,455.48	+10.9
1924	———	10,562,339.95*	10,562,339.95*	+ 0.5
1925	———	11,736,434.28*	11,736,434.28*	+11.1
1926	———	12,252,189.30*	12,252,189.30*	+ 4.4
1927	———	12,697,985.07*	12,697,985.07*	+ 3.6
1928	———	13,887,952.88*	13,887,952.88*	+ 9.4
1929	———	14,287,249.85*	14,287,249.85*	+ 2.9
1930	———	13,796,124.97*	13,796,124.97*	— 3.4
1931	———	11,078,890.99*	11,078,890.99*	—19.7
1932	$1,098,015.00	8,558,209.00	9,656,224.00	—12.8
1933	1,491,466.00	8,520,315.00	10,011,781.00	+ 3.7
1934	2,119,427.00	9,173,114.00	11,292,541.00	+12.8
1935	2,289,858.00	9,910,387.00	12,200,245.00	+ 8.0

*Revenues earned for handling Chico-Weso Bridge traffic for Southern Pacific have been deducted.

(Testimony of J. F. Bon.)

Statement No. 11

The Western Pacific Railroad Company

WESTERN PACIFIC RAILROAD FREIGHT REVENUES

Month	Year 1928	Year 1929 Revenue	% Increase or Decrease over or under 1928
January	$ 906,931.81	$1,068,347.16	+17.8
February	818,5[illegible]88	924,851.78	+13.0
March	880,049.11	1,093,917.06	+24.3
April	913,143.75	1,097,590.10	+20.2
May	993,742.16	1,118,626.89	+12.6
June	939,669.23	971,898.21	+ 3.4
July	1,195,890.16	1,115,538.38	— 6.7
August	1,217,129.40	1,295,733.43	+ 6.5
September	1,658,963.96	1,517,619.88	— 8.5
October	1,898,399.94	1,783,823.11	— 6.0
November	1,280,228.56	1,193,567.73	— 6.8
December	1,185,225.92	1,105,736.12	— 6.7
Year	$13,887,952.88	$14,287,249.85	+ 2.9

Period	Revenue	Percent of Change	
First six months of 1929	$ 6,275,231.20	15.1	Increase Over Same 1928 Period
Last six months of 1928	$ 8,435,837.94	5.3	Increase Over Same 1929 Period
Total	$14,711,069.14		

No revenue derived from Chico-Weso Bridge service is included in these figures.

Office of Vice Pres.—Traffic

San Francisco, Calif.

(Testimony of J. F. Bon.)

Statement No. 12

The Western Pacific Railroad Company

FORECAST OF REVENUE TO BE DERIVED FROM FREIGHT (ACCOUNT No. 101) BY W. P. RR. FOR YEARS 1936 TO 1940, INCLUSIVE.

	Year	Traffic Moved Via	Revenue
Products of Agriculture	1936	N. C. E.	$ 476,219.00
		Remainder of System	2,975,200.00
		Total	3,451,419.00
	1937	N. C. E.	562,803.00
		Remainder of System	1,123,960.00
		Total	3,686,763.00
	1938	N. C. E.	649,389.00
		Remainder of System	3,272,720.00
		Total	3,922,109.00
	1939	N. C. E.	714,328.00
		Remainder of System	3,421,480.00
		Total	4,135,808.00
	1940	N. C. E.	779,267.00
		Remainder of System	3,719,000.00
		Total	4,498,267.00
Animals and Products	1936	N. C. E.	$ 100,367.00
		Remainder of System	480,130.00
		Total	580,497.00
	1937	N. C. E.	102,367.00
		Remainder of System	504,136.00
		Total	606,503.00
	1938	N. C. E.	104,367.00
		Remainder of System	528,142.00
		Total	632,509.00

N. C. E. means Northern California Extension of Western Pacific Railroad, extending from Keddie to Bieber, Calif., a distance of 113.5 miles.

(Testimony of J. F. Bon.)

	1939	N. C. E.	106,367.00
		Remainder of System	552,148.00
		Total	658,515.00
	1940	N. C. E.	108,367.00
		Remainder of System	600,161.00
		Total	708,528.00
Products of Mines	1936	N. C. E.	$ 179,239.00
		Remainder of System	1,088,519.00
		Total	1,267,758.00
	1937	N. C. E.	196,309.00
		Remainder of System	1,141,617.00
		Total	1,337,926.00
	1938	N. C. E.	213,379.00
		Remainder of System	1,194,715.00
		Total	1,408,094.00
	1939	N. C. E.	230,449.00
		Remainder of System	1,274,362.00
		Total	1,504,811.00
	1940	N. C. E.	256,055.00
		Remainder of System	1,380,559.00
		Total	1,636,614.00
Products of Forest	1936	N. C. E.	$ 1,105,174.00
		Remainder of System	423,476.00
		Total	1,528,650.00
	1937	N. C. E.	1,297,378.00
		Remainder of System	500,472.00
		Total	1,797,850.00
	1938	N. C. E.	1,489,582.00
		Remainder of System	577,468.00
		Total	2,067,050.00

N. C. E. means Northern California Extension of Western Pacific Railroad, extending from Keddie to Bieber, Calif., a distance of 113.5 miles.

(Testimony of J. F. Bon.)

	Year	Traffic Moved Via	Revenue
	1939	N. C. E.	1,686,786.00
		Remainder of System	635,215.00
		Total	2,322,001.00
	1940	N. C. E.	1,825,939.00
		Remainder of System	692,962.00
		Total	2,518,901.00
Manufactures and Miscellaneous	1936	N. C. E.	$ 575,912.00
		Remainder of System	4,490,231.00
		Total	5,066,143.00
	1937	N. C. E.	680,624.00
		Remainder of System	4,928,302.00
		Total	5,608,926.00
	1938	N. C. E.	795,336.00
		Remainder of System	5,366,373.00
		Total	6,161,709.00
	1939	N. C. E.	906,048.00
		Remainder of System	5,913,962.00
		Total	6,820,010.00
	1940	N. C. E.	1,005,760.00
		Remainder of System	6,571,069.00
		Total	7,576,829.00
L. C. L.	1936	N. C. E.	$ 113,613.00
		Remainder of System	627,395.00
		Total	741,008.00
	1937	N. C. E.	134,269.00
		Remainder of System	658,765.00
		Total	793,034.00
	1938	N. C. E.	154,925.00
		Remainder of System	690,135.00
		Total	845,060.00

(Testimony of J. F. Bon.)

	Year	Traffic Moved Via	Revenue
	1939	N. C. E.	175,581.0
		Remainder of System	721,505.0
		Total	897,086.0
	1940	N. C. E.	196,237.0
		Remainder of System	784,245.0
		Total	980,482.0
Total	1936	N. C. E.	$ 2,550,524.0
		Remainder of System	10,084,951.0
		Total	12,635,475.0
	1937	N. C. E.	2,973,750.0
		Remainder of System	10,857,252.0
		Total	13,831,002.0
	1938	N. C. E.	3,406,978.0
		Remainder of System	11,629,553.0
		Total	15,036,531.0
	1939	N. C. E.	3,819,559.0
		Remainder of System	12,518,672.0
		Total	16,338,231.0
	1940	N. C. E.	4,171,625.0
		Remainder of System	13,747,996.0
		Total	17,919,621.0

N. C. E. means Northern California Extension of Western Pacific Railroad, extending from Keddie to Bieber, Calif., a distance of 113.5 miles.

Office of Vice Pres.—Traffic
San Francisco, California
February 27, 1936.

Statement No. 13

The Western Pacific Railroad Company

STATEMENT INDICATING FOLLOWING FREIGHT REVENUES OF WESTERN PACIFIC RAILROAD (EXCEPT NORTHERN CALIFORNIA EXTENSION):

Forecast for Year 1940 vs. Average for Years 1923 to 1927, Incl.; Average for Years 1926 and 1927; High Year Since 1926.

	Forecast for 1940	Average for Years 1923 to 1927, inclusive	Average for Years 1926 and 1927	High Year Since 1926
Agriculture	$ 3,719,000	$ 2,528,181	$ 2,823,807	$ 4,129,420 — 1930
Animals	600,161	588,057	584,209	734,417 — 1930
Mines	1,380,559	2,480,693	2,347,022	2,539,154 — 1929
Forest	692,962	1,106,658	1,215,137	1,186,820 — 1927
Manufactures and Miscellaneous	6,571,069	3,967,235	4,544,638	6,116,827 — 1929
L. C. L.	784,245	881,657	960,771	1,088,010 — 1929
Total	$13,747,996	$11,552,481	$12,475,087	$14,287,250 — 1929

Office of Vice. Pres.—Traffic
San Francisco, Calif.
March 11th, 1936.

Statement No. 14

The Western Pacific Railroad Company

FORECAST OF RAILWAY OPERATING REVENUE
FOR YEARS 1936 TO 1940, INCLUSIVE

Account No.	Item or Account	YEARS 1936	1937	1938	1939	1940
101	Freight	$12,635,475	$13,831,002	$15,036,531	$16,338,231	$17,919,621
102	Passenger	$ 464,696	$ 806,015	$ 1,007,517	$ 1,511,265	$ 1,209,020
103	Excess Baggage	2,323	4,030	5,037	7,556	6,045
106	Mail	46,400	62,408	68,641	68,641	68,641
107	Express	80,245	95,961	102,116	107,221	112,581
108	Other Passenger Train	1,782	2,227	2,782	4,173	3,338
131	Dining and Buffet	41,823	72,541	90,676	136,014	108,812
	Total Passenger Train Revenues	$ 637,269	$ 1,043,182	$ 1,276,769	$ 1,834,870	$ 1,508,437
110	Switching	$ 101,083	$ 110,648	$ 120,292	$ 130,705	$ 143,356
115	Water Transfers	—	—	—	—	—
	Total Other Train Revenues	$ 101,083	$ 110,648	$ 120,292	$ 130,705	$ 143,356
	Total Transportation Revenues	$13,373,827	$14,984,832	$16,433,592	$18,303,806	$19,571,414
132	Hotel and Restaurant	$ 15,477	$ 17,024	$ 18,726	$ 20,598	$ 22,657
133	Station, Train and Boat Privileges	1,147	1,434	1,792	2,688	2,150
134	Parcel Room	167	290	363	544	435
135	Storage—Freight	660	660	660	660	660
136	Storage—Baggage	650	1,128	1,410	2,115	1,693
137	Demurrage	11,453	11,453	11,453	11,453	11,453
142	Rents of Buildings and Other Property	7,382	7,382	7,382	7,382	7,382
143	Miscellaneous	23,192	25,344	27,814	29,857	32,704
	Total Incidental Revenues	$ 60,128	$ 64,715	$ 69,600	$ 75,297	$ 79,134
151 & 152	Joint Facility—Credit	$ 4,387	$ 4,387	$ 4,387	$ 4,387	$ 4,387
	Total Railway Operating Revenues	$13,438,342	$15,053,934	$16,507,579	$18,383,490	$19,654,935

Office of Vice Pres.—Traffic
San Francisco, California
February 27, 1936

[Endorsed]: Finance Docket 10913. Exhibit No. 27. Witness: J. F. Bon. Filed Mar. 23, 1936.

(Testimony of J. F. Bon.)

Mr. Nicodemus: The witness may be cross-examined.

Cross Examination

Mr. Swaine: I have only one question.

Q. (By Mr. Swaine) Have you prepared, or have you had prepared, an exhibit comparable to Exhibit No. 22 and statement No. 14 of this last exhibit on the consolidated basis instead of on the Western Pacific alone?

A. Eventually—— [1860]

Mr. Nicodemus: (Interposing) I think that will require some time.

Mr. Swaine: What can you do to show the real picture?

Mr. Nicodemus: To what extent would you like this—revenues from certain subsidiaries shown?

Mr. Swaine: Whatever the examiner thinks necessary; knowing much better the accounting practices, he will know what is necessary to complete the picture. My feeling is that this is only a part of the picture. We ought to have whatever is essential to the evidence as a whole. I do not see that it does much good to have a forecast of what the earnings of a part of the system will be unless you know what the rest of them will be.

Mr. Nicodemus: I will discuss that with the accounting officers, and see what can be developed.

Mr. Swaine: Very well.

Examiner Boyden: Off the record.

(Discussion off the record ensued.)

(Testimony of J. F. Bon.)

Examiner Boyden: Mr. Nicodemus, how long would it take you to prepare a system exhibit such as No. 22, and statement 14?

Mr. Nicodemus: I will have to refer that to Mr. Degraff.

Mr. Degraff: A minimum of two weeks after we return to San Francisco. [1861]

Mr. Nicodemus: A minimum of two weeks after they return to San Francisco—I was trying to avoid any delay in the submission of this to the Commission.

Mr. Swaine: I am entirely in sympathy with that proposition.

Mr. Nicodemus: If Mr. Swaine thinks the exhibit is deficient, we will have to meet his view.

Mr. Swaine: I ask you if you don't think so, too.

Mr. Nicodemus: I don't think it varies in that exhibit more than 5 per cent.

Mr. Engelbright: It would be pretty minor.

Mr. Nicodemus: It would be almost negligible.

Mr. Degraff: One of the roads would about break even, and the other would show a little profit. I honestly cannot change the thing very materially.

Mr. Nicodemus: I think the result would be negligible and the amount of delay would be considerable and undesirable.

Q. (By Examiner Boyden) Which other two properties would affect the result?

A. The Sacramento Northern and the Tidewater Southern.

(Testimony of J. F. Bon.)

Q. What is the gross, approximately, of the Sacramento Northern?

A. I don't want to guess at it.

Examiner Boyden: Off the record [1862].

(Discussion off the record ensued.)

Mr. Nicodemus: We will undertake to get that; I don't know how long it will take.

Examiner Boyden: Let us have them as soon as you can prepare them.

Q. (By Examiner Boyden) What relationship is there between your total railway operating revenues estimated for 1936 and those for 1935? In other words, what is the total increase in percentage?

A. I don't have that for the total revenues; I have it for the freight, which is the main revenue.

Q. What is it for the freight?

A. 1936, the freight revenue is 103.6 per cent of that for 1935.

Q. What is the estimate for 1937, with respect to 1935?

A. 1937 with respect to 1935, is 113.3 per cent.

Q. What is it for 1938?

A. 1938, with respect to 1935, it is 123.2 per cent.

Q. What is it for 1939?

A. 1939, with respect to 1935, it is 133.9 per cent, and for 1940, with respect to 1935, it is 146.8 per cent.

Q. What is the fundamental basis for your estimated increase in traffic each year?

(Testimony of J. F. Bon.)

A. As a whole? [1863]

Q. Yes.

A. I studied our past situation, and based the forecast on improvement in conditions and improvement in our own position.

Q. What do you mean by improvement in your own position?

A. We are bettering our position by the location of industries—the Northern California extension has helped us out in ways other than freight that moves over that line—the location of industries and plants.

Heretofore, when a plant was located on our rails, it was at a disadvantage because it could not ship to or from the northwest without the payment of an additional switching charge, whereas if it was located on one of our competitors' rails, it was that much better off. Some of the territory of our subsidiaries is coming into better production.

The Tidewater Southern Railway is delivering to us today about as many carloads of grapes going to the East as they did when the movement was approximately 70,000 cars a year. There is a movement today of about half that.

Q. Then, your estimate is based on an assumed improvement in business conditions which will develop, and a certain assumed amount of additional traffic?

A. Yes, sir; and I think business conditions will continue [1864] to improve.

Q. How much of the additional business will the railroads move?

(Testimony of J. F. Bon.)

A. I did not get that close.

Q. That is what I am trying to find out.

A. I could not do that. My forecast was made on the improvement of conditions, betterment of our position, and my informed judgment.

Q. What do you use as a basis for determining what the increase in revenues would be on a certain increase in business conditions?

A. I did this by groups of commodities. I studied our past performance and included a certain group of commodities and on that basis I concluded that we should continue to improve our revenue. On some of them I took a very nominal increase, and on the system outside of the Northern California Extension. the increase is very nominal.

Q. When you considered past performance, what years did you consider?

A. Particularly 1923 to 1935.

Q. Would you consider that in those years any more than in other years, any special consideration should be given to any particular years in that period?

A. Oh, yes. I thought that our revenue in 1935, if business conditions had been normal, should have been about [1865] the average for 1926 or 1927.

Q. (By Examiner Wilkinson) Mr. Bon, the Western Pacific say that about 30 per cent of their traffic is received and delivered to other lines—received from and delivered to other lines.

A. I have not got the figures in my mind.

(Testimony of J. F. Bon.)

Q. It is a large percentage?

A. We have a considerable amount of business that I call bridge traffic.

Q. Are you figuring that the traffic you will receive from other lines and deliver to other lines will increase in the same proportion as your total increases as given here?

A. Some of it will; our transcontinental business, all of which we receive from or deliver to another line, will increase.

Q. Do you contemplate that the traffic which you will originate on your own line will increase a greater proportion than what you receive from connecting lines?

A. I think in about the same ratio.

Q. That is what I thought.

A. Yes. I have here the percentage increase for the system outside of the Northern California Extension. The Northern California Extension showed a greater percentage increase than for the balance of the system.

For example, the increase on the balance of the sys- [1866] tem in 1940 over 1935 is 38.7 per cent —a great increase.

Q. (By Examiner Boyden) Now, you say that you estimate that if business conditions had been normal in 1935, your traffic would have been the same as in 1926 and 1927—did I understand that correctly?

(Testimony of J. F. Bon.)

A. About that average; that is my judgment.

Q. Did you take into consideration the fact that there have been other forms of transportation which have taken some traffic? A. Yes.

Q. From your system?

A. Oh; we have had those other forms of transportation, particularly water, since 1921, via the Canal and, all the time, via the coastwise steamers and the California inland waterways. Of course, boat competition has been no more severe since 1930 than it was prior to that time.

Q. (By Examiner Wilkinson) The Western Pacific has not suffered as much competition from water carriers as other railroads generally, have they?

A. No, I do not think they have; we have been able to watch and keep our traffic better than some of them.

Q. The topography of the country affects the motor carrier transportation?

A. No, sir. Take the San Joaquin and Sacramento Valleys, they are a fine place for motor carriers; they were operat- [1867] ing between California and Utah common points, and are now.

Q. (By Mr. Nicodemus) You suspect they have been operating at a loss in the past? A. Yes.

Q. But that will be corrected by regulation?

A. Yes.

Q. (By Examiner Boyden) Is it correct to say that in your estimates you have not considered com-

(Testimony of J. F. Bon.)

petition from other forms of transportation—that they have not reduced your revenues to any extent?

A. Oh, they have, Mr. Examiner—yes, indeed; in my opening statement I said that in previous depressions we had suffered only like other business, but in this depression we have lost a tremendous amount of traffic because of competing forms of transportation.

The truck lines get pretty hungry for business, and they cut the life out of us.

Q (By Examiner Wilkinson) It is not based upon increased rates, is it?

A. In some instances, yes.

Q. Will you make any statement as to how much they have decreased it?

A. In a general way, the truck lines operating between California and Utah, of which there were about six differ- [1868] ent companies, met with the railroads about seven weeks ago and asked us to increase our rates, effective with the date they had to file their tariffs with the Commission.

We said no, we preferred to see those tariffs in operation before we would do it, but they wanted to increase those rates right away, and we would like to get more money, too, but we wanted to see the tariffs in operation first.

I think we have reached the bottom of lower rates due to those competing forms of transportation.

Examiner Boyden: Any further questions?

(No response.)

(Testimony of J. F. Bon.)

You will arrange to have Mr. Bon return for further cross examination at a later date?

Mr. Nicodemus: We will be glad to.

Examiner Boyden: All right.

Mr. Nicodemus: I call Mr. Engelbright.

EDWARD W. ENGELBRIGHT

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Mr. Engelbright, will you please give your name to the reporter?

A. Edward W. Engelbright.

Q. You are consulting engineer on the staff of the Western [1869] Pacific? A. I am.

P. President Elsey testified that you would be available to support the estimated operating expenses shown on exhibit No. 22. A. Yes, sir.

Q. I will simply ask you whether or not you believe those estimates to be sound and reasonably accurate, and ask you to state briefly the process by which those estimates were made.

A. The estimates for maintenance of way and maintenance of equipment, first, should be qualified by a statement previously made on the record, that the operating expenses in connection with the three-year program of rehabilitation from 1936 to 1938, inclusive, are expected to be charged off to profit and loss.

(Testimony of Edward W. Engelbright.)

Q. Let me interrupt you to ask at this point—I am just reminded of it—President Elsey was unable to state the extent to which the former rehabilitation program remained uncompleted at the beginning of the depression? Have you refreshed your recollection or examined the records to determine that? A. Yes.

Q. What is the amount of the original program?

A. The original program in 1927 contemplated the expendi- [1870] ture of $18,000,000, and during the years 1927 to 1932, inclusive, a total of $7,791,261 was expended on that program.

Q. So that approximately ten million dollars remained uncompleted? A. Yes, sir.

Examiner Wilkinson: Let me ask you this:

Q. (By Examiner Wilkinson) Was that for maintenance, or was that for improvement?

A. It was both. There was in that period expended for way and structures and maintenance, $2,335,093, and for equipment maintenance, $1,511,617, or a total of $3,846,710 on maintenance.

The charges to investment account in that same period were $3,944,551.

Q. (By Mr. Nicodemus) At approximately what date did Mr. Arthur Curtis James and Mr. T. M. Schumacher, at the present time, respectively, Chairman of the Board and Chairman of the Executive Committee, come into the management?

A. I am not personally aware of that, Mr. Nicodemus—exactly when.

(Testimony of Edward W. Engelbright.)

Q. It is a matter of corporate history, though?

A. Yes.

Q. 1927—would that be about the time?

A. I was not here at that time, so I cannot say.

[1871]

Q. All right. That information is shown by the annual reports on file with the Commission, is it not? A. Yes.

Q. Now, will you take up this exhibit and go forward with the estimates that led you to believe that it would cost $10,371,000 to operate the property in 1936?

A. Well, the estimates for the regular operating expenses have been made on the same general basis that we commonly make our estimates, in connection with current operations, with the exception previously mentioned, representing the judgment of our engineering and mechanical and operating offices, as to the requirements of the property under the level of revenues indicated on the statement.

Q. This statement was prepared on the basis of representations made by those different offices, and assembled?

A. Discussions with those offices, yes.

Q. You are constantly doing that work—making estimates of operating costs for the future?

A. I am. In preparing the figures, it was necessary to give due thought to the effect of the expenditures being made on the three-year program; that is, there would necessarily be a good effect from the

(Testimony of Edward W. Engelbright.)

laying of such a large amount of rail in the three-year period, and the doing of considerable ballasting; the reconstruction of box cars with steel sides; the replacement of arch bar [1872] trucks with cast steel trucks, and other items of that character would necessarily have a beneficial effect on our maintenance period immediately following the execution of the program.

The estimate for transportation expenses has been prepared after discussion with the vice president and general manager, and has been arrived at on a transportation ratio basis; it represents an estimate based on judgment as to what the expenses for transportation would be under the level of revenues shown.

Q. What you have said for 1936 applies equally to the four subsequent years shown on exhibit No. 22?

A. It does. I think that the statement and the notes on the statement at the right, which bring out some of the points involved, together with the rest of the figures, are probably self-explanatory, but if they are not, I am prepared to furnish further information in connection with it.

Mr. Nicodemus: You may cross examine this witness; that is all I wish to ask him.

Q. (By Examiner Boyden) In estimating your transportation expenses, did you go into the details of the various items making up the expenses, or just how did you estimate it?

(Testimony of Edward W. Engelbright.)

A. Mr. Bon has stated that he expected to have another [1873] passenger train on in May of next year. We gave consideration to that, and consideration to the fact that at the present time we have some unused train capacity in which a certain amount of additional business, if offered, would be handled without any additional train miles, but generally speaking, other than those adjustments, it had to be arrived at on a percentage basis, based on judgment.

Q. Do you have in exhibit form the details of your estimate for transportation expenses for 1936?

A. No; I have not got it in exhibit form.

Q. (By Mr. Nicodemus) You have it in work sheets?

A. We have the work sheets used in the preparation of this estimate.

Q. (By Examiner Boyden) Will you give us for the record the details of that estimate, please?

A. For 1936?

Q. Yes, sir. A. Yes, sir.

Q With respect to the other items—maintenance of way and structures—have you the details of those?

A. I have work sheets that can be furnished, yes. Necessarily, the estimate of maintenance of way, and also maintenance of equipment—much of that represents the informed judgment of our maintenance of way officers, [1874] and the equipment represents the informed judgment of the superin-

(Testimony of Edward W. Engelbright.)

tendent of motive power, for the simple reason that those figures are largely under control They can be held down in one year, but the inevitable result is that they will go up in some other year, so that they are based more or less on judgment.

Q. You don't have any of those figures with you now?

A We have them in Washington here, but not here in the room.

Examiner Boyden: Off the record.

(Discussion off the record ensued.)

Examiner Boyden: Now, on the record: Mr. Nicodemus, will you have Mr. Engelbright prepare for the record a detailed statement of his computations of operating expenses for the years 1936 to 1940, inclusive?

Mr. Nicodemus: I will do that.

Examiner Boyden: And furnish it for the record?

Mr. Nicodeums: Yes. We can get that together rather quickly.

Q. (By Examiner Boyden) Did you have anything to do with the preparation of the figures for railway track materials?

A. I secured the figures after consultation with our tax department; it represents the estimate of the tax department because they are thoroughly familiar with all the matters, and we showed them the basis of the estimated [1875] revenues, and they went over the whole matter, and it really represents their estimate.

(Testimony of Edward W. Engelbright.)

Q. Is there anything included there for taxes under the Railroad Retirement Act and the Social Security Act?

A. No. If you will look at the next two lines immediately below that, you will see that we have set those items out separate; the excise taxes or the Retirement and Social Security Acts; that is, for the ordinary operation of the property, and, separately the excise taxes for the rehabilitation program.

Q. Does that mean that in 1936, the $237,000 relates entirely to the Railroad Retirement Act and the Social Security Act? A. That is right.

Q. And so on through all the years up to 1940?

A. Yes. It might be well to state for the record, in case any question should be raised about the next item—the hire of equipment item—that that does not represent the debits of this company from the accrual of per diem wholly: the per diem is in that figure, but a large proportion of it represents the car mileage payments due to our heavy use of mileage cars for the shipment of perishables.

Q. Do you have a breakdown of that figure,

A. Yes, I can show you that; that is, for past years. The estimated figures for the car hire item are purely estim- [1876] ates For instance, the year 1935, out of the total payments for per diem and other equipment hire, the total payments of $1,430,000—$855,000 of it represents payments for mileage cars.

(Testimony of Edward W. Engelbright.)

Q. What was the total charge for that year?

A. The total payments?

Q. Yes.

A. They were $1,430,000 and, included in that, was $855,000 for mileage.

Q. The total payments are larger than anything included in the estimate?

A. Well, because the figure of the estimate represents net. If you will notice on the left hand side, it is a net figure; that is, after taking the credits on the other side.

Examiner Boyden: Are there any further questions?

(No response.)

Cross Examination

Q. (By Mr. Swaine) I notice that in this forecast your charges for maintenance of way and structures applies on charges for maintenance of equipment run from between 28 and 30 per cent of your total railway operating revenue.

I assume that is your estimate of proper maintenance charges, assuming that you start with the road in normal [1877] condition.

A. Yes; that is correct.

Q Now, have you got the percentages of your expenditures for maintenance of way and structures and maintenance of equipment as compared with your total railway operating revenues for the period 1929 to 1935, inclusive?

(Testimony of Edward W. Engelbright.)

A. Yes, I have it here; not in the form of an exhibit, but I have the information.

Mr. Swaine: I think it might be helpful to read the figures of your total railway operating revenues for those years into the record, and also the figures for maintenance of way and structures.

I will say to the Examiner that I suspect Mr. Elsey overstated a little the amount of deferred maintenance. I doubt very much, in giving those figures, that it was overstated by as much as $1,000,000 a year for that period.

The Witness: Mr. Swaine, what do you want me to read?

Mr. Swaine: For each year from 1929 to 1935, inclusive, give the total railway operating revenues, maintenance of way and structures, and maintenance of equipment.

The Witness: And the percentage?

Mr. Swaine: If you have it, by way of percentage.

The Witness: I have it both ways.

Q. (By Mr. Swaine) Give us both ways; it will save us making the computations. [1878]

A. It will be quite a tedious reading, and if you wish, we can prepare this in exhibit form.

Mr. Swaine: I don't care; I thought if you had the figures you could give them more quickly if you read them into the record.

Examiner Boyden: I suggest you read them into the record.

(Testimony of Edward W. Engelbright.)

The Witness: Total operating revenues for the Western Pacific Railway Company: 1921; Revenues, $12,104,000; Way, $2,157,000; 17.83 per cent; Equipment, $2,338,000; 19.3 per cent.

1922: Revenues, $12,505,000; Way, $1,970,000; 15.76 per cent; Equipment, $2,219,000; 17.7 per cent.

1923: Revenues, $14,138,000; Way, $2,293,000; 16.22 per cent; Equipment, $2,371,000; 16.78 per cent.

1924: Revenues, $14,370,000; Structures, $2,760,000; 19.2 per cent; Equipment, $2,519,000; 17.5 per cent.

1925: Revenues, $15,569,000; Structures, $2,238,000; 14.4 per cent; Equipment, $2,456,000; 15.8 per cent.

1926: Revenues, $16,057,000; Way, $2,272,000; 14.1 per cent; Equipment, $2,520,000; 15.7 per cent.

1927: Revenues, $16,433,000; Way & Structures, $3,084,000; 18.7 per cent; Equipment, $2,949,000; 17.9 per cent.

1928: Revenues, $17,594,000; Way, $3,345,000; 19 per [1879] cent; Equipment, $3,011,000; 17.1 per cent.

1929: Revenues, $17,688,000; Way & Structures, $3,173,000; 17.9 per cent; Equipment, $3,262,000; 18.44 per cent.

1930: Revenues, $16,298,000; Way & Structures, $2,609,000; 16 per cent; Equipment, $2,641,000; 16.2 per cent.

1931: Revenue, $12,914,000; Way, $2,118,000; 16.4 per cent; Equipment, $2,226,000; 17.2 per cent.

(Testimony of Edward W. Engelbright.)

1932: $10,768,000 Revenues; Way & Structures, $1,332,000; 12.4 per cent; Equipment, $1,867,000; 17.3 per cent.

1933: Revenues, $10,868,000; Way, $1,659,000; 15.3 per cent; Equipment, $1,896,000; 17.4 per cent.

1934: Revenues, $12,303,000; Way, $1,898,000; per cent, 15.4; Equipment, $1,907,000; 15.5 per cent.

1935: Revenues, $12,907,000; Way, $2,369,000; the percentage is 18.3; Equipment, $2,147,000, and the percentage is 16.6.

That is all of the years. It must be remembered that the period from 1927 to 1931, inclusive, which we have previously discussed, was the period of the so-called improvement program, and during that period all of the maintenance expense incidental to that program was included in regular operating expense figures, which have [1880] just been quoted.

So, to that extent, the figures in that period are accentuated.

Q. (By Mr. Swaine) "Distorted" is a better word.

A. Distorted, yes. The figures in that period were bearing some of the expense that should have been borne by previous years.

Q. As I remember your figures, they were above 30 per cent, even when you had a gross in excess of the prognosticated gross.

A. The figures prior to the program, Mr. Swaine,—that they totaled more than 30 per cent?

Q. Yes. A. That is true.

(Testimony of Edward W. Engelbright.)

Q. But you are piling up a tremendous amount of deferred maintenance and had more than 30 per cent gross revenues charged to maintenance of way and equipment, and yet your gross revenues were larger than you estimate for 1936.

Are the totals comparable to 30 per cent for maintenance of way?

A. Yes, because the improvements that are being made—that were made in the previous improvement program, and the improvements in the weight of rail and additional tie plates, improved ballast, and the improvements to rolling stock are such that they will produce less or require less [1881] maintenance in the future than was true in this earlier period, prior to the other improvement program.

There were a great many miles of the track in those days that had no tie plates whatever, in which the ties failed rather rapidly, not due to rot, but to mechanical wear, so that they had a very short life, whereas today the life of our ties is increasing due to the use of heavier rail and larger tie plates and better drainage of the track structure.

Q. Now, while the figures which you read for the period 1931 to 1935, as I remember them, would be pretty nearly one million dollars a year under the figure which you gave for maintenance of way and equipment for 1936, what is your own estimate of the amount of deferred maintenance for the years 1931 to 1935, inclusive, which ought to be deducted

(Testimony of Edward W. Engelbright.)

from the net railway operating income in order to afford a real picture of what the real revenues for the real net railway operating income for that period was?

A. I could not answer that offhand, Mr. Swaine.

Q. This morning Mr. Elsey gave a figure of five million dollars as deferred maintenance, and I understand that produces an astounding result; when he ended up with the other items, he had a red ink figure.

Mr. Nicodemus: It is attributed to that period, as I [1882] understand it.

Mr. Swaine: We misunderstood each other, but I want some facts. How much was the net maintenance for the railroad in the period from 1931 to 1935?

The Witness: I don't think anyone could give an adequate answer to that question. [1883]

Q. (By Mr. Swaine) What is your best judgment?

A. I could not give it in money; I don't believe anybody could arrive at it. If you look at a freight car in a yard and it is in bad order, it would be very difficult for you to say today how much of that bad order condition accumulated prior to this period —how many and how much during that period.

Q. You have been expending quite a lot of money up to 1936; you had high figures for maintenance of way and equipment, more than for 1936, so, presumably, you have been maintaining normal maintenance, or doing a little better than that, making

(Testimony of Edward W. Engelbright.)

up a considerable amount of your past under-maintenance.

A. We certainly did during the period of the improvement program.

Q. Now, beginning in 1931, if I understand you, you not only failed to continue to cut down the theretofore accrued under-maintenance, but you actually added to your under-maintenance.

A. That is true.

Q. I would like your best guess as to what that additional accrued under-maintenance was between 1931 and 1935.

A. I could not give it because of the under-maintenance that might exist at this moment; I do not believe anybody could say what proportion of that represents under- [1884] maintenance that accrued before the other program was in effect, and subsequently; for instance, the rail has been in the track for the entire period; a lot of the ballast has been in the track for the entire period; a lot of it since the road was constructed, and how can we ever arrive at any sort of a money figure which would show how much of the present accrued under-maintenance, or lack of maintenance, is represented, or has accrued in the past five years, as compared with ten years prior to that or fifteen years prior to that. I dont' believe a figure could be arrived at by any logical process.

Q. The question is suggested—how much would it take to put the property back in the condition it was in on January 1, 1931? You would have the

(Testimony of Edward W. Engelbright.)

same exact difficulty in getting at what I ask?

A. Yes, because in 1931, the program was only half completed,—the previous program was only a half completed project.

Q. (By Mr. Nicodemus) In other words, $10,000,000?

A. Our present program, of course, goes a little ahead of that because time has been running since then; our present program is 9½ million dollars.

Q. (By Mr. Swaine) You might get at it this way: How much track do you think you ought to relay annually, as- [1885] suming you had the track in normal condition?

A. It is very difficult to say because it all depends on when the rail was put in the road; if has been in operation for 25 or 30 years. It is possible to lay out, with a fair degree of accuracy, the proper percentage of rail to be laid each year, say, at 12½ per cent, or 10 per cent, or something of that sort, depending on the conditions, so that you gradually rotate around and get your whole road rerailed.

Q. How much have you laid during the period from 1931 to 1935?

A. I will have to refer to my papers. (Witness consults papers.) Let's see—1931 to 1935—103 miles.

Q. What is the total mileage for the system?

A. The total mileage of the system is 1,217 miles of road, but there has been some rail laid prior to that.

Q. In five years, you lay about 80 per cent of the track? A. Yes.

(Testimony of Edward W. Engelbright.)

Q. That clearly indicates that on that item there has been some accruing deferred maintenance during the period.

A. Yes, it does. Of course, the five-year period we have just passed through—it was not a question of what you wanted to do; it was a question of what it was pos- [1886] sible to do under the conditions existing—the financial conditions.

Q. I quite understand that. I do not make the slightest criticism; everything was done that could reasonably be expected, but I would like to find out what the real earnings from the property have been in the past and what they can be expected to be in the future. I don't think the figures on the past performance are very indicative of what the property really earned, and I know my clients would like to have some assurance of what the income will be in the future—give us your best guess.

A. My best guess as to income in the future is represented by exhibit No. 22. We had a great many conferences with everybody concerned—Mr. Elsey and everyone who could shed any light on the matter, and it represents the best judgment of several men as to what can be hoped for in the future, on the assumption that revenues outlined thereon may be realized.

Q. On the assumption that you have spent ten million dollars for the period? A. Yes.

Mr. Swaine: That is all.

Examiner Boyden: Any further questions?

(No response.)

Mr. Nicodemus: I call Mr. DeGraff. [1887]

D. C. DeGRAFF

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Please give your name to the reporter. A. D. C. DeGraff.

Q. Mr. DeGraff, you are general auditor of the Western Pacific Railway Company?

A. Yes, sir.

Q. And auditor of the Tidewater Southern Railway Company? A. Yes.

Q. President Elsey testified regarding certain exhibits—exhibit No. 11—the balance sheet as of December 31, 1935, and exhibit No. 12—an analysis of the property account shown by that balance sheet, and a pro forma exhibit—I think No. 16—were prepared under your direction? A. Yes, sir.

Q. You believe them to be correct and accurate in all respects? A. Yes.

Mr. Nicodemus: Counsel may cross examine; I believe Mr. Swaine would like to ask a question about the balance sheet. The debtor has no questions to ask this witness. [1888]

Cross Examination

Q. (By Mr. Swaine) I asked Mr. Elsey this morning whether or not the items appearing under "Current assets" in account No. 717, aggregating $413,679.25, were items which you believe were readily convertible into cash. Why are you now putting them under the item of current assets?

(Testimony of D. C. DeGraff.)

Mr. Nicodemus: Whether you went in on the judgment of the Commission, or on your own judgment.

Mr. Swaine: These items of the Sacramento Northern include an item of accrued interest on Sacramento Northern Railway Company notes receivable of $200,347, and then another item of accrued interest on Sacramento Northern Railway Advances, $69,549, and over under "Investments" I discovered there was an item of $4,525,000 of notes receivable from the Sacramento Northern, and an item of $3,338,356.42 under "Sacramento Northern Railway advances".

It was testified that that represented unpledged obligations given to refund the interest and, in part, advanced to the operating deficits. My query was whether or not those items were really realizable items.

A. This $130,336.86 represents the interest accrued on the Sacramento Northern Bonds owned by the Western Pacific Railroad Company for the six months period ending [1889] December 31, 1935.

Q. Put there solely for that reason—it had not run more than six months?

A. I won't say that particularly, but prior to this time all of those interest items due from the Sacramento Northern Railway had been paid to the Western Pacific Railroad Company.

Q. Paid in cash?

(Testimony of D. C. DeGraff.)

A. Paid in cash, yes, sir, and if the Sacramento Northern Railway Company did not have the money to pay them, it was advanced to them by the Western Pacific Railway Company, and, consequently, this current asset was cancelled, and that brought it up in the amount as advanced to the Sacramento Northern Railway.

Q. Yes. So the regular course of accounting here, as I understand it, is that the six months' interest goes into the current asset item account No. 717; that some time after the expiration of the six months' period the Sacramento Northern pays that item in cash, but it gets the cash by an advance from the Western Pacific Railway Company, which turns up in the investment account—is that right? A. That is right.

Q. Therefore, this current asset is not, from a realistic approach to the consolidated picture anything that is re- [1890] alizable in cash, is it?

A. No.

Mr. Swaine: I suggest, Mr. Examiner, that in addition to the income statements that we requested this morning, with respect to the Sacramento Northern, and in respect to the Tidewater Southern—two of the important subsidiaries—that we have the latest two available balance sheets of those two companies as well.

Examiner Boyden: Will you furnish those balance sheets, Mr. Nicodemus?

(Testimony of D. C. DeGraff.)

Mr. Nicodemus: Yes, sir; I will make a note of it.

Examiner Boyden: Any further questions?

Q. (By Mr. Wilkinson) It is exhibit No. 16 your pro forma general balance sheet of 1936?

A. Yes.

Q. You show there "Investment in Road Equipment, $13,689,000." What is the basis for that figure?

A. That is taken from our general ledger.

Q. In other words, that is a continuation of the present investment in road and equipment?

A. Yes, sir.

Q. And you are not contemplating changing the investment in road and equipment item as a result of the reorganization? A. No, sir. [1891]

Examiner Boyden: No further questions. The witness is excused. Have you any further witnesses?

Mr. Nicodemus: No further witnesses; the debtor rests, subject to the additional testimony that has been requested in exhibit form. I should like to have another hearing if I could.

Mr. Willard: Mr. Examiner, we have heard something here about earnings in connection with fixed charges under the plan, as covered by a requirement of section 77, and there may be some doubt as to whether or not that requirement is met, but I am now more concerned about another requirement in section 77 to the effect that the provisions of the plan must give fair and equitable treatment to all classes of creditors and afford due recognition to

(Testimony of D. C. DeGraff.)

the right of each class of creditors and stockholders and not discriminate unfairly in favor of any class of creditor or stockholder.

The Railroad Credit Corporation has said to the Commission and to the debtor on two occasions that it feels that the plan submitted to you is inequitable and does discriminate unfairly.

The Railroad Credit Corporation appears to be the only creditor that has not been consulted or advised in the course of the preparation of this plan, and it had hoped that at this hearing there would be introduced [1892] some evidence justifying the basis of conversion referred to in the plan. The record so far seems to be quite barren of any evidence of that character, and we know of no presumption in favor of the debtor. The justification must be established by the debtor.

Of course, if no evidence is put in, and you think there is evidence on the face of the plan itself, as well as some to be inferred from the evidence to be introduced here today, showing conclusivly, to our minds, at least, that the plan is inequitable and does discriminate unfairly against the Railroad Credit Corporation.

I say in that connection that we do not regard the treatment accorded the Reconstruction Finance Corporation as being inequitable in giving them equality with the mortgage bondholders, at least, based on such information as we now have, and I think they are entitled, not because of the new

(Testimony of D. C. DeGraff.)

money or on other grounds to be given equality with the first mortgage bondholders, but if there is no evidence introduced by the debtor in justification of the basis of conversion, particularly with respect to the Railroad Credit Corporation in relation to the other debtors, then, of course, feeling as we do, we must ask the Commission on the record to refuse to approve the plan submitted.

It may be that after we have had an opportunity to [1893] study the evidence that has been put in here today and to study the record, that we will desire to make a statement, perhaps through a witness—I am not prepared yet to say whether we would want to do that or not, but I assume we would be given that opportunity at a later date. We will be prepared to go ahead within a few days after we have a copy of the record.

Examiner Boyden: Let me ask you one question, Mr. Willard.

Mr. Willard: Yes.

Examiner Boyden: Supposing the debtor's plan is not supported by adequate or suitable evidence as to the equitability of the exchange of securities which it suggests, what is your view as to whether or not the Commission should approve that plan as being impotent?

Mr. Willard: Well, I expect the Commission could, if the Commission felt it was equitable.

Examiner Boyden: Regardless of the evidence or lack of evidence?

(Testimony of D. C. DeGraff.)

Mr. Willard: Regardless—if there were evidence establishing that it was not equitable, I would not expect the Commission to approve it, but if there were merely a want of evidence, in that event I would suppose the Commission had authority to approve it. We feel that there is affirmative evidence of inequality already in [1894] the record, and if that seems inadequate, then we shall desire to produce more evidence of the same character. The Railroad Credit Corporation is in a separate class.

Examiner Boyden: You will be given an opportunity to be heard from later on, Mr. Willard.

Mr. Willard: Thank you.

Mr. Swaine: Mr. Examiner, I will state the position of the holders of the first mortgage bonds, whom I represent. We were consulted and consulted at considerable length in working out the best plan, not only by counsel for the debtor, but we had some consultation with Mr. Jones, and at one meeting I think Mr. Clay was also present.

It was represented to us that the Reconstruction Finance Corporation desired a plan along these lines and would meet the commitments involved in the plan.

We have stated, and state now again that the Reconstruction Finance Corporation desires a plan along these lines, and is willing to make the commitments contemplated by the plan, and if the plan is acceptable to our bondholders, we will simply recommend acceptance to such other bondholders as may consult us.

(Testimony of D. C. DeGraff.)

That is subject, however, to two conditions to which Mr. Nicodemus has already adverted, and one which he has not mentioned and which has been thrown into promin- [1895] ence by what Mr. Willard has just said.

The two conditions that Mr. Nicodemus referred to are first that the forms of paper shall be satisfactory to us. We had never seen them until they were submitted here this morning. I question whether or not it is worth while spending a great deal of time going over those documents in detail until the general principles of the plan have been somewhat crystallized.

The second thing is the approval of the voting trustees, and two of the three voting trustees have agreed, and the other one has not.

Now, the other element of the plan, as to which our acceptance would be conditional, is this: We do not believe that section 77 as it now stands in respect of the provision that the Commission can enforce the plan on the dissenting classes of creditors is constitutional in the light of a recent decision of the Kentucky Supreme Court on the provisions of section 77-B, which is certainly less onerous than other paragraphs of the section.

I don't believe that if there were any class of which more than 33⅓ per cent dissented, this plan would be adequate to pass a good title to the successor company, and we would not want to take securities of that company if we did not believe it had good title. [1896]

(Testimony of D. C. DeGraff.)

Therefore, unless the debtor can secure 66⅔ per cent of each class of creditors—and that includes the Railroad Credit Corporation, which I believe is separately classified, and the Reconstruction Finance Corporation, which is separately classified, we ask that the plan be amended as contemplated by section 77, by the insertion of the provision that the rights of any class of creditors of which less than 66⅔ per cent assent, shall be protected by the sale of the property free of the lien of that class of creditors and the substitution of the proceeds of the sale for property in respect of that class.

In other words, unless the statutory two-thirds of each class is released, the dissenting classes shall have what we regard as a constitutional method of releasing their rights in the property in order that the new company shall be assured of the validity of the title to the property.

With those changes, and on the assumption that the Railroad Credit Corporation will accept the plan, we will accede to it ourselves. If those conditions are not met, our view is that the first mortgage bondholders have an absolute first lien upon the property, and that no other creditors, other than the holders of the equipment obligations, which I understand no one suggests be [1897] disturbed, are entitled to receive securities either superior to or on a par with the holders of the first mortgage bonds.

Putting it another way, as far as the present debt is concerned, the Railroad Credit Corporation, the

(Testimony of D. C. DeGraff.)

Reconstruction Finance Corporation, and the A. C. James Corporation holdings are secured by mortgage bonds which are junior entirely to the first mortgage bonds save for certain collateral, which this record shows is substantially valueless, they are required as a matter of law, which Mr. Willard read from section 77, to receive junior securities; that is, securities junior to those given to the first mortgage bondholders.

As I said this morning, in respect to the Railroad Credit Corporation, if it cares to buy ten million dollars worth of securities on a basis more favorable than any one else would provide, that then any market rate or market price at which it furnishes the money, would furnish a consideration for advancing its position.

We do not believe that the apparent discrimination in favor of the Reconstruction Finance Corporation on its old debt, upon analysis, is a real discrimination against anybody else because the Reconstruction Finance Corporation, under the plan, does furnish a very substantial additional consideration for that better treatment. [1898]

Therefore, as to the Reconstruction Finance Corporation, its position under the plan has got to be looked at as an entirety, whereas, as to the Railroad Credit Corporation and the A. C. James Corporation, their positions can be looked at only in the light of the collateral that they hold.

(Testimony of D. C. DeGraff.)

That is a practical matter. It means that unless the Commission is prepared to adopt this plan substantially as it is written, subject to modification with respect to the technically dissenting classes of security holders in any new plan, our committee would like to be consulted as to the terms upon which the new money shall be put up, because unless the new money is to be put up on our terms, or on terms which will not adversely affect our interests, I think the first mortgage bondholders will be prepared to put up the new money themselves.

Examiner Boyden: Your decision would be acceptable to consideration by the Commission and approval of the plan which was submitted to the various groups of creditors for consideration and acceptance, would it not? In other words, that would give your creditors their opportunity to accept or reject the plan—is that not right?

Mr. Swaine: I am afraid I don't follow your question. [1899]

Examiner Boyden: You have stated that if there is any modification of the plan, your group of creditors desire to be consulted as to the terms *upon the* money will be furnished by the Reconstruction Finance Corporation. Now, approval by the Commission of the plan and submission of that plan to the creditors would afford your group their statutory opportunity, would it not, to accept or reject the terms upon which the Reconstruction Finance Corporation would supply the money, provided, of

(Testimony of D. C. DeGraff.)

course, that the plan contemplated such procedure.

Mr. Swaine: Entirely so; except, under those circumstances, we might be the dissenting class, and, again, we would like to have a modification providing for protecting the interests of the dissenting class, and we ask for that modification of the plan.

We are asking here that the plan be modified to protect the interests of any class of which less than 66⅔ per cent shall assent by providing for the sale of the property upon which that class has a lien.

Examiner Boyden: Approval of the plan for submission to the creditors to determine which groups would accept it to the extent of 66⅔ per cent, of course.

Mr. Swaine: My own view is that that should be in the plan right now—whatever plan is put up.

Examiner Wilkinson: Mr. Nicodemus, I don't think the [1900] plan is specific as to whether or not a new corporate entity is contemplated.

Mr. Nicodemus: A new corporate entity is not contemplated.

Examiner Wilkinson: Is not contemplated?

Mr. Nicodemus: It is contemplated if the court affirming this plan will make it effective retroactively to December 31, 1935, and will cancel as of midnight of that date all of the securities of the former company, the new one to be effective January 1, 1936.

Examiner Wilkinson: In other words, only such modifications as would be necessary to the debtors.

(Testimony of D. C. DeGraff.)

Mr. Nicodemus: Any amendment would be in the character of the securities.

Examiner Wilkinson: And no sale is contemplated?

Mr. Nicodemus: No; unless there is an unnecessary expense under this application.

Mr. Coulson: Mr. Examiner, am I correct in understanding that the Commission will, when these various exhibits come in, fix a time for some discussion of the plan as a plan on its legal side?

I would like, on behalf of the A. C. James Company, to make some comment about some phases of the plan, but I would much rather do it after the exhibits are in, and we have had a chance to look at the record as made [1901] today.

I differ a little with Mr. Swaine—or, perhaps, I misunderstood his position—I think the Commission has a very large power of rejection under subsection d of section 77, and I would like to say that while the A. C. James Corporation is in a position of a junior creditor, of approving the basic principle of the plan in the attempt to reorganize this property by keeping alive the principal debt of the creditors, but transferring to an income basis so much of that principal, debt as is necessary to relieve the road of a reasonable probability of a similar experience under conditions we can reasonably anticipate.

Yet, there are some features of the plan on which we would like to comment, and if the first mort-

(Testimony of D. C. DeGraff.)

gage bondholders do have a hearing, we urge that a clause be put in the plan to be approved by the Commission as a modified plan, which would provide for sale—we would like also to be heard on that question of whether the Commission or the court is clothed with that sort of power under section o of section 77, so I would suggest that the Commission permit the various creditors to have a chance to see this record and see these additional exhibits, and then fix a date when there might be a general hearing on the plan, and from our point of view, we would [1902] like it to be a hearing in which the Commission is considering the plan in the light, not of whether the plan as filed is final and is to be approved or disapproved, but in the light of the Commission's clear power under subsection (d) to originate a plan itself.

Examiner Boyden: As I understand Mr. Swaine's position, he has already stated that the group which he represents suggests that modification of the plan—is that correct?

Mr. Swaine: We suggest that, or that we be assured that all classes of creditors assent to the plan. We don't care—if the Railroad Credit Corporation and the A. C. James Corporation and the Reconstruction Finance Corporation assent to the plan, that becomes wholly academic, because you have got the consent of every class of creditors—that is, the statutory amount—but failing that, we don't believe that the provision which purports to

(Testimony of D. C. DeGraff.)

permit the court and the Commission to force a provision on a class of creditors is a valid provision, and I therefore do not believe that you would have a valid plan for reorganization if you should do that.

Examiner Boyden: You think the plan should contain a provision that if it was not acceptable to all classes of creditors or the requisite percentage of the creditors, that then it should be sold under the conditions [1903] to which you referred?

Mr. Swaine: That is right; in other words, we think the plan should contain a provision which would permit its being carried out in the manner which would be beyond any attack as to its constitutionality, so that the securities which will eventually be put out, will be valid security.

Mr. Nicodemus: I would like very much for Mr. Swaine to submit an amendment to carry out what he has in mind.

Mr. Swaine: I did submit it to you in the preamble to that plan.

Mr. Nicodemus: Will you re-submit it to the Commission? I don't think it was authorized by section 77.

Mr. Swaine: No.

Mr. Nicodemus: I would like to state that we are very hopeful of having this plan accepted by 66⅔ per cent of each class of creditors, and I think after Mr. Willard has studied the record, he will

(Testimony of D. C. DeGraff.)

find it an equitable plan.

Mr. Swaine: I think I can read a provision into the record to convey what I have in mind. I suggest the insertion on page 18 as a separate heading —probably being headed "Paragraph 9"—Roman nine—and that would change paragraph IX to paragraph X, and would change [1904] paragraph X to paragraph XI—a section entitled "Provision for Dissenting Creditors and Stockholders," reading as follows:

"If more than one-third of any class of creditors or stockholders of the railroad company, as they may be classified by the court in the reorganization proceeding, shall not accept the plan within the period hereinbefore provided, the property of the railroad company shall be sold at public auction at a fair upset price, as determined by the court in the reorganization proceeding, and the non-assenting creditors of such class, or the non-assenting stockholders, as the case may be, shall be entitled to receive their aliquot portion of the proceeds of sale of such property after deducting therefrom all expenses of such sale, and the amount which would be required to pay in full the principal and interest to the date of such sale of all creditors whose claims are prior in lien or superior in equity to the class of such non-assenting creditors, or the rights of such non-assenting stockholders.

"Upon any such sale, the committee representing the first mortgage bondholders under the plan, or its

(Testimony of D. C. DeGraff.)

nominees, may act as purchasers of the property for the benefit of the reorganization, and may apply on account of the purchase price, the distributive share of the pro- [1905] ceeds of such sale of all securities and holders which have assented to the plan and the securities, though not assenting to the plan, of all classes, two-thirds or more in amount, which have assented to the plan."

I will say that I have no great desire to have the committee which I represent act as a purchaser, but I am perfectly willing that the Board of Directors of the debtor shall have the same power so long as it is perfectly clear that the power is to be exercised for the benefit of the reorganization.

Mr. Coulson: If the Commission please, I would like to reaffirm, on behalf of one of the junior creditors, the statement I previously made that if the Commission inserted that clause, we would oppose it. I think the time to decide whether or not there is a dissenting interest is after the plan is approved and reported to the court by the Commission and submitted to the creditors, but I think the clause Mr. Swaine has just read into the record as a suggestion for inclusion by the Commission, is quite outside the scope of Section 77 of the Bankruptcy Act, and we would like an opportunity at the appropriate time to be heard in regard to it.

Mr. Swaine: Section 77 contains a clear affirmation that any plan may provide for sale of the property. You will remember that before the last amend-

(Testimony of D. C. DeGraff.)

ment, that [1906] was a mandatory provision; under the new amendments, it is permissive but not mandatory.

Mr. Coulson: I defer to Mr. Swaine's wisdom as to section 77, but I am unable to apply it to the sale of the whole property, and that is a power ordinarily lodged in a foreclosure court.

Mr. Nicodemus: Colonel Coulson's suggestion of terminating this hearing with the understanding that we get together within a reasonably short time is satisfactory to the debtor.

Examiner Boyden: How soon will you be able to complete the preparation of the additional exhibits?

Mr. Nicodemus: How long will it take, Mr. Degraff?

Mr. Degraff: We are a long ways from home, Mr. Nicodemus; I think we ought to have a month.

Mr. Nicodemus: I would hate to have a month go by for the preparation of the exhibits, but it seems we will not be able to get along without them, so there seems to be no alternative—one month.

Examiner Boyden: I think we should adjourn —this is off the record.

(Discussion off the record ensued.)

Examiner Boyden: We will adjourn until April 21, 1936.

(Whereupon, at 4:20 o'clock p. m. of the same day, March 23, 1936, an adjournment was taken until April 21, 1936.) [1907]

April 21, 1936

PROCEEDINGS

Examiner Wilkinson: Come to order, gentlemen.

Mr. Nicodemus: Recall Mr. Elsey.

CHARLES ELSEY

was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Nicodemus) At the last hearing I asked Mr. Englebright if he could give us the date of the election of Mr. James, Mr. Schumacher, and Mr. Adams as directors and officers of the debtor. He was unable to do it. Can you supply those dates?

A. Yes, sir. Mr. Arthur Curtiss James and Mr. C. M. Schumacher were elected directors on July 6, 1926. Mr. H. M. Adams was elected director and president at the annual meeting on March 30, 1927.

Q. At that time did they to your knowledge make an inspection of the property of the Western Pacific Railroad Company? A. Yes, sir.

Q. Following that inspection, did they issue a circular to the stockholders of the Western Pacific Corporation, that is, the holding corporation owning the preferred and common stock of the debtor?

A. Yes, sir.

Q. Have you a copy of that circular? [1911]

A. Yes, sir.

Q. Is that the circular? A. Yes, sir.

Mr. Nicodemus: I offer the circular in evidence

(Testimony of Charles Elsey.)

and ask that it be marked as exhibit No. 28, which is the next consecutive number.

Examiner Wilkinson: The circular which is referred to will be marked as Exhibit No. 28.

(Exhibit No. 28, Witness Elsey, received in evidence.)

Q. (By Mr. Nicodemus) At the last hearing, were you requested by certain counsel and by the examiners to prepare or arrange for the preparation of certain additional exhibits?

A. Yes, sir.

Q. Has this been done? A. Yes, sir.

Q. Have the new exhibits which you stated you have prepared in accordance with those requests already been distributed to counsel?

A. That is correct.

Q. How many exhibits have been prepared?

A. 36.

Q. I have three separate exhibits, one of which consists of 36 statements.

A. That is correct. [1912]

Q. When you refer to the 36 exhibits, you really mean that the first exhibit that we have to offer contains 36 separate statements?

A. That is correct.

Q. At the last hearing Mr. J. F. Bon, the traffic manager, testified in support of the operating revenues shown on the exhibits which we introduced at that hearing. Mr. Englebright testified as to the operating expenses, and the auditor, Mr. D. C. DeGraff, testified as to certain of the financial ex-

(Testimony of Charles Elsey.)

hibits. Do you propose to have the same witnesses support similar statements in these new exhibits?

A. Yes, sir.

Q. That is, excepting Mr. Bon. Will you state to the examiner the situation as to Mr. Bon?

A. Mr. Bon was taken quite ill on return to San Francisco and was unable to make this trip. Mr. Henry Poulterer, the assistant freight traffic manager, cooperated with Mr. Bon in preparing the original statements and also the earnings statements on our subsidiaries. Mr. Poulterer is here to testify here in place of Mr. Bon.

Q. Mr. Poulterer collaborated with him in the preparation of the exhibit used at the last hearing, as well as those that we offer at this hearing?

A. That is correct. [1913]

Q. And is, as you understand it, prepared to testify and be cross examined as to all the exhibits?

A. Yes, sir.

Mr. Nicodemus: I should like, Mr. Examiner, to offer as exhibit No. 29, the compilation of 36 individual statements referred to by Mr. Elsey, subject, of course, to the testimony to be offered by Messrs. Poulterer, Englebright, and DeGraff.

Examiner Wilkinson: The documents just referred to by counsel will be marked Exhibit No. 29.

(Exhibit No. 29, Witness Elsey, received in evidence.)

[Here follows Exhibit No. 29 continuing to page 2092.]

(Testimony of Charles Elsey.)

EXHIBIT NO. 29

The Western Pacific Railroad Company

ADDITIONAL EXHIBITS

As

REQUESTED BY COUNSEL FOR CREDITORS

Or

EXAMINERS FOR INTERSTATE COMMERCE COMMISSION

at hearing held March 23, 1936

together with

SUPPLEMENTARY EXPLANATORY MEMORANDA

The Western Pacific RR Co.,
Office of President,
San Francisco, California. April 9, 1936.

INDEX

	Statement Number
Advances to Subsidiaries:	
To Deep Creek Railroad Company	14
To Sacramento Northern Railway	12
To Standard Realty & Development Company	15
To Tidewater Southern Railway Company	13
Branch Lines and Subsidiaries:	
Dates of Acquisition, Cost, Etc.	20
Deductions from Gross Income:	
The Western Pacific RR. Co.—Details, 14 years	23
Freight Car Miles:	
The Western Pacific RR. Co. and Subsidiaries	18
Improvement Programs—Previous:	
Sacramento Northern Railway	24
The Western Pacific Railroad Company	21
Tidewater Southern Railway Company	27
Income Accounts:	
Alameda Belt Line—Record for 8 years, 1928 to 1935, inclusive	34
Central California Traction Co.—Record for 8 years, 1928 to 1935, inclusive	32
Deep Creek Railroad Company—Record for 15 years, 1921 to 1935, inclusive	30
Sacramento Northern Railway—Record for 10 years, 1926 to 1935, inclusive	25
Tidewater Southern Railway Company—Record for 14 years, 1922 to 1935, inclusive	28
Western Pacific Railroad Company—Record for 14 years, 1922 to 1935, inclusive	22
Western Pacific System—Record for 14 years, 1922 to 1935, inclusive	9
Western Pacific System—Estimated for 5 years, 1936 to 1940, inclusive	2-7 incl.
Locomotive Miles:	
The Western Pacific RR. Co. and Subsidiaries	18

	Statement Number
Non-Operating Income:	
The Western Pacific RR. Co.—Details, 14 years	23
Notes and Memoranda:	
Relating to Alameda Belt Line	33
Central California Traction Company	32
Deep Creek Railroad Company	29
Sacramento Northern Railway	24
Standard Realty & Development Co.	35
Tidewater Southern Railway Company	27
Western Pacific RR. Co. Income Record	21
Western Pacific System Income Estimate	1
Obligations of Subsidiaries to Parent Company:	
Deep Creek Railroad Company	14
Sacramento Northern Railway	12 & 26
Standard Realty & Development Company	15
Tidewater Southern Railway Company	13 & 28.1
Passenger Train Car Miles:	
The Western Pacific RR. Co. and Subsidiaries	18
Road Mileage:	
The Western Pacific RR. Co. and Subsidiaries	17
Rolling Stock Owned:	
The Western Pacific RR. Co. and Subsidiaries	19
Traffic:	
Earnings on traffic interchanged with subsidiaries	10
Valuations:	
The Western Pacific RR. Co. and Subsidiaries	16

W. P. System Forecast
Statement No. 1
Notes

The Western Pacific Railroad System

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME
Years 1936 - 1940
(Statements 1 to 7, both inclusive)

NOTE 1

This estimate has been prepared in connection with proceedings on a Plan of Reorganization of The Western Pacific Railroad Company filed with the United States District Court and the Interstate Commerce Commission on February 8, 1936.

Statement No. 2 sets forth an estimated consolidated Income Account for the years 1936 to 1940, both inclusive, on an assumed basis of revenues (with estimated operating expenses corresponding to such revenue levels) for The Western Pacific Railroad Company and its three subsidiary railroad lines.

The figures shown on Statement No. 2 represent a consolidated income estimate with all inter-company transactions eliminated.

NOTE 2

Maintenance costs shown for 1936, 1937 and 1938 do not include operating charges incident to the Re-

(Testimony of Charles Elsey.)

habilitation Program of The Western Pacific Railroad Company. Similarly, no estimated Operating Expenses are included for any extraordinary rehabilitation which may be required on subsidiary lines. Plan of Reorganization for The Western Pacific Railroad Company contemplates, subject to approval of the Interstate Commerce Commission, that such expense will be charged to Profit and Loss during those years.

NOTE 3

Sacramento Northern Railway accounts are maintained in conformity with the Interstate Commerce Commission Classification of Accounts for Electric Railways, which includes hire of Equipment charges with "General and Miscellaneous." In the consolidated figures, all hire of equipment has been included under that account, as shown on Line 21.

NOTE 4

Western Pacific currently reports, under "Other Income," interest on obligations of the subsidiary companies to the parent company, i. e., interest on bonds, notes and advances on open account. Such interest income has been eliminated from estimates of the Western Pacific's "Other Income" on Statements Nos. 3, 4, 5, 6 and 7, with the exception of interest on a note of the Tidewater Southern since it is proposed to convert all other such subsidiary obligations to "Advances on Open Account" without interest.

(Testimony of Charles Elsey.)

NOTE 5

In comparing estimated "Hire of Equipment" estimates with past records, consideration must be given to the fact that effective January 1, 1936, rentals from lease of Western Pacific refrigerator cars must be included as an item of "Other Income," whereas prior years' rentals were credited to Hire of Equipment Account.

NOTE 6

Interest shown for Western Pacific's Equipment Trusts and Lease-Conditional Sale Agreement provides only for present obligations. No charges for new equipment obligations are included herein since definite plans are not at present available.

NOTE 7

Bonds will be sold to provide funds for the Rehabilitation Program as needs arise, and interest is herein considered as shown below:

Year	Bonds Sold During Year	Outstanding End of Year	Average for the Year	4% Interest on Average
1936	$3,000,000	$ 3,000,000	$ 1,625,000	$ 65,000
1937	3,500,000	6,500,000	4,750,000	190,000
1938	3,500,000	10,000,000	8,250,000	330,000
1939	None	10,000,000	10,000,000	400,000

and subsequently.

(Testimony of Charles Elsey.)

NOTE 8

Bonded debt of the Tidewater Southern Railway was wholly extinguished by the Sinking Fund as of March 31, 1935, and all Advances on Open Account repaid as of December 31, 1935 leaving no debt to the parent Western Pacific except a note in amount of $508,278.61 dated June 26, 1933, and due March 1, 1945, on which current interest has been and is expected to be paid currently.

Office of the President,
San Francisco, Calif.,
April 7th, 1936.

W. P. System Forecast
Statement No. 2 Recapitulation

WESTERN PACIFIC RAILROAD SYSTEM

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME

		1936	1937	1938	1939	1940
1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$13,775,700	$15,048,700	$16,332,700	$17,672,700	$19,293,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	841,100	1,200,100	1,434,100	1,986,100	1,717,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	212,500	277,500	309,500	364,500	339,500
5	Miscellaneous Other Revenues—Net	220,900	234,900	248,900	264,900	281,900
6	Total Railway Operating Revenues	15,050,200	16,761,200	18,325,200	20,288,200	21,632,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,463,800	2,509,800	2,608,800	2,767,800	2,940,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,229,300	2,403,800	2,531,300	2,887,800	3,290,300
10	Power (Electric power used on Sacramento Northern Railway)	164,000	171,000	181,000	190,000	194,000
11	Traffic Expense	712,600	735,600	766,600	782,600	803,600
12	Transportation—Rail Line	5,682,600	6,061,900	6,444,900	6,934,900	6,985,900
13	Miscellaneous Operations	92,000	100,000	100,000	115,000	125,000
14	General and Miscellaneous Operations (Note 3)	198,400	204,500	209,600	212,600	215,600
15	General Expense	464,900	489,900	514,900	539,900	564,900
16	Transportation for Investment—Credit	76,000*	76,000*	77,000*	52,000*	52,000*
17	Total Railway Operating Expenses (As qualified above)	11,931,600	12,600,500	13,280,100	14,378,600	15,068,100
18	Railway Tax Accruals—Regular Items	717,300	722,500	824,700	926,900	1,129,100
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	279,400	408,400	514,200	552,200	582,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	28,000	36,000	41,000	—	—
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,064,600	1,136,500	1,188,400	1,214,400	1,240,400
22	Joint Facility Rents—Net	148,000*	170,000*	188,000*	210,000*	225,000*
23	Net Railway Operating Income	1,177,300	2,027,300	2,664,800	3,426,100	3,837,400
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	322,000	287,000	229,000	184,000	171,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	148,636	150,936	155,336	159,736	163,336
27	Total Other Income	470,636	437,936	384,336	343,736	334,336
28	Total Income	1,647,936	2,465,236	3,049,136	3,769,836	4,171,736
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	123,850	122,650	119,550	117,350	115,250

2	Freight Revenue	$13,775,700	$15,048,700	$16,332,700	$17,672,700	$19,293,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	841,100	1,200,100	1,434,100	1,986,100	1,717,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	212,500	277,500	309,500	364,500	339,500
5	Miscellaneous Other Revenues—Net	220,900	234,900	248,900	264,900	281,900
6	Total Railway Operating Revenues	15,050,200	16,761,200	18,325,200	20,288,200	21,632,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,463,800	2,509,800	2,608,800	2,767,800	2,940,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,229,300	2,403,800	2,531,300	2,887,800	3,290,300
10	Power (Electric power used on Sacramento Northern Railway)	164,000	171,000	181,000	190,000	194,000
11	Traffic Expense	712,600	735,600	766,600	782,600	803,600
12	Transportation—Rail Line	5,682,600	6,061,900	6,444,900	6,934,900	6,985,900
13	Miscellaneous Operations	92,000	100,000	100,000	115,000	125,000
14	General and Miscellaneous Operations (Note 3)	198,400	204,500	209,600	212,600	215,600
15	General Expense	464,900	489,900	514,900	539,900	564,900
16	Transportation for Investment—Credit	76,000•	76,000•	77,000•	52,000•	52,000•
17	Total Railway Operating Expenses (As qualified above)	11,931,600	12,600,500	13,280,100	14,378,600	15,068,100
18	Railway Tax Accruals—Regular Items	717,300	722,500	824,700	926,900	1,129,100
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	279,400	408,400	514,200	552,200	582,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	28,000	36,000	41,000	—	—
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,064,600	1,136,500	1,188,400	1,214,400	1,240,400
22	Joint Facility Rents—Net	148,000•	170,000•	188,000•	210,000•	225,000•
23	Net Railway Operating Income	1,177,300	2,027,300	2,664,800	3,426,100	3,837,400
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	322,000	287,000	229,000	184,000	171,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	148,636	150,936	155,336	159,736	163,336
27	Total Other Income	470,636	437,936	384,336	343,736	334,336
28	Total Income	1,647,936	2,465,236	3,049,136	3,769,836	4,171,736
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	123,850	122,650	119,550	117,350	115,250
31	Available for Interest on Funded Debt	1,524,086	2,342,586	2,929,586	3,652,486	4,056,486
23	Deduct Interest on WP RR Equipment Trusts and Lease Conditional Sale Agreement (Note 6)	121,680	82,875	45,215	24,772	17,976
33	Deduct Interest on $15,675,900 of 4% WP RR Bonds (Exchanged Series)	627,036	627,036	627,036	627,036	627,036
34	Deduct Interest at 4% on new Bonds sold to finance WP RR 3-Year Rehabilitation Program (Note 7)	65,000	190,000	330,000	400,000	400,000
35	Deduct Interest on Funded Debt of Subsidiaries (Notes 4 and 8)	2,940	2,580	2,220	1,860	1,500
36	Total Fixed Interest on Funded Debt	816,656	902,491	1,004,471	1,053,668	1,046,512
37	Available Net Income After Fixed Interest Charges	707,430	1,440,095	1,925,115	2,598,818	3,009,974

Office of the President,
San Francisco, Calif.
April 7th, 1936.

•Denotes red figures.

W. P. System
Forecast
Statement No. 3 Details

WESTERN PACIFIC RAILROAD SYSTEM

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME — 1936

		W. P. RR.	S. N. Ry.	T. S. Ry.	D. C. RR.	Consolidated
1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$12,635,000	$ 856,000	$ 280,000	$ 4,700	$13,775,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	465,000	376,000	—	100	841,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	172,000	40,000	—	500	212,500
5	Miscellaneous Other Revenues—Net	166,000	51,000	7,000	100	220,900
6	Total Railway Operating Revenues	13,438,000	1,323,000	287,000	5,400	15,050,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,120,000	292,000	46,000	5,800	2,463,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,058,000	163,000	7,500	800	2,229,300
10	Power (Electric power used on Sacramento Northern Railway)	—	164,000	—	—	164,000
11	Traffic Expense	663,000	41,000	8,500	100	712,600
12	Transportation—Rail Line	5,063,000	545,000	69,500	5,100	5,682,600
13	Miscellaneous Operations	92,000	—	—	—	92,000
14	General and Miscellaneous Operations (Note 3)	—	232,000	—	—	198,400
15	General Expense	450,000	—	14,000	900	464,900
16	Transportation for Investment—Credit	75,000*	1,000*	—	—	76,000*
17	Total Railway Operating Expenses (As qualified above)	10,371,000	1,436,000	145,500	12,700	11,931,600
18	Railway Tax Accruals—Regular Items	646,000	52,000	18,500	800	717,300
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	237,000	39,000	3,000	400	279,400
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	28,000	—	—	—	28,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,030,000	—	13,700	100	1,064,600
22	Joint Facility Rents—Net	158,000*	—	400	—	148,000*
23	Net Railway Operating Income	1,284,000	204,000*	105,900	8,600*	1,177,300
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	322,000	—	—	—	322,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	141,000	32,400	3,000	—	148,636
27	Total Other Income	463,000	32,400	3,000	—	470,636
28	Total Income	1,747,000	171,600*	108,900	8,600*	1,647,936

1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$12,635,000	$ 856,000	$ 280,000	$ 4,700	$13,775,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	465,000	376,000	—	100	841,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	172,000	40,000	—	500	212,500
5	Miscellaneous Other Revenues—Net	166,000	51,000	7,000	100	220,900
6	Total Railway Operating Revenues	13,438,000	1,323,000	287,000	5,400	15,050,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,120,000	292,000	46,000	5,800	2,463,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,058,000	163,000	7,500	800	2,229,300
10	Power (Electric power used on Sacramento Northern Railway)	—	164,000	—	—	164,000
11	Traffic Expense	663,000	41,000	8,500	100	712,600
12	Transportation—Rail Line	5,063,000	545,000	69,500	5,100	5,682,600
13	Miscellaneous Operations	92,000	—	—	—	92,000
14	General and Miscellaneous Operations (Note 3)	—	232,000	—	—	198,400
15	General Expense	450,000	—	14,000	900	464,900
16	Transportation for Investment—Credit	75,000*	1,000*	—	—	76,000*
17	Total Railway Operating Expenses (As qualified above)	10,371,000	1,436,000	145,500	12,700	11,931,600
18	Railway Tax Accruals—Regular Items	646,000	52,000	18,500	800	717,300
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	237,000	39,000	3,000	400	279,400
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	28,000	—	—	—	28,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,030,000	—	13,700	100	1,064,600
22	Joint Facility Rents—Net	158,000*	—	400	—	148,000*
23	Net Railway Operating Income	1,284,000	204,000*	105,900	8,600*	1,177,300
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	322,000	—	—	—	322,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	141,000	32,400	3,000	—	148,636
27	Total Other Income	463,000	32,400	3,000	—	470,636
28	Total Income	1,747,000	171,600*	108,900	8,600*	1,647,936
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	121,000	3,600	1,600	—	123,850
31	Available for Interest on Funded Debt	1,626,000	175,200*	107,300	8,600*	1,524,086
23	Deduct Interest on WP RR Equipment Trusts and Lease Conditional Sale Agreement (Note 6)	121,680	—	—	—	121,680
33	Deduct Interest on $15,675,900 of 4% WP RR Bonds (Exchanged Series)	627,036	—	—	—	627,036
34	Deduct Interest at 4% on new Bonds sold to finance WP RR 3-Year Rehabilitation Program (Note 7)	65,000	—	—	—	65,000
35	Deduct Interest on Funded Debt of Subsidiaries (Notes 4 and 8)	—	2,940	25,414	—	2,940
36	Total Fixed Interest on Funded Debt	813,716	2,940	25,414	—	816,656
37	Available Net Income After Fixed Interest Charges	812,284	178,140*	81,886	8,600*	707,420

Office of the President,
San Francisco, Calif.
April 7th, 1936.

*Denotes red figures.

W. P. System
Forecast
Statement No. 4 Details

WESTERN PACIFIC RAILROAD SYSTEM

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME

1937

		W. P. RR.	S. N. Ry.	T. S. Ry.	D. C. RR.	Consolidated
1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$13,831,000	$ 933,000	$ 280,000	$ 4,700	$15,048,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	806,000	394,000	—	100	1,200,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	237,000	40,000	—	500	277,500
5	Miscellaneous Other Revenues—Net	180,000	51,000	7,000	100	234,900
6	Total Railway Operating Revenues	15,054,000	1,418,000	287,000	5,400	16,761,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,150,000	308,000	46,000	5,800	2,509,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,225,000	170,000	8,000	800	2,403,800
10	Power (Electric power used on Sacramento Northern Railway)	—	171,000	—	—	171,000
11	Traffic Expense	685,000	42,000	8,500	100	735,600
12	Transportation—Rail Line	5,419,000	563,000	74,800	5,100	6,061,900
13	Miscellaneous Operations	100,000	—	—	—	100,000
14	General and Miscellaneous Operations (Note 3)	—	240,000	—	—	204,500
15	General Expense	475,000	—	14,000	900	489,900
16	Transportation for Investment—Credit	75,000*	1,000*	—	—	76,000*
17	Total Railway Operating Expenses (As qualified above)	10,979,000	1,493,000	151,300	12,700	12,600,500
18	Railway Tax Accruals—Regular Items	650,000	53,000	18,700	800	722,500
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	355,000	49,000	4,000	400	408,400
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	36,000	—	—	—	36,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,100,000	—	13,700	100	1,136,500
22	Joint Facility Rents—Net	180,000*	—	400	—	170,000*
23	Net Railway Operating Income	2,114,000	177,000*	98,900	8,600*	2,027,300
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	287,000	—	—	—	287,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	143,000	32,600	3,100	—	150,936
27	Total Other Income	430,000	32,600	3,100	—	437,936
28	Total Income	2,544,000	144,400*	102,000	8,600*	2,465,236
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	120,000	3,400	1,600	—	122,650

2	Freight Revenue	$13,831,000	$ 933,000	$ 280,000	$ 4,700	$15,048,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	806,000	394,000	--	100	1,200,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	237,000	40,000	—	500	277,500
5	Miscellaneous Other Revenues—Net	180,000	51,000	7,000	100	234,900
6	Total Railway Operating Revenues	15,054,000	1,418,000	287,000	5,400	16,761,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,150,000	308,000	46,000	5,800	2,509,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,225,000	170,000	8,000	800	2,403,800
10	Power (Electric power used on Sacramento Northern Railway)	—	171,000	—	—	171,000
11	Traffic Expense	685,000	42,000	8,500	100	735,600
12	Transportation—Rail Line	5,419,000	563,000	74,800	5,100	6,061,900
13	Miscellaneous Operations	100,000	—	—	—	100,000
14	General and Miscellaneous Operations (Note 3)	—	240,000	—	—	204,500
15	General Expense	475,000	—	14,000	900	489,900
16	Transportation for Investment—Credit	75,000*	1,000*	—	—	76,000*
17	Total Railway Operating Expenses (As qualified above)	10,979,000	1,493,000	151,300	12,700	12,600,500
18	Railway Tax Accruals—Regular Items	650,000	53,000	18,700	800	722,500
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	355,000	49,000	4,000	400	408,400
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	36,000	—	—	—	36,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,100,000	—	13,700	100	1,136,500
22	Joint Facility Rents—Net	180,000*	—	400	—	170,000*
23	Net Railway Operating Income	2,114,000	177,000*	98,900	8,600*	2,027,300
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	287,000	—	—	—	287,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	143,000	32,600	3,100	—	150,936
27	Total Other Income	430,000	32,600	3,100	—	437,936
28	Total Income	2,544,000	144,400*	102,000	8,600*	2,465,236
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	120,000	3,400	1,600	—	122,650
31	Available for Interest on Funded Debt	2,424,000	147,800*	100,400	8,600*	2,342,586
23	Deduct Interest on WP RR Equipment Trusts and Lease Conditional Sale Agreement (Note 6)	82,875	—	—	—	82,875
33	Deduct Interest on $15,675,900 of 4% WP RR Bonds (Exchanged Series)	627,036	—	—	—	627,036
34	Deduct Interest at 4% on new Bonds sold to finance WP RR 3-Year Rehabilitation Program (Note 7)	190,000	—	—	—	190,000
35	Deduct Interest on Funded Debt of Subsidiaries (Notes 4 and 8)	—	2,580	25,414	—	2,580
36	Total Fixed Interest on Funded Debt	899,911	2,580	25,414	—	902,491
37	Available Net Income After Fixed Interest Charges	1,524,089	150,380*	74,986	8,600*	1,440,095

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April 7th, 1936.

*Denotes red figures.

WESTERN PACIFIC RAILROAD SYSTEM

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME

1938

		W. P. RR.	S. N. Ry.	T. S. Ry.	D. C. RR.	Consolidated
1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$15,037,000	$ 1,011,000	$ 280,000	$ 4,700	$16,332,700
3	Passenger Revenue (Including City Line revenues of. Sacramento Northern Railway)	1,008,000	426,000	—	100	1,434,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	269,000	40,000	—	500	309,500
5	Miscellaneous Other Revenues—Net	194,000	51,000	7,000	100	248,900
6	Total Railway Operating Revenues	16,508,000	1,528,000	287,000	5,400	18,325,200
7	Operating Expenses (Exeluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (including Operating Expense of Routine A & B Work—Note 2)	2,250,000	307,000	46,000	5,800	2,608,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,350,000	172,000	8,500	800	2,531,300
10	Power (Electric power used on Sacramento Northern Railway)	—	181,000	—	—	181,000
11	Traffic Expense	715,000	43,000	8,500	100	766,600
12	Transportation—Rail Line	5,778,000	587,000	74,800	5,100	6,444,900
13	Miscellaneous Operations	100,000	—	—	—	100,000
14	General and Miscellaneous Operations (Note 3)	—	247,000	—	—	209,600
15	General Expense	500,000	—	14,000	900	514,900
16	Transportation for Investment—Credit	75,000•	2,000•	—	—	77,000•
17	Total Railway Operating Expenses (As qualified above)	11,618,000	1,535,000	151,800	12,700	13,280,100
18	Railway Tax Accruals—Regular Items	750,000	55,000	18,900	800	824,700
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	450,000	59,000	4,700	500	514,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	41,000	—	—	—	41,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,150,000	—	13,700	100	1,188,400
22	Joint Facility Rents—Net	198,000•	—	400	—	188,000•
23	Net Railway Operating Income	2,697,000	121,000•	97,500	8,700•	2,664,800
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	229,000	—	—	—	229,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	147,000	32,900	3,200	—	155,336
27	Total Other Income	376,000	32,900	3,200	—	384,336
28	Total Income	3,073,000	88,100•	100,700	8,700•	3,049,136
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	117,000	3,300	1,600	—	119,550

2	Freight Revenue	$15,037,000	$ 1,011,000	$ 280,000	$ 4,700	$16,332,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	1,008,000	426,000	—	100	1,434,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	269,000	40,000	—	500	309,500
5	Miscellaneous Other Revenues—Net	194,000	51,000	7,000	100	248,900
6	Total Railway Operating Revenues	16,508,000	1,528,000	287,000	5,400	18,325,200
7	Operating Expenses (Excluding Operating Expense of WP RR Rehabilitation Program—See Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,250,000	307,000	46,000	5,800	2,608,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,350,000	172,000	8,500	800	2,531,300
10	Power (Electric power used on Sacramento Northern Railway)	—	181,000	—	—	181,000
11	Traffic Expense	715,000	43,000	8,500	100	766,600
12	Transportation—Rail Line	5,778,000	587,000	74,800	5,100	6,444,900
13	Miscellaneous Operations	100,000	—	—	—	100,000
14	General and Miscellaneous Operations (Note 3)	—	247,000	—	—	209,600
15	General Expense	500,000	—	14,000	900	514,900
16	Transportation for Investment—Credit	75,000•	2,000•	—	—	77,000•
17	Total Railway Operating Expenses (As qualified above)	11,618,000	1,535,000	151,800	12,700	13,280,100
18	Railway Tax Accruals—Regular Items	750,000	55,000	18,900	800	824,700
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	450,000	59,000	4,700	500	514,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	41,000	—	—	—	41,000
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,150,000	—	13,700	100	1,188,400
22	Joint Facility Rents—Net	198,000•	—	400	—	188,000•
23	Net Railway Operating Income	2,697,000	121,000•	97,500	8,700•	2,664,800
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	229,000	—	—	—	229,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	147,000	32,900	3,200	—	155,336
27	Total Other Income	376,000	32,900	3,200	—	384,336
28	Total Income	3,073,000	88,100•	100,700	8,700•	3,049,136
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	117,000	3,300	1,600	—	119,550
31	Available for Interest on Funded Debt	2,956,000	91,400•	99,100	8,700•	2,929,586
23	Deduct Interest on WP RR Equipment Trusts and Lease Conditional Sale Agreement (Note 6)	45,215	—	—	—	45,215
33	Deduct Interest on $15,675,900 of 4% WP RR Bonds (Exchanged Series)	627,036	—	—	—	627,036
34	Deduct Interest at 4% on new Bonds sold to finance WP RR 3-Year Rehabilitation Program (Note 7)	330,000	—	—	—	330,000
35	Deduct Interest on Funded Debt of Subsidiaries (Notes 4 and 8)	—	2,220	25,414	—	2,220
36	Total Fixed Interest on Funded Debt	1,002,251	2,220	25,414	—	1,004,471
37	Available Net Income After Fixed Interest Charges	1,953,749	93,620•	73,686	8,700•	1,925,115

Office of the President,
San Francisco, Calif.
April 7th, 1936.

•Denotes red figures.

W. P. System
Forecast
Statement No. 6 Details

WESTERN PACIFIC RAILROAD SYSTEM

Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

A FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME — 1939

		W. P. RR.	S. N. Ry.	T. S. Ry.	D. C. RR.	Consolidated
1	Assumed Operating Revenues (Note 1)					
2	Freight Revenue	$16,338,000	$ 1,050,000	$ 280,000	$ 4,700	$17,672,700
3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	1,511,000	475,000	—	100	1,986,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	324,000	40,000	—	500	364,500
5	Miscellaneous Other Revenues—Net	210,000	51,000	7,000	100	264,900
6	Total Railway Operating Revenues	18,383,000	1,616,000	287,000	5,400	20,288,200
7	Operating Expenses (Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,400,000	316,000	46,000	5,800	2,767,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,700,000	178,000	9,000	800	2,887,800
10	Power (Electric power used on Sacramento Northern Railway)	—	190,000	—	—	190,000
11	Traffic Expense	730,000	44,000	8,500	100	782,600
12	Transportation—Rail Line	6,250,000	605,000	74,800	5,100	6,934,900
13	Miscellaneous Operations	115,000	—	—	—	115,000
14	General and Miscellaneous Operations (Note 3)	—	251,000	—	—	212,600
15	General Expense	525,000	—	14,000	900	539,900
16	Transportation for Investment—Credit	50,000•	2,000•	—	—	52,000•
17	Total Railway Operating Expenses (As qualified above)	12,670,000	1,582,000	152,300	12,700	14,378,600
18	Railway Tax Accruals—Regular Items	850,000	57,000	19,100	800	926,900
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	485,000	62,000	4,700	500	552,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	—	—	—	—	—
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,175,000	—	13,700	100	1,214,400
22	Joint Facility Rents—Net	220,000•	—	400	—	210,000•
23	Net Railway Operating Income	3,423,000	85,000•	96,800	8,700•	3,426,100
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	184,000	—	—	—	184,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	151,000	33,200	3,300	—	159,736
27	Total Other Income	335,000	33,200	3,300	—	343,736
28	Total Income	3,758,000	51,800•	100,100	8,700•	3,769,836
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	115,000	3,100	1,600	—	117,350
31	Available for Interest on Funded Debt	3,643,000	54,900•	98,500	8,700•	3,652,486

3	Passenger Revenue (Including City Line revenues of Sacramento Northern Railway)	1,511,000	475,000	—	100	1,986,100
4	Mail, Express, Dining & Buffet and Other Passenger Train Revenues	324,000	40,000	—	500	364,500
5	Miscellaneous Other Revenues—Net	210,000	51,000	7,000	100	264,900
6	Total Railway Operating Revenues	18,383,000	1,616,000	287,000	5,400	20,288,200
7	Operating Expenses (Note 1)					
8	Maintenance of Way & Structures (Including Operating Expense of Routine A & B Work—Note 2)	2,400,000	316,000	46,000	5,800	2,767,800
9	Maintenance of Equipment (Including Depreciation and Operating Expense of Routine A & B Work—Note 2)	2,700,000	178,000	9,000	800	2,887,800
10	Power (Electric power used on Sacramento Northern Railway)	—	190,000	—	—	190,000
11	Traffic Expense	730,000	44,000	8,500	100	782,600
12	Transportation—Rail Line	6,250,000	605,000	74,800	5,100	6,934,900
13	Miscellaneous Operations	115,000	—	—	—	115,000
14	General and Miscellaneous Operations (Note 3)	—	251,000	—	—	212,600
15	General Expense	525,000	—	14,000	900	539,900
16	Transportation for Investment—Credit	50,000•	2,000•	—	—	52,000•
17	Total Railway Operating Expenses (As qualified above)	12,670,000	1,582,000	152,300	12,700	14,378,600
18	Railway Tax Accruals—Regular Items	850,000	57,000	19,100	800	926,900
19	Excise Taxes—Ordinary Expense Payrolls (Railroad Retirement and Social Security)	485,000	62,000	4,700	500	552,200
20	Excise Taxes—WP RR Rehabilitation Program Payrolls (Railroad Retirement and Social Security)	—	—	—	—	—
21	Hire of Equipment—Net Debit (Notes 3 and 5)	1,175,000	—	13,700	100	1,214,400
22	Joint Facility Rents—Net	220,000•	—	400	—	210,000•
23	Net Railway Operating Income	3,423,000	85,000•	96,800	8,76[illegible]	3,426,100
24	Other Income (Assuming WP RR Plan of Reorganization is effective January 1, 1936—Note 4)					
25	Rents from Road and Equipment (Rental on cars leased to Pacific Fruit Express Company—Note 5)	184,000	—	—	—	184,000
26	Miscellaneous Interest and Other Rents from Road and Equipment	151,000	33,200	3,300	—	159,736
27	Total Other Income	335,000	33,200	3,300	—	343,736
28	Total Income	3,758,000	51,800•	100,100	8,700•	3,769,836
29	Miscellaneous Deductions from Income					
30	All items other than interest on Funded Debt	115,000	3,100	1,600	—	117,350
31	Available for Interest on Funded Debt	3,643,000	54,900•	98,500	8,700•	3,652,486
23	Deduct Interest on WP RR Equipment Trusts and Lease Conditional Sale Agreement (Note 6)	24,772	—	—	—	24,772
33	Deduct Interest on $15,675,900 of 4% WP RR Bonds (Exchanged Series)	627,036	—	—	—	627,036
34	Deduct Interest at 4% on new Bonds sold to finance WP RR 3-Year Rehabilitation Program (Note 7)	400,000	—	—	—	400,000
35	Deduct Interest on Funded Debt of Subsidiaries (Notes 4 and 8)	—	1,860	25,414	—	1,860
36	Total Fixed Interest on Funded Debt	1,051,808	1,860	25,414	—	1,053,668
37	Available Net Income After Fixed Interest Charges	2,591,192	56,760•	73,086	8,700•	2,598,818

Office of the President,
San Francisco. Calif
April 7th. 1936.

•Denotes red figures.

(Testimony of Charles Elsey.)

Statement No. 8
Page No. 1

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

INCOME ACCOUNT—COMBINED 1922 to 1935, INCLUSIVE
Inter-Company Accounts Eliminated

NOTES

1. Accounts of the Sacramento Northern Railway do not appear until 1926 and this subsidiary was further enlarged by acquisition of the San Francisco-Sacramento Railroad in 1929.

2. Northern California Extension from Keddie to Bieber—112 miles—was not placed in revenue service until Nov. 10, 1931. Revenues accruing to the System lines on traffic to and from this new line are included after that date, but the portion of such revenues earned on the new line itself were not included until after May 31, 1932. Such revenues were credited to Construction Account, which was also charged with operations. Subsequently these revenues and expenses were cleared through Profit and Loss by authority of the Interstate Commerce Commission.

3. Review of Maintenance of Way expenses should be considered in connection with the growth of the property. This is outlined for the component lines and the System by Statement No. 17. Increased intensity of use is indicated by increases in locomotive and car miles shown by Statement No. 18.

4. Maintenance of Way & Structures accounts for 1934 include Operating Expenses approximating

(Testimony of Charles Elsey.)

$107,286 incidental to laying 43 track miles of new rail as emergency renewals in 1934. Similarly approximately $353,036 Operating Expense is included in 1935 incident to laying of 100 track miles of necessary new rail and completion of the 1934 rail work.

Statement No. 8
Page No. 2

5. Included in the Maintenance of Way & Structures and Maintenance of Equipment expenses are Operating Expenses incident to the Improvement Program of the Western Pacific Railroad, which are separately shown, and of the Sacramento Northern Railway and Tidewater Southern Railway, which programs are described more specifically in Statements Nos. 21, 24 and 27.

6. Review of Maintenance of Equipment expenses should be considered in connection with the increased units of equipment to be maintained as shown by Statement No. 19, and also with reference to increased use of equipment as generally shown by increasd car and locomotive miles indicated by Statement No. 18.

7. Operating Expense approximating $54,000 in 1934 and $83,000 in 1935 are included as a result of rehabilitation of 134 box cars and 207 box cars, respectively.

8. Hire of Equipment for period shown has been Net after taking credit for rentals from lease of Western Pacific owned refrigerator cars to the Pacific Fruit Express Company, which rentals have been as follows:

(Testimony of Charles Elsey.)

1922	$	1929	$497,708
1923	159,334	1930	472,169
1924	600,526	1931	445,862
1925	654,100	1932	421,362
1926	629,473	1933	396,927
1927	547,947	1934	371,777
1928	522,390	1935	346,712

Effective January 1, 1936, such rentals will no longer be credited to Hire of Equipment but will be credited to Non-Operating Income.

By reason of having handled heavy movement of perishables, Western Pacific's Hire of Equipment account has always reflected substantial charges for mileage car rentals which are shown below for the period covered by the attached records:

1922	$138,323	1929	$561,471
1923	286,201	1930	850,711
1924	328,933	1931	731,656
1925	426,284	1932	683,235
1926	495,126	1933	693,624
1927	560,487	1934	841,745
1928	630,778	1935	855,053

The above figures are also indicative of the growth of the Company's perishable fruit and vegetable traffic.

Statement No. 8
Page No. 3

9. Traffic value of subsidiaries is indicated by Statement No. 10, showing Western Pacific's revenues on traffic interchanged with such subsidiaries.

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

COMBINED INCOME ACCOUNT - YEARS 1922 to 1935, BOTH INCLUSIVE (*)

W.P. SYSTEM
INCOME ACCOUNT

	Year 1922	Year 1923	Year 1924	Year 1925	Year 1926	Year 1927	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935
MILES OF ROAD OPER. END OF YEAR	1,184.70	1,183.98	1,183.98	1,183.98	1,318.78	1,318.07	1,327.17	1,432.82	1,441.01	1,439.10	1,593.67	1,596.87	1,596.87	1,596.73
OPERATING REVENUES														
Freight	$ 9,667,959.74	$10,731,276.36	$11,241,579.94	$12,634,074.70	$14,269,681.43	$14,764,680.63	$15,974,136.87	$16,358,040.90	$15,480,000.79	$12,342,040.80	$10,662,430.10	$10,950,947.76	$12,338,085.21	$13,254,372.23
Passenger	2,184,093.30	2,455,419.60	2,126,585.63	2,000,817.49	2,319,180.72	2,090,479.80	1,870,789.86	2,187,700.11	1,798,033.78	1,515,282.63	764,977.05	865,247.84	429,719.67	730,957.44
Mail	74,580.80	70,082.08	66,663.43	85,749.73	71,743.15	70,644.56	75,048.11	114,256.98	82,950.14	77,279.36	69,592.40	58,244.41	54,186.73	55,438.48
Express	406,882.11	467,527.31	456,108.18	380,712.12	389,869.58	358,205.21	401,888.00	446,940.29	394,021.82	306,899.29	95,630.31	89,519.79	85,373.93	83,860.59
Dining Car, Hotel & Restaurant	238,142.09	252,885.15	244,074.36	238,101.06	237,198.71	249,161.63	256,400.45	265,315.87	234,256.45	185,603.70	123,683.73	107,290.94	94,527.10	100,931.37
Miscellaneous	165,198.91	417,241.99	884,572.02	899,093.13	703,854.12	775,403.97	841,580.84	735,202.81	661,049.11	627,149.80	605,145.17	467,390.94	605,145.17	201,897.56
Total Railway Operating Revenues	$12,786,863.95	$14,414,812.46	$14,669,312.92	$15,898,847.74	$17,021,487.71	$18,308,574.80	$19,421,851.16	$20,096,536.77	$18,819,061.87	$14,882,988.27	$12,251,071.06	$12,202,489.08	$13,779,237.81	$14,407,457.67
OPERATING EXPENSES														
Ordinary M.W. & S.	$ 2,008,880.43	$ 2,342,737.44	$ 2,813,104.39	$ 2,884,917.78	$ 2,889,319.98	$ 3,061,709.87	$ 2,727,280.87	$ 3,391,202.17	$ 3,139,298.14	$ 2,608,737.40	$ 1,712,737.70	$ 1,931,499.20	$ 2,166,837.83	$2,693,537.85
Improvement Program Charges (W.P.RR.)						324,217.92	931,358.97	486,094.58	857,421.44	110,338.81	(26,965.69)	(35,197.13)	588.02	
Total M.W. & S.	2,008,880.43	2,342,737.44	2,813,104.39	2,884,917.78	2,889,319.98	3,385,927.79	3,658,639.84	3,877,296.75	3,996,719.58	2,719,076.21	1,685,771.81	1,896,302.07	2,167,425.85	2,693,537.85
Ordinary M.of E.(Inc.Depr.& Retire.)	2,844,747.82	2,369,174.55	2,847,988.84	2,474,979.71	2,695,906.04	2,761,760.34	2,904,221.74	2,795,857.80	2,712,812.14	2,443,887.51	2,035,780.66	2,042,481.33	2,081,821.61	2,313,293.73
Improvement Program Charges (W.P.RR.)						362,386.33	374,345.10	587,305.61	174,040.23	12,396.28	143.56			
Total M. of E.	2,844,747.82	2,369,174.55	2,847,988.84	2,474,979.71	2,695,906.04	3,124,146.67	3,278,566.84	3,383,163.41	2,886,852.37	2,456,283.79	2,035,924.22	2,042,481.33	2,081,821.61	2,313,293.73
Power	13,001.74	10,384.76	10,354.31	11,885.48	121,280.09	145,944.00	148,948.91	235,531.75	280,370.25	214,695.00	172,811.73	153,604.73	152,087.20	150,022.26
Traffic	401,972.83	430,622.10	428,138.82	462,826.29	504,615.36	596,087.83	771,373.67	921,235.41	882,714.23	865,209.38	780,004.44	699,075.82	690,851.01	715,425.26
Transportation-Rail Line	4,631,508.22	4,821,764.25	4,881,134.61	5,330,653.05	5,589,988.32	5,883,588.63	6,537,886.38	6,815,421.98	6,745,779.89	6,181,446.50	4,886,108.85	4,416,774.00	4,889,748.20	5,580,855.26
Miscellaneous Operations	280,873.19	411,936.48	493,640.65	447,308.87	480,280.98	550,602.90	779,146.31	887,087.31	894,106.38	810,735.33	411,869.54	333,244.80	409,901.25	88,270.29
General	496,648.09	541,288.46	493,640.65	481,786.84	695,265.98	790,829.87	804,854.93	932,087.30	886,014.82	836,548.42	670,769.03	609,679.46	595,053.32	520,359.72
Transportation for Investment	(14,288.99)	(40,289.21)	(50,288.19)	(39,289.03)	(56,004.27)	(55,918.78)	(167,081.11)	(132,436.18)	(202,363.04)	(202,207.41)	(56,090.04)	(41,908.99)	(12,639.14)	(12,278.17)
Total Railway Operating Expenses	$10,088,496.44	$10,887,330.90	$11,691,986.94	$11,841,734.11	$12,919,831.01	$14,818,197.65	$15,907,869.97	$16,727,680.73	$15,821,798.29	$13,523,797.31	$10,522,369.80	$10,129,680.99	$11,183,735.28	$12,064,689.22
Net Revenue from Railway Operations	$ 2,707,867.51	$ 3,527,481.56	$ 2,977,325.98	$ 4,056,813.63	$ 4,101,656.70	$ 3,791,597.15	$ 3,513,981.19	$ 3,368,876.04	$ 2,997,263.58	$ 1,359,190.96	$ 1,728,701.26	$ 2,072,829.79	$ 2,595,502.53	$ 2,342,768.45
Railway Tax Accruals	986,368.21	972,864.87	927,884.98	$ 1,001,984.88	1,419,180.43	1,641,842.74	1,997,655.06	1,970,312.14	1,850,038.36	1,103,715.45	713.72	6,738.95	7,972.03	
Uncollectible Railway Revenues	841.99	1,181.26	6,911.48	1,837.83	1,757.89	908.64	881.82	1,326.25	450.80	844.26	2,076.82			
Railway Operating Income	$ 1,720,657.32	$ 2,553,435.43	$ 2,073,190.28	$ 3,053,191.37	$ 2,699,048.58	$ 2,149,188.77	$ 2,825,456.78	$ 1,918,076.79	$ 1,737,500.54	$ 78,568.34	$ 622,908.99	$ 1,138,206.66	$ 1,726,227.15	$ 1,584,761.46
Hire of Equipment - Net Credit or Net Debit	$ 386,993.18	$ 880,775.03	$ 909,610.44	$ 880,602.62	$ 814,814.80	$ 263,984.15	$ 69,771.23	$ 267,259.44	$ 380,730.99	$ 360,267.81	$ 431,717.84	$ 502,318.04	$ 645,819.75	$ 775,650.21
Joint Facility Rents - Net Credit or Net Debit	76,076.18	70,808.82	40,819.97	171,473.60	213,121.07	223,534.48	256,248.92	254,343.72	211,979.97	210,672.70	168,743.04	160,494.30	141,870.70	124,041.02
Net Railway Operating Income	$ 1,971,577.32	$ 3,063,602.14	$ 3,023,690.83	$ 4,384,467.49	$ 4,726,684.15	$ 2,636,747.40	$ 2,853,476.43	$ 2,419,679.95	$ 1,568,749.52	$ (71,046.77)	$ 359,934.19	$ 805,382.01	$ 1,222,678.10	$ 933,152.27
NON-OPERATING INCOME														
Rental of Property	$ 74,338.36	$ 99,931.29	$ 107,681.97	$ 110,329.87	$ 135,447.58	$ 144,787.80	$ 156,567.49	$ 203,536.37	$ 235,254.98	$ 180,427.42	$ 154,861.76	$ 137,188.77	$ 132,330.18	$ 134,224.79
Interest Accruals	421,227.07	380,332.08	179,049.11	140,455.20	93,858.99	86,449.84	151,936.45	118,544.93	89,860.92	101,506.60	51,851.67	32,420.37	25,466.06	17,531.49
Miscellaneous	294.46	509.29	10,788.08	275.00	508.49	457.65	637.65	425.77	1,671.03	4,260.91	287.84	37.00	(2,572.09)	669.81
Total Non-Operating Income	$ 496,019.87	$ 480,852.66	$ 297,999.76	$ 251,060.46	$ 229,815.06	$ 231,724.29	$ 309,141.59	$ 322,507.07	$ 326,766.91	$ 286,195.13	$ 207,001.26	$ 169,646.14	$ 155,524.15	$ 152,426.09
GROSS INCOME	$ 2,467,597.19	$ 3,484,454.80	$ 3,321,219.39	$ 4,444,427.95	$ 4,956,499.18	$ 2,868,492.30	$ 3,162,618.02	$ 2,742,187.02	$ 1,894,516.44	$ 215,148.36	$ 566,935.45	$ 975,048.15	$ 1,378,002.25	$ 1,085,578.36
MISCELLANEOUS DEDUCTIONS														
Miscellaneous Rents	$ 43,617.09	$ 43,906.88	$ 48,838.37	$ 42,809.39	$ 43,270.72	$ 43,249.93	$ 46,957.44	$ 48,447.47	$ 47,059.63	$ 47,109.97	$ 47,760.69	$ 51,003.16	$ 49,436.61	$ 40,891.03
Miscellaneous Tax Accruals	77.80	79.60	165.30	388.56	1,404.86	2,252.92	6,188.63	14,671.24	15,599.72	20,928.31	27,399.85	38,045.42	46,836.74	49,399.65
Amortization of Discount	103,604.04	110,891.78	121,317.89	126,288.83	130,159.18	128,060.82	124,441.73	130,972.48	135,984.32	139,697.92	144,910.99	146,877.72	144,082.61	143,433.02
Miscellaneous Charges to Income	14,272.50	15,500.00	15,995.75	20,379.17	22,182.30	20,414.93	18,689.18	20,249.44	143,385.52	194,119.84	94,157.76	65,114.67	53,422.46	46,265.27
Total Miscellaneous Deductions	$ 161,473.13	$ 170,478.26	$ 186,109.71	$ 190,075.94	$ 197,016.96	$ 193,978.60	$ 196,246.98	$ 212,340.63	$ 342,029.19	$ 401,856.04	$ 314,229.29	$ 301,040.97	$ 293,758.41	$ 275,988.97
AVAILABLE FOR INTEREST	$ 2,306,124.06	$ 3,313,976.54	$ 3,135,109.68	$ 4,454,352.01	$ 4,759,282.22	$ 2,674,493.79	$ 2,964,371.04	$ 2,529,846.39	$ 1,552,487.24	$ (186,707.68)	$ 252,706.16	$ 674,007.18	$ 1,084,243.85	$ 809,589.39
Interest on Funded Debt	$ 1,832,088.34	$ 1,475,119.28	$ 1,779,782.78	$ 1,933,735.45	$ 2,076,777.07	$ 2,134,887.70	$ 2,312,527.06	$ 2,507,645.03	$ 2,667,746.29	$ 2,817,446.16	$ 3,180,532.21	$ 3,437,937.18	$ 3,370,262.05	$ 3,349,290.30
Interest on Unfunded Debt	2,037.53	1,788.62	1,289.10	1,742.76	2,909.09	2,663.08	4,655.16	1,892.67	812.51	18,201.45	73,869.12	69,497.39	43,567.67	39,792.91
Total Interest Deductions	$ 1,834,088.87	$ 1,476,886.90	$ 1,781,291.88	$ 1,935,478.21	$ 2,079,686.16	$ 2,137,530.78	$ 2,317,182.22	$ 2,509,477.70	$ 2,668,558.80	$ 2,835,647.61	$ 3,254,401.33	$ 3,507,434.57	$ 3,413,829.72	$ 3,389,089.21
NET INCOME	$ 1,072,088.19	$ 1,837,089.64	$ 1,353,817.80	$ 2,518,873.80	$ 2,679,596.06	$ 536,963.01	$ 647,188.82	$ 20,368.69	$ (1,116,071.56)	$ (3,022,355.29)	$ 3,001,696.17	$ (2,833,427.39)	$ (2,329,585.87)	$ (2,583,499.82)

Note: Figures in parentheses, viz.: ( ) denote red.

(*) Includes Sacramento Northern Railway 1926 to 1935, inclusive.

(*) Includes San Francisco-Sacramento RR. Co. 1929 to 1935, inclusive

(Testimony of Charles Elsey.)

Statement No. 10

The Western Pacific Railroad Company
Revenues on Traffic Interchanged
with
Sacramento Northern Railway
Tidewater Southern Railway Company
Central California Traction Company
Deep Creek Railroad Company
1922 - 1935

	Interchanged With				
Year	S.N. Ry.	T.S. Ry.	C.C.T. Co.	D.C. RR.	Total
1922	$ *	$313,461	$ †	$ ‡	$ 313,461
1923	*	388,857	†	‡	388,857
1924	*	406,266	†	‡	406,266
1925	*	507,208	†	‡	507,208
1926	559,015	575,183	†	18,549	1,152,747
1927	654,549	629,232	†	13,003	1,296,784
1928	741,147	686,818	257,511	12,522	1,697,998
1929	752,257§	546,663	203,706	14,129	1,516,755
1930	1,128,265§	756,303	286,632	10,141	2,181,341
1931	847,795§	474,557	194,263	8,775	1,525,390
1932	825,108§	449,353	219,208	10,458	1,504,127
1933	851,729§	422,892	207,638	8,704	1,490,963
1934	922,958§	549,069	216,253	6,556	1,694,836
1935	892,513§	544,748	216,522	5,082	1,658,865

NOTES

*Sacramento Northern Railway was acquired by The Western Pacific Railroad Company as of November 5, 1925, and increased by acquisition of San Francisco-Sacramento Railroad as of January 1, 1929.

†Western Pacific's interest in Central California Traction Co. was acquired as of January 1, 1928.

‡Information on Deep Creek contributions of traffic not available 1922 through 1927.

(Testimony of Charles Elsey.)

§Included in revenues accruing to The Western Pacific Railroad Company from Sacramento Northern Railway interchange for 6 months of 1929 and the years thereafter are revenues on business to and from the Holland Branch of the Sacramento Northern Railway, which branch was placed in service in June, 1929.

Office of the President,
San Francisco, Calif.,
April 4th, 1936.

Statement No. 11

Notes for Statements on Advances to Subsidiaries

1. Sacramento Northern Railway:
Tidewater Southern Railway Company:

Prior to September, 1935, advances made to the Sacramento Northern Railway and Tidewater Southern Railway Company were added to the principal of "Advances on Open Account" and interest at 5% on the accumulated total was accrued and paid monthly.

The Tidewater Southern Railway Company has repaid all previous advances and on which interest was accrued at 5% and paid.

2. Deep Creek Railroad Company:

Advances to Deep Creek Railroad Company during 1932 represent bills and interline accounts which had been rendered against the Deep Creek by Western Pacific over a considerable period. In 1932 these were offset by journal entries and an equal amount set up

(Testimony of Charles Elsey.)

as "Advances on Open Account" WITHOUT INTEREST.

Interest at 5% was accrued and paid monthly by the Deep Creek on principal of other advances shown.

3. Standard Realty & Development Company:
Advances shown are non-interest bearing.

Sacramento Northern Railway

DISPOSITION OF ADVANCES MADE BY THE WESTERN PACIFIC RAILROAD COMPANY

Year	Amount	For New Lines and Extensions Additions and betterments and Misc. Phys. Property	For Interest Payments by Sacto. Nor. Ry. to West. Pac. RR. Co.			Approximate amount paid W. P. RR. for proportion of joint expenses not specifically maintained for Sacto. Nor. Ry.	Total Returned to The W. P. RR. Co.	Other Disposition		
			On First Mortgage Bonds owned by W. P.	On Notes	On Advances			Interest on Bonds owned by Public	Interest on Sacto. Union Sta. mortgage (Bisbee Notes)	To reimburse General Cash
1928	$1,492,734.	$ 120,000.*	—	—	—	—	—	—	—	—
1929	1,110,000.	2,482,734.*	—	—	—	—	—	—	—	—
1930	1,775,000.	1,711,015.*	63,985.**	—	—	—	63,985.	—	—	—
1931	784,000.	198,260.*	260,674.	160,504.	97,923	47,400.	566,501.	545.	3,600.	15,094.
1932	788,115.	12,735.*	260,674.	160,504.	139,670.	47,000.	607,848.	545.	3,600.	163,387.
1933	632,252.	15,688.	260,674.	201,555.	131,585.	22,750.***	616,564.	—	—	—
1934	660,000.	21,690.	260,674.	240,417.	125,243.	11,976.***	638,310.	—	—	—
1935	621,000.	33,576.	130,337.	40,070.	89,445.	49,800.	309,652.	545.	3,315.	273,912.
Totals	7,863,101.	4,595,698.								
*Converted to notes dated 12/29/28, 9/2/30 and 6/26/33	4,524,744.	4,524,744.								
Balance in open account at 12/31/35	$3,338,357	$ 70,954.	$1,237,018.	$803,050.	$583,866.	$178,926.	$2,802,860.	$1,635.	$10,515.	$452,393.

**Total Interest paid for year $260,674.

***Total for each of years 1933 and 1934, approximately 47,000.

Cash on hand Dec. 31, 1935 $ 137,140.

Statement No. 12

Sacramento Northern Railway

DISPOSITION OF ADVANCES MADE BY THE WESTERN PACIFIC RAILROAD COMPANY

	Amount	For New Lines and Extensions Additions and betterments and Misc. Phys. Property	For Interest Payments by Sacto. Nor. Ry. to West. Pac. RR. Co.			Approximate amount paid W. P. RR. for proportion of joint expenses not specifically maintained for Sacto. Nor. Ry.	Total Returned to The W. P. RR. Co.	Other Disposition			Grand Total	Western Pacific Revenue on business interchanged with Sacto. Nor.
			On First Mortgage Bonds owned by W. P.	On Notes	On Advances			Interest on Bonds owned by Public	Interest on Sacto. Union Sta. mortgage (Bisbee Notes)	To reimburse General Cash		
	$1,492,734.	$ 120,000.*	—	—	—	—	—	—	—	—	—	—
	1,110,000.	2,482,734.*	—	—	—	—	—	—	—	—	—	$ 752,257.
	1,775,000.	1,711,015.*	63,985.**	—	—	—	63,985.	—	—	—	63,985.	1,128,266.
	784,000.	198,260.*	260,674.	160,504.	97,923	47,400.	566,501.	545.	3,600.	15,094.	585,740.	847,795.
	788,115.	12,735.*	260,674.	160,504.	139,670.	47,000.	607,848.	545.	3,600.	163,387.	775,380.	825,108.
	632,252.	15,688.	260,674.	201,555.	131,585.	22,750.***	616,564.	—	—	—	632,252.	851,729.
	660,000.	21,690.	260,674.	240,417.	125,243.	11,976.***	638,310.	—	—	—	660,000.	922,958.
	621,000.	33,576.	130,337.	40,070.	89,445.	49,800.	309,652.	545.	3,315.	273,912.	621,000.	892,513.
	7,863,101.	4,595,698.										
notes dated 12/29/28, 6/26/33	4,524,744.	4,524,744.										
n account at	$3,338,357.	$ 70,954.	$1,237,018.	$803,050.	$583,866.	$178,926.	$2,802,860.	$1,635.	$10,515.	$452,393.	$3,338,357.	

**Total Interest paid for year $260,674.

***Total for each of years 1933 and 1934, approximately 47,000.

Dec. 31, 1935 $ 137,140.

(Testimony of Charles Elsey.)

Statement No. 13

Tidewater Southern Railway Company

DISPOSITION OF ADVANCES MADE BY THE WESTERN PACIFIC RAILROAD COMPANY

(1) Year	(2) Amount	(3) For Additions and Betterments and Misc. Phys. Property	(4) (Note) To reimburse General Cash
1927	$ 65,000	$ 65,000	———
1928	90,000	90,000	———
1929	95,000	95,000	———
1930	254,000	254,000	———
1931	57,000	4,279	$52,721
1932	13,000	———	13,000
1933	64,200	———	64,200
1934	70,000*	———	70,000*
1935	59,921*	———	59,921*
Totals	$508,279	$508,279	
Converted to note dated 6/26/1933	508,279	508,279	
Balance in Open Account at 12/31/1935	None	None	None
Cash on hand December 31, 1935			$153,192

*Denotes red figures.

Note: Column 4 represents amounts necessary for application to income deficits, etc.

Statement No. 14

Deep Creek Railroad Company

DISPOSITION OF ADVANCES MADE BY THE WESTERN PACIFIC RAILROAD COMPANY

(1) Year	(2) Amount	(3) Taxes	(4) Amount due West. Pac. RR. Co. in settlement of accumulated inter-line Frt. Acct. and Misc. Bills	(5) Paid West. Pac. RR. Co. for interest on note	(6) Paid West. Pac. RR. Co. for interest on advances	(7) (Note) To reimburse General Cash	(8) Grand Total
1931	$ 3,900	$1,200	.....	$ 2,700	.....	.....	$ 3,900
1932	73,530	.....	73,530	.....	.....	.....	73,530
1933	2,800	.....	.....	2,700	.....	100	2,800
1934	9,100	650	.....	2,700	598	5,152	9,100
1935	11,100	650	.....	2,025	550	7,875	11,100
Total in open account at 12/31/35	$100,430	$2,500	$73,530	$10,125	$1,148	$13,127	$100,430
Cash on hand Dec. 31, 1935	$ 3,161						

Note: Column 7 represents amounts necessary for application to income deficits, etc.

(Testimony of Charles Elsey.)

Statement No. 15

Standard Realty and Development Company

DISPOSITION OF ADVANCES MADE BY THE WESTERN PACIFIC RAILROAD COMPANY

Year	Amount	Additional Property	Taxes	Misc. Expenses	Grand Total
1926	$250,016	$245,737	$ 4,105	$ 174	$250,016
1927	.....	.....	.....	.....	.....
1928	115,500	100,500	12,000	3,000	115,500
1929	20,000	9,099	8,901	2,000	20,000
1930	21,082	16,082	4,000	1,000	21,082
1931	7,000	.....	7,000	.....	7,000
1932	6,000•	.....	.....	6,000•	6,000•
1933	.....	.....	.....	.....	.....
1934	1,500	.....	1,500	.....	1,500
1935	17,612†	15,212	2,400	.....	17,612
Total in open account at 12/31/35	$426,710‡	$386,630	$39,906	$ 174	$426,710
Cash on hand Dec. 31, 1935	$ 1,630				

•Denotes red figures.

†Detail as follows:

Cash	$ 2,400
Charge for property from W. P. Cal.	23,824
Credit for property transferred to W. P. RR. Co.	8,612
	$17,612

‡This is correct total as shown by S. R. & D. Co's. balance sheet for December, 1935. Difference of $23,256 adjusted in W. P. RR. Co's. accounts for February, 1936.

(Testimony of Charles Elsey.)

Statement No. 16

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

VALUATION RECAPITULATION

The Western Pacific Railroad Company	$123,385,730.00
Sacramento Northern Railway	18,742,443.00
Tidewater Southern Railway Company	1,999,360.00
Deep Creek Railroad Company	492,318.00
Total W. P. System (as of Dec. 31, 1935)	$144,619,851.00

Office of President
April 6, 1936.

Statement No. 16
Page No. 2

The Western Pacific Railroad Company

VALUATION

Book Value, Road and Equipment, June 30, 1914	$ 81,481,136.40
I. C. C. Value, Road and Equipment, June 30, 1914	63,321,000.00
Difference	$ 18,160,136.40
Book Value, Road and Equipment, December 31, 1935	$137,689,739.14
Deduct reduction by I. C. C. June 30, 1914	18,160,136.40
I. C. C. Valuation plus subsequent Additions and Betterments to December 31, 1935	$119,529,602.74
Non operating Property	3,856,127.99
TOTAL VALUE W. P. PROPERTY DECEMBER 31, 1935 (I. C. C. Basis)	$123,385,730.73

Office of President
April 6, 1936.

(Testimony of Charles Elsey.)

Statement No. 16
Page No. 3

Sacramento Northern Railway

VALUATION

Property Owned:		
I. C. C. Physical Valuation as of December 31, 1928, including Lands, and less Depreciation		$16,327,542.00
From December 31, 1928, to December 31, 1935:		
R. & E.—Additions and Betterments	$2,397,739.63	
Less Retirements	744,779.37	
Total Increase—R. & E.	$1,652,960.26	
Less Depreciation accrued on Passenger Cars, Service Cars, Locomotives and Floating Equipment, from January 1, 1929, to December 31, 1935, inc.	291,990.91	
Net Increase—R. & E.	$1,360,969.35	1,360,969.35
Value as of December 31, 1935		$17,688,511.35
Misc. Physical Property:		
I. C. C. Valuation as of December 31, 1928		$ 961,886.00
From December 31, 1928, to December 31, 1935:		
Additions to Misc. Physical Property	$125,883.92	
Less Retirements	33,838.26	
Net Increase, Misc. Physical Property		92,045.66
Value as of December 31, 1935		$ 1,053,931.66
TOTAL VALUE above items as of December 31, 1935:		
Property Owned & Misc. Physical Property		$18,742,443.01

Office of President,
April 6, 1936.

(Testimony of Charles Elsey.)

Statement No. 16
Page No. 4

Tidewater Southern Railway Co.

VALUATION

Property Owned and Used:		
I. C. C. Physical Valuation as of December 31, 1927, including land, and less depreciation		$1,519,110.00
From December 31, 1927, to December 31, 1935:		
R. & E.—Additions and Betterments	$409,748.81	
Less Retirements	240,866.55	
	$168,882.26	
Plus items omitted from Basic Valuation which were in existence at that time:		
Water Tank—Turlock	$ 750.00	
Furniture—Mills Building	1,159.75	1,909.75
Total Increase—R. & E.	$170,792.01	
Less Depreciation accrued on Locomotives, Freight Cars, Service Cars and Automobiles from January 1, 1928, to December 31, 1935, inc.	4,183.57	
Net Increase—R. & E.	$166,608.44	166,608.44
Value as of December 31, 1935		$1,685,718.44

(Testimony of Charles Elsey.)

Misc. Physical Properties:		
I. C. C. Valuation as of December 31, 1927		272,951.00
Additions during period 1928-35, inc.	$57,636.86	
Less Retirements	21,945.45	
Net Increase		35,691.41
Value as of December 31, 1935		$ 308,642.41
TOTAL PROPERTY OWNED as of December 31, 1935		$1,999,360.85

Office of President,
April 6, 1936.

Statement No. 16
Page No. 5

Deep Creek Railroad Company

VALUATION

Based on tentative Engineering and Land Report of Dec. 31, 1927.

Item	New	After Depreciation
Road and Equipment	$647,689	$489,877
Land Operative	2,166	2,166
Land Non-Operative	11	11
Total	$649,866	$492,054
Additions and Betterments (to Dec. 31, 1935)		264
Total		$492,318

Office of President,
April 6, 1936.

(Testimony of Charles Elsey.)

Statement No. 17.

Page No. 1

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

RECAPITULATION

	Operated Mileage End of Year			
	Miles of Road	Add'l Main Track	Yards and Sides	Total
1922	1158.18	5.93	229.38	1393.49
1923	1157.46	5.93	256.13	1419.52
1924	1157.46	188.97	267.47	1613.90
1925	1157.46	186.03	282.95	1626.44
1926	1322.23	194.87	343.29	1860.39
1927	1321.55	194.48	360.70	1876.73
1928	1330.65	194.48	380.29	1905.42
1929	1436.00	201.34	402.52	2039.86
1930	1444.49	201.34	419.83	2065.66
1931	1442.58	201.36	427.93	2071.87
1932	1597.23	201.36	471.79	2270.38
1933	1601.07	201.08	476.14	2278.29
1934	1600.93	200.93	480.86	2282.72
1935	1595.29	200.87	495.39	2291.55

(Testimony of Charles Elsey.)

Statement No. 17
Page No. 2

The Western Pacific Railroad Company

Operated Mileage End of Year				
	Miles of Road	Add'l Main Track	Yards and Sides	Total
1922	1046.88	5.93	216.04	1268.85
1923	1046.16	5.93	242.79	1294.88
1924	1046.16	188.97	254.60	1489.73
1925	1046.16	186.03	270.08	1502.27
1926	1046.16	186.03	282.27	1514.46
1927	1046.16	185.64	293.68	1525.48
1928	1055.26	185.64	311.83	1552.73
1929	1055.26	185.64	317.38	1558.28
1930	1055.26	185.64	328.51	1569.41
1931	1054.99	185.64	330.85	1571.48
1932	1214.49	185.64	375.64	1775.77
1933	1217.35	185.36	377.52	1780.23
1934	1217.35	185.36	381.75	1784.46
1935	1211.71	185.30	393.83	1790.84

Statement No. 17
Page No. 3

Sacramento Northern Railway

Operated Mileage End of Year				
	Miles of Road	Add'l Main Track	Yards and Sides	Total
1926	164.77	8.84	46.73	220.34
1927	164.09	8.84	48.77	221.70
1928	164.09	8.84	50.21	223.14
1929	269.44	15.70	66.63	351.77
1930	277.93	15.70	72.98	366.61
1931	276.41	15.72	74.57	366.70
1932	276.41	15.72	74.20	366.33
1933	276.34	15.72	76.13	368.19
1934	276.20	15.57	76.74	368.51
1935	276.20	15.57	79.20	370.97

(Testimony of Charles Elsey.)

Statement No. 17
Page No. 4

Tidewater Southern Railway Company

	Operated Mileage End of Year			
	Miles of Road	Add'l Main Track	Yards and Sides	Total
1922	65.30	———	12.19	77.49
1923	65.30	———	12.19	77.49
1924	65.30	———	11.72	77.02
1925	65.30	———	11.72	77.02
1926	65.30	———	13.14	78.44
1927	65.30	———	17.10	82.40
1928	65.30	———	17.10	82.40
1929	65.30	———	17.36	82.66
1930	65.30	———	17.19	82.49
1931	65.18	———	21.36	86.54
1932	60.33	———	20.78	81.11
1933	61.38	———	20.75	82.13
1934	61.38	———	20.63	82.01
1935	61.38	———	20.62	82.00

Statement No. 17
Page No. 5

Deep Creek Railroad Company

	Operated Mileage End of Year			
	Miles of Road	Add'l Main Track	Yards and Sides	Total
1922	46.00	———	1.15	47.15
1923	46.00	———	1.15	47.15
1924	46.00	———	1.15	47.15
1925	46.00	———	1.15	47.15
1926	46.00	———	1.15	47.15
1927	46.00	———	1.15	47.15
1928	46.00	———	1.15	47.15
1929	46.00	———	1.15	47.15
1930	46.00	———	1.15	47.15
1931	46.00	———	1.15	47.15
1932	46.00	———	1.17	47.17
1933	46.00	———	1.74	47.74
1934	46.00	———	1.74	47.74
1935	46.00	———	1.74	47.74

(Testimony of Charles Elsey.)

Statement No. 18

Page No. 1

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

RECAPITULATION

	Total Locomotive Miles			
Year	Frt. and Mixed	Passenger	Freight Car Miles	Passenger Train Car Miles
1922	2,182,088	1,472,956	58,867,417	10,126,116
1923	2,545,941	1,528,662	67,101,930	10,390,027
1924	2,609,544	1,470,370	76,041,188	9,941,886
1925	2,924,351	1,479,260	87,483,669	9,540,273
1926	3,045,265	1,473,898	94,373,532	11,385,398
1927	3,256,527	1,475,480	100,896,930	11,594,886
1928	3,594,632	1,515,229	111,178,294	11,938,429
1929	4,172,123	1,500,341	116,087,861	13,027,703
1930	4,240,463	1,489,510	119,735,402	12,713,485
1931	3,505,271	1,609,813	102,714,352	14,088,818
1932	3,073,937	1,057,767	91,758,883	9,448,409
1933	3,164,340	773,197	95,554,360	7,072,867
1934	3,692,955	735,495	110,856,907	6,999,019
1935	3,990,554	804,861	116,390,964	7,835,328

Note: Includes locomotive miles from 1929 to 1935, inclusive, and freight and passenger car miles from 1926 to 1935, inclusive, for Sacramento Northern Railway.

Includes locomotive miles from 1926 to 1935, inclusive, and freight and passenger car miles from 1922 to 1935, inclusive for Tidewater Southern Railway Company.

(Testimony of Charles Elsey.)

Statement No. 18
Page No. 2

The Western Pacific Railroad Company

Year	Total Locomotive Miles: Frt. and Mixed	Total Locomotive Miles: Passenger	Freight Car Miles	Passenger Train Car Miles
1922	2,172,924	1,472,956	58,426,569	9,981,190
1923	2,535,548	1,528,662	66,609,578	10,235,277
1924	2,596,809	1,470,370	75,494,996	9,829,101
1925	2,914,324	1,479,260	86,890,258	9,416,781
1926	2,972,976	1,473,898	91,794,743	9,454,247
1927	3,183,143	1,475,480	98,248,177	9,692,346
1928	3,523,976	1,515,229	108,407,403	10,094,436
1929	3,633,384	1,500,341	111,891,964	10,057,680
1930	3,577,185	1,489,510	116,494,460	9,789,650
1931	3,027,706	1,609,813	99,744,749	10,972,609
1932	2,681,703	1,057,767	89,381,751	7,423,831
1933	2,775,949	773,197	93,362,767	5,482,482
1934	3,260,729	735,495	108,540,206	5,200,056
1935	3,578,871	804,861	113,931,363	5,989,488

Statement No. 18
Page No. 3

Sacramento Northern Railway

Year	Total Locomotive Miles: Frt. and Mixed	Total Locomotive Miles: Passenger	Freight Car Miles	Passenger Train Car Miles
1926	Not available	None	1,955,451	1,811,406
1927	" "	"	1,990,048	1,783,683
1928	" "	"	2,060,859	1,723,733
1929	465,257	"	3,633,525	2,850,509
1930	585,071	"	2,596,891	2,807,741
1931	403,783	"	2,464,676	3,004,611
1932	321,883	"	1,913,408	1,966,678
1933	320,765	"	1,788,177	1,565,758
1934	340,743	"	1,763,445	1,794,193
1935	334,529	"	1,957,172	1,841,170

(Testimony of Charles Elsey.)

Statement No. 18
Page No. 4

Tidewater Southern Railway Company

Year	Total Locomotive Miles: Frt. and Mixed	Total Locomotive Miles: Passenger	Freight Car Miles	Passenger Train Car Miles
1922	Not available	None	419,999	135,762
1923	"	"	429,040	144,357
1924	"	"	430,797	103,290
1925	"	"	537,606	114,312
1926	62,929	"	598,996	110,385
1927	64,879	"	639,600	110,352
1928	61,080	"	689,169	110,684
1929	63,914	"	542,509	110,154
1930	72,267	"	630,712	110,154
1931	68,774	"	486,529	106,590
1932	65,315	"	442,391	52,864
1933	62,824	"	386,906	19,947
1934	86,713	"	534,903	.....
1935	71,072	"	490,930	.....

Statement No. 18
Page No. 5

Deep Creek Railroad Company

Year	Total Locomotive Miles: Frt. and Mixed	Total Locomotive Miles: Passenger	Freight Car Miles	Passenger Train Car Miles
1922	9,164	None	20,849	9,164
1923	10,393	"	63,312	10,393
1924	12,735	"	115,395	9,495
1925	10,027	"	55,805	9,180
1926	9,360	"	24,342	9,360
1927	8,505	"	19,105	8,505
1928	9,576	"	20,863	9,576
1929	9,568	"	19,863	9,360
1930	5,940	"	13,339	5,940
1931	5,008	"	18,398	5,008
1932	5,036	"	21,333	5,036
1933	4,802	"	16,510	4,680
1934	4,770	"	18,353	4,770
1935	6,082	"	11,499	4,670

(Testimony of Charles Elsey.)

Statement No. 19

Page No. 1

The Western Pacific Railroad Company
Sacramento Northern Railway*
Tidewater Southern Railway Company
Deep Creek Railroad Company

RECAPITULATION

UNITS OF ROLLING STOCK AND FLOATING EQUIPMENT OWNED IN SERVICE AT END OF YEAR

Year	Locomotives	Freight Train Cars†	Passgr. Train Cars	Company Service Equipment	Floating Equipment	Total
1922	144	6,005	12	229	4	6,394
1923	150	6,179	40	244	4	6,617
1924	160	6,456	60	250	5	6,931
1925	160	6,482	60	250	5	6,957
1926	178	6,762	107	277	5	7,329
1927	184	6,808	107	322	5	7,426
1928	186	6,789	111	311	6	7,403
1929	198	7,136	147	363	8	7,852
1930	193	7,132	147	356	8	7,836
1931	193	7,122	149	364	8	7,836
1932	193	7,089	149	383	8	7,822
1933	193	7,086	149	381	7	7,816
1934	188	6,892	127	366	7	7,580
1935	188	6,872	127	367	7	7,561

*Includes Sacramento Northern Railway from 1926 to 1935, inclusive, and San Francisco-Sacramento Railroad Company from 1929 to 1935, inclusive.

†Refrigerator cars leased to and maintained by P. F. E. Co. not included.

(Testimony of Charles Elsey.)

Statement No. 19
Page No. 2

The Western Pacific Railroad Company

UNITS OF ROLLING STOCK AND FLOATING EQUIPMENT OWNED IN SERVICE OF THIS COMPANY AT END OF YEAR

Year	Locomotives	Freight Train Cars*	Passgr. Train Cars	Company Service Equipment	Floating Equipment	Total*
1922	139	6,002	8	228	4	6,381
1923	145	6,176	36	242	4	6,603
1924	155	6,453	56	249	5	6,918
1925	155	6,479	57	249	5	6,945
1926	160	6,453	57	253	5	6,928
1927	164	6,498	57	299	5	7,023
1928	164	6,479	61	298	6	7,008
1929	169	6,818	61	297	6	7,351
1930	167	6,814	61	303	6	7,351
1931	167	6,806	61	309	6	7,349
1932	167	6,793	61	309	6	7,336
1933	167	6,790	61	308	5	7,331
1934	163	6,758	61	306	5	7,293
1935	163	6,738	61	307	5	7,274

*Refrigerator cars leased to and maintained by P. F. E. Co. not included.

Statement No. 19
Page No. 3

Sacramento Northern Railway

UNITS OF ROLLING STOCK AND FLOATING EQUIPMENT OWNED IN SERVICE OF THIS COMPANY AT END OF YEAR

Year	Locomotives	Freight Train Cars	Passgr. Train Cars	Company Service Equipment	Floating Equipment	Total
1926	13	306	46	22	....	387
1927	15	307	46	21	....	389
1928	17	307	46	11	....	381
1929	24	315	82	64	2	487
1930	22	315	82	51	2	472
1931	22	312	84	54	2	474
1932	22	292	84	73	2	473
1933	22	292	84	73	2	473
1934	21	131	65	59	2	278
1935	21	131	65	59	2	278

Statement No. 19

Page No. 4

Tidewater Southern Railway Company

UNITS OF ROLLING STOCK OWNED IN SERVICE OF THIS COMPANY AT END OF YEAR

Year	Locomotives	Freight Train Cars	Passenger Train Cars	Company Service Equipment	Total
1922	3	1	3	1	8
1923	3	1	3	1	8
1924	3	1	3	1	8
1925	3	1	3	1	8
1926	3	1	3	1	8
1927	3	1	3	1	8
1928	3	1	3	1	8
1929	3	1	3	1	8
1930	3	1	3	1	8
1931	3	3	3	—	9
1932	3	3	3	—	9
1933	3	3	3	—	9
1934	3	2	—	1	6
1935	3	2	—	1	6

(Testimony of Charles Elsey.)

Statement No. 19
Page No. 5

Deep Creek Railroad Company

UNITS OF ROLLING STOCK OWNED IN SERVICE OF THIS COMPANY AT END OF YEAR

Year	Locomotives	Freight Train Cars	Passenger Train Cars	Company Service Equipment	Total
1922	2	2	1	----	5
1923	2	2	1	1	6
1924	2	2	1	----	5
1925	2	2	----	----	4
1926	2	2	1	1	6
1927	2	2	1	1	6
1928	2	2	1	1	6
1929	2	2	1	1	6
1930	1	2	1	1	5
1931	1	1	1	1	4
1932	1	1	1	1	4
1933	1	1	1	----	3
1934	1	1	1	----	3
1935	1	1	1	----	3

Statement No. 20
Page No. 1

The Western Pacific Railroad Company and Subsidiaries

STATEMENT SHOWING DATE AND COST OF ACQUISITION OR COMPLETION OF VARIOUS IMPORTANT TRACKAGE NOW INCLUDED IN THE SYSTEM AS OF DECEMBER 31, 1935

The Western Pacific Railroad Company Acquisitions Name	Present Length	Date Acquired (A) or Constructed (C)	Cost
Branch —Hawley to Loyalton, California	12.79 Mi.	December 1, 1916 (A)	Note
Branch —Gulling Junction to Gulling, California	2.41 Mi.	December 1, 1916 (A)	Note
Railroad—Tidewater Southern Railway Company, California	61.38 Mi.	March, 1917 (A)	$1,223,848.94
Branch —Grants-Tooele, Utah	15.52 Mi.	December 16, 1917 (C)	288,054.32
Railroad—Deep Creek Railroad Company, Utah	46.00 Mi.	January 19, 1918 (A)	450,000.00
Branch —Ellerbeck, Utah	5.85 Mi.	January 31, 1918 (C)	77,020.52
Branch —Reno—California and Nevada	33.11 Mi.	February 11, 1918 (A & C)	1,250,298.83
Branch —Davies Mills, California	1.44 Mi.	June 14, 1918 (C)	33,959.93
Branch —Calpine, California	12.62 Mi.	January 31, 1922 (C)	465,538.66
Branch —Bidwell, California	2.51 Mi.	May 14, 1922 (C)	186,899.52
Branch —Niles-San Jose, California	23.07 Mi.	December 21, 1922 (C)	2,520,217.54
Railroad—Sacramento Northern Railway, California	158.12 Mi.	November 5, 1925 (A)	4,975,456.13
Railroad—Central California Traction Company, California*	53.78 Mi.	January 1, 1928 (A)	848,999.68
Branch —Terminous, California	7.92 Mi.	January 5, 1928 (C)	580,215.59
Forward	436.52 Mi.		$12,900,509.66

The Western Pacific Railroad Company Acquisitions Name	Present Length	Date Acquired (A) or Constructed (C)	Cost
Branch —Oregon Short Line Connection, Nevada	1.18 Mi.	June 30, 1929 (C)	110,092.94
Branch —Northern California Extension, California	106.54 Mi.	November 10, 1931 (C)	9,953,657.76
Railroad—Alameda Belt Line, California†	4.46 Mi.	September 15, 1932 (A & C)	471,697.97
Total: The Western Pacific Railroad Company Acquisitions—Forward	548.70 Mi.		$23,435,958.33

Note—$35,100.00 was paid for all property of Boca & Loyalton Railway Company. Value of salvage recovered from abandoned portion and equipment exceeded this amount so no cost has been allocated to that portion of the road property retained.

*Central California Traction Company owned equally with Atchison, Topeka and Santa Fe Railroad Company and Southern Pacific Company.

†Alameda Belt Line owned equally with Atchison, Topeka and Santa Fe Railroad Company.

Statement No. 20
Page No. 3

Sacramento Northern Railway Acquisitions Name	Present Length	Date Acquired (A) or Constructed (C)	Cost
Railroad—San Francisco-Sacramento Railroad, California	88.21 Mi.	January 1, 1929 (A)	$ 1,924,572.19
Branch —Holland, California	15.78 Mi.	June 29, 1929 (C)	742,391.14
Branch —Pittsburg, California	.86 Mi.	May 31, 1930 (C)	131,434.79
Branch Vacaville, California	7.60 Mi.	August 31, 1930 (C)	335,273.53
Total: Sacramento Northern Railway Acquisitions	112.45 Mi.		$ 3,133,671.65
GRAND TOTAL	661.15 Mi.		$26,569,629.98

(Testimony of Charles Elsey.)

Statement No. 21
Page No. 1

The Western Pacific Railroad Company

INCOME ACCOUNT, 1922 TO 1935, BOTH INCLUSIVE

NOTES

1. Northern California Extension. Refer to Note 2 on Statement No. 8.

2. Maintenance of Way & Structures and Maintenance of Equipment. Refer to Notes 3, 4, 5, 6 and 7 on Statement No. 8, Page 2.

3. Hire of Equipment-Net. Refer to Note 8 on Statement No. 8.

4. For details of accruals to Non-Operating Income and Deductions from Gross Income see Statement No. 23.

5. For information as to cash advances made subsidiaries each year, see Statements Nos. 11 to 15, both inclusive.

6. Western Pacific Improvement Program: An improvement program which contemplated the expenditure of $18,000,000 over a 5-year period was initiated in 1927 and partially carried out with the resultant expenditures shown below:

	Maintenance				
	Way and Structures	Equipment	Total	Investment Accounts	Total
1927	$ 324.218	$ 363,386	$ 687,604	$ 707,110	$1,394,714
1928	931,336	374,345	1,305,681	988,123	2,293,804
1929	488,024	587,306	1,075,330	836,575	1,911,905
1930	537,421	174,040	711,462	808,331	1,519,793
1931	110,339	12,396	122,735	534,339	657,074
1932	Cr. 56,246	144	Cr. 56,102	70,073	13,971
	$2,335,092	$1,511,617	$3,846,710	$3,944,551	$7,791,261

Note: Of the originally contemplated $18,000,000 program, $8,000,000 was estimated as Operating Expense.

Statement No. 21
Page No. 2

The more important items of work accomplished under this Improvement Program are indicated below by years:

PRINCIPAL IMPROVEMENTS IN ROADWAY AND STRUCTURES

YEAR 1927

New 85-pound rail was laid for 50 miles south from Oroville, California, and 25 miles was laid in the Feather River Canyon between Oroville and Portola, California.

Banks were widened to the total extent of 96 miles, and the track between Wendover and Clive, Utah, was fully gravel ballasted.

A bridge consisting of four 150-foot and two 100-foot steel truss spans was constructed across the Yuba

(Testimony of Charles Elsey.)

River at Marysville, California, and 1400 feet of timber trestles between Winnemucca and Wells, Nevada, were replaced with steel and concrete structures.

About 8½ miles of new passing tracks, side tracks and extensions to such existing tracks were constructed.

YEAR 1928

10 miles of new 85-pound rail was laid in the Feather River Canyon, 16 miles from Sacramento north, and 82 miles between Melrose, California (near Oakland) and Stockton—a total of 108 miles; and 412,000 rail anchors and 225,000 new tie plates were applied at various points.

Banks were widened in the Feather River Canyon for 39 miles and between Oakland and Sacramento for 131.5 miles.

The track between Stockton and Niles, California, for a distance of 63 miles was fully ballasted with crushed rock, and similar work was done on 10.5 miles of track in the Feather River Canyon.

1455 feet of timber trestles between Weso, Nevada, and Alazon, Nevada, were replaced with steel and concrete structures, including four 120-foot and one 160-foot steel bridges. At various other points 1005 feet of timber trestles were replaced with concrete structures.

New passing tracks, side tracks and extensions to such tracks aggregating 11½ miles were constructed, and new section quarters were built at 13 points between Shafter, Nevada, and Salt Lake City.

(Testimony of Charles Elsey.)

Statement No. 21
Page No. 3

YEAR 1929

New 85-pound rail was laid at various points in the Feather River Canyon to the extent of 11.9 miles, and 91,350 rail anchors and 80,056 new tie plates were applied at various points during the year.

Banks were widened at various points to the total extent of 137.81 miles.

Track was fully ballasted with crushed rock between Oakland and Niles, 24.97 miles, and in the Feather River Canyon, 14.87 miles. The track between Burmester and Salt Lake City, 31.50 miles, was fully gravel ballasted.

Timber bridges aggregating 415 feet were replaced by two 120-foot and one 62-foot steel span bridges, and six single-span timber trestles aggregating 90 feet in length were replaced with concrete structures.

New passing tracks, side tracks and extensions to such tracks totalling 2 miles were constructed.

An extension to the Portola Depot and Hotel building was completed, providing 25 additional sleeping rooms and additional office and depot space, and a new modern commissary building was constructed at Oakland.

YEAR 1930

Rail between Ellerbeck and Salt Lake City, 37 miles, was renewed with new 85-pound section.

Banks were widened at various points to the extent of 177.9 miles, and 45.72 miles of track between

(Testimony of Charles Elsey.)

Stockton and Sacramento was fully ballasted with crushed rock, and, similarly, 20.99 miles of track in the Feather River Canyon. Gravel ballast was used on 19 miles of track between Delle and Burmester, Utah.

285 feet of timber trestles were replaced with concrete structures, and the portals of 3 tunnels and 262 lineal feet of timber lining in tunnels were replaced with concrete.

There was constructed 1.24 miles of passing track extensions.

A new freight depot at Blairsden, California, was constructed, and the passenger station was enlarged and modernized, and a new agent's dwelling was constructed.

YEAR 1931

Track between Cluro and Tonka, Nevada, and between Elburz and Alazon, Nevada, aggregating 60 miles, was relayed with new 110-pound rail.

Bank widening of 70 miles of track was completed between Reno Junction and Floka, Nevada, and 27 miles of gravel ballast was applied between Knolls and Delle, Utah.

Two concrete portals and 96 feet of concrete lining was placed at Tunnel 36, and 18 feet of concrete lining was placed at Tunnel 31.

Filling of certain low lands owned in San Francisco was completed, providing 40 acres of desirable industrial property adjoining rail and deep water shipping facilities.

(Testimony of Charles Elsey.)

PRINCIPAL IMPROVEMENTS IN EQUIPMENT

As indicated in the following statement, various classes of freight cars were rehabilitated and improved:

	1927	1928	1929	1930	1931	Total
Box cars rebuilt	622	345	542	210	—	1719
Box cars converted to Stock cars	20	180	—	—	—	200
Flats, new steel center sills	7	93	75	68	—	243
Tank cars, heavy repairs	35	20	—	—	—	55
Gondolas, heavy repairs and doors	—	207	500	71	—	778
Stock cars, heavy repairs	—	36	182	—	—	218
TOTAL	684	881	1299	349	—	3213

In addition to work on freight cars outlined above, important improvements were made to locomotives by installation of thermic syphons, feedwater heaters, superheaters, and various other economy devices. The operating expense of such work is included in Maintenance of Equipment for the period 1927 to 1931, inclusive.

THE WESTERN PACIFIC RAILROAD COMPANY

INCOME ACCOUNT - YEARS 1932 TO 1936, BOTH INCLUSIVE

	Year 1932	Year 1933	Year 1934	Year 1935	Year 1936	Year 1937	Year 1938	Year 1939	Year 1940	Year 1941
MILES OF ROAD OPER. END OF YEAR	1,062.40	1,062.68	1,062.68	1,062.68	1,062.68	1,062.68	1,061.78	1,061.78	1,061.78	1,061.81
OPERATING REVENUES										
Freight	$ 9,478,388.80	$10,818,456.68	$10,976,851.96	$12,537,076.28	$12,961,371.30	$13,484,393.07	$14,647,080.68	$14,927,797.85	$12,706,885.97	$11,079,822.98
Passenger	2,180,177.87	2,484,289.06	2,052,199.78	1,979,780.46	1,851,028.66	1,672,642.19	1,494,648.06	1,370,106.71	1,081,197.61	772,731.65
Mail	72,095.66	87,901.28	84,815.31	85,999.81	85,990.28	85,289.87	87,673.25	108,027.78	74,560.92	68,641.18
Express	405,815.45	464,365.79	455,300.13	536,827.84	518,999.66	523,866.71	562,110.97	581,894.63	398,940.78	259,280.85
Dining Car, Hotel & Restaurant	256,142.09	282,866.13	244,074.28	230,101.06	231,368.90	244,230.17	238,498.06	243,668.15	218,818.29	174,882.80
Miscellaneous	152,408.84	415,479.32	352,147.32	398,289.09	430,378.47	700,719.26	782,122.82	829,849.35	726,468.94	495,787.82
Total	$12,535,348.32	$14,138,358.98	$14,370,488.86	$15,569,063.04	$16,087,065.37	$16,435,443.37	$17,894,074.88	$17,587,998.50	$15,288,860.53	$12,914,526.71
OPERATING EXPENSES										
Ordinary M.W. & S.	$ 1,970,310.18	$ 2,293,004.68	$ 2,781,387.47	$ 2,826,096.18	$ 2,872,387.18	$ 2,739,841.98	$ 2,413,377.35	$ 2,685,045.11	$ 2,072,440.76	$ 2,008,196.74
Improvement Program Charges						334,217.02	831,336.97	488,084.58	537,481.44	110,338.81
Total M.W. & S.	1,970,310.18	2,293,004.68	2,780,387.47	2,826,096.18	2,872,387.18	3,074,059.00	3,244,714.32	3,173,129.69	2,609,922.20	2,118,535.55
Ordinary M. of E.(Inc.Depr. & Retire.)	2,219,572.13	2,371,022.72	2,819,307.64	2,826,996.35	2,819,781.78	3,134,088.03	2,137,241.32	1,797,861.58	1,497,139.09	2,214,255.70
Improvement Program Charges						363,286.65	574,345.10	507,306.61	174,060.23	12,392.28
Total M. of E.	2,219,572.13	2,371,022.72	2,819,307.64	2,826,996.35	2,819,781.78	3,249,421.68	2,711,619.32	2,305,167.17	1,671,199.32	2,226,621.98
Traffic	338,898.56	427,171.08	489,008.07	459,636.50	481,618.25	536,872.78	759,705.71	699,488.68	632,196.11	801,980.37
Transportation-Rail Line	4,538,398.82	4,744,636.09	4,870,934.89	5,243,883.00	5,099,698.34	5,398,341.61	6,044,422.19	6,020,116.90	5,909,315.88	5,484,888.65
Miscellaneous Operations	350,873.19	458,941.46	508,277.08	547,308.87	560,250.38	650,608.90	679,148.31	587,099.31	494,106.33	510,726.33
General	458,731.78	416,388.04	438,888.80	437,538.65	449,804.10	548,439.01	562,830.85	594,384.22	538,287.07	573,488.59
Trans. for Investment	(14,838.98)	(48,838.51)	(58,888.18)	(49,887.05)	(58,484.88)	(80,888.61)	(188,117.00)	(108,238.41)	(160,807.88)	(226,883.51)
Total Rly. Oper. Expe.	$ 9,837,180.67	$10,663,711.81	$11,677,884.83	$11,838,948.06	$11,873,199.66	$13,120,088.03	$14,209,808.69	$14,458,042.41	$13,153,838.96	$11,639,804.16
Net Rev. from Rly. Operations	$ 2,688,197.65	$ 3,474,857.18	$ 2,692,608.43	$ 4,326,102.98	$ 4,781,923.89	$ 3,308,394.34	$ 3,367,888.20	$ 3,349,888.09	$ 2,143,741.57	$ 1,474,722.55
Rly. Tax Accruals	983,894.92	981,168.07	877,172.89	979,998.47	1,305,608.80	1,305,478.98	1,171,178.94	1,287,408.58	1,113,278.62	1,108,614.34
Uncollectible Rly. Rev.	241.98	7,180.36	6,911.48	1,837.83	1,718.77	808.08	883.88	1,388.23	428.46	344.82
Railway Operating Income	$ 1,704,469.98	$ 2,522,207.78	$ 2,008,718.08	$ 3,294,469.68	$ 3,476,609.82	$ 1,804,114.35	$ 2,215,799.41	$ 1,961,126.78	$ 2,032,004.09	$ 367,863.95
Hire of Equipt. Net Cr. or Net Dr.	$ 338,991.55	$ 380,183.08	$ 921,672.49	$ 870,158.97	$ 642,878.70	$ 324,619.51	$ 93,074.49	$ 279,441.07	$ 345,828.49	$ 322,982.12
Joint Facility Rents Net Cr. or Net Dr.	73,676.12	88,208.52	43,219.97	173,878.80	219,719.04	232,749.41	272,136.73	286,980.15	294,582.85	218,638.28
Net Railway Oper. Income	$ 1,966,776.35	$ 3,014,182.31	$ 2,973,610.58	$ 4,298,499.25	$ 4,337,308.36	$ 2,381,488.27	$ 2,581,010.63	$ 2,501,815.96	$ 1,810,760.45	$ 263,270.11
NON-OPERATING INCOME										
Rental of Property	$ 75,507.60	$ 90,145.37	$ 104,344.08	$ 107,888.54	$ 111,747.88	$ 112,198.24	$ 118,274.80	$ 147,304.97	$ 152,987.03	$ 142,096.78
Interest Accruals	438,877.97	334,849.08	186,394.90	151,063.00	278,699.38	290,686.55	397,141.91	476,560.19	541,232.81	646,148.45
Miscellaneous	2.00	2.00	10,162.00	275.00	239.00	356.00	494.00	228.75	1,307.95	172.20
Total Non-Operating Income	$ 514,387.57	$ 424,996.45	$ 301,121.98	$ 259,226.54	$ 390,686.26	$ 403,240.79	$ 515,890.71	$ 624,093.91	$ 693,527.79	$ 788,420.23
GROSS INCOME	$ 2,479,163.92	$ 3,446,859.76	$ 3,274,737.48	$ 4,557,725.79	$ 4,722,789.90	$ 2,784,426.06	$ 3,096,891.34	$ 3,125,809.89	$ 2,504,288.24	$ 1,051,690.34
MISCELLANEOUS DEDUCTIONS										
Miscellaneous Rents	$ 43,516.09	$ 43,908.88	$ 42,535.37	$ 42,809.39	$ 43,270.72	$ 43,254.32	$ 43,898.32	$ 45,005.83	$ 43,573.64	$ 46,652.58
Miscellaneous Tax Accruals	77.50	78.80	183.30	328.55	1,404.86	2,252.92	8,188.63	14,671.24	15,599.72	20,928.31
Amortization of Discount Funded Debt	100,927.34	103,373.86	119,171.95	124,095.07	128,187.65	126,274.44	122,863.14	129,803.88	134,848.01	138,799.70
Miscellaneous Charges to Income	14,236.25	15,484.99	15,798.79	19,863.65	19,296.49	17,700.09	15,830.62	17,373.20	100,869.74	120,049.92
Total Miscellaneous Deductions	$ 158,757.18	$ 167,844.33	$ 180,689.41	$ 186,896.66	$ 192,159.72	$ 189,481.77	$ 190,780.71	$ 206,854.15	$ 294,889.11	$ 326,430.49
AVAILABLE FOR INTEREST	$ 2,320,406.74	$ 3,278,814.43	$ 3,094,048.07	$ 4,371,029.13	$ 4,530,630.18	$ 2,594,944.29	$ 2,906,110.63	$ 2,919,055.74	$ 2,309,399.13	$ 855,254.95
Interest on Funded Debt	$ 1,213,047.88	$ 1,457,268.39	$ 1,763,121.12	$ 1,918,250.42	$ 2,036,621.64	$ 2,137,982.05	$ 2,288,456.22	$ 2,440,758.50	$ 2,612,867.07	$ 2,774, [illegible]7.18
Interest on Unfunded Debt	2,013.46	1,750.64	1,677.27	1,711.76	1,944.80	2,131.44	4,176.14	703.66	738.46	17,809.67
Total Interest Deductions	$ 1,215,061.34	$ 1,459,018.92	$ 1,764,798.39	$ 1,919,962.18	$ 2,038,566.44	$ 2,140,093.49	$ 2,292,632.36	$ 2,441,462.16	$ 2,613,605.53	$ 2,792,416.85
NET INCOME	$ 1,105,345.40	$ 1,819,795.51	$ 1,329,249.68	$ 2,451,066.95	$ 2,470,063.74	$ 394,850.80	$ 613,478.27	$ 468,593.58	$ (304,006.40)	$ (2,127,161.90)

Note: Figures in parentheses, viz.: ( ) denote red.

THE SOUTHERN PACIFIC RAILROAD COMPANY

INCOME ACCOUNT - YEARS 1922 TO 1936, BOTH INCLUSIVE

S.P.R.R.

INCOME ACCOUNT

	Year 1922	Year 1923	Year 1924	Year 1925	Year 1926	Year 1927	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935
YEAR	1,043.40	1,042.68	1,042.68	1,042.68	1,042.68	1,042.68	1,051.78	1,051.78	1,051.78	1,051.81	1,210.93	1,212.11	1,212.13	1,212.15
	$ 9,476,288.20	$10,213,456.46	$10,994,221.98	$12,337,076.28	$12,961,371.80	$13,494,293.07	$14,047,080.60	$14,527,797.65	$13,796,888.97	$11,079,282.99	$ 9,886,294.42	$10,011,781.60	$11,292,641.61	$12,500,845.15
	2,150,177.09	2,494,229.05	2,082,199.78	1,979,780.49	1,921,026.66	1,972,642.19	1,694,865.05	1,970,103.71	1,021,137.61	772,721.63	382,048.27	279,937.17	288,213.14	371,727.70
	75,039.68	87,901.28	84,212.51	63,599.81	63,990.26	63,289.67	67,972.25	105,097.78	74,560.62	49,641.18	29,386.06	27,296.08	27,094.48	46,377.01
	408,915.45	444,365.79	455,300.13	388,237.54	318,899.68	325,088.71	282,110.97	321,894.65	225,260.78	209,280.68	104,806.78	44,849.32	64,826.13	78,484.80
urant	288,148.09	288,686.13	284,074.26	238,101.06	231,548.90	244,530.17	243,498.08	243,698.15	218,618.89	174,982.60	91,301.38	84,543.98	82,981.04	80,922.64
	185,468.24	419,432.82	292,187.82	295,289.89	250,378.47	705,719.24	719,182.85	699,942.26	702,448.23	222,727.22	474,978.26	499,144.24	289,498.77	181,344.29
	$12,605,348.32	$14,188,268.99	$14,370,466.96	$15,380,045.04	$16,057,065.27	$16,433,483.27	$17,064,074.88	$17,869,995.80	$16,299,880.83	$12,914,586.71	$10,768,712.83	$10,948,372.88	$12,302,903.07	$13,907,071.44
	$ 1,970,510.18	$ 2,293,004.68	$ 2,780,367.47	$ 2,838,096.12	$ 3,272,357.18	$ 3,789,841.96	$ 3,413,377.22	$ 3,685,045.11	$ 3,072,440.76	$ 2,008,196.74	$ 1,388,083.05	$ 1,658,773.81	$ 1,888,164.97	$ 2,389,189.44
ges						334,217.92	921,328.97	488,026.86	537,421.44	110,328.81	(54,948.69)			
pr. & Retire.)	1,970,510.18	2,293,004.68	2,780,367.47	2,838,096.12	3,272,357.18	3,454,059.88	3,344,718.80	3,172,069.09	3,609,862.20	2,118,525.55	1,331,868.24	1,658,773.81	1,888,164.97	2,389,189.44
ges	2,819,572.12	2,971,883.72	2,819,307.64	2,838,096.12	2,819,761.78	3,081,088.03	3,197,294.22	3,276,881.28	3,497,139.06	2,214,258.70	1,886,886.78	1,898,710.66	1,906,981.00	2,147,457.99
						343,306.63	294,348.10	697,306.61	174,040.23	12,308.88	145.80			
	2,819,572.12	2,971,883.72	2,819,307.64	2,838,096.12	2,819,761.78	3,424,481.66	3,491,642.32	3,974,187.89	3,671,179.29	2,226,567.58	1,886,730.32	1,898,710.66	1,906,981.00	2,147,457.99
	348,978.56	487,171.05	489,008.07	457,598.60	451,818.28	482,378.75	784,765.71	838,529.28	838,290.11	601,080.37	498,987.38	520,998.11	965,897.04	866,457.15
	4,568,566.82	4,764,656.09	4,870,904.89	5,843,883.00	5,093,698.64	5,295,341.61	6,044,482.19	6,068,116.95	5,855,315.68	4,444,888.65	4,331,801.67	3,901,748.74	4,332,188.71	4,991,322.32
	350,973.19	455,941.46	508,277.06	647,508.67	580,280.28	680,808.90	679,148.31	587,087.31	694,206.88	510,788.33	411,889.44	353,244.80	409,201.85	86,270.89
	458,761.76	416,285.04	498,298.50	437,599.65	446,584.10	548,499.01	582,630.85	594,944.22	592,897.07	373,998.89	448,948.86	419,084.89	508,218.89	344,755.35
	(14,288.99)	(49,290.83)	(98,985.12)	(49,999.08)	(98,485.32)	(80,998.83)	(168,117.00)	(108,888.41)	(169,607.89)	(256,885.31)	89,998.97	(61,188.97)	(11,182.98)	(30,680.48)
	$ 9,837,150.67	$10,685,711.81	$11,477,884.33	$11,338,942.06	$11,272,199.66	$12,180,069.05	$14,209,806.66	$14,480,042.41	$13,152,928.96	$11,480,804.16	$ 9,081,921.84	$ 8,818,306.34	$ 9,780,782.40	$10,894,942.05
ns	$ 2,668,197.65	$ 3,474,557.18	$ 3,892,602.43	$ 4,236,102.98	$ 4,781,985.99	$ 5,200,294.24	$ 5,267,674.20	$ 5,349,052.99	$ 5,146,791.87	$ 1,474,722.82	$ 1,736,790.99	$ 2,080,008.94	$ 2,522,110.67	$ 2,312,189.39
	968,694.72	981,186.07	877,172.89	979,995.47	-1,205,603.80	1,503,476.93	1,171,178.94	1,287,402.66	1,113,278.82	1,106,614.24	998,026.81	851,194.99	792,368.48	678,877.94
	841.96	1,161.26	6,911.48	1,837.82	1,718.72	802.06	883.82	1,288.82	458.64	544.82	2,078.82	899.72	5,421.72	7,075.73
	$ 1,704,660.96	$ 2,522,207.75	$ 3,008,716.06	$ 3,254,269.68	$ 3,474,909.62	$ 3,804,114.39	$ 4,215,799.41	$ 4,061,184.76	$ 4,032,004.09	$ 367,563.92	$ 736,687.36	$ 1,199,111.63	$ 1,724,340.40	$ 1,626,175.69
	$ 335,991.55	$ 360,183.06	$ 981,872.49	$ 870,185.97	$ 642,878.70	$ 284,619.51	$ 98,074.49	$ 276,441.07	$	$	$	$	$	$
			43,219.97	173,873.60	219,719.04	282,749.41	272,196.73	266,980.15	249,886.49	322,982.12	208,887.91	472,123.84	608,498.84	744,071.97
	73,678.15	88,808.32							284,582.85	218,668.88	180,017.43	179,838.87	151,877.78	134,209.49
	$ 1,966,776.35	$ 3,014,162.31	$ 3,973,810.52	$ 4,298,499.25	$ 4,337,206.36	$ 4,321,483.27	$ 4,581,010.63	$ 4,601,315.98	$ 4,910,760.45	$ 863,270.11	$ 918,114.68	$ 908,887.16	$ 1,287,461.92	$ 1,016,313.34
	$ 75,307.60	$ 88,145.37	$ 104,544.08	$ 107,868.84	$ 111,747.88	$ 118,198.84	$ 118,874.80	$ 147,304.97	$ 152,987.03	$ 142,098.78	$ 119,861.17	$ 108,946.89	$ 99,438.46	$ 100,232.41
	436,877.97	334,249.08	186,394.90	151,063.00	273,499.88	290,488.55	297,141.81	476,560.19	541,252.81	648,148.45	94,227.11	68,217.80	682,087.13	707,444.12
	2.00	2.00	10,183.00	275.00	339.00	856.00	484.00	328.72	1,307.96	173.20	196.00	36.00	194.90	40.00
ncome	$ 512,387.57	$ 422,496.45	$ 301,121.98	$ 259,326.84	$ 385,586.84	$ 409,543.39	$ 416,500.61	$ 624,093.91	$ 695,527.79	$ 790,420.23	$ 740,243.28	$ 786,199.09	$ 781,690.09	$ 807,716.53
	$ 2,479,163.92	$ 3,436,658.76	$ 4,274,732.48	$ 4,557,825.79	$ 4,722,789.90	$ 4,731,486.06	$ 5,098,691.84	$ 5,125,409.89	$ 5,606,280.24	$ 1,051,690.84	$ 1,778,380.16	$ 1,864,088.84	$ 2,049,102.01	$ 1,824,089.87
	$ 43,516.09	$ 43,908.88	$ 42,535.37	$ 42,609.39	$ 43,270.78	$ 43,284.32	$ 43,998.32	$ 45,008.83	$ 45,573.64	$ 46,632.66	$ 46,830.41	$ 50,723.16	$ 48,737.61	$ 40,405.89
als	77.50	79.60	163.30	328.55	1,404.86	2,252.92	2,188.63	14,671.84	15,599.72	21,926.31	27,309.86	38,045.42	46,312.93	48,582.52
t Funded Debt	100,927.34	108,374.86	119,171.95	124,095.07	128,187.65	126,874.44	122,863.14	129,603.88	134,846.01	178,796.70	144,213.87	146,182.20	143,389.02	143,316.70
o Income	14,236.25	15,484.99	18,798.79	19,663.85	19,396.42	17,700.09	18,830.82	17,573.10	100,869.74	190,049.92	87,798.28	61,489.92	49,856.26	44,049.84
eductions	$ 158,787.18	$ 167,844.33	$ 180,669.41	$ 186,696.86	$ 192,159.72	$ 189,481.77	$ 190,780.71	$ 206,564.13	$ 296,889.11	$ 396,484.99	$ 306,289.11	$ 296,419.70	$ 288,035.31	$ 276,354.15
	$ 2,320,406.74	$ 3,278,814.43	$ 3,994,063.07	$ 4,371,029.13	$ 4,530,630.18	$ 4,554,944.29	$ 4,908,110.83	$ 2,919,055.74	$ 2,309,399.13	$ 655,284.90	$ 972,131.05	$ 1,367,604.64	$ 1,761,088.30	$ 1,547,675.72
	$ 1,218,047.88	$ 1,487,268.69	$ 1,763,121.12	$ 1,918,230.42	$ 2,088,621.64	$ 2,187,962.05	$ 2,288,636.22	$ 2,449,658.50	$ 2,612,667.07	$ 2,774,[illegible]37.16	$ 3,138,874.21	$ 3,388,979.88	$ 3,318,319.15	$ 3,301,478.52
bt	2,013.66	1,760.44	1,977.27	1,711.76	1,844.80	2,131.44	4,176.14	703.66	736.46	17,809.47	73,733.92	82,435.01	42,214.06	36,922.43
ions	$ 1,215,041.55	$ 1,489,018.92	$ 1,764,798.39	$ 1,919,962.18	$ 2,090,366.44	$ 2,190,093.49	$ 2,292,832.43	$ 2,450,362.16	$ 2,613,403.53	$ 2,792,476.63	$ 3,202,308.23	$ 3,456,414.89	$ 3,360,533.21	$ 3,340,400.95
	$ 1,105,345.16	$ 1,819,795.51	$ 1,329,264.68	$ 2,451,066.95	$ 2,470,263.74	$ 394,850.90	$ 615,278.27	$ 468,693.68	$ (304,006.40)	$ (2,127,161.83)	$ (2,230,177.18)	$ (2,087,807.75)	$ (1,599,467.01)	$ (1,792,725.23)

es, viz.: ( ) denote red.

NON-OPERATING INCOME AND DEDUCTIONS FROM GROSS INCOME

YEARS 1923 TO 1938, INCLUSIVE

	1923	1926	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934	1935
NON-OPERATING INCOME														
Rental of property	$ 75,808	$ 98,145	$ 104,544	$ 107,689	$ 111,747	$ 112,198	$ 118,275	$ 147,805	$ 152,967	$ 148,069	$ 119,841	$ 102,947	$ 90,488	$ 100,238
Separately Operated Properties - Profit Central California Traction Co.									29,619					
Interest Accruals														
Interest on U.S. Govt. Liberty Loan Bonds	60,696	99,841	42,190											
" " " Victory Loan Notes	42,595	80,401												
" " Sacramento Northern R.R. Bonds				51,089	199,885	229,832	230,243	230,674	230,674	230,674	230,674	230,674	230,674	230,674
" " Sacramento Northern Ry. Notes							648	78,928	105,806	160,805	160,805	201,885	240,417	240,417
" " Sacramento Northern Ry. Advances							2,451	33,378	88,285	99,484	129,971	151,886	155,945	158,994
" " Central California Traction Co. Bonds							20,996	21,816	22,889	19,881	15,710	18,184	14,881	13,928
" " Tidewater Southern Ry. Co. Notes	13,804	12,870	6,065									12,096	22,414	25,414
" " Tidewater Southern Ry. Co. Advances						1,868	5,841	9,986	23,480	22,484	20,854	18,174	6,185	2,627
" " Deep Creek R.R. Co. Note	2,675	3,000	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700
" " Deep Creek R.R. Co. Advances									20	195	212	868		1,074
" " Clover Valley Lumber Co. Notes	2,100	2,100	1,940	2,100	1,800	1,380	1,488	820	880	820	147			
" " Railway Express Agency, Inc., Advances							28	888	888	486	656	784	974	1,153
" " U.S. Govt. Treasury Certificates	66,804													
" " Bank Balances	245,396	196,487	151,577	106,985	61,000	61,787	57,176	26,789	25,048	16,884	18,904	10,414		
" " Deferred Purchase Contract Payments, and minor balances in accounts with Individuals and Companies, etc.	199	940	2,185	1,800	2,475	1,747	788	1,188	1,048	1,448	1,888	1,001	1,805	288
" " Overpayments of U.S. Govt. Income Tax							64,681	81,788		884				
" " Deferred payments of passenger divisions from Southern Pacific Co.	4,011													
Interest during Obstruction on free funds expended for additions and betterments, and extensions				4,096	7,686	1,804	20,559	8,484	16,880	58,981	8,841	(Red) 92	60	235
Interest on payments made to McCloud River R.R. Co. for purchase of line, subsequently refunded													4,188	
Interest on San Francisco-Sacramento R.R. Co. Notes				2,586	7,982									
Total Interest Accruals:	426,679	534,349	186,596	151,068	273,490	290,488	307,148	476,560	541,285	548,148	540,287	536,217	588,057	707,444
Miscellaneous Income	2	2	10,183	278	288	284	484	889	1,208	178	188	26	188	40
Total Non-Operating Income:	$ 512,289	$ 632,496	$ 301,188	$ 259,287	$ 385,584	$ 403,948	$ 515,881	$ 624,094	$ 734,167	$ 726,480	$ 760,848	$ 738,189	$ 781,680	$ 807,717
DEDUCTIONS FROM GROSS INCOME														
Miscellaneous Rents	$ 43,518	$ 45,906	$ 42,836	$ 42,609	$ 45,871	$ 43,884	$ 45,809	$ 48,008	$ 45,874	$ 46,688	$ 46,880	$ 50,722	$ 48,726	$ 40,405
Miscellaneous Tax Accruals	78	80	185	280	1,406	2,886	8,189	14,871	18,800	20,988	27,400	24,048	46,818	48,883
Interest on Funded Debt														
On First Mortgage Bonds	1,198,888	1,818,480	1,888,871	1,486,148	1,845,870	1,885,886	1,861,848	1,888,800	1,892,681	2,188,880	2,868,868	2,484,806	2,484,808	2,484,808
On Equipment Trust Certificates Series "A"	19,800													
" " " " Series "B"		141,788	280,827	270,187	248,888	228,857	208,818	187,697	167,068	148,488	128,818	108,877	84,868	68,987
" " " " Series "C"			108,888	188,441	167,086	188,871	184,886	118,801	101,816	80,181	78,746	57,841	88,878	44,891
" " " " Series "D"								88,888	80,482	44,848	48,192	28,848	28,892	88,848
" Western Pacific Railroad Corporation Advances				84,674	89,188	71,188	871,788	897,988	888,870	886,148	878,488	874,786	874,786	874,786
" Sacramento Northern Railroad Advances					87,878	88,800	78,087							
" Western Realty Company Advances									2,878	8,780	2,800	2,800	2,800	2,800
" Notes Payable - A.C. James Co.											148,887	848,980	848,980	249,990
" " - Reconstruction Finance Corporation											98,488	154,784	187,880	149,260
" Baldwin Locomotive Works - Lease of locomotives												88,884	88,877	19,717
Total Interest on Funded Debt:	1,218,088	1,457,888	1,788,181	1,818,880	2,088,888	2,187,988	2,288,886	2,448,888	2,818,887	2,784,807	3,188,874	3,888,878	3,818,818	3,801,478
Amortization of Discount on Funded Debt														
On First Mortgage Bonds	88,788	88,888	87,888	108,448	108,108	108,788	106,980	118,880	117,880	188,488	188,808	188,788	188,788	188,401
" Equipment Trust Certificates Series "A"	2,181													
" " " " Series "B"		10,118	80,487	18,188	17,708	18,848	14,781	18,818	11,886	10,864	8,881	7,484	5,887	4,649
" " " " Series "C"			878	1,881	1,874	1,888	1,188	1,088	848	848	728	688	588	417
" " " " Series "D"								1,871	4,881	4,188	8,818	8,488	8,178	2,850
" General and Refunding Mortgage Bonds											888	827		
Total Amortization of Discount on Funded Debt:	100,987	108,874	119,178	124,086	188,188	188,274	188,868	180,804	184,848	188,800	144,818	146,188	145,888	148,817
Interest on Unfunded Debt														
On Baldwin Locomotive Works - Lease of locomotives										11,888	88,180			
" Notes Payable - Reconstruction Finance Corporation											88,708			
" " - The Railroad Credit Corporation											18,887	66,488	40,881	88,888
Underpayment of U.S. Govt. Income Tax							8,848			(Red) 84				
Miscellaneous	2,014	1,781	1,877	1,718	1,845	2,181	681	704	788	6,888	2,084	2,947	1,888	287
Total Interest on Unfunded Debt:	2,014	1,781	1,877	1,718	1,845	2,181	4,178	704	788	17,810	78,784	69,488	48,814	38,988
Miscellaneous Deductions														
Separately Operated Properties - Loss														

YEARS ARRANGED TO SHOW CHRONOLOGICAL

DEDUCTS. FROM GROS

	1921	1922	1923	1924	1925	1926	1927	1928	1929	1930	1931	1932	1933	1934
NON-OPERATING INCOME														
Rental of property	$ 75,808	$ 98,148	$ 104,544	$ 107,889	$ 111,767	$ 118,189	$ 118,575	$ 147,805	$ 188,997	$ 148,089	$ 119,861	$ 108,947	$ 99,488	$ 100,835
Separately Operated Properties - Profit														
Central California Traction Co.									29,519					
Interest Accruals														
Interest on U.S. Govt. Liberty Loan Bonds	60,986	99,841	42,190											
" " " Victory Loan Notes	42,583	20,401												
" " Sacramento Northern R.R. Bonds				51,089	199,855	229,239	230,248	230,674	230,674	230,674	230,674	230,674	230,674	230,674
" " Sacramento Northern Ry. Notes							848	78,928	105,226	120,828	120,828	120,828	221,239	240,417
" " Sacramento Northern Ry. Advances							2,451	33,578	69,288	88,484	129,971	151,288	185,245	188,094
" " Central California Traction Co. Bonds							20,896	21,816	22,288	18,881	18,710	18,184	14,881	13,988
" " Tidewater Southern Ry. Co. Notes	13,804	13,270	6,065									16,088	22,414	25,414
" " Tidewater Southern Ry. Co. Advances						1,688	8,841	9,868	23,480	22,484	20,884	18,174	6,188	2,287
" " Deep Creek R.R. Co. Notes	2,475	3,000	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700	2,700
" " Deep Creek R.R. Co. Advances									80	198	218	298		1,074
" " Clover Valley Lumber Co. Notes	2,100	2,100	1,960	2,100	1,800	1,680	1,488	900	680	880	147			
" " Railway Express Agency, Inc., Advances								88	288	486	686	784	974	1,153
" " U.S. Govt. Treasury Certificates	65,804													
" " Bank Balances	246,396	196,497	131,377	106,983	51,000	51,787	37,178	26,769	25,042	16,884	12,884	10,414		
" " Deferred Purchase Contract Payments, and minor balances in accounts with Individuals and Companies, etc.	199	940	2,196	1,600	2,475	1,747	788	1,188	1,048	1,448	1,888	1,001	1,806	298
" " Overpayments of U.S. Govt. Income Tax							44,881	21,788		884				
" " Deferred payments of passenger divisions from Southern Pacific Co.	4,011													
Interest during Construction on free funds expended for additions and betterments, and extensions				4,096	7,886	1,804	20,588	8,484	16,880	88,981	8,841	(Red) 92	80	238
Interest on payments made to McCloud River R.R. Co. for purchase of line, subsequently refunded													4,188	
Interest on San Francisco-Sacramento R.R. Co. Notes				2,588	7,988									
Total Interest Accruals:	436,878	884,849	186,588	181,068	878,680	290,488	297,168	476,840	641,888	648,148	640,897	688,817	688,087	707,444
Miscellaneous Income	2	2	10,188	878	888	884	484	888	1,808	178	188	86	188	40
Total Non-Operating Income:	$ 518,888	$ 488,496	$ 801,188	$ 888,887	$ 885,884	$ 408,948	$ 515,881	$ 684,894	$ 784,147	$ 788,480	$ 780,848	$ 788,189	$ 781,880	$ 807,717
DEDUCTIONS FROM GROSS INCOME														
Miscellaneous Rents	$ 43,818	$ 45,906	$ 48,888	$ 48,809	$ 45,971	$ 45,884	$ 43,888	$ 43,006	$ 45,874	$ 46,888	$ 46,880	$ 88,788	$ 48,788	$ 40,405
Miscellaneous Tax Accruals	78	80	188	888	1,408	8,888	8,188	14,871	18,800	80,888	87,400	88,045	46,818	48,588
Interest on Funded Debt														
On First Mortgage Bonds	1,188,888	1,818,480	1,888,871	1,488,148	1,848,870	1,888,888	1,881,848	1,888,800	1,888,881	2,188,880	2,848,888	2,484,808	2,484,808	2,484,808
On Equipment Trust Certificates Series "A"	19,800													
" " " " Series "B"		141,788	888,887	870,187	848,888	888,887	808,818	187,887	187,088	148,488	188,818	108,877	84,888	68,987
" " " " Series "C"			108,988	188,441	187,088	188,871	184,886	118,001	101,818	90,181	78,748	87,841	58,978	44,581
" " " " Series "D"								88,888	80,408	48,848	48,188	88,848	88,888	88,848
Western Pacific Railroad Corporation Advances				84,674	88,188	71,188	871,788	887,888	888,870	888,148	878,488	874,788	874,788	874,788
Sacramento Northern Railroad Advances					87,878	88,888	P8,087							
Western Realty Company Advances									8,878	8,788	8,888	8,888	8,888	8,888
Notes Payable - A.C. James Co.											148,887	888,888	888,888	848,888
" " " - Reconstruction Finance Corporation											88,488	184,784	187,888	148,288
Baldwin Locomotive Works - Lease of locomotives												88,884	88,877	18,717
Total Interest on Funded Debt:	1,818,088	1,487,888	1,788,181	1,818,880	2,088,888	2,187,888	2,888,888	2,448,888	2,818,887	2,784,887	3,188,874	3,888,878	3,818,818	3,801,478
Amortization of Discount on Funded Debt														
On First Mortgage Bonds	88,788	88,888	87,888	108,448	108,108	108,788	108,880	118,880	117,880	188,488	188,808	188,788	188,788	188,401
Equipment Trust Certificates Series "A"	8,181													
" " " " Series "B"		10,118	80,887	18,188	17,708	14,888	14,781	15,818	11,888	10,884	8,881	7,484	8,887	4,849
" " " " Series "C"			878	1,481	1,888	1,888	1,188	1,088	848	848	728	588	888	417
" " " " Series "D"								1,871	4,481	4,188	8,818	8,488	8,178	2,850
General and Refunding Mortgage Bonds											888	887		
Total Amortization of Discount on Funded Debt:	100,887	108,874	118,178	184,088	188,188	188,874	188,868	188,804	184,848	188,800	144,818	148,188	148,888	148,817
Interest on Unfunded Debt														
On Baldwin Locomotive Works - Lease of locomotives										11,888	88,188			
Notes Payable - Reconstruction Finance Corporation											88,708			
" " " - The Railroad Credit Corporation											18,887	88,488	40,881	88,888
Underpayment of U.S. Govt. Income Tax							8,848			(Red) 84				
Miscellaneous	2,014	1,781	1,877	1,718	1,848	8,181	681	704	788	8,888	8,884	8,887	1,888	887
Total Interest on Unfunded Debt:	2,014	1,781	1,877	1,718	1,848	8,181	4,178	704	788	17,810	78,784	88,488	42,814	88,988
Miscellaneous Deductions														
Separately Operated Properties - Loss										107,488	18,187	8,088	8,188	13,851
Alameda Belt Line										88,888	88,888	88,887	80,848	80,488
Central California Traction Co.									188,888					
Income tax on bond interest	12,888	11,784	14,088	14,878	18,888	18,871	10,748	10,018	9,884	10,088	10,114	10,088	888	888
Miscellaneous	1,418	8,781	4,780	4,988	8,488	8,488	8,088	7,881	8,871	7,880	7,888	18,884	8,888	9,508
Total Miscellaneous Deductions:	14,888	18,488	18,788	19,888	19,884	17,700	18,881	17,878	188,488	188,080	87,788	81,470	88,888	44,080
TOTAL DEDUCTIONS FROM GROSS INCOME:	$1,878,818	$1,888,844	$1,948,487	$2,108,888	$2,888,887	$2,888,874	$2,888,818	$2,888,818	$2,948,818	$3,178,888	$3,808,888	$3,781,888	$3,848,887	$3,818,788

(Testimony of Charles Elsey.)

Statement No. 24
Page No. 1

Sacramento Northern Railway

INCOME ACCOUNT, 1922 TO 1935, BOTH INCLUSIVE

NOTES

1. Sacramento Northern Railway is an electrically operated, standard gauge, freight and passenger railroad serving and connecting San Francisco and Oakland with Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa, Oroville, Chico and other Sacramento Valley points. Street railway service is also operated in Sacramento, Marysville, Yuba City and Chico. Revenues from city lines are included in "Miscellaneous" on Statement No. 25.

2. Sacramento Northern Railway was acquired by The Western Pacific Railroad Company as of November 5, 1925. That portion of the present road between Oakland and Sacramento (88.21 miles) was acquired as of January 1, 1929, from the San Francisco-Sacramento Railroad. The Holland Branch, 15.77 miles, and the Vacaville connecting line, 9.56 miles, were constructed and placed in service in June, 1929, and August, 1930, respectively.

3. Improvement Program: During the years 1928 to 1932, inclusive, a program of rehabilitation and extension and improvement was under way on this road, which resulted in the following charges:

	Total	Operating	Capital
Road	$2,146,956	$189,545	$1,957,411
Equipment	62,938	13,174	49,764
TOTAL	$2,209,894	$202,719	$2,007,175

(Testimony of Charles Elsey.)

The Operating Expense shown in the foregoing tabulation is included in appropriate maintenance accounts, principally in 1930, and is largely due to improvements on the line between Oakland and Sacramento consisting of bank restoration, rail renewals and ballasting with gravel and crushed rock. Capital charges reflect, in part, the construction of the Holland Branch, Vacaville connecting line, Pittsburg Branch, and other added facilities.

4. Heavy tie renewals, with consequent increased material and labor accounts, were made during 1929, 1930 and 1931 to eliminate then accumulated deferred maintenance of this character.

5. Western Pacific revenues on traffic interchanged with Sacramento Northern Railway are shown on Statement No. 10.

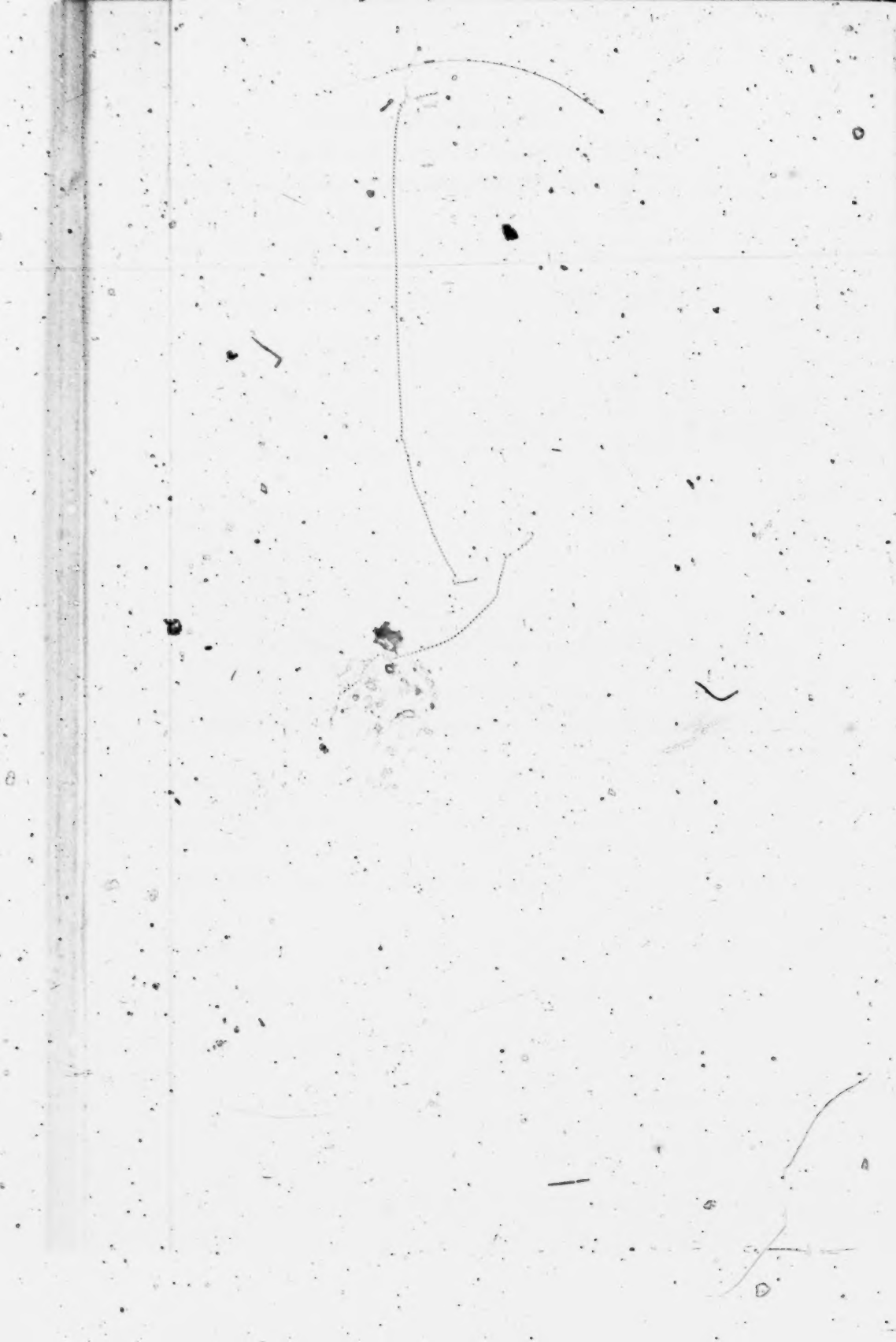
SACRAMENTO NORTHERN RAILWAY

S. P.
INCOME ACCT.

INCOME ACCOUNTS - YEAR 1926 TO 1935, BOTH INCLUSIVE

	Year 1926	Year 1927	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935
MILES ROAD OPERATED END OF YEAR	164.77	164.09	164.09	269.44	277.93	276.41	276.41	276.34	276.20	276.20
OPERATING REVENUES										
Freight	$ 992,822.65	$1,018,999.37	$ 988,675.04	$1,138,609.81	$1,226,065.92	$ 962,303.66	$ 765,800.21	$ 722,880.15	$ 768,880.88	$ 777,746.88
Passenger	448,718.19	402,621.86	362,349.66	803,389.84	700,873.87	533,880.89	380,367.26	281,513.37	304,452.90	321,589.62
Mail	5,908.97	5,806.96	5,224.94	7,089.21	7,182.37	7,653.44	9,281.77	8,446.94	8,026.85	8,595.85
Express	38,878.66	33,281.37	37,949.42	62,821.00	54,187.49	45,896.87	29,521.18	26,011.10	29,700.19	24,494.77
Dining Car & Parlor Car	5,799.81	4,831.46	4,906.37	11,647.72	15,641.14	9,380.90	4,239.05	3,774.11	2,992.67	2,938.05
Miscellaneous	77,959.69	76,964.77	78,344.76	86,229.98	71,876.92	69,827.86	51,675.61	77,861.80	87,124.24	85,943.86
Total	$1,569,482.17	$1,541,606.71	$1,477,452.19	$2,104,366.80	$2,083,307.61	$1,648,962.55	$1,240,885.08	$1,119,617.47	$1,200,847.73	$1,221,309.03
OPERATING EXPENSES										
Way & Structures	$ 214,890.11	$ 245,998.97	$ 222,908.80	$ 298,183.89	$ 303,868.22	$ 496,310.46	$ 277,061.05	$ 216,981.80	$ 226,513.67	$ 274,791.17
Equipment	153,980.97	149,830.32	140,300.67	212,238.12	222,966.67	210,804.89	160,281.16	142,072.49	164,164.14	159,699.61
Power	129,106.95	132,906.44	130,748.03	222,617.48	239,360.08	203,406.08	165,842.13	150,733.60	158,064.46	159,022.26
Conducting Transportation	411,106.82	398,264.31	395,495.00	655,184.92	693,244.83	623,022.80	496,449.21	460,540.43	493,008.37	521,152.39
Traffic	39,682.95	36,778.70	36,600.00	60,066.01	63,479.61	56,974.62	44,277.78	40,886.39	40,683.67	40,745.72
General & Miscellaneous	225,699.04	230,277.46	230,021.49	350,651.17	296,897.13	269,386.97	220,256.25	199,991.19	223,133.42	203,112.97
Transportation for Investment	(5,947.74)	(3,986.60)	(984.11)	(27,213.74)	(39,492.18)	(8,897.09)	(1,359.66)	(899.65)	(1,218.74)	(1,788.41)
Total Operating Expenses	$1,181,827.11	$1,190,080.60	$1,185,104.88	$2,081,699.55	$2,269,045.94	$1,863,698.76	$1,361,809.28	$1,209,915.78	$1,297,382.39	$1,356,740.53
Net Rev. from Rly. Operations	$ 388,186.06	$ 351,525.11	$ 292,347.61	$ 22,696.65	($ 285,738.33)	($ 215,486.21)	($ 120,924.64)	($ 90,298.28)	($ 96,534.66)	($ 135,431.50)
Rly. Tax Accruals	81,324.02	101,618.78	90,569.59	130,493.84	122,103.44	117,282.66	85,606.40	66,787.31	88,892.34	51,909.74
Railway Operating Income	$ 306,861.04	$ 249,906.33	$ 201,778.02	($ 77,797.19)	($ 407,841.77)	($ 332,768.87)	($ 206,533.04)	($ 157,085.59)	($ 185,427.00)	($ 187,341.24)
NON-OPERATING INCOME										
Rental of Property	$ 24,784.17	$ 32,614.29	$ 39,786.07	$ 52,592.11	$ 40,147.77	$ 40,017.54	$ 35,480.74	$ 35,063.19	$ 33,394.25	$ 32,632.08
Interest Accruals	20,814.74	27,888.79	23,157.99	26,281.03	20,705.80	4,855.07	4,952.13	3,399.94	2,096.80	1,344.03
Miscellaneous	170.49	158.77	138.41	192.02	363.08	4,075.91	117.84	138.00	(2,344.88)	455.30
Total Non-Operating Income	$ 45,743.40	$ 60,661.85	$ 63,082.47	$ 79,065.16	$ 61,216.05	$ 48,948.52	$ 40,550.71	$ 38,596.13	$ 33,146.17	$ 34,431.41
GROSS INCOME	$ 352,104.44	$ 310,568.20	$ 264,860.49	$ 267.97	($ 346,625.72)	($ 283,760.37)	($ 165,982.33)	($ 118,490.46)	($ 152,280.83)	($ 152,909.83)
MISCELLANEOUS DEDUCTIONS										
Miscellaneous Rents	$ 1,441.32	$ 1,164.68	$ 1,333.64	$ 1,441.64	$ 1,453.64	$ 1,502.71	$ 1,582.10	$ 1,506.10	$ 1,934.10	$ 1,522.43
Miscellaneous	2,417.39	2,714.84	2,821.06	2,948.73	3,825.99	3,968.22	3,343.91	3,559.29	3,121.27	2,161.35
Total Miscellaneous Deductions	$ 3,858.71	$ 3,879.46	$ 4,154.70	$ 4,390.37	$ 5,279.63	$ 5,470.93	$ 6,926.01	$ 5,065.39	$ 5,042.37	$ 3,683.78
AVAILABLE FOR INTEREST	$ 348,245.73	$ 306,688.74	$ 260,685.79	($ 4,122.40)	($ 351,905.35)	($ 289,231.30)	($ 172,908.34)	($ 123,556.85)	($ 123,995.90)	($ 156,593.61)
Interest on Funded Debt (To WP RR Co.)	$ 199,854.86	$ 229,632.54	$ 260,241.97	$ 339,605.92	$ 366,479.84	$ 421,222.98	$ 560,848.26	$ 563,814.27	$ 626,338.92	$ 660,085.09
" " " " (To WP RR Corp.)	--	--	9,150.23	42,843.55	42,813.00	42,813.00	42,813.00	42,813.00	42,813.00	42,813.00
" " " " (Other)	4,231.44	4,194.96	3,860.90	5,018.68	4,144.90	2,599.36	4,144.90	4,144.90	4,129.90	3,859.92
Interest on Unfunded Debt (To WP RR Co.)	--	--	2,334.90	33,377.80	82,393.11	98,423.71	--	--	--	--
" " " " (Other)	1,060.71	881.07	451.18	1,106.36	66.16	199.79	108.95	57.45	1,342.55	894.16
Total Interest Deductions	$ 205,137.01	$ 234,648.57	$ 276,039.18	$ 421,952.31	$ 495,897.01	$ 566,258.84	$ 607,915.11	$ 640,829.60	$ 674,619.37	$ 707,652.17
NET INCOME	$ 143,108.72	$ 72,140.17	($ 15,353.39)	($ 426,074.71)	($ 847,802.36)	($ 855,490.14)	($ 780,823.45)	($ 764,385.45)	($ 798,615.27)	($ 864,245.78)

Note: Figures in parentheses, viz.: ( ) denote red.



(Testimony of Charles Elsey.)

Statement No. 26
Page No. 1

Sacramento Northern Railway

STATEMENT SHOWING CHARACTER OF NOTES EXECUTED BY SACRAMENTO NORTHERN RAILWAY PAYABLE TO THE WESTERN PACIFIC RAILROAD COMPANY

Date of Note—December 29, 1928.

Due—March 1, 1943.

Interest rate—5¾% per annum.

Amount of note—$1,372,733.95.

Authority for issue—Interstate Commerce Commission order dated November 21, 1928, Finance Docket 7124.

Date of Note—September 2, 1930.

Due—March 1, 1945.

Interest rate—5¼% per annum.

Amount of note—$1,553,742.77.

Authority for issue—Interstate Commerce Commission order dated August 21, 1930, Finance Docket 8415.

Date of Note—June 26, 1933.

Due—March 1, 1945.

Interest rate—5% per annum.

Amount of note—$1,598,267.66.

Authority for issue—Interstate Commerce Commission order dated June 12, 1933, Finance Docket 9997.

The aggregate amount of these three notes, $4,524,744.38, cover that portion of $5,645,733.95 cash

(Testimony of Charles Elsey.)

advanced by The Western Pacific Railroad Company prior to June 1, 1932, and represents the net charges of the Sacramento Northern Railway to its investment in Road and Equipment for the period January 1, 1928, to May 31, 1932, aggregating $4,309,952.13 as stated in the following detail by primary accounts.

501	Engineering	$ 51,484.06
502	Right of way	613,518.55
503	Other land used in operation	61,470.00
504	Grading	336,639.24
505	Ballast	288,938.16
506	Ties	123,753.80
507	Rails, fastenings and joints	468,818.38
508	Special work	55,594.42
510	Track and roadway labor	205,884.71
511	Paving	11,718.13
512	Roadway machinery and tools	8,330.50
513	Tunnels and subways	117,716.66
515	Bridges, trestles and culverts	274,032.35
516	Crossings, fences and signs	75,203.48
517	Signals and interlocking apparatus	84,677.57
518	Telephone and telegraph lines	15,478.02
519	Poles and fixtures	124,831.99
521	Distribution system	173,006.59
522	General office buildings	885.52
523	Shops and car houses	6,552.39
524	Stations, miscellaneous buildings and structures	151,563.99
525	Wharves and docks	37,476.28
526	Park and resort property	1,606.95
529	Other expenditures—Way and structures	29.37
	Total Way and Structures	$3,289,211.11
530	Passenger and combination cars	185,376.76
531	Freight express and mail cars	25,147.06
532	Service equipment	15,864.40

(Testimony of Charles Elsey.)

533	Electric equipment of cars	173,565.63
534	Locomotives	213,658.98
535	Floating equipment	129,943.03
536	Shop equipment	8,047.88
537	Furniture	2,654.34
538	Miscellaneous equipment	7,818.43
	Total Equipment	$ 762,076.51
540	Substation buildings	16,270.54
543	Substation equipment	198,440.70
544	Transmission system	1,846.38
	Total Power	$ 216,557.62
545	Franchises	600.65
546	Law expenditures	4,982.48
547	Interest during construction	33,692.36
549	Taxes	2,349.75
550	Miscellaneous	481.65
	Total General and Miscellaneous	$ 42,106.89
	Grand Total	$4,309,952.13
	Miscellaneous Physical Property	$ 214,792.25

Also net charges for the same period to investment in Miscellaneous Physical Property aggregating $214,792.25.

The expenditures for road and equipment were principally applied to acquisition of the San Francisco, Sacramento Railroad Company, construction of the Holland, Pittsburg and Vacaville branches, and main line improvement at various points.

Expenditures for Miscellaneous Physical Property were principally for non-operative facilities at various points leased to outside parties.

Accounting Department,
San Francisco, California,
April 8th, 1936.

(Testimony of Charles Elsey.)

Statement No. 27

Tidewater Southern Railway Company
INCOME ACCOUNT, 1922 TO 1935, BOTH INCLUSIVE

NOTES

1. Tidewater Southern Railway Company owns and operates a standard gauge steam railroad (formerly operated in part electrically) connecting Stockton, California, with Manteca, Escalon, Modesto and Turlock in the San Joaquin Valley. Passenger service was abandoned in 1932.

2. Improvement Program: During the years 1927 to 1932, inclusive, improvements to roadway and structures were made, such as rail renewals, ballasting, bank widening, bridge and trestle work, and other improvements which resulted in the following charges:

	Total	Operating	Capital
Roadway	$203,983	$68,516	$135,467

All of the Operating Expenses involved are included in Maintenance of Way & Structures and principally in 1929, 1930 and 1931.

3. Bonded debt of the Tidewater Southern Railway Company was wholly extinguished through the Sinking Fund on March 31, 1935. Its only funded debt is a note in the amount of $508,278.61 due The Western Pacific Railroad Company.

4. Western Pacific's revenues on traffic interchanged with Tidewater Southern are shown by Statement No. 10.

T. S.

INC. ACCT.

TIDEWATER SOUTHERN RAILWAY COMPANY

INCOME ACCOUNT - YEARS 1922 TO 1938, BOTH INCLUSIVE

	Year 1922	Year 1923	Year 1924	Year 1925	Year 1926	Year 1927	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934 (*)	Year 1935 (*)
MILES ROAD OPERATED END OF YEAR	65.30	65.30	65.30	65.30	65.30	65.30	65.30	65.30	65.30	65.18	60.33	61.38	61.38	61.38
OPERATING REVENUES														
Freight	$ 182,874.76	$ 203,749.81	$ 208,107.10	$ 245,791.89	$ 291,717.82	$ 313,544.34	$ 331,314.92	$ 289,412.63	$ 428,744.49	$ 273,487.30	$ 235,160.68	$ 308,822.36	$ 271,818.89	272,479.74
Passenger	30,845.69	26,838.60	18,947.94	16,866.94	17,104.86	15,805.91	18,883.17	13,847.17	13,399.38	8,978.01	2,385.47	22.70	1.32	1.60
Mail	864.94	1,218.73	1,218.73	1,218.73	1,218.73	1,216.73	1,218.72	1,209.60	1,218.73	1,218.73	488.15	-	-	-
Express	2,332.93	2,667.18	1,697.56	1,588.89	1,894.90	1,450.18	1,559.54	1,405.02	1,445.89	1,145.43	227.16	1.92	-	-
Miscellaneous	1,423.18	1,996.34	1,444.27	5,692.87	3,094.71	2,185.32	2,188.08	3,079.00	3,362.81	2,037.14	4,012.43	3,176.09	4,809.92	7,161.82
Total	$ 217,731.48	$ 236,049.87	$ 231,615.98	$ 290,958.32	$ 316,030.01	$ 332,229.77	$ 349,361.43	$ 308,853.82	$ 448,171.30	$ 287,866.81	$ 242,273.89	$ 312,023.08	$ 276,129.13	$279,643.16
OPERATING EXPENSES														
Way & Structures	$ 29,276.01	$ 41,994.30	$ 41,[illegible].20	$ 35,564.88	$ 37,276.41	$ 53,499.70	$ 59,799.62	$ 104,688.01	$ 157,118.97	$ 99,803.06	$ 42,537.40	$ 37,706.49	$ 39,165.98	$ 44,145.32
Equipment	16,882.92	14,823.60	16,946.54	15,786.70	16,963.92	17,700.17	16,780.41	15,386.19	14,938.38	12,038.76	7,993.06	5,405.02	9,920.41	5,751.38
Power	13,001.14	10,284.75	12,304.57	11,885.62	12,114.07	13,097.56	12,801.93	10,914.98	11,090.19	11,988.92	6,769.60	2,310.00	-	-
Conducting Transportation	68,892.37	69,348.82	69,248.86	78,400.59	78,876.46	85,942.86	91,642.22	86,823.00	93,043.47	79,804.96	60,843.94	58,648.87	61,697.09	64,078.88
Traffic	3,844.91	2,418.97	2,900.91	2,873.40	3,106.51	3,906.78	4,847.18	4,615.02	6,563.06	7,199.21	7,135.25	7,096.68	7,193.01	8,500.47
General & Miscellaneous	81,713.65	42,889.96	45,888.30	52,083.48	50,033.01	56,876.17	55,362.02	57,141.87	54,242.14	50,838.48	47,329.49	34,219.74	14,054.99	11,447.23
Transportation for Investment						(1,863.34)			(863.00)	(97.04)	(47.89)	(988.90)	(23.96)	(1.07)
Total Oper. Expenses	$ 179,810.80	$ 184,767.10	$ 186,814.38	$ 196,894.08	$ 198,372.58	$ 228,839.30	$ 241,133.36	$ 279,966.07	$ 334,638.16	$ 269,643.34	$ 172,261.16	$ 139,124.91	$ 132,009.52	$133,929.21
Net Rev. From Rly. Operations	$ 37,920.68	$ 51,282.47	$ 45,101.30	$ 94,365.98	$ 117,657.43	$ 103,390.43	$ 108,228.08	$ 28,887.75	$ 111,533.14	$ 18,043.47	$ 70,012.73	$ 72,898.17	$ 144,119.61	$145,720.95
Rly. Tax Accruals	17,487.06	16,515.48	15,141.79	16,593.56	24,306.17	30,696.01	30,860.88	26,057.48	22,892.97	24,804.63	16,959.99	14,699.10	13,808.81	18,445.88
Railway Operating Income	$ 20,433.62	$ 34,766.99	$ 29,959.51	$ 77,771.69	$ 93,351.26	$ 72,694.42	$ 77,367.17	$ 2,829.27	$ 88,640.17	$ (6,761.16)	$ 53,052.74	$ 58,199.07	$ 130,310.80	$127,275.07
NON-OPERATING INCOME														
Rental of Property	$ 2,306.76	$ 5,041.92	$ 6,553.51	$ 5,617.03	$ 5,629.92	$ 4,395.26	$ 5,118.26	$ 8,260.93	$ 7,834.54	$ 9,664.76	$ 2,425.90	$ 2,004.61	$ 2,617.26	$ 3,981.59
Interest Accruals	704.60	1,304.36	1,154.34	898.26	1,778.68	2,036.44	2,316.90	2,173.99	1,737.06	1,894.67	1,282.39	1,648.40	2,360.71	536.25
Miscellaneous	172.46	232.32	17.08	-	-	72.88	35.24	6.00	-	10.00	15.00	-	-	279.51
Total Non-Operating Income	$ 3,183.80	$ 6,618.60	$ 7,724.93	$ 6,515.29	$ 5,407.60	$ 6,504.60	$ 5,470.40	$ 10,439.92	$ 9,571.59	$ 10,969.00	$ 3,703.37	$ 3,653.01	$ 4,986.97	$ 4,799.35
GROSS INCOME	$ 23,617.42	$ 41,385.42	$ 37,684.24	$ 84,286.98	$ 98,759.06	$ 79,199.02	$ 82,837.57	$ 13,267.99	$ 98,211.76	$ 4,208.86	$ 56,756.11	$ 61,852.08	$ 135,297.77	$132,074.42
MISCELLANEOUS DEDUCTIONS														
Hire of Equipment	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -	$ -
Miscellaneous Rents	3,277.00	3,277.00	3,276.00	3,276.00	3,276.00	3,276.00	6,330.12	3,276.00	3,039.13	2,307.30	2,184.38	1,611.04	16,139.81	13,722.74
Amortization of Discount	2,678.70	2,517.92	2,345.34	2,163.78	1,971.83	1,786.38	1,578.59	1,366.60	1,136.31	898.22	697.42	885.52	1,971.16	1,955.51
Miscellaneous	36.26	118.01	94.96	1,215.62	466.32	-	7.50	37.51	71.25	101.80	1,088.87	86.46	733.59	118.32
Total Miscellaneous Deductions	$ 5,991.96	$ 5,909.93	$ 5,716.30	$ 6,655.28	$ 5,715.85	$ 5,062.38	$ 7,916.21	$ 4,672.11	$ 4,246.69	$ 3,306.72	$ 3,970.31	$ 2,582.02	$ 2,465.90	1,767.71
AVAILABLE FOR INTEREST	$ 17,655.76	$ 35,475.49	$ 31,968.54	$ 77,626.80	$ 93,043.21	$ 74,136.64	$ 74,921.36	$ 8,595.88	$ 94,363.17	$ 4,899.14	$ 52,845.80	$ 59,460.66	$ 132,947.31	$130,512.14
Interest on Funded Debt (To WP RR Co.)	$ -	$ -	$ -	$ -	$ -	$ 1,568.08	$ 5,541.48	$ 9,998.27	$ 23,419.51	$ 28,433.78	$ 30,853.56	$ 31,228.67	$ 31,537.37	$ 28,041.03
" " " (Other)	19,010.46	17,660.00	16,641.66	15,686.03	14,023.99	12,710.69	10,899.71	10,184.32	8,121.32	6,436.84	3,000.00	5,000.00	5,000.00	1,138.86
Interest on Unfunded Debt (To WP RR Co.)	13,804.11	12,889.27	6,049.35	-	-	-	-	-	-	-	-	-	-	-
" " " (Other)	23.85	17.98	47.61	38.00	13.58	10.57	23.93	22.85	7.89	192.16	26.25	4.95	11.06	11.82
Total Interest Deductions	$ 32,838.42	$ 30,567.25	$ 22,738.62	$ 15,817.03	$ 14,037.57	$ 14,289.34	$ 16,425.12	$ 20,145.24	$ 31,548.72	$ 35,062.78	$ 33,879.81	$ 36,233.62	$ 36,548.42	$ 29,191.71
NET INCOME	$ (14,682.66)	$ 5,048.24	$ 9,213.92	$ 62,111.77	$ 79,005.64	$ 59,847.30	$ 58,496.24	$ (10,849.36)	$ 62,714.45	$ (30,133.41)	$ 14,965.99	$ 23,227.04	$ 77,418.89	$ 35,320.43

(*) I.C.C. ordered that year 1934 accounts and subsequent be distributed in accordance with I.C.C. Classification of Accounts for Steam Railroads.

Note: Figures in parentheses, viz. ( ) denote red.

(Testimony of Charles Elsey.)

Statement No. 28.1
Page No. 1

Tidewater Southern Railway Company

STATEMENT SHOWING CHARACTER OF NOTE EXECUTED BY TIDEWATER SOUTHERN RAILWAY COMPANY PAYABLE TO THE WESTERN PACIFIC RAILROAD COMPANY.

Authority for Issue—Interstate Commerce Commission order dated June 12, 1933, Finance Docket 9998.

Date of Note—June 26, 1933.

Due—March 1, 1945.

Interest rate—5% per annum.

Amount of note—$508,278.61.

The principal of the note covers that portion of $619,000.00 cash advanced by The Western Pacific Railroad Company prior to June 1, 1932, and represents the net charges of the Tidewater Southern Railway Company to its investment in Road and Equipment, for the period January 1, 1927, to May 31, 1932, aggregating $405,223.71, as stated in the following detail by primary accounts.

501	Engineering	$ 5,695.01
502	Right of Way	16,150.24
503	Other land used in operation	13,943.94
504	Grading	12,204.33
505	Ballast	23,946.56
506	Ties	10,781.69
507	Rails, rail fastenings and joints	74,957.84
508	Special work	14,746.47
510	Track and roadway labor	28,608.34
511	Paving	10,687.97
512	Roadway machinery and tools	594.89

(Testimony of Charles Elsey.)

515	Bridges, trestles and culverts		27,391.13
516	Crossings, fences and signs		21,407.56
518	Telephone and telegraph lines		1,735.80
519	Poles and fixtures		5,294.34
521	Distribution system	Cr.	249.09
522	General office buildings	Cr.	67.90
523	Shops and car houses	Cr.	449.21
524	Stations, miscellaneous buildings		151,228.54
526	Park and resort property	Cr.	1,762.75
	Total Way and Structures		$416,845.70

Statement No. 28.1
Page No. 2

530	Passenger and combination cars	Cr.	$ 12,012.92
531	Freight express and mail cars	Cr.	1,897.44
532	Service equipment		666.05
533	Electric equipment of cars	Cr.	1.92
534	Locomotives	Cr.	63.62
537	Furniture		165.31
538	Miscellaneous equipment		982.75
	Total Equipment	Cr.	$ 12,161.79
540	Substation buildings		220.00
546	Law expenditures		319.80
	Total general and miscellaneous		$ 539.80
	Grand Total		$405,223.71

Also net charges for the same period to investment in Miscellaneous Physical Property aggregating $103,054.90.

The expenditures for road and equipment are principally account of reconstruction of Modesto Yards, construction of miscellaneous facilities and industry tracks, at Modesto and various points. Expenditures for Miscellaneous Physical Property were largely

(Testimony of Charles Elsey.)

for non-operative facilities at Modesto, Turlock, Hilmar and other points leased to outside parties.

Accounting Department,
April 8th, 1936,
San Francisco, Calif.

Statement No. 29

Deep Creek Railroad Company
INCOME ACCOUNT, 1921 TO 1935, BOTH INCLUSIVE

NOTES

Deep Creek Railroad Company owns and operates a standard gauge steam railroad running from Wendover, Utah, to Gold Hill, Utah, a distance of 44.6 miles.

Western Pacific's revenues on traffic interchanged with Deep Creek are shown on Statement No. 10.

Statement No. 30

D. C. Inc. Acct.

Deep Creek Railroad Company
INCOME ACCOUNTS—YEARS 1921 TO 1935, INCLUSIVE

	1921	1922	1923	1924	1925	1926	1927	1928
Total Railway Operating Revenues	$26,935	$14,896	$42,385	$71,670	$40,268	$18,097	$13,248	$11,413
Total Railway Operating Expenses	25,950	24,258	20,299	40,027	24,359	20,212	14,417	12,696
Net Revenue from Railway Operations	985	9,362•	22,086	31,643	15,909	2,115•	1,169•	1,283•
Railway Tax Accruals and Uncollectibles	6,167	6,013	5,181	5,220	5,395	7,448	5,753	5,028
Net Railway Operating Income	5,182•	15,375•	16,905	26,423	10,514	9,562•	6,922•	6,311•
Total Non-Operating Income (Including Equipment Rents)	1,229	249	603	255	197	169	161	163
Gross Income	3,953•	15,126•	17,508	26,678	10,711	9,393•	6,761•	6,148•
Miscellaneous Deductions								
Hire of Equipment	1,712	308	2,263	5,835	2,317	689	414	380
Joint Facility Rents	179	—	—	—	—	—	—	—
Miscellaneous	152	—	—	—	—	—	—	—
Total Miscellaneous Deductions	2,043	308	2,263	5,835	2,317	689	414	380
Available for Interest	5,996•	15,434•	15,245	20,843	8,394	10,082•	7,175•	6,528•
Interest on Funded Debt (To The Western Pacific Railroad Company)	—	—	—	—	—	2,700	2,700	2,700
Interest on Funded Debt (Other)	—	—	—	—	—	—	—	—
Interest on Unfunded Debt (To The Western Pacific Railroad Company)	3,000	3,000	3,000	2,700	2,700	—	—	—
Interest on Unfunded Debt (Other)	—	—	—	104	1•	—	—	4
Total Interest Deductions	3,000	3,000	3,000	2,804	2,699	2,700	2,700	2,704
Net Income	$ 8,996•	$18,434•	$12,245	$18,039	$ 5,695	$12,782•	$ 9,875•	$ 9,232

	1929	1930	1931	1932	1933	1934	1935	1936
Total Railway Operating Revenues	$11,809	$ 7,520	$ 9,461	$12,455	$11,353	$ 7,383	$ 5,355	
Total Railway Operating Expenses	14,845	30,008	14,603	13,327	11,582	12,017	12,580	
Net Revenue from Railway Operations	3,036•	22,488•	5,142•	872•	229•	4,634•	7,225•	
Railway Tax Accruals and Uncollectibles	5,520	1,337	1,335	1,120	1,242	787	801	
Net Railway Operating Income	8,556•	23,825•	6,477•	1,992	1,471•	5,421•	8,026•	
Total Non-Operating Income (Including Equipment Rents)	237	163	12	57	10	6•	13	
Gross Income	8,319•	23,662•	6,465•	1,935•	1,461•	5,427•	8,013•	
Miscellaneous Deductions								
Hire of Equipment	382	615	365	830	88	197	91	
Joint Facility Rents	—	—	—					

Net Railway Operating Income	5,182•	15,375•	16,905	26,423	10,514	9,562•	6,922•	6,311•
Total Non-Operating Income (Including Equipment Rents)	1,229	249	603	255	197	169	161	163
Gross Income	3,953•	15,126•	17,508	26,678	10,711	9,393•	6,761•	6,148•
Miscellaneous Deductions								
Hire of Equipment	1,712	308	2,263	5,835	2,317	689	414	380
Joint Facility Rents	179	—	—	—	—	—	—	—
Miscellaneous	152	—	—	—	—	—	—	—
Total Miscellaneous Deductions	2,043	308	2,263	5,835	2,317	689	414	380
Available for Interest	5,996•	15,434•	15,245	20,843	8,394	10,082•	7,175•	6,528•
Interest on Funded Debt (To The Western Pacific Railroad Company)	—	—	—	—	—	2,700	2,700	2,700
Interest on Funded Debt (Other)	—	—	—	—	—	—	—	—
Interest on Unfunded Debt (To The Western Pacific Railroad Company)	3,000	3,000	3,000	2,700	2,700	—	—	—
Interest on Unfunded Debt (Other)	—	—	—	104	1•	—	—	4
Total Interest Deductions	3,000	3,000	3,000	2,804	2,699	2,700	2,700	2,704
Net Income	$ 8,996•	$18,434•	$12,245	$18,039	$ 5,695	$12,782•	$ 9,875•	$ 9,232

	1929	1930	1931	1932	1933	1934	1935	1936
Total Railway Operating Revenues	$11,809	$ 7,520	$ 9,461	$12,455	$11,353	$ 7,383	$ 5,355	
Total Railway Operating Expenses	14,845	30,008	14,603	13,327	11,582	12,017	12,580	
Net Revenue from Railway Operations	3,036•	22,488•	5,142•	872•	229•	4,634•	7,225•	
Railway Tax Accruals and Uncollectibles	5,520	1,337	1,335	1,120	1,242	787	801	
Net Railway Operating Income	8,556•	23,825•	6,477•	1,992	1,471•	5,421•	8,026•	
Total Non-Operating Income (Including Equipment Rents)	237	163	12	57	10	6•	13	
Gross Income	8,319•	23,662•	6,465•	1,935•	1,461•	5,427•	8,013•	
Miscellaneous Deductions								
Hire of Equipment	382	615	365	830	88	197	91	
Joint Facility Rents	—	—	—	—	—	—	—	
Miscellaneous	—	—	—	—	—	—	—	
Total Miscellaneous Deductions	382	615	365	830	88	197	91	
Available for Interest	8,701•	24,277•	6,830•	2,765•	1,549•	5,624•	8,104•	
Interest on Funded Debt (To The Western Pacific Railroad Company)	2,700	2,700	2,720	2,895	2,912	3,298	3,774	
Interest on Funded Debt (Other)	—	—	—	—	—	—	—	
Interest on Unfunded Debt (To The Western Pacific Railroad Company)	—	—	—	—	—	—	—	
Interest on Unfunded Debt (Other)	—	—	—	—	—	—	1	
Total Interest Deductions	2,700	2,700	2,720	2,895	2,912	3,298	3,775	
Net Income	$11,401•	$26,977•	$ 9,550•	$ 5,660•	$ 4,461•	$ 8,922•	$11,879•	

•Denotes red figures.

Office of the President,
San Francisco, Calif.

(Testimony of Charles Elsey.)

Statement No. 31

Central California Traction Company

INCOME ACCOUNT, 1928 TO 1935, INCLUSIVE

Central California Traction Company owns and operates a standard gauge, electrically operated railroad between Stockton and Sacramento, California, with a branch line from Lodi Junction to Lodi. Total road mileage, 53.78 miles.

The company is owned jointly and equally by The Western Pacific Railroad Company, The Atchison, Topeka & Santa Fe Railway, and the Southern Pacific Company. Parent companies have agreed to equally share any operating deficits or profits as well as advances for bond interest, sinking fund or Additions and Betterments.

Central California Traction Company
INCOME AND PROFIT AND LOSS ACCOUNT

	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	
Railway Operating Income							
Railway Operating Revenues	$ 445,048.91	$ 390,893.52	$ 453,275.61	$ 309,555.59	$ 254,411.42	$ 188,867.21	$ 2
Railway Operating Expenses	435,103.04	441,620.56	418,225.08	390,248.84	304,236.18	206,925.57	1
Net Income (or Deficit) Railway Operations	$ 9,945.87	$ 50,727.04•	$ 35,050.53	$ 80,693.25•	$ 49,824.76•	$ 18,558.36•	$
Taxes Assignable to Railway Operations	17,315.78	26,082.61	21,825.08	19,830.11	16,196.86	12,084.38	
Operating Income (or Loss)	$ 7,369.91•	$ 76,809.65•	$ 13,225.45	$ 100,523.36•	$ 66,021.62•	$ 30,642.74•	$
Non-Operating Income							
Miscellaneous Rent Income	$ —	$ —	$ —	$ —	$ 46.00	$ —	$
Net Income from Miscellaneous Physical Property	30.00	—	117.50	—	—	—	
Income from Funded Securities	—	—	—	—	—	—	
Income from Unfunded Securities and Accounts	650.00	1,011.07	729.90	1,048.59	860.74	933.30	
Contributions from Others:							
Atchison, Topeka & Santa Fe Ry. Proportion	—	56,455.47	28,819.26	65,308.43	53,568.68	29,996.87	
Southern Pacific Company Proportion	—	56,455.47	28,819.26	65,308.44	53,568.65	29,996.88	
The Western Pacific Railroad Company Proportion	—	56,455.48	28,819.25	65,308.44	53,568.65	29,996.88	
Miscellaneous Income	—	—	—	—	—	—	
Total Non-Operating Income	$ 680.00	$ 170,377.49	$ 87,305.17	$ 196,973.90	$ 161,612.72	$ 90,923.93	$
Gross Income (or Loss)	$ 6,689.91•	$ 93,567.84	$ 100,530.62	$ 96,450.54	$ 95,591.10	$ 60,281.19	$ 1
Deductions from Gross Income							
Miscellaneous Rents	$ —	$ —	$ 100.00	$ —	$ 25.00	$ 25.00	$
Net Loss on Miscellaneous Physical Property	—	—	—	41.52	375.90	278.39	
Interest on Funded Debt	67,875.00	72,462.50	73,675.22	64,183.67	52,023.03	50,270.01	
Interest on Unfunded Debt	2,118.91	7,512.83	13,469.98	23,698.42	10,024.66	10.65	
Amortization of Discount on Funded Debt	13,241.83	13,241.88	13,241.78	11,399.47	9,369.54	9,039.50	
Miscellaneous Debits	602.78	350.63	43.64	80.67	102.26	27.50	
Total Deductions from Gross Income	$ 83,838.52	$ 93,567.84	$ 100,530.62	$ 99,403.75	$ 71,920.39	$ 59,651.05	$
Net Income (or Loss) transferred to Credit (or Debit) of Profit and Loss	$ 90,528.43•	$ None	$ None	$ 2,953.21•	$ 23,670.71	$ 630.14	$

•Denotes red figures.

Central California Traction Company
INCOME AND PROFIT AND LOSS ACCOUNT

Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935	Total
445,048.91	$ 390,893.52	$ 453,275.61	$ 309,555.59	$ 254,411.42	$ 188,867.21	$ 210,598.20	$ 202,135.49	$2,454,285.95
435,103.04	441,620.56	418,225.08	390,248.84	304,236.18	206,925.57	186,280.60	193,889.86	2,576,529.73
9,945.87	$ 50,727.04•	$ 35,050.53	$ 80,693.25•	$ 49,824.76•	$ 18,558.36•	$ 24,317.60	$ 8,245.63	$ 122,243.78•
17,315.78	26,082.61	21,825.08	19,830.11	16,196.86	12,084.38	9,912.72	7,985.53	131,233.07
7,369.91•	$ 76,809.65•	$ 13,225.45	$ 100,523.36•	$ 66,021.62•	$ 30,642.74•	$ 14,404.88	$ 260.10	$ 253,476.85•
—	$ —	$ —	$ —	$ 46.00	$ —	$ 13.50	$ 25.00	$ 84.50
30.00	—	117.50	—	—	—	—	—	147.50
—	—	—	—	—	—	10.42	8.00	18.42
650.00	1,011.07	729.90	1,048.59	860.74	933.30	5.01	—	5,238.61
—	56,455.47	28,819.26	65,308.43	53,568.68	29,996.87	30,545.91	20,457.62	285,152.24
—	56,455.47	28,819.26	65,308.44	53,568.65	29,996.88	30,545.89	20,457.62	285,152.21
—	56,455.48	28,819.25	65,308.44	53,568.65	29,996.88	30,545.91	20,457.60	285,152.21
—	—	—	—	—	—	83.00	16.83	99.83
680.00	$ 170,377.49	$ 87,305.17	$ 196,973.90	$ 161,612.72	$ 90,923.93	$ 91,749.64	$ 61,422.67	$ 861,045.52
6,689.91•	$ 93,567.84	$ 100,530.62	$ 96,450.54	$ 95,591.10	$ 60,281.19	$ 106,154.52	$ 61,682.77	$ 607,568.67
—	$ —	$ 100.00	$ —	$ 25.00	$ 25.00	$ 25.00	$ 25.00	$ 200.00
—	—	—	41.52	375.90	278.39	229.87	338.33	1,264.01
67,875.00	72,462.50	73,675.22	64,183.67	52,023.03	50,270.01	48,462.24	46,587.93	475,539.60
2,118.91	7,512.83	13,469.98	23,698.42	10,024.66	10.65	3.46	3.87	56,842.78
13,241.83	13,241.88	13,241.78	11,399.47	9,369.54	9,039.50	8,718.33	8,381.07	86,633.40
602.78	350.63	43.64	80.67	102.26	27.50	25.50	32.01	1,264.99
83,838.52	$ 93,567.84	$ 100,530.62	$ 99,403.75	$ 71,920.39	$ 59,651.05	$ 57,464.40	$ 55,368.21	$ 621,744.78
90,528.43•	$ None	$ None	$ 2,953.21•	$ 23,670.71	$ 630.14	$ 48,690.12	$ 6,314.56	$ 14,176.11•

Central California Traction Company
INCOME AND PROFIT AND LOSS ACCOUNT

Profit and Loss Account	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933
Credits						
Credit Balance at Beginning of Year	$1,743,290.55	$1,652,222.53	$1,652,222.53	$1,598,067.53	$1,598,067.53	$1,625,324.81
Credit Balance Transferred from Income Account	—	—	—	—	23,670.71	630.14
Profit on Road and Equipment Sold	—	—	—	—	10.00	—
Donations	—	—	—	—	—	—
Miscellaneous Credits	—	—	—	21,640.55	35,432.42	4,973.05
Debits						
Debit Balance Transferred from Income Account	90,528.43	—	—	2,953.21	—	—
Appropriations of Surplus for Investment in Physical Property	—	—	—	—	—	—
Loss on Road and Equipment Retired	539.59	—	—	565.04	5,545.40	4,791.82
Delayed Income Debits	—	—	—	—	24,976.32	—
Miscellaneous Debits	—	—	54,155.00	18,122.30	1,334.13	811.37
Balance Carried Forward to Balance Sheet	1,652,222.53	1,652,222.53	1,598,067.53	1,598,067.53	1,625,324.81	1,625,324.81
Memorandum						
Income and Profit and Loss Debits not contributed through Income by parent companies:						
Year 1928—Income and Profit and Loss Deficit	$ 91,068.02					
Years 1930 and 1932—Adjustment of Discount on Capital Stock	26,897.72					
Year 1934—Adjustment of charge against parent companies in year 1932 for under accrual of depreciation prior to January 1, 1929	36,619.43					
Total	$ 154,585.17					

Central California Traction Company
INCOME AND PROFIT AND LOSS ACCOUNT

Profit and Loss Account	Year 1934	Year 1935	Total
Credits			
Beginning of Year	$1,625,324.81	$1,588,705.38	$1,743,290.55
Transferred from Income Account	48,690.12	6,314.56	79,305.53
and Equipment Sold	3.00	—	13.00
	—	779.55	779.55
Credits	8,847.48	1,511.17	72,404.67
Debits			
Transferred from Income Account	—	—	93,481.64
of Surplus for Investment in Physical			
	—	779.55	779.55
and Equipment Retired	93,629.05	7,713.86	112,784.76
e Debits	—	—	24,976.32
Debits	530.98	111.87	75,065.65
rward to Balance Sheet	1,588,705.38	1,588,705.38	1,588,705.38
and Loss Debits not contributed through companies:			
and Profit and Loss Deficit			$ 91,068.02
932—Adjustment of Discount on Capital			26,897.72
ment of charge against parent companies r 1932 for under accrual of depreciation to January 1, 1929			36,619.43
Total			$ 154,585.17

(Testimony of Charles Elsey.)

Statement No. 33

Alameda Belt Line

INCOME ACCOUNT, 1928-1935, INCLUSIVE

Alameda Belt Line owns 14.09 miles and operates 15.86 miles of standard gauge, steam operated belt line in the City of Alameda and serving the Encinal Terminal docks, California Packing Corporation docks and various other industries.

The company is jointly and equally owned by the Western Pacific and The Atchison, Topeka & Santa Fe Railway. Parent companies have agreed to equally share any operating deficits or profits as well as advances for Additions and Betterments or other requirements.

Alameda Belt Line
INCOME AND PROFIT AND LOSS ACCOUNT

	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934
Operating Income							
Railway Operating Revenues	$ 55,024.66	$ 52,523.48	$ 50,493.94	$ 38,603.61	$ 37,755.67	$ 51,322.24	$ 62,629
Railway Operating Expenses	90,662.22	111,459.75	67,931.18	61,515.43	55,415.64	54,917.23	63,511
Net Revenue (or Loss) from Railway Operations	$ 35,637.56*	$ 58,936.27*	$ 17,437.24*	$ 22,911.82*	$ 17,659.97*	$ 3,594.99*	$ 881
Railway Tax Accruals	1,339.14	1,480.80	2,869.55	2,761.95	2,353.91	2,103.56	2,885
Uncollectible Railway Revenues	—	—	—	—	—	—	—
Railway Operating Income (or Loss)	$ 36,976.70*	$ 60,417.07*	$ 20,306.79*	$ 25,673.77*	$ 20,013.88*	$ 5,698.55*	$ 3,766
Non-Operating Income							
Rent from Locomotives	$ 7.29	$ —	$ —	$ —	$ —	$ —	$ —
Miscellaneous Rent Income	54.80	59.80	2.20	6.00	6.00	6.00	11
Miscellaneous Non-Operating Physical Property	—	—	676.82	879.43	862.01	898.88	906
Income from Unfunded Securities and Accounts	541.39	26,779.60	978.74	390.29	2,364.24	131.08	
Contributions from Other Companies:							
The Western Pacific Railroad Co. Proportion	—	—	—	107,429.86	16,167.39	9,050.08	9,152
Atchison, Topeka & Santa Fe Ry. Proportion	—	—	—	107,429.86	16,167.40	9,050.08	9,152
Total Non-Operating Income	$ 603.48	$ 26,839.40	$ 1,657.76	$216,135.44	$ 35,567.04	$ 19,136.12	$ 19,222
Gross Income (or Loss)	$ 36,373.22*	$ 33,577.67*	$ 18,649.03*	$190,461.67	$ 15,553.16	$ 13,437.57	$ 15,456
Deductions from Gross Income							
Hire of Freight Cars—Debit Balance	$ 4,963.00	$ 2,473.05	$ 2,472.30	$ 2,050.35	$ 1,557.15	$ 2,088.05	$ 3,128
Rent for Locomotives	30,223.83	22,620.70	11,197.20	—	—	—	748
Rent for Work Equipment	439.00	1,074.00	—	—	—	—	—
Miscellaneous Rents	15.00	—	5.00	—	—	—	—
Miscellaneous Tax Accruals	—	—	1,630.15	2,447.39	2,392.62	1,940.98	1,872
Interest on Funded Debt	—	—	19,174.62	1,029.51	11,603.39	9,408.54	9,705
Interest on Unfunded Debt	—	—	—	.15	—	—	—
Total Deductions from Gross Income	$ 35,640.83	$ 26,167.75	$ 34,479.27	$ 5,527.40	$ 15,553.16	$ 13,437.57	$ 15,456
Net Income (or Loss) Transferred to Credit (or Debit) of Profit and Loss	$ 72,014.05*	$ 59,745.42*	$ 53,128.30*	$184,934.27	$ None	$ None	$ Non

*Denotes red figures.

Alameda Belt Line
INCOME AND PROFIT AND LOSS ACCOUNT

	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935	Total
Operating Income									
ting Revenues	$ 55,024.66	$ 52,523.48	$ 50,493.94	$ 38,603.61	$ 37,755.67	$ 51,322.24	$ 62,629.44	$ 62,046.96	$430,400.00
ting Expenses	90,662.22	111,459.75	67,931.18	61,515.43	55,415.64	54,917.23	63,511.09	67,113.91	572,526.45
ie (or Loss) from Railway Operations	$ 35,637.56*	$ 58,936.27*	$ 17,437.24*	$ 22,911.82*	$ 17,659.97*	$ 3,594.99*	$ 881.65*	$ 5,066.95*	$162,126.45*
ecruals	1,339.14	1,480.80	2,869.55	2,761.95	2,353.91	2,103.56	2,885.06	4,200.92	19,994.89
Railway Revenues	—	—	—	—	—	—	—	—	—
perating Income (or Loss)	$ 36,976.70*	$ 60,417.07*	$ 20,306.79*	$ 25,673.77*	$ 20,013.88*	$ 5,698.55*	$ 3,766.71*	$ 9,267.87*	$182,121.34*
Non-Operating Income									
omotives	$ 7.29	$ —	$ —	$ —	$ —	$ —	$ —	$ —	$ 7.29
Rent Income	54.80	59.80	2.20	6.00	6.00	6.00	11.00	6.00	151.80
Non-Operating Physical Property	—	—	676.82	879.43	862.01	898.88	906.66	963.00	5,186.80
nfunded Securities and Accounts	541.39	26,779.60	978.74	390.29	2,364.24	131.08	—	—	31,185.34
rom Other Companies:									
rn Pacific Railroad Co. Proportion	—	—	—	107,429.86	16,167.39	9,050.08	9,152.64	13,863.60	155,663.57
Topeka & Santa Fe Ry. Proportion	—	—	—	107,429.86	16,167.40	9,050.08	9,152.64	13,863.60	155,663.58
Operating Income	$ 603.48	$ 26,839.40	$ 1,657.76	$216,135.44	$ 35,567.04	$ 19,136.12	$ 19,222.94	$ 28,696.20	$347,858.38
me (or Loss)	$ 36,373.22*	$ 33,577.67*	$ 18,649.03*	$190,461.67	$ 15,553.16	$ 13,437.57	$ 15,456.23	$ 19,428.33	$165,737.04
Deductions from Gross Income									
t Cars—Debit Balance	$ 4,963.00	$ 2,473.05	$ 2,472.30	$ 2,050.35	$ 1,557.15	$ 2,088.05	$ 3,128.80	$ 4,549.15	$ 23,281.85
omotives	30,223.83	22,620.70	11,197.20	—	—	—	748.80	1,855.40	66,645.93
Equipment	439.00	1,074.00	—	—	—	—	—	—	1,513.00
Rents	15.00	—	5.00	—	—	—	—	—	20.00
Tax Accruals	—	—	1,630.15	2,447.39	2,392.62	1,940.98	1,872.76	1,708.29	11,992.19
unded Debt	—	—	19,174.62	1,029.51	11,603.39	9,408.54	9,705.87	10,835.06	61,756.99
nfunded Debt	—	—	—	.15	—	—	—	—	.15
uctions from Gross Income	$ 35,640.83	$ 26,167.75	$ 34,479.27	$ 5,527.40	$ 15,553.16	$ 13,437.57	$ 15,456.23	$ 18,947.90	$165,210.11
e (or Loss) Transferred to Credit (or Debit) t and Loss	$ 72,014.05*	$ 59,745.42*	$ 53,128.30*	$184,934.27	$ None	$ None	$ None	$ 480.43	$ 526.93

red figures.

Statement No. 34 (Continued)

Alameda Belt Line

INCOME AND PROFIT AND LOSS ACCOUNT

Profit and Loss Account	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935	Total
Credits									
Credit Balance Transferred from Income	$ —	$ —	$ —	$184,934.27	$ —	$ —	$ —	$ 480.43	$185,414.70
Donations	—	971.70	—	—	—	—	—	—	971.70
Miscellaneous Credits	—	—	13.40	.10	—	—	—	—	13.50
Debits									
Debit Balance at Beginning of Year	4,585.32	76,599.37	136,344.79	189,519.69	4,585.32	4,585.32	4,585.32	4,585.32	4,585.32
Debit Balance Transferred from Income	72,014.05	59,745.42	53,128.30	—	—	—	—	—	184,887.77
Surplus Appropriated for Investment in Physical Property	—	971.70	—	—	—	—	—	—	971.70
Debits from Retired Road and Equipment	—	—	—	—	—	—	—	480.43	480.43
Miscellaneous Debits	—	—	60.00	—	—	—	—	—	60.00
Debit Balance Carried to Balance Sheet	76,599.37	136,344.79	189,519.69	4,585.32	4,585.32	4,585.32	4,585.32	4,585.32	4,585.32

(Testimony of Charles Elsey.)

Statement No. 35

Standard Realty and Development Company
INCOME ACCOUNT, 1922 TO 1935, INCLUSIVE

Standard Realty & Development Company was formed as a wholly owned subsidiary of the Western Pacific and primarily for the purpose of handling land purchases and sales in connection with non-operating property.

The Standard Realty & Development Company has no bonded debt.

STANDARD REALTY AND DEVELOPMENT COMPANY
INCOME ACCOUNT—YEARS 1922 to 1935—BOTH INCLUSIVE

	Year 1922	Year 1923	Year 1924	Year 1925	Year 1926	Year 1927	Year 1928	Year 1929	Year 1930	Year 1931	Year 1932	Year 1933	Year 1934	Year 1935
Credits														
Rentals of Property	$16,622	$13,491	$10,652	$13,350	$11,638	$21,316	$15,318	$16,000	$14,462	$15,210	$11,386	$ 9,763	$ 9,794	$11,686
Interest Receipts	1,258	2,878	2,534	1,257	1,175	1,307	1,679	410	347	289	158	5	5	—
Interest on Bank Balances	599	1,677	1,234	854	1,232	1,310	337	236	290	244	231	121	—	—
Dividend Income	—	—	—	—	7,500	—	7,500	—	—	—	—	—	—	—
Total Credits	$18,479	$18,046	$14,420	$15,461	$21,545	$23,933	$24,834	$16,646	$15,099	$15,743	$11,775	$ 9,889	$ 9,799	$11,686
Debits														
Taxes	$14,910	$11,330	$11,063	$11,475	$12,860	$19,196	$15,172	$17,986	$18,015	$16,349	$16,734	$14,187	$12,289	$11,738
Water and Electric Service	693	582	524	492	417	1,561	842	1,007	951	927	959	604	362	312
Collecting and Renting Expense	574	519	469	451	431	684	490	531	505	464	509	526	495	610
Repairs to Property	1,116	668	461	770	679	1,649	1,095	1,259	1,114	1,517	1,182	976	921	1,462
General Expenses	1,223	1,428	1,320	1,474	1,406	1,810	1,918	1,974	1,968	1,928	1,840	1,297	1,324	2,875
Rental of Property Paid	—	—	—	—	—	—	—	—	—	—	—	—	—	181
Insurance and Premiums	63*	408	993	536	335	805	636	398	339	384	314	152	267	505
Legal Expenses	—	—	240	216	—	—	—	—	—	—	—	—	—	—
Total Debits	$18,453	$14,935	$15,070	$15,414	$16,128	$25,705	$20,153	$23,155	$22,892	$21,569	$21,538	$17,742	$15,658	$17,683
Income Balance (Deficit in Red)	$ 26	$ 3,111	$ 650*	$ 47	$ 5,417	$ 1,772*	$ 4,681	$ 6,509*	$ 7,793*	$ 5,826*	$ 9,763*	$ 7,853*	$ 5,859*	$ 5,997*

*Denotes red figures.

[End of Exhibit No. 29.]

[Endorsed]: F. D. 10913. Exhibit No. 29. (Consisting of 36 Statements.) Witness: Elsey. Filed April 21, 1936.

STANDARD REALTY AND DEVELOPMENT COMPANY
INCOME ACCOUNT—YEARS 1922 to 1935—BOTH INCLUSIVE

s red figures.

[End of Exhibit No. 29.]

ed]: F. D. 10913. Exhibit No. 29. (Consisting of 36 Statements.) Witness: Elsey. Filed April 21, 1936.

(Testimony of Charles Elsey.)

Q. (By Mr. Nicodemus) The next exhibit marked on my memorandum is an analysis of balance sheets of certain subsidiary companies. Have you that exhibit? A. Yes, sir.

Q. Will you describe them more in detail?

A. It is an analysis of the balance sheet of our subsidiary companies as of December 31, 1935, Sacramento Northern Railway Company, Tidewater Southern Railway Company, Deep Creek Railroad Company, and Standard Realty and Development Company.

Mr. Nicodemus: We offer that and ask that it be numbered exhibit 30, and received subject to further examination of Mr. DeGraff.

Examiner Wilkinson: The analysis of balance sheet of the [1914] Sacramento Northern Railway Company, Tidewater Southern Railway Company, Deep Creek Railroad Company, and the Standard Realty & Development Company, will be marked as exhibit No. 30.

(Exhibit No. 30, Witness Elsey, received in evidence.)

Q. (By Mr. Nicodemus) The third exhibit, I understand, is the statement of the Form A prescribed by the Interstate Commerce Commission of net capital expenditures, covering a certain period. I think it is the period from the organization of the present company up to January 1, 1936.

A. Correct.

(Testimony of Charles Elsey.)

Mr. Nicodemus. We offer this as exhibit No. 31, subject to further examination of Mr. DeGraff if desired.

Examiner Wilkinson. The document containing the details of uncapitalized net expenditures will be marked as Exhibit No. 31.

(Exhibit No. 31, Witness Elsey, received in evidence.)

Q. (By Mr. Nicodemus) Exhibit No. 29, Mr. Elsey, which has just been received in evidence, relates very largely to the system accounts as distinguished from the railroad company accounts, the latter being the exhibits being offered at the last hearing.

Have you made a comparison as to the differences between the results for the system and the results for [1915] the railroad company, to determine whether or not there is any substantial variation, or whether the variation is relatively negligible?

A. Yes, sir.

Q. What has been the result?

A. There is very little difference in the compilation of the original statement we filed at the last hearing, which was solely of the Western Pacific Railroad Company, in comparison with this statement taking in the Western Pacific and its various subsidiaries.

Q. Are you willing that this plan be tested by either set of studies? A. Yes, sir.

(Testimony of Charles Elsey.)

Q. Will those variations that you have mentioned and which you state are relatively negligible be explained by the other witnesses or certain of the witnesses you have already named?

A. Yes, sir.

Q. Statement No. 9, forming part of exhibit 29, shows that for the years 1931, 1932, and 1933, the system accounts kept in accordance with the Interstate Commerce Commission's regulations show that less than $1,027,000 was earned in each of these years. Have you any reason to submit as to why you believe that the accounts for these years do not truly reflect the earning power of the [1916] company or what the earning power would be in a future depression? A. Yes, sir.

Q. At least as severe as the one we have just passed through, assuming that we are through it? Will you give those reasons?

A. The operating revenues of the Western Pacific System which consists of the Western Pacific Railroad Company, Sacramento Northern Railway, Tidewater Southern Railway Company, and Deep Creek Railroad Company, reached a low point for the past thirteen years in the years 1932 to 1934, inclusive

The earnings derived from the Northern California Extension during the years 1932 to 1934, are not a fair criterion as to what this property could earn in the future during a similar period of depression as existed during 1932 to 1934.

(Testimony of Charles Elsey.)

The line was placed in operation in November, 1931, and, in addition to commencing operations in the midst of the depression, it had all of the handicaps of any new property, such as the route not being generally known to a large number of shippers throughout the country, and, also, the doubt in the shippers' minds as to whether satisfactory schedules could be maintained over this new mountain route. [1917]

The operating revenues of the Western Pacific System for the years 1932 to 1934, inclusive, were $38,232,797, or an average of $12,744,266 per annum. The operating revenues for the System, for the same period, less the earnings from the Northern California Extension were $33,523,889, or an average of $11,174,629 per annum. The freight revenues for the System for the same period, less the earnings from the Northern California Extension, were $29,242,553, or an average of $9,747,517 per annum.

For the reason that the Sacramento Northern did not become a part of the Western Pacific System until 1926, we have used the years 1926-1927, less earnings from the Chico-Weso bridge traffic, as a "normal" period of freight earnings for the System prior to the construction of the Northern California Extension.

The average freight revenues of the System, less earnings from Chico-Weso bridge traffic, for these two years were $13,714,620 per annum and the av-

(Testimony of Charles Elsey.)

erage freight revenues for the System for the years 1932 to 1934, less Northern California Extension earnings, were 71 per cent of the normal period.

The Traffic Department estimates that our freight revenues for the Northern California Extension for 1940 will be $4,171,625, and if at some time after that year [1918] general business conditions recede to the level existing in 1932 to 1934, and assuming that the revenues for the Northern California Extension decline in the same proportion as our System freight earnings decreased in the present depression, our earnings from this line would then amount to 71 per cent of the above estimate, or $2,961,853.

In arriving at the approximate gross revenues of the Western Pacific System during a depression period after the Northern California Extension is on a normal earning basis we have the following results:

Average annual system operating revenues for the years 1932 to 1934, inclusive, but not including Northern California Extension earnings, $11,174,629.

Estimated operating revenues for the Northern California Extension, $2,961,853.

Total estimated annual operating revenues for the System during a future depression period, $14,136,482.

The foregoing estimated depression operating revenues for the System of $14,136,482 compared

(Testimony of Charles Elsey.)

with System operating revenue of $13,779,237 for the year 1934, in which year, disregarding amortization of discount on first mortgage bonds, there was available for interest, $1,218,000 as compared with interest charges under the Plan of $1,027,000. [1919]

It is assumed that in a future depression year operating expenses will be no higher than in 1934, in which year there was charged to operating expenses, $107,286. account laying 43.5 miles of rail and approximately $54,000 account rebuilding of 134 box cars, as well as the restoration during the last seven months of $92,000, representing the first one-quarter of the 10 per cent general wage reduction which had been placed in effect during February, 1932.

It is my opinion that if, in a future depression, general business conditions recede to the level existing in the years 1932 to 1934, inclusive, our System earnings will not fall to the level of those years for the reason that just prior to the depression we constructed several branches, which, like the Northern California Extension, have proven their value during a depression period but have not as yet had the benefits of being in operation during normal times and, consequently, have not been able to demonstrate their real worth as feeders to our main line.

I refer to the Terminous Branch, which was placed in operation in January, 1928, and produced operating revenues to the System in 1934, of $321,380; the Connection with the Oregon Short Line at Wells, Nevada, was completed in June, 1929, and

(Testimony of Charles Elsey.)

produced revenues of [1920] $180,000 in 1933; the Holland Line of the Sacramento Northern Railway was placed in service in 1929, and produced revenues of $222,000 in 1935. In addition to the foregoing we purchased a one-third interest in the Central California Traction Company on January 1, 1928, and during the depression years the business from this connection has given us revenues in excess of $200,000 per annum.

On January 1, 1929, we purchased the San Francisco-Sacramento Railroad, which was merged with the Sacramento Northern Railway. The acquisition of this property has given us an opportunity to serve some very desirable agricultural territory and also some highly developed industrial districts, the principal industrial point being Pittsburg, California, at which point is located the Columbia Steel Company plant, a subsidiary of the United States Steel Corporation.

The completion, in May, 1934, of the Dotsero Cutoff by the Denver & Rio Grande Western Railroad strengthened the position of the Western Pacific by making available to it a route 175 miles shorter than the route via the old line on traffic moving via our friendly connections, i. e., the Burlington and Rock Island Railroads; thus affording to the Western Pacific a better opportunity of securing competitive traffic moving between points in [1921] California, on the one hand, and territory Denver and east thereof, on the other.

(Testimony of Charles Elsey.)

As business resumes normalcy, the vast gathering power of the Burlington and Rock Island will, without doubt, be reflected to a very marked degree in increased freight and passenger traffic and revenue to the Western Pacific.

Q. In view of those considerations, do you believe that the proposed fixed charge of $1,027,000 under the plan is a figure safely within the System's power to earn even under depression conditions as serious as those through which we have passed?

A. I do.

Mr. Nicodemus. You may cross examine, Mr. Swaine, if you wish.

Cross Examination

Q. (By Mr. Swaine) Mr. Elsey, would you regard it as of value to your company to have your fixed interest obligations eligible for investment by savings banks and insurance companies?

A. Yes.

Q. Under the laws of New York?

A. I am not familiar with the laws of New York.

Q. I am just saying, would you regard it as of value to the credit of the company to have your fixed interest- [1922] bearing obligations eligible for investment by New York savings banks or New York insurance companies. A. Yes, sir.

Q. Do you think that your record of earnings or your estimate of earnings is apt to show over the next few years the fixed interest 1½ times earned?

A. I am quite certain of that, but there will be

(Testimony of Charles Elsey.)

another witness that will give that in detail, Mr. Swaine, and will have the figures.

Q. You said that the differences between the figures which you produced at the last hearing and the figures you have produced at this hearing with reference to the amount available for interest show no substantial difference between the company figures produced last time and the consolidated figures produced this time, is that right? A. Yes, sir.

Q. The figure produced last time for the year 1929—I do not remember the number of the exhibit, but it was the exhibit which is headed, "Annual fixed charges under Plan, $1,027,036. Record of present company," and a series of years beginning with 1929, and "Available for Interest,"—the year 1929; it is a one-page exhibit that you have had before.

Mr. Nicodemus. You mean statement 22 in this exhibit? [1923]

Mr. Swaine. No. no. I want the little one-page exhibit that you introduced before. What was the number?

The Witness. Exhibit 3.

Q (By Mr. Swaine) Exhibit 3 showed for 1929, available for interest, $2,919,056. The exhibit which you have produced this morning shows $2,520,000. I will use round figures. That difference of $400,000 you do not regard as substantial, then?

A. Yes, but the proposition is, as I have just explained, our credit is going to be judged by our new set-up.

(Testimony of Charles Elsey.)

Q. That is not the question I asked you, Mr. Elsey. You made the statement that there was no substantial difference between the figures you produced last time and the figures you produced today.

Mr. Nicodemus. Except—

Mr. Swaine. Listen to me. I asked you just one question:

Q. Do you regard the difference between $2,500,000 and $2,900,000 as not substantial? I just want to get the witness' ideas as to the amount he regards as substantial. That can be a yes or no answer. Your figure before for the year was $2,919,000, and your figure now is $2,520,000.

Mr. Nicodemus. I think you ask the question a little too broadly. [1924]

Mr. Swaine. No, that is all I want to know: Does he regard that difference of $400,000 as a non-substantial difference?

Mr. Nicodemus. Those figures were explained at the last hearing. He meant that the new exhibits—

Mr. Swaine. Oh, I am not examining you Mr. Nicodemus. I am asking Mr. Elsey.

Q. The identical figure under this item "Available for Interest" on Exhibit 3 is $2,900,000, and it is $2,520,000 now. Do you regard that as substantial or not in railroad earnings?

A. That was not the proposition, Mr. Swaine.

Q. I did not ask you what the proposition was when I asked you that question.

(Testimony of Charles Elsey.)

A. I made the statement that the substantial difference was negligible. That was on the proposition of our forecast for 1936 to 1940.

Q. I am not talking about the future; that is speculative. I am trying to develop the past.

A. I am talking about the future.

Q. Would you say the difference between $2,90,000 and $2,500,000 was substantial in the past?

A. I was not referring to the past, Mr. Swaine.

Examiner Wilkinson. Mr. Elsey, suppose you just answer the question and then explain it as you see fit [1925]

Q. (By Mr. Swaine) The figure that you introduced before as "Available for Interest," was $2,300.000 in 1930. You have now produced a figure of $1,500,000, $1,552,000, to be exact.

A. It is in 1930?.

Q. That is 1930 A. Yes.

Q. Do you not think that anybody judging the plan in respect of the past record—I am not assuming that anybody would be so foolish as to judge this plan in the light of the past earnings, but if anybody were so foolish as to do that, would that not be a very substantial difference?

A That would, if they simply took that one situation into consideration.

Q. That makes a substantial difference, does it not? A. Yes, sir.

Q. The year 1931, the figure which you produced last time was $665,000 available for interest, and the

(Testimony of Charles Elsey.)

figure that you have now produced is a deficit of $186,000. If anyone tries to look at this in the light of the past, that makes a very serious difference, does it not?

A. If they simply confine themselves to that one year, yes.

Q. If that is a factor, so far as that factor enters into [1926] it, it is a serious adverse difference, is it not? A. That is correct.

Q. Take the year 1932. The figure which you produced before was $972,000. The figure which you produce today, is $252,000. Now, we will omit the factor of the speculative future, but the factor in the past involves a substantial change in appearance, does it not, from what we had before?

A. Yes, sir.

Q. In 1933, the figure which you produced before was $1,367,000. The figure which you produced this morning is $674,000. That again produces a substantial adverse comparison, does it not?

A. It does, yes. The proposition is that—

Q. I did not ask you what the proposition is, I am confining it to this one factor. I know there are other factors.

In 1934, the figure you produced before was $1,700,000. The figure which you produced this morning is $1,084,000. That again gives a substantial adverse appearance, does it not?

A. Yes, sir.

(Testimony of Charles Elsey.)

Q. The figure that you produced before for 1935 was $1,547,000. The figure which you produced this morning is $805,000. Looking at just that one factor now, that [1927] again is a substantial adverse comparison, is it not? A. Yes, sir.

Q. The figure that you produced for 1934 before was, as I said, $1,761,000, and for 1935, $1,547,000, a decline of $200,000. Again, the figures that you produced this morning show for 1934, $1,084,000, and for 1935, $805,000, a decline of nearly $300,000. The indication of a declining trend from 1934 to 1935, looking at just that one factor, is itself an adverse factor, is it not, that anybody has to take into account in considering what kind of a plan one ought to have?

A. No, not necessarily.

Q. Why not?

A. The proposition is, if you are going to make a comparison of two particular years, you have to analyze what are the results of the figures in those two years. I will be prepared upon that.

Q. Yes, but that evidences a declining trend in net, does it not?

A. It is on the face of it, but after you take into consideration, as I said, what has happened in those two years as to revenues and expenses, it will change the complexion of the figures.

Q. How did you treat the Railroad Retirement Act charges and credits as between 1934 and 1935, in these two figures [1928] that you have just given us?

(Testimony of Charles Elsey.)

A. 1935, I show as a deduction.

Q. You charge it out in 1935?

A. Yes, sir.

Q. How much?

A. I do not have the figures. Mr. Engelbright will be prepared to discuss those figures.

Mr. Swaine: So as to have the continuity of the record, I wonder if he will supply those.

Examiner Wilkinson: Will you supply those?

Mr. Nicodemus: I think part of it went in one year and part in another.

Mr. Engelbright: In 1934, there were charged for five months pension charges of $97,683, and, to complete the thing, in 1935, there were charged for four months, $51,593. In that same year, there was a credit taken for the refund of the entire pension collections of $149,267, which is the sum of those other two figures.

Q. (By Mr. Swaine) With that set of figures given, Mr. Elsey, I ask you whether the 1934 earnings as compared with the 1935 earnings are not distorted by $97,000; that is, if you disregard the pension in both periods, your 1934 earnings would be $97,000 higher than are revealed here, and if you disregard the pension figures in 1935, the 1935 figure will be $97,000 lower. In other [1929] words, eliminating the Railroad Retirement Act entirely from both accounts, you would have $1,181,000 for 1934, and you would have $708,000 for 1935. Is that not correct?

(Testimony of Charles Elsey.)

A. That is about right, but in making a comparison you cannot pick out one particular item that is going to suit your case without going into the whole comparison as to the two-year period.

Q. I understand all that, Mr. Elsey. All I am trying to do is get the facts. A. I know.

Q. And see whether these are not facts, that anybody interested in the credit of the property in the future has to take into account.

A. That is correct, but they want to take into account the whole picture.

Q. Oh, I understand that, there are other things to be taken into account, but I want to be sure we have all the things.

I would like to ask you also how you treated, in arriving at these figures, the amounts which you advanced in the years 1928 to 1935, inclusive, to the Central California Traction Company, and in the years 1932 to 1935, inclusive, the amounts which you advanced to the Alameda Belt Line.

A. That is deducted from our income before taking into [1930] consideration the amount available for interest.

Q. All advances? A. Yes, sir.

Q. Whether for sinking fund or not?

A. Yes, sir.

Mr. Swaine: Is that correct, Mr. Englebright, all advances, whether for sinking fund or not?

Mr. Englebright: I would rather have you ask Mr. DeGraff, Mr. Swaine.

(Testimony of Charles Elsey.)

Mr. DeGraff, all advances for the Central California Traction and the Alameda Belt Line come out of our income before available for interest, do they not?

Mr. DeGraff: The advances for sinking fund do not affect the income. They are charged up to the Central California Traction Company as advances.

Mr. Swaine: That is what I thought. In other words, how much of this income here that you have reported has to go, as a practical matter, to these two companies, to keep them going before any amount is really available cash-wise to pay interest on your own bonds?

Mr. DeGraff: The amount shown in those statements there is in the Western Pacific's income deductions as "Loss from separate operating properties." That will indicate the amount that the Western Pacific has assumed on account of the Central California Traction Company [1931] and the Alameda Belt Lines' income.

Mr. Swaine: Does that include the sinking fund?

Mr. DeGraff: No. The sinking fund is a separate item.

Mr. Swaine: Does it include advances for additions and betterments to those properties?

Mr. DeGraff: No.

Mr. Swaine: Have you a statement here of the amount of the advances that you had to make to those two properties for sinking fund and additions

(Testimony of Charles Elsey.)

and betterments? You tell me that the advances for bond interest are already out.

Mr. DeGraff: Yes.

Mr. Swaine: And any advances for operating loss are already out.

Mr. DeGraff: Yes.

Mr. Swaine: But not the advances for sinking fund or additions or betterments.

Mr. DeGraff: No.

Mr. Swaine: Do you know how much that is?

Mr. DeGraff: There are statements in that exhibit that show it.

Q. (By Mr. Swaine) You would agree, Mr. Elsey, would you not, that if your commitments to these two properties require you to put up cash for such purposes and additions and betterments and for sinking fund, that amount of cash [1932] really is not available in any practical sense for the payment of interest on Western Pacific obligations?

A. Not at the present time.

Q. Would you say that in any one of these years, 1931 to 1935, inclusive, to which I have been referring, there was either any extraordinary undermaintenance or any extraordinary over-maintenance? That is, are the accounts distorted either way? I just want the facts.

A. I would want to make an analysis of the accounts, Mr. Swaine, before I answer that question.

Q. I thought that was one of the reasons why we took the four weeks' adjournment, so that we

(Testimony of Charles Elsey.)

would know about that. I asked you before, and Mr. Nicodemus thinks that I owe you an apology for misleading you. I certainly did not intend to mislead you, and I want now to know what the fact is.

Is there any under-maintenance or is there any over-maintenance in producing the figures that you have now produced from 1931 to 1935, inclusive?

A. I am not prepared to state, Mr. Swaine.

Q Do you not think that is a relevant fact which any one questioning the soundness of the plan or considering the soundness of a plan ought to have before him?

A. If you wish those figures, we will prepare them for you. [1933]

Q. I am just asking you whether you do not think that is a relevant thing. A. Yes, I do.

Mr. Nicodemus: Is that not covered by Mr. Englebright's proposed testimony?

Mr. Swaine: Oh, it is here?

Mr. Nicodemus: Yes, sir. We explained that the detail of these statements would be supported by certain individual witnesses.

Q (By Mr. Swaine) Looking to the future, what have you done with reference to fuel costs; first, you operate your locomotives with coal?

A. Partly coal and partly oil.

Q. What have you done about coal costs?

A. That matter will be gone into in detail on those operating expenses by Mr. Englebright.

Q. You do not know?

(Testimony of Charles Elsey.)

A. No, sir, I have not gone into the detail of it.

Q. Have you a statement of your earnings for the first three months of 1936, on a consolidated basis?

A. I could not say. I hardly think so.

Q. A statement of your consolidated income account for the three months of 1936?

Mr. Englebright: No, we have not computed the third month yet. [1934]

Mr. Swaine: Can you tell me how it compares with the first three months of 1935?

Mr. Englebright: Consolidated?

Mr. Swaine: Yes.

Mr. Englebright: No, I could not offhand. I could ascertain it for you

Mr. Swaine: Could you tell me approximately?

Mr. Englebright: I do not like to give an approximate figure.

Mr. Nicodemus: Mr. Bon testified at the last hearing that we got off to a bad start in 1936.

Q. (By Mr. Swaine) The reason I ask is that your estimate for 1936, is $1,600,000, whereas your actual last year was $805,000. In other words, you are estimating that you will make twice as much in 1936 as you made in 1935. I would like to know just how well you are approximating that.

A. As I say, I could not answer that question without having a statement prepared.

Q. You mean you do not know how your property is doing?

(Testimony of Charles Elsey.)

A. I am not going to quote any figures that I am not prepared to give an accurate answer to.

Q. You are the operating manager of the property, are you not? A. Yes, sir. [1935]

Q. Is it doing better this year or worse this year than it did last year?

A. So far as gross is concerned, this year it is doing better.

Q. I mean net.

A. I have not checked it up.

Q. How did it do in January?

A. I could not say.

Q. Or February?

A. I could not say as far as the net is concerned. I do not have the figure here, and I am not going to quote—

Q. You mean you have no impression whether it is better or worse?

A. I am not to quote any figures. If you want any statement prepared, we will prepare a statement.

Q. I am not anxious to have a detailed, penny statement.

A. We will give you an approximate figure, if that is what you wish.

Q. I would like to know how your property is doing, as to whether it is doing better this year or not. You have estimated it is going to do twice as well That would be a very happy result to the bondholders.

(Testimony of Charles Elsey.)

Mr. Nicodemus: I do not know of any such estimate.

The Witness: The proposition of a three-months statement at the beginning of the year to me would not be a [1936] conclusive answer to the proposition of what we propose to do for the twelve months' period.

Q. (By Examiner Wilkinson) Mr. Elsey, did the results of operation this year influence your estimates for 1936 to 1940, in any way?

A. I did not quite get your question.

Q. Did your actual results of operation this year influence your estimate for 1936 to 1940, in any way?

A. Why, yes. Our traffic witness stated that the first two months of the year we did not do so well, and of course he has used that as his basis for his 1936 statement, but only 1936. It would have no effect in the years 1937 to 1940, inclusive.

Q. Then do I infer from that that your operations so far this year show a worse result than for 1935?

A. The first two months do. Our preliminary figures for March, show a very material pick-up so far as gross is concerned.

Q. (By Mr. Swaine) But you do not know as to the net? A. No, sir.

Q. So you are relying on the last nine months of the year to make the difference between $805,000 and $1,524,000? I was wrong in saying $1,600,000; $1,524,000 for this year.

(Testimony of Charles Elsey.)

A. That is correct. [1937]

Q. The present plan, Mr. Elsey, provides for a capital fund immediately following fixed interest, does it not? A. Correct.

Q. If I remember the negotiations, you were the one that was very insistent upon that capital fund. Why do you think you have to have that capital fund?

A. A certain class of expenditures I do not believe should be capitalized.

Q. Although charged to capital under the Interstate Commerce Commission rules? A. Yes.

Q. Your estimate is you should have at least a half a million dollars during the years 1936 to 1940?

A. Yes, sir.

Q. As a matter of fact, you thought it ought to be more than that, did you not?

A. Yes, sir.

Q. And this was a compromise?

A. Yes, sir.

Q. The plan provides for a million dollars for the five years following that, does it not?

A. Correct.

Q. Which was your idea of what it really ought to be? A. Yes, sir.

Q. Would you be willing as the officer responsible for the [1938] operation of this property and its duty to the public to have any part of that capital fund either come out proportionately with some return upon income bonds, or after some return

(Testimony of Charles Elsey.)

on income bonds? The way your plan now is drawn, the whole capital fund comes out after interest charges and before contingent interest charges. Would you be willing as the responsible officer to have it provided that half of the available net income or one-fourth of the available net income after fixed charges up to the amount of $500,000, or a million dollars, whatever your figure is, should be applied to the capital fund? A. No, sir.

Q. Why not?

A. As I have said before, I think there is a certain class of expenditures that should not be capitalized.

Q. But if you are going to have all this income that you estimated, then if you took out half of the income after fixed charges until you got up to $500,000, that being your estimate, you would amply provide for it, and in the meantime you would be providing some return to the existing mortgage bondholders.

A. I have taken the position right along, Mr. Swaine, that this matter of our capital fund should come out before any contingent interest is paid.

[1939]

Q. That is really because you are not at all sure the earnings are going to be there, is it not?

A. No.

Q. If you were sure the earnings would be there, you would be willing to divide the earnings as between a capital fund and interest, would you not?

(Testimony of Charles Elsey.)

A. No, sir, not on a contingent interest.

Q. It has been so provided in various other systems; why not here?

A. I do not know about your other systems.

Q. You want the capital fund sure, do you not?

A. Absolutely.

Q. You want it sure, and you do not believe that if you divided the income after fixed charges you would be sure of this capital fund?

A. No, I am not taking that position, Mr. Swaine. I am taking the position that——

Q. Would you be sure of it?

A. I could not say.

Q. You are very uncertain as to whether——

A. You never can tell the future. The proposition is, there are certain capital charges that come on a railroad every year that are not revenue-producing expenditures, and that money should certainly come ahead of your interest on your income bonds. [1940]

Q. You would not be willing to rely upon your estimates of earnings in determining whether or not you would be sure of your capital fund?

A. It is not a matter of relying on the estimates. This is the policy that I think is the correct policy to pursue in the matter of financing.

Q. That is because you want to be sure of it, is it not?

A. Not only sure, but I say it is a policy.

Mr. Swaine: That is all.

(Testimony of Charles Elsey.)

Q. (By Mr. Wilkinson) Mr. Elsey, in connection with your exhibit 22, which shows your forecast for 1936 to 1940, of the Western Pacific, as to the amount which you show in line 30, interest on equipment trust and lease conditional sale agreement for 1936, $121,680, is there any provision made in this forecast here for payment of principal on these equipment trusts?

A. That comes out of your capital fund, Mr. Examiner.

Q. You mean that is going to come out of the ten million dollars new money?

A. No, that is out of the capital fund of the $500,000 a year for the first five years and a million dollars for the second three years thereafter.

Q. What is the total amount of payments on the equipment trusts for 1936?

Mr. Englebright: You mean the principal, Mr. Wilkinson? [1941]

Examiner Wilkinson: Yes, payment on the principal.

The Witness: $717,933. Of course, we have our depreciation also that is charged out of our income account.

Examiner Wilkinson: Certainly, and do you have it readily available for the future years?

The Witness: Yes, sir.

Examiner Wilkinson: Will you read it into the record, please?

(Testimony of Charles Elsey.)

Mr. Englebright: I can give you that, Mr. Elsey, direct. You have to figure it from that statement, do you not?

The Witness: I was just going to figure it out. The equipment trust of March 1, 1923, is a payment of $375,000 a year, and the last payment is in 1938. The equipment trust of March 15, 1934, an annual of $207,000 a year, and the last payment is in 1938. Equipment trust of May 1, 1929, $73,000 per year, and the last payment is in 1943.

The contract with the Baldwin Locomotive Works dated June 5, 1931, is a payment of $62,933, and the last payment is in 1941.

(Witness excused.) [1942]

H. E. POULTERER

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Your occupation, Mr. Poulterer, is what?

A. Assistant freight traffic manager of the Western Pacific Railroad, Sacramento Northern Railway, and Tidewater Southern Railroad.

Q. How long have you been connected with the Western Pacific System?

A. Since April 20, 1931.

Q. Prior to that time, what experience have you had in traffic?

(Testimony of H. E. Poulterer.)

A. I have had approximately 30 years railroad experience, all in the traffic department. I was assistant general freight agent of the Union Pacific System at Omaha prior to going with the Western Pacific.

Q. Did you collaborate with Mr. J. F. Bon in the preparation of Exhibit 22?

A. Yes, I did.

Q. Insofar as the same relates to operating revenues, that is?

A. Yes, operating revenues.

Q. Have you read Mr. Bon's testimony at the hearing on March 23rd? [1943] A. Yes.

Q. Do you adopt that? A. Yes.

Q. You are prepared to stand cross examination on his testimony? A. Yes.

Q. Did you collaborate with Mr. Bon in the preparation of Exhibit 28, the exhibit received this morning, which has the 36 individual statements?

A. Insofar as the operating revenues are shown on that statement, yes.

Q. Have you prepared a separate exhibit, a new exhibit dealing with certain phases of the operating forecasts of revenues? A. Yes, I have.

Q. Will you describe that?

A. It is an exhibit consisting of five pages, entitled "Statements indicating revenues of Sacramento Northern Railway, Tidewater Southern Railway Company, and Deep Creek Railroad Company,

(Testimony of H. E. Poulterer.)

for the years 1929 to 1935, inclusive, and a forecast of revenues for the years 1936 to 1940, inclusive."

Q. Have you any comments to make on the exhibits I have already mentioned, Exhibit 22, Exhibit 29, and this new exhibit which you have prepared, which I now offer as [1944] Exhibit 32?

A. Yes. I would like to make some remarks about this new exhibit.

Mr. Nicodemus: I offer this subject to the further testimony of the witness.

Examiner Wilkinson: The statement indicating revenues of the Sacramento Northern Railway, the Tidewater Southern Railway Company, and the Deep Creek Railroad Company for the years 1929 to 1935, inclusive, and a forecast of revenues for the years 1936 to 1940, will be marked Exhibit 32.

(Exhibit No. 32 Witness Poulterer, received in evidence.)

(Testimony of H. E. Poulterer.)

EXHIBIT No. 32

STATEMENTS
INDICATING REVENUES
OF
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY
COMPANY
AND
DEEP CREEK RAILROAD COMPANY
For Years 1929 to 1935, Inclusive,
and a
Forecast of Revenues for the Years
1936 to 1940, Inclusive.

Office of Freight Traffic Manager,
Sacramento Northern Railway,
Tidewater Southern Railway Co.,
San Francisco, California,
April 3, 1936.

Statement No. 1

Sacramento Northern Railway

FREIGHT TRAFFIC AND FREIGHT REVENUE FOR YEARS 1929 TO 1935, INCLUSIVE

Commodity	Year	Cars	Tons	S. N. Revenue	S. N. Rev. Per Ton
Products of Agriculture	1929	11,260	296,365	$417,541.53	$1.41
	1930	15,800	392,465	526,330.88	1.34
	1931	14,375	384,427	427,833.28	1.11
	1932	12,142	328,315	350,570.50	1.07
	1933	13,865	387,198	336,144.00	.87
	1934	14,662	416,184	375,180.46	.90
	1935	10,712	284,207	303,425.35	1.07

(Testimony of H. E. Poulterer.)

Animals and Products	1929	786	10,193	$ 19,747.98	$1.94
	1930	1,217	16,704	30,752.97	1.84
	1931	1,418	19,020	33,237.18	1.75
	1932	831	10,075	17,146.28	1.70
	1933	1,230	14,268	22,930.00	1.61
	1934	1,763	20,247	32,202.86	1.59
	1935	1,481	16,952	32,474.77	1.92
Products of Mines	1929	4,536	216,783	$114,900.61	$ .53
	1930	3,300	149,342	81,094.69	.54
	1931	2,470	103,000	65,838.53	.64
	1932	2,279	112,011	67,734.66	.60
	1933	1,496	69,140	40,976.85	.59
	1934	1,323	61,620	31,504.89	.51
	1935	2,797	142,520	61,165.81	.43
Products of Forests	1929	1,269	30,362	$ 39,730.61	$1.31
Chico-Oroville Bridge	1929	11,862	361,328	71,172.00	.20
$6.00 per car	1930	1,165	27,775	38,893.89	1.40
Chico-Oroville Bridge	1930	8	250	48.00	.19
$6.00 per car	1931	985	22,843	29,015.46	1.27
Chico-Oroville Bridge	1931	8	258	48.00	.19
$6.00 per car	1932	555	12,608	16,056.51	1.27
	1933	608	14,326	16,977.25	1.19
	1934	787	19,714	18,596.31	.94
	1935	798	21,046	20,524.46	.98
Manufactures and	1929	6,521	172,792	$344,053.88	$1.99
Miscellaneous	1930	8,734	227,063	433,483.23	1.91
	1931	6,884	194,985	332,830.15	1.71
	1932	5,525	155,541	269,948.56	1.74
	1933	5,911	154,115	260,149.90	1.69
	1934	6,118	172,740	256,972.43	1.49
	1935	7,264	219,749	298,763.05	1.36
Less Carload	1929	.....	31,640	$143,561.34	$4.54
	1930	.....	26,707	124,092.37	4.65
	1931	.....	18,687	82,679.50	4.42
	1932	.....	11,242	47,955.06	4.27
	1933	.....	10,507	40,256.53	3.83
	1934	.....	11,967	45,576.08	3.81
	1935	.....	12,990	44,175.01	3.40

(Testimony of H. E. Poulterer.)

TOTAL	1929	36,234	1,119,463	$1,150,707.95	$1.03
	1930	30,224	840,306	1,234,696.03	1.47
	1931	26,140	743,220	971,482.10	1.31
	1932	21,332	629,792	769,411.57	1.22
	1933	23,110	649,554	717,434.53	1.10
	1934	24,653	702,472	760,033.03	1.08
	1935	23,052	697,464	760,528.45	1.09

Office of Freight Traffic Manager,
Sacramento Northern Railway,
San Francisco, California,
April 3, 1936.

Statement No. 2

Tidewater Southern Railway Company

FREIGHT TRAFFIC AND FREIGHT REVENUE FOR YEARS 1929 TO 1935, INCLUSIVE

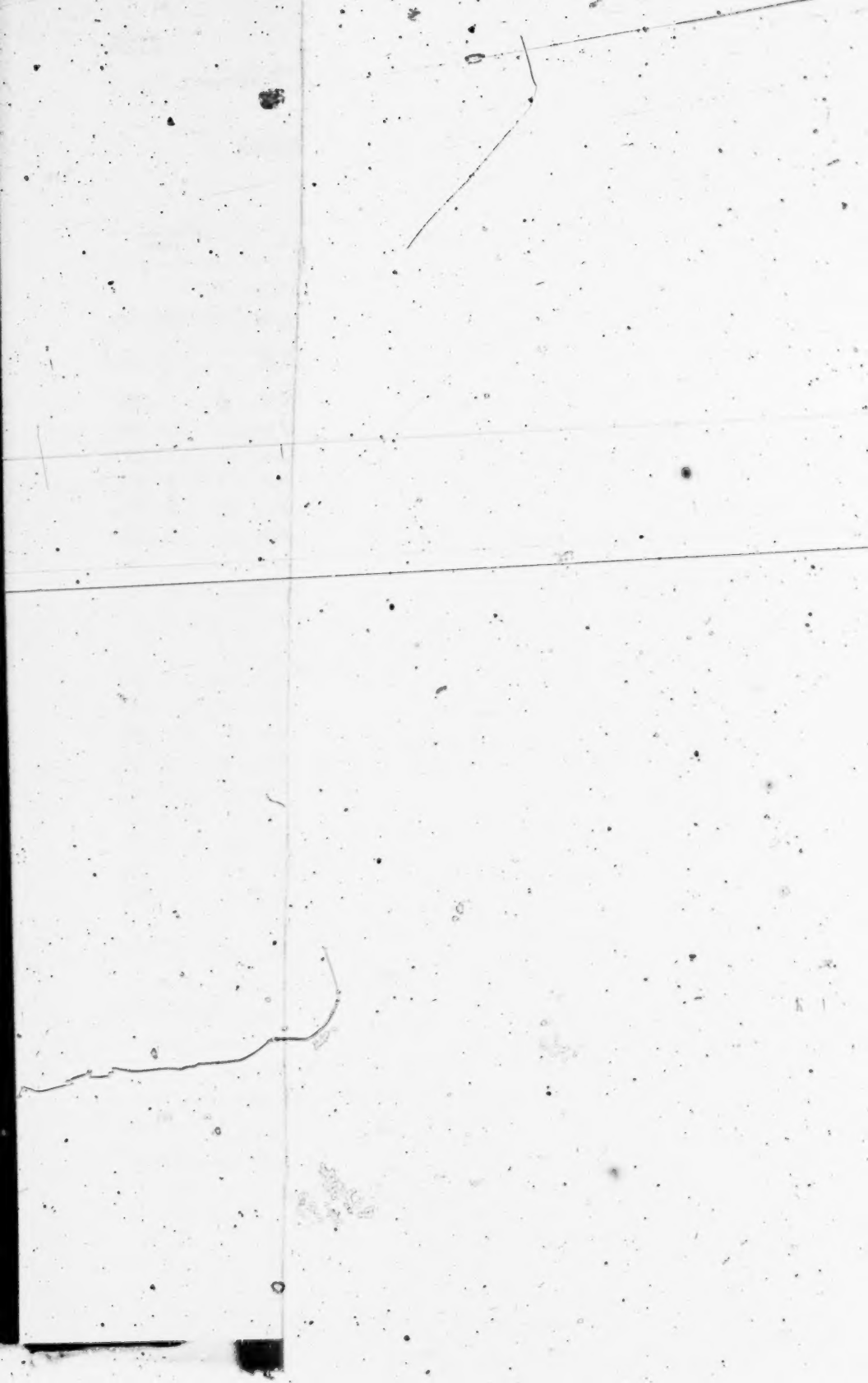
Commodity	Year	Cars	Tons	T. S. Revenue	T. S. Rev. Per Ton
Products of Agriculture	1929	4,617	67,641	$181,135.84	$2.68
	1930	6,182	90,144	314,600.68	3.49
	1931	5,181	130,200	185,202.22	1.42
	1932	6,129	180,212	168,692.71	.94
	1933	6,230	202,107	151,903.00	.75
	1934	7,317	205,941	218,192.25	1.06
	1935	5,930	148,365	211,818.94	1.43
Animals and Products	1929	6	71	$ 134.56	$1.90
	1930	4	48	107.00	2.23
	1931	5	60	118.00	1.97
	1932	17	208	439.15	2.11
	1933	64	778	1,225.46	1.58
	1934	46	623	975.39	1.57
	1935	49	662	927.54	1.40
Products of Mines	1929	250	11,175	$ 5,839.46	$ .52
	1930	620	27,714	12,374.30	.45
	1931	617	27,580	10,936.51	.40
	1932	347	15,511	6,874.25	.44
	1933	186	8,314	4,333.13	.52
	1934	326	14,908	8,229.12	.55
	1935	260	11,376	7,305.09	.64

(Testimony of H. E. Poulterer.)

Products of Forests	1929	466	10,392	$ 13,948.96	$1.34
	1930	454	10,124	13,769.92	1.36
	1931	211	4,705	5,936.40	1.26
	1932	250	5,575	6,295.95	1.13
	1933	94	2,096	2,491.90	1.19
	1934	154	3,395	3,763.64	1.11
	1935	217	4,914	5,682.05	1.16
Manufactures and Miscellaneous	1929	2,295	70,570	$ 75,198.77	$1.07
	1930	2,294	70,501	80,736.65	1.15
	1931	2,091	64,287	58,862.09	.92
	1932	1,537	47,500	45,186.05	.96
	1933	1,319	41,680	39,418.39	.95
	1934	1,285	40,487	36,912.21	.91
	1935	1,475	44,803	42,444.70	.95
Less Carload	†1929	——	1,577	$ 5,740.95	$3.64
	†1930	——	1,076	3,917.58	3.64
	†1931	——	1,024	3,741.15	3.64
	†1932	——	814	2,961.70	3.64
	1933	——	858	3,061.82	3.57
	1934	——	920	3,446.28	3.75
	1935	——	1,144	4,120.30	3.60
TOTAL	1929	7,634	161,426	$281,998.54	$1.74
	1930	9,554	199,607	425,506.13	2.13
	1931	8,105	227,856	264,796.37	1.16
	1932	8,280	249,820	230,449.81	.92
	1933	7,893	255,833	202,433.70	.79
	1934	9,128	266,274	271,518.89	1.02
	1935	7,931	211,264	272,298.62	1.29

†Tons available for 1933-34-35 only. Tons for 1929 to 1932, inclusive, based on average rate per ton for 1933 to 1935, inclusive.

Office of Freight Traffic Manager,
Tidewater Southern Railway Company,
San Francisco, California,
April 3, 1936.



Statement No. 3

Sacramento Northern Railway

FORECAST OF REVENUE FROM TRANSPORTATION AND OTHER RAILWAY OPERATIONS
FOR YEARS 1936 TO 1940, INCLUSIVE

Account	Item or Account	YEARS 1936	1937	1938	1939	1940
	Revenue from Transportation					
101	Passenger	$ 337,668	$ 353,747	$ 385,905	$ 434,142	$ 466,300
102	Baggage	3,638	3,811	4,157	4,676	5,022
103	Parlor, Dining and Special Car)					
104	Mail	8,596	8,596	8,596	8,596	8,596
105	Express	30,000	30,000	30,000	30,000	30,000
106	Milk	1,000	1,000	1,000	1,000	1,000
107	Freight	855,521	933,295	1,011,069	1,049,956	1,088,843
108	Switching	10,000	10,000	10,000	10,000	10,000
109	Miscellaneous Transportation	10,000	10,000	10,000	10,000	10,000
	Total	$1,256,423	$1,350,449	$1,460,727	$1,548,370	$1,619,761
	Revenue from Other Railway Operations					
110	Station and Car Priveleges	$ 700	$ 700	$ 700	$ 700	$ 700
111	Parcel Room	600	600	600	600	600
112	Storage	300	300	300	300	300
113	Demurrage	1,705	1,705	1,705	1,705	1,705
115	Rents of Tracks and Facilities	11,823	11,823	11,823	11,823	11,823
116	Rent of Equipment	4,324	4,324	4,324	4,324	4,324
117	Rents of Buildings and Other Property	7,387	7,387	7,387	7,387	7,387
118	Power	158	158	158	158	158
119	Miscellaneous	695	695	695	695	695
	Total	$ 27,692	$ 27,692	$ 27,692	$ 27,692	$ 27,692
	Total Interurban	$1,284,115	$1,378,141	$1,488,419	$1,576,062	$1,647,453
	Total City Line Revenues	$ 38,561	$ 39,317	$ 40,073	$ 40,829	$ 41,585
	Gross Revenue	$1,322,676	$1,417,458	$1,528,492	$1,616,891	$1,689,038

Office of Freight Traffic Manager
Sacramento Northern Railway
San Francisco, California
April 3, 1936

(Testimony of H. E. Poulterer.)

Statement No. 4

Tidewater Southern Railway Company

FORECAST OF RAILWAY OPERATING AND OTHER REVENUES FOR YEARS 1936 TO 1940, INCLUSIVE

Steam Account No.	Item or Account	1936	1937	1938	1939	1940
101	Freight	$280,000	$280,000	$280,000	$280,000	$280,000
102 to 109 incl.	Passenger, Baggage, Dining and Special Car, Mail, Express and Milk	.....	.....	.....	.....	.....
110	Switching	5,300	5,300	5,300	5,300	5,300
143	Miscellaneous Transportation Revenue	.....	.....	.....	.....	.....
	Total Revenue for Transportation	$285,300	$285,300	$285,300	$285,300	$285,300
135	Storage					
137	Demurrage					
142	Rents of Bldgs. and Other Property	$ 1,836	$ 1,836	$ 1,836	$ 1,836	$ 1,836
143	Miscellaneous					
	Total from Other Operations	$ 1,836	$ 1,836	$ 1,836	$ 1,836	$ 1,836
	Grand Total Railway Operating Revenues	$287,136	$287,136	$287,136	$287,136	$287,136

Office of Freight Traffic Manager,
Tidewater Southern Railway Company,
San Francisco, California,
April 3, 1936.

(Testimony of H. E. Poulterer.)

Statement No. 5

Deep Creek Railroad Company

OPERATING REVENUE FOR YEAR 1934 AND 1935

	1934	1935
Freight	$6,428.49	$4,670.30
Passenger	133.08	72.78
Mail and Express	486.40	477.42
Miscellaneous	334.93	134.89
Total Operating Revenue	$7,382.90	$5,355.39

FORECAST OF OPERATING REVENUE FOR YEARS 1936 TO 1940, INCLUSIVE

	1936	1937	1938	1939	1940
Freight	$4,700	$4,700	$4,700	$4,700	$4,700
Passenger	100	100	100	100	100
Mail and Express	500	500	500	500	500
Miscellaneous	100	100	100	100	100
Total Operating Revenue	$5,400	$5,400	$5,400	$5,400	$5,400

Office of Freight Traffic Manager,
The Western Pacific RR. Co.,
San Francisco, California,
April 3, 1936.

[Endorsed]: F. D. 10913. Exhibit No. 32. Witness Poulterer. Filed April 21, 1936.

The Witness: Shall I proceed?

Examiner Wilkinson: Yes.

The Witness: The Sacramento Northern Railway main line extends from Oakland to Chico 176.51 miles, and both freight and passenger service is

(Testimony of H. E. Poulterer.)

operated over the main line and the following branches:

Pittsburgh Branch—West Pittsburgh to Pittsburgh, 2.17 miles;

Woodland Branch—Sacramento to Woodland 16.96 miles;

Colusa Branch—Colusa Junction to Colusa, 21.74 miles; [1945]

Oroville Branch—Oroville Junction to Oroville, 5.49 miles;

Freight service only is operated over the following branches:

Willotta Branch—Creek to Willotta, 17.16 miles;

Vacaville Branch—Vacaville Junction to Vacaville, 4.58 miles;

Rolland Branch—Riverview to Oxford, 15.77 miles;

Swanston Branch—Globe to Swanston, 1.4 miles.

These distances are short operating mileages for passenger trains; freight distances in some cases are slightly longer due to necessity of routing freight trains around the congested urban areas.

It operates passenger street car service in Sacramento 2.57 miles; Marysville and Yuba City 2.19 miles and in Chico 2.68 miles.

The Sacramento Northern Railway does not operate directly into San Francisco on its own rails. Its passenger trains do, however, operate over Key System tracks 4.89 miles to the Key Route Pier in

(Testimony of H. E. Poulterer.)

Oakland, where direct ferry connection is made to San Francisco.

Statement No. 1, Exhibit No. 32 shows the freight traffic and freight revenues of the Sacramento Northern Railway for the years 1929 to 1935, inclusive As is shown by this statement, its freight traffic while [1946] diversified, consists largely of the products of agriculture, manufactures and miscellaneous.

Its agricultural traffic is largely deciduous fruits, vegetables, dried fruit, grain, chiefly barley, grain products, rice and sugar beets.

In addition to losses on unregulated trucks, the decline in the traffic classed as products of agriculture was due primarily to two reasons:

First was the unsatisfactory market conditions prevailing throughout the East for fruits and vegetables during the past few years, the effect of which was that all of these commodities produced in the territory served by this railroad were not marketed; and second, the abandonment of some production because of competition of other growing districts.

As an example, there formerly was a large area contiguous to Sacramento that produced a substantial quantity of lettuce. It was found that there were other sections in California, chiefly in the Salinas district, that were better adapted to the growing of this particular vegetable, resulting in the abandonment and production around Sacramento,

(Testimony of H. E. Poulterer.)

and while the acreage abandoned consists chiefly of productive soil adapted to the growing of other vegetables, other crops have not been substituted, because of the unsatisfactory market demand.

[1947]

Livestock traffic, as evidenced by the cars, tonnage and earnings, on animals and products, has largely held its own.

The severe decline shown in the products of mines is due to the decrease in coal, sand and gravel, etc. Coal handled by the Sacramento Northern Railway, while not heavy, consists mainly of Utah coal. Its consumption has steadily declined due to its displacement by oil and natural gas. The decline in sand, gravel, etc., is wholly attributable to its loss to unregulated truck competition, but shows some recovery for the year 1935 over 1933 and 1934.

The general decline in the traffic of products of forests has been because of lack of new building and the loss of box shooks tonnage to the unregulated trucks.

Traffic handled by the Sacramento Northern Railway classed as manufactures and miscellaneous consists largely of petroleum products, iron and steel articles, cement and canned goods. This traffic reached its lowest level in 1932 and 1933, due both to the depression and to losses to trucks, but there was some recovery in 1935 over the four previous years.

(Testimony of H. E. Poulterer.)

The less-carload traffic handled by the Sacramento Northern Railway is mainly short-haul. This is particularly attractive truck traffic and the losses sustained [1948] by the Sacramento Northern Railway are largely due to unregulated truck competition.

Statement No. 3—we will skip No. 2 for the time being—of Exhibit No. 32 is a forecast of revenue of transportation and other railway operations for the years 1936 to 1940, inclusive.

In our opinion the increases in passenger and baggage revenue starting in 1934, and continuing through 1935, justify the increases forecast for the next five years. We have reduced passenger rates to a level that is attractive to the traveling public, and with the growing objection of motorists to the hazardous condition on the highways, due to the increase in the accident ratio, we find more and more of them are using the trains for inter-city trips. We also expect to be operating over the San Francisco Oakland Bay Bridge in about October 1937, and it appears at present that we will be the only line at that time in position to render through service without change of equipment, between Sacramento Valley points and San Francisco.

It will also reduce our present running time, both of which should have a decided advantage in attracting additional passenger traffic. The World's Fair to be held in San Francisco in 1939 will, no

(Testimony of H. E. Poulterer.)

doubt, substantially stimulate passenger traffic during that period. [1949]

There is a large population that works in San Francisco that, because of climatic conditions, commutes from and to the surrounding area. While many people commute from and to Berkeley and Oakland, this development never, to any extent, reached the area back of or east of Berkeley and Oakland. The chief reasons for this have been the long transit time in commuting and the inconvenience in reaching that territory by automobile.

The latter is being removed by the construction of street level tunnels under the hills, and with the inauguration of through car service by the Sacramento Northern Railway over the new trans-bay bridge the commuting time will be materially reduced and we look for a substantial commuter traffic. This should develop to a large degree by 1940.

The earnings shown for mail, express and milk, are substantially the same as 1934 earnings on these classes of traffic. We have not shown any increase for the subsequent years to 1940, and while we reasonably expect that this traffic will return some increased earnings, the amount will not have any substantial effect on the total earnings of the property.

Sacramento Northern Railway earnings for 1934 showed an increase of 6.4 per cent over 1933. The 1935 earnings increased but 1.2 per cent over 1934, a greater in- [1950] crease being restricted by freez-

(Testimony of H. E. Poulterer.)

ing weather in the early part of that year, materially cutting down the asparagus crop. These increases, however, indicate that with the upturn in traffic, which has already taken place, plus a reasonably anticipated continued improvement, our freight earnings in the future should increase quite materially.

Various reasons for this are:

It is certainly reasonable to expect an improvement in the market demand in California fruits and vegetables.

The Sacramento Northern serves a territory particularly adapted to this class of agriculture. The Holland Branch, especially, serves a very fertile acreage, particularly adapted to the growing of vegetables, already producing substantially but capable of further increase.

Three new warehouses have recently been constructed at points on this line, one each at Chico, Yuba City and Millar, for the handling of grain and rice, all representing new tonnage.

New bulk loading facilities have been built at Colusa and Millar which will handle bulk grain and rice, tonnage formerly moving by highway truck or by truck and barge.

We are encouraged in the hope for additional sand and gravel tonnage by the fact we now find that due to [1951] increasing truck costs, we are better able to compete with that form of transportation in the handling of this class of traffic.

(Testimony of H. E. Poulterer.)

One of the principal industries served by the Sacramento Northern Railway is the Columbia Steel Company, a subsidiary of the United States Steel Corporation, at Pittsburgh, California. This company is constantly expanding its facilities for the production of various iron and steel articles, all of which should reflect in additional revenue, both in inbound pig iron and coke as well as in the outbound manufactured articles.

The varied traffic consisting of manufactured articles, moving chiefly from the East San Francisco Bay area, is increasing and should continue to increase, all of the industries being reached by the Sacramento Northern Railway through switching arrangements at Oakland:

I have already referred to loss of petroleum products, consisting largely of gasoline. In past years trucks have made serious inroads on this traffic, which formerly moved by rail. We have endeavored to keep our rates on a competitive basis, but as these trucks were unregulated, they had various ways open to them to take this traffic which, under our regulations, we could not meet. [1952]

Increased trucking costs have resulted in some of this traffic coming back to the rails.

As a further indication of this, bulk facilities for the handling of gasoline have recently been installed on our lines to accommodate traffic which heretofore has moved exclusively by truck. The California Railroad Commission is now investigat-

(Testimony of H. E. Poulterer.)

ing rates on gasoline and other petroleum products by both rail and truck. We confidently expect that out of this investigation will come increased revenue for our lines, either through a general increase in the rate level or by placing us in position to better compete at the present level.

In July 1935 a new sugar factory was constructed at Tasco, California, an exclusive station on the Sacramento Northern Holland Branch. The plans of this company call for a material increase in sugar production during the next few years, as compared with the 1935 output. There was a large proportion of the 1935 pack which did not move prior to January 1, 1936, so that the increased earnings from this operation are not wholly reflected in the 1935 earnings.

The revenue shown for switching and miscellaneous transportation is approximately what we earned in 1934. We have not forecast an increase for the subsequent years, but naturally with an increased freight traffic, there no [1953] doubt will be an increase in these two items; the amounts, however, will not have any great effect on the total earnings of the property.

The revenue shown from other railway operations, Accounts 110 to 119, inclusive, for the year 1936, is approximately an average of the earnings for the years 1934 and 1935. Some of these items will no doubt increase, but the total of the earnings is not of any great importance.

(Testimony of H. E. Poulterer.)

The effect of the use of the private automobile has largely been discounted in city line revenues, resulting from street car operations. This class of revenue should more nearly reflect fluctuations in local business conditions and the forecast is based on a nominal increase each year to 1940. If increases we have obtained in these street car operations for the early part of 1936, up to and including April 7th, can be used as any indicator, the foremost we have shown for the years 1936 to 1940 may be considered ultra conservative. For the early part of 1936 these revenues have shown an increase of 9.62 per cent in Sacramento, 11.87 per cent in Marysville-Yuba City, and 7.08 per cent in Chico.

Based on what I have already stated, our forecast reflects the following percentage increases:

Account 101 (Passenger), Account 102 (Baggage), [1954] Account 103 (Parlor, Dining and Special Car revenues), an increase over 1935 to 1940 of 45 per cent spread over the years, 5 per cent in each year 1936 and 1937, 10 per cent in 1938, 15 per cent in 1939, and 10 per cent in 1940. The ultimate forecast earnings for 1940 of $446,300 is approximately $19,000 less than the actual 1931 earnings.

Account 107 (Freight Revenue); the forecast earnings for 1940 reaches a 40 per cent increase over those of 1935, spread over 10 per cent each for the years 1936, 1937 and 1938, and 5 per cent each for the years 1939 and 1940. The forecast 1940 earn-

(Testimony of H. E. Poulterer.)

ings are approximately $106,500 more than the actual 1931 earnings, and $137,200 less than those in 1930.

Total city line revenues for 1940 is 10 per cent greater than the actual earnings for 1935 at an average of 2 per cent for each of the five years. The amount for 1940 of $41,585 is approximately $2800 more than was actually earned in 1932, but $4,250 less than the 1931 earnings.

The gross revenue of $1,689,038 is 38.3 per cent increase over 1935, this total increase being spread over the years, 8.3 per cent in 1936, 6.9 per cent in 1937, 9.9 per cent in 1938, 7.3 per cent in 1939 and 5.9 per cent in 1940. [1955]

The forecast gross revenue of $1,689,038 in 1940 is approximately $40,775 greater than the actual gross revenue for the year 1931, but is approximately $394,000 less than the actual revenue in the year 1930.

The Tidewater Southern Railway operates its main line from Stockton to Hillmar, a distance of 51.7 miles, with branches from Manteca Junction to South Manteca, 6.6 miles, and from Hatch to Turlock 6.1 miles. The territory served is essentially agricultural.

Statement No. 2, Exhibit No. 32, shows freight traffic and freight revenues of the Tidewater Southern Railway for the years 1929 to 1935, inclusive. The revenues of this company are largely from the products of agriculture. In addition to the fruit and

(Testimony of H. E. Poulterer.)

vegetable loading sheds served by the line, the principal industries are a sugar factory at Manteca and a cannery at McHenry.

Traffic other than agricultural, consists largely of sugar, canned goods, petroleum products and box shooks.

Statement No. 4 is a forecast of railway operating and other revenue for the Tidewater Southern Railway, for the years 1936 to 1940, inclusive.

The forecast for 1936 is slightly higher earnings than those of 1935. We anticipate that there will be some fluctuations in this revenue for the subsequent years to 1940, but as the small area served by this line [1956] does not afford much opportunity for increased acreage production, we have forecast earnings for each of the remaining five years the same as for the year 1936.

The Deep Creek Railroad Company operates 44.6 miles south from Wendover, Utah, serving substantially a mining territory. Its freight revenues are largely dependent on mining activities in the Gold Hill District at the southerly terminus of the line, although some revenue is derived from sheep moving to winter ranges in the fall and out in the spring.

The revenues of this line have in the past few years been nominal, but with a revival in mining, especially a demand for ore that would warrant the smelting of arsenical ores, which predominate in the district served by this line, it is possible for

(Testimony of H. E. Poulterer.)

a traffic to develop that would substantially increase the revenue; for instance, in the year 1923 the revenues were $42,385; in 1924 they were $71,670, and in 1925 they were $40,268.

In our forecast of earnings for this line, shown on Statement No. 5, we have shown substantially the same revenue for the years 1936 to 1940 as was earned for the year 1935. This was not because we thought there may be no increase—on the contrary, we think there will be—but as this district will probably be the last of any part of the System to benefit from advancing metal [1957] prices or demand by reason of the nature of the ores, and prompted by our desire to keep our forecasts on a conservative basis, we would rather forecast no increase than to over estimate.

We do, however, hold the opinion that it is reasonable to expect that the earnings of this line during the next five years will show some stimulation as mining and metal conditions improve.

In conclusion let me say that all these estimates for the Western Pacific Railroad Company and its subsidiaries have been primarily prepared for the purpose of testing the soundness of the proposed Plan of Reorganization and for that reason we have estimated on a thoroughly conservative basis in order to avoid, if possible, the reaching of misleading conclusions.

Mr. Bon referred to prospects for a general rate level higher than at present. The California Rail-

(Testimony of H. E. Poulterer.)

road Commission has already launched an investigation into the rail and truck rates in California on:

Petroleum and its products,

Household Goods and Furniture,

Rock, Sand and Gravel,

Less-than-Carload and Less-than-Truckload Freight,

Beer and Beverages,

Oil Well Supplies, [1958]

Fruits and Vegetables from and to certain points,

Pickup and Delivery Rates between San Francisco Bay, on the one hand, and Stockton and Sacramento, on the other,

Grain and Grain Products,

and have stated that they will shortly institute one on livestock.

The object of all these investigations is to determine trucking costs and whether, in consideration of those costs, the rail rates should be raised. It is very reasonable to anticipate that some increases in our rates will be ordered. Surely we have nothing to lose. If our rates remain stationary we are certain that because of rising truck costs we will gain in tonnage, resulting in greater revenue; and if our rail rates are increased, our revenue should increase. The question is not so much whether there will be an increase in revenue but, rather, to what extent.

There are vast deposits of minerals, both metallic and non-metallic, in our territory. Development of these has in many cases been retarded by their re-

(Testimony of H. E. Poulterer.)

moteness from markets that could not be reached in competition with imports or sources of supply more advantageously located. A revival in general business conditions will stimulate the development of these resources. [1959]

As an indication of these possibilities: We will in a few days commence to move iron pyrites from Palisade, Nevada, to Garfield Smelter, Utah.

We are now publishing a rate under which we are assured there will be a new movement of crude graphite from Carson City, Nevada, to Oakland.

We also have a very encouraging prospect of moving a large tonnage of volcanic ash from Bed Rock, California, to San Francisco for use in making household cleanser.

There are other developments that, so far, have not passed the promotion stage and cannot yet be classed as prospects. Doubtless many will fail to materialize but some of them may, and no doubt will develop into actual tonnage.

The State of California, the principal state served by the Western Pacific, has not by any means reached its maximum in development and production. Statement No. 3 of Exhibit No. 27 shows the population increase since 1920. It no doubt will steadily increase for many years to come and, naturally, tonnage on the railroad is bound to reflect it. The San Francisco Bay area is very favorably situated as a location for manufacturing and distribution, and as expansion along these lines takes place our tonnage will increase.

(Testimony of H. E. Poulterer.)

In our forecasts we have not been materially [1960] influenced by these probable developments and have tried to keep them within reasonable and conservative limits.

Q. Do you conclude the estimates of operating revenues for the railroad company as presented in Exhibit 22 and for the syster as set forth in Exhibit 29 are conservative and may with reasonable certainty be used as a safe basis for a sound plan of reorganization?

A. Yes, I do.

Mr. Nicodemus: You may cross examine him, Mr. Swaine, if you wish.

Mr. Swaine: There is no cross examination. I do not think it will be profitable to cross examine on speculations. We all realize what the future prognostications are.

Examiner Wilkinson: Is Mr. Poulterer the only man that you are going to put on now for the traffic studies?

Mr. Nicodemus: Yes, sir.

Examiner Wilkinson: Does any one of the other parties desire to cross examine?

Mr. Poulterer, you will be here this afternoon, will you not?

The Witness: Yes.

Examiner Wilkinson: All right. You will be excused temporarily. We might want to ask a few questions, our- [1961] selves.

(Witness excused.)

(Whereupon, a short recess was taken.)

Mr. Nicodemus: Call Mr. Englebright. [1962]

E. W. ENGLEBRIGHT

testified further as follows:

Direct Examination

Q (By Mr. Nicodemus) Mr. Englebright, you testified at the last hearing in support of the operating expenses presented in Exhibit 22. Are you now prepared to support the corresponding estimates in Exhibit 29?

A. Yes. I have prepared an exhibit in response to Examiner Boyden's question as to the details of operating expense estimate for 1936 and the other operating expense estimates that were shown in Exhibit 22, filed at that time.

Q. I did not understand he asked for an exhibit, he simply said he would like to have your work sheets, or something to support it, and this is what?

A. I had to prepare it.

Q. And this is what you supply?

A. I supply this in response to Examiner Boyden's request for further details in connection with the operating expenses as estimated and shown on Exhibit 22.

Mr. Nicodemus: This will be Exhibit 33, I believe.

Examiner Wilkinson: The statement entitled "Additional Information requested by Examiner

(Testimony of E. W. Englebright.)

Boyden relating to estimates of operating expenses" will be marked as Exhibit No. 33. [1963]

(Exhibit No. 33, Witness Englebright, received in evidence.)

EXHIBIT NO. 33

ADDITIONAL INFORMATION REQUESTED BY EXAMINER BOYDEN RELATING TO ESTIMATES OF OPERATING EXPENSES OF THE WESTERN PACIFIC RAILROAD COMPANY AS SHOWN BY EXHIBIT 22.

Maintenance of Way and Structures:

Owing to the collateral benefits and effect on Maintenance of Way and Structures expense of the 183 miles of rail renewal and the 110 miles of ballast work being carried out in 1936, as shown by Exhibit 23, the Operating Expense of which is expected to be charged to Profit and Loss (if the Interstate Commerce Commission approves), the estimate for "Ordinary" maintenance for 1936 has not been materially increased over that of 1935 as will be shown below. The estimate for 1936 represents an increase of about $165,000 for "Ordinary" maintenance over the similar actual expenditures for 1935.

Reported Maintenance of Way & Structures expenses for 1935 were $2,369,169. Deducting $453,075 operating charges due to 1935 Budget work (in which is included $345,896 relative to laying 100 miles of new rail in 1935 and $7,140 carried over from 1934

(Testimony of E. W. Englebright.)

in connection with renewal of 43 miles of rail in that year) and $73,000 expended due to unusual 1935 storm conditions, leaves a balance of $1,843,094 for 1935 "Ordinary" Maintenance of Way & Structures.

The estimated 1936 "Ordinary" Maintenance of Way & Structures expense of $2,008,565 plus the 1936 routine budget and carryover operating expenses of $111,435, make up the $2,120,000 shown by Exhibit 22.

From above:

1936 "Ordinary" M. W. & S.	$2,008,565
1935 "Ordinary" M. W. & S.	1,843,094
An increase for 1936 "Ordinary" of	$ 165,471

This increase is expected to be necessary for:

Increased tie renewals, labor and material	$ 70,000
Ordinary bridge and culvert work	45,000
Painting buildings, etc.	15,000
Wage restoration increase	15,000
Water service and miscellaneous	20,471
Total increase for 1936 "Ordinary"	$ 165,471

The estimates for Maintenance of Way & Structures for 1937 and 1938 (during which years the Rehabilitation Program will be in progress) represent flat estimates based on the expected increased use due to the assumed increase in traffic and also on the

(Testimony of E. W. Englebright.)

continued assumption that Operating Expenses of the Program will be charged to Profit and Loss.

The estimates for 1939 and 1940 represent similar flat estimates with due regard to the continued benefits resulting from the rail renewal and ballast work to be accomplished under the Rehabilitation Program during 1936, 1937 and 1938. The placement of nearly 300 miles of ballast and approximately 500 miles of new 100-pound and 112-pound rail with improved joints, tie plates, and appurtenances will result in permanent benefit to track maintenance expense.

Maintenance of Equipment:

Owing to the improvements under way during 1936, as shown by Exhibit 23, the Operating Expenses of which are expected to be charged to Profit and Loss (if the Interstate Commerce Commission approves), the total direct operating expenses chargeable to Maintenance of Equipment for 1936 are estimated at about $143,000 LESS than actual similar expenses accrued in 1935.

This reduction occurs principally in the estimated requirements for Freight Car Repairs, as shown below:

(Testimony of E. W. Englebright.)

MAINTENANCE OF EQUIPMENT
Comparison of 1935 Actual and 1936 Estimated

	Actual 1935	Estimated 1936	Increase or Decrease
Superintendence	$ 62,219	$ 65,000	$ 2,781 Inc.
Steam Loco.—Repairs	712,872	768,000	55,128 Inc.
Frt. Train Cars—Repairs	564,855	400,000	164,855 Dec.
Pasr. Train Cars—Repairs	87,414	60,000	27,414 Dec.
Float. Equip.—Repairs	58,240	30,000	28,240 Dec.
Work Equip.—Repairs	29,705	55,000	25,295 Inc.
Miscel. Equip.—Repairs	65,911	60,000	5,911 Dec.
Total Direct	$1,581,216	$1,438,000	$143,216 Dec.
Depr. & Retirements	566,242	620,000	53,758 Inc.
Total M. of E.	$2,147,458	$2,058,000	$ 89,458 Dec.

The estimated Maintenance of Equipment Operating Expenses for 1937 and 1938 (during both of which years the Rehabilitation Program will be in progress) represent flat estimates based on the increased estimated revenue and on an assumed depreciation of $620,000 annually, and the continued assumption that Operating Expenses of the Rehabilitation Program will be charged to Profit and Loss in those years.

The estimates for 1939 and 1940 represent similar flat estimates with due regard to the continued benefits resulting from the large amount of freight car work to be done under the Rehabilitation Program during 1936, 1937 and 1938 and the necessary increases incident to the estimated level of revenues for such years.

(Testimony of E. W. Englebright.)

Traffic Expense:

Traffic Expense for 1935 was $666,457 and is estimated by that department at $663,000 for 1936.

Estimates for four subsequent years are flat estimates with provision for increased solicitation and other necessary expenses believed to be necessary for increased volume of traffic assumed by the estimate.

Transportation Expense:

It has been assumed that Transportation Expenses for 1936 will not be substantially increased over such expenses for 1935, since the assumed increase in traffic can be handled without increased freight or passenger train miles.

Wages had not been fully restored to present levels for the first three months of 1935 but if they had been so restored, the increase in 1935 would have approximated $32,000 in Transportation accounts. Additional fuel costs have been assumed at approximately $40,000 with a resulting aggregate increase in estimated Transportation Expense for 1936 amounting to approximately $72,000 over such costs for 1935.

A comparison of such estimated Transportation Expense for 1936 with actual figures for 1935 is shown below:

(Testimony of E. W. Englebright.)

Accounts	Actual 1935	Estimated 1936	Increase
Total Operating Revs.	$12,907,071	$13,438,000	$530,929
Transportation:			
Supervision and Dispatching	$ 249,939	$ 252,000	$ 2,061
Station Service	688,674	694,000	5,326
Yards and Terminals	776,668	782,000	5,332
Engine Service	1,958,030	2,007,000	48,970
Train Service	831,917	838,000	6,083
Miscellaneous	288,412	290,000	1,588
Casualties	197,682	200,000	2,318
Total Transportation	$ 4,991,322	$ 5,063,000	$ 71,678
Transportation Ratio	38.7%	37.7%	Dec. 1.0%

Transportation Expense for years 1937 to 1940, inclusive, has been estimated primarily as a ratio to revenues, such ratio being based on our best judgment as to what such ratio would be with traffic of the volume represented by the assumed level of revenues set forth. No attempt has been made to break the expense figure thus found down to different groups of expense.

Miscellaneous Expense:

Estimated expenses for Dining and Buffet service, Hotels, and Other Miscellaneous Operations for 1936 to 1940, inclusive, are flat estimates. In comparing these estimates with the record of this account for past years it must be remembered that prior to 1935 cost of production or purchase of ice and salt used for refrigerator cars was included but is now charged through other accounts.

(Testimony of E. W. Englebright.)

For convenience, there is shown below the amount of such ice and salt expense included under this heading for the years 1924 to 1934, inclusive.

Expenses Covering Cost of Ice and Salt Sold

1924	$217,027.96	1930	$412,417.34
1925	253,625.86	1931	274,755.36
1926	287,130.37	1932	267,484.33
1927	342,474.30	1933	237,192.44
1928	369,300.21	1934	311,244.93
1929	280,872.89		

General Expense:

Estimates shown for 1936 to 1940, inclusive, are flat with gradual increase to cover expenses incident to the added business expected.

Transportation for Investment—Credit:

Figures shown represent flat estimates covering principally the effect of the work being carried forward under the Rehabilitation Program.

Railway Tax Accruals—Ordinary:

Figures shown for 1936 to 1940, inclusive, represent estimate of Tax Department based on the assumption that present methods of assessment now in use in California, Nevada and Utah will continue during the ensuing five years.

Excise Taxes:

Estimates for Excise Taxes are shown separately for "Ordinary" Maintenance and Operations and for the expense of the Rehabilitation Program.

In estimating the labor proportion of ordinary operating expenses, labor has been estimated at 60%

(Testimony of E. W. Englebright.)

of the total. Direct departmental estimates for labor of the Rehabilitation Program were used for estimating excise taxes thereon.

Hire of Equipment—Net Debit:

Figures shown for years 1936 to 1940, inclusive, represent flat estimates based on a review of past experience. Comparison with previous years must consider that, effective January 1st, 1935, rentals received for Western Pacific owned refrigerator cars leased to Pacific Fruit Express Company can no longer be credited to this account.

It must also be remembered that Western Pacific's payments for car hire are largely represented by payments for use of refrigerator cars on a mileage basis, which payments amounted to $855,053 in 1935. Payments in connection with other private line cars amounted to $67,812 for 1935.

Credits for lease of Western Pacific refrigerator cars to Pacific Fruit Express Company and charges for mileage on refrigerator cars used by the Western Pacific are more particularly set forth on Page 2 of Statement No. 8 of an exhibit subsequently to be offered and which will be entitled "Additional Exhibits as Requested by Counsel for Creditors or Examiners for Interstate Commerce Commission at Hearing Held March 23, 1936, together with Supplementary Explanatory Memoranda."

Joint Facility Rents—Net Credit:

Amounts shown by estimates for 1936 to 1940, inclusive, represent estimates arrived at by applying

(Testimony of E. W. Englebright.)

an average percentage of revenues based on past performance.

[Endorsed]: F. D. 10913. Exhibit No. 33. Witness E. W. Englebright. Filed April 21, 1936.

Q. (By Mr. Nicodemus) Referring to statement No. 9 in Exhibit No. 29, System Income Account for the years 1922 to 1935, do you consider the figures indicate the amount available for interest in the years 1934 and 1935, to be fairly representative for the level of revenues received in those years?

A. I think the earnings as represented by "Available for Interest" in 1934 and 1935 must be viewed with respect to certain charges that entered into the accounts in both of those years, which had a distorting effect.

For example, in 1934, statement 9 shows available for interest as $1,084,243. In viewing this figure in respect to our proposed Reorganization Plan, we could with propriety add back to that figure $133,766, which in the accounts for 1932 represented amortization of discount on our first mortgage bonds.

We could also add back $97,683, representing the five months' pension expenses included in that year.

We also laid 43 miles of rail that year, which involved operating expenses of $107,286.

I think that all of those items were more or less special as far as 1934 is concerned, and after they

(Testimony of E. W. Englebright.)

are all charged back we would have what might be called 1934 [1964] available adjusted for these abnormalities of $1,422,978.

Similarly, in 1935 statement 9 shows available for interest as $805,589.

Similarly we would add back amortization of discount on bonds, which in that year was $135,401.

Operating charges on 100 miles of rail plus a slight carry over from the 1934 job amounted to $353,036.

We had a very disastrous slide situation in April in the Feather River Canyon which tied the road up for a considerable period and which involved the necessity of detouring passenger and freight trains over the Southern Pacific Lines from Sacramento to Flanigan, and in some cases from Sacramento to Weso. The detour expenses involved in that operation in part were charged against revenues as prescribed by the Commission to the extent of $65,306. The extraordinary expenses in connection with the maintenance of way and structures account having to do with that slide amounted to $29,324.

The transportation account, due to some details of the manner in which the Commission has these things taken care of, also is charged with a certain amount of the detour expense, and that figure amounted to $23,171.

There were pension charges in 1935 for four months of $51,593, but during 1935 there was also

(Testimony of E. W. Englebright.)

a credit taken into other income of $149,267, which will adjust out the [1965] pension items in the two years.

Adding all of those figures back and deducting the pension refund, we would have what might be called 1935 with abnormalities removed, showing the available for interest as $1,314,153.

Q. Were there any unusual conditions affecting operating revenues during the years 1934 and 1935 to which you wish to refer?

A. Yes. In 1934 the company received the benefit of a rather artificial situation created by the port strike in San Francisco and other Pacific Coast cities, which resulted in considerable additional business, and particularly north and south via the Northern California Line; whereas in 1935 practically at the same time of year we suffered from the bad effects of the serious lumber mill strike which continued for about three months among the lumber mills in the northwest territory which supplies much of our northern California traffic.

Q. Have you any general comments to make on Exhibit 29?

A. Yes, I have, but before leaving this subject I think that there is another factor of distortion between 1934 and 1935 that must be considered.

Q. Put it in.

A. That is that in 1934 the wage deduction was largely in effect throughout the entire year, whereas in 1935 the [1966] restoration had been made for

(Testimony of E. W. Englebright.)

the latter nine months, which had a tendency to improve the available for interest for 1934 as reported and changed its relationship as to 1935.

Q. That explains why you had a lower net and higher gross in 1935 as against 1934?

A. Yes.

Q. All right.

A. Taking up exhibit 29 in more detail, it is necessary to call attention to certain factors to aid in its interpretation.

Exhibit 29 consists of 36 statements of one or more pages each and having to do with various estimates or records relating to The Western Pacific Railroad Company and its subsidiaries.

Statements 1 to 7, inclusive, set forth an estimated consolidated income account for The Western Pacific Railroad Company and rail line subsidiaries for the years 1936 to 1940, inclusive.

The estimates for The Western Pacific Railroad Company shown on Statements 3 to 7, inclusive, are the same as those shown on Exhibit 22 heretofore filed. The estimated revenues for subsidiary railroad companies are based on estimates filed by Mr. Poulterer in this proceeding.

Particular attention is directed to Notes 1, 2, 4 and 6 on Statement No. 1, which sets forth important conditions bearing on the estimate.

Statement No. 2 is a recapitulation showing the estimated consolidated income account for The Western Pa- [1968] cific Railroad Company and its three subsidiary railroad companies shown in the

(Testimony of E. W. Englebright.)

title. but with all inter-company transactions eliminated.

Attention is called to the comparison of estimated "Available Net Income After Fixed Interest Charges," set forth on Line 37 of this statement, with the comparable figures for The Western Pacific Railroad Company only, as set forth by Line 34 on Exhibit 22, filed March 23rd in this proceeding.

Such a comparison shows that the consolidated income estimate produces available net income after fixed charges which is not materially different from that found by consideration of The Western Pacific Railroad Company only.

In 1936 the consolidated statement when compared with Exhibit 22 shows a reduction of such income by $104,854; in 1937 a reduction of $83,994; in 1938 a reduction of $28,634; in 1939 an increase of $7626; in 1940 an increase of $57,986.

The consolidated statement estimates that the fixed charges contemplated by the Plan of Reorganization would be earned 1.87 times in 1936; 2.59 times in 1937; 2.92 times in 1938; 3.47 times in 1939 and 3.88 times in 1940.

Operating expenses of the Sacramento Northern Railway and Tidewater Southern Railway Company have been estimated in collaboration with the operating officers of [1969] those companies, and the various eliminations of inter-company accounts were carried out with the assistance of the General Auditor's staff.

(Testimony of E. W. Englebright.)

The fixed charges set forth are those contemplated by the Reorganization Plan filed with this Commission February 8, 1936.

Statements 3 to 7, inclusive, are the detailed estimates for each year for the constituent roads of the System and a consolidation thereof for each year under consideration.

Statement 8 consisting of 3 pages, contains pertinent explanatory data to aid in reviewing Statement 9.

Particular attention is directed to the information given by Statement 8 with respect to the periods when certain additional road mileage became part of the System and to further information in connection with such acquisitions as set forth more in detail by Statement 20.

Much of this increase in System mileage was acquired or constructed just prior to or during the depression period and has not yet had an opportunity of contributing earnings up to the level expected in a period of normal business activity.

Statement 9 is a consolidated income account record of the System lines with all inter-company transactions eliminated. Review of this statement must be con- [1970] sidered concurrently with information given in Statement 8 if misleading interpretations are to be avoided.

Especially important is the information with respect to the Improvement Programs in effect during the period 1927 to 1931, inclusive, as set forth more specifically in Statements 21, 24 and 27.

(Testimony of E. W. Englebright.)

Much of the pick-up of deferred maintenance accomplished during that period was charged to ordinary maintenance and not included in the Operating Expenses of the programs as separately set forth by the various statements submitted.

Reference to exhibit 23 will show that the operating expenses incident to the 3-year rehabilitation program are estimated at approximately $5,000,000, which may be taken as representative of the amount of deferred maintenance existing January 1, 1936.

It is apparent that if such deferment had not accumulated, the amounts available for interest in past years would have been lessened by $5,000,000, but it is not possible to allocate with any accuracy the particular years which would have been affected.

For example, physical depreciation of rail and equipment commences at once with initial use.

However, even if the $5,000,000 in deferred maintenance should be considered to have accrued entirely during [1971] the 14 year period shown by Statement 9, the average amount available for interest annually would have been approximately $1,800,000 or 1.7 times the maximum fixed charges indicated by the Plan of Reorganization.

Attention is called to the inclusion of "Amortization of discount on first mortgage bonds" as a deduction prior to setting forth amounts "Available for interest." If the present bond issue is retired and replaced with other bonds exchanged or sold at par, this deduction would be eliminated except

to the small extent necessary to amortize the expense of issuing the new securities.

Various changes in accounting procedure prescribed by the Interstate Commerce Commission must also be considered.

Statement No. 10 shows The Western Pacific Railroad Company's revenues on business interchanged with certain subsidiary or affiliated lines. Attention is called to the unusual record of sustained revenues contributed by these roads during the depression period—a record that demonstrates the worth of these lines as traffic producers even under adverse conditions.

Statement 11 requires no comment.

Statements 12, 13, 14 and 15 show a record of advances made, respectively, to the Sacramento Northern Railway, Tidewater Southern Railway Company, Deep Creek Railroad Company and Standard Realty & Development Company. [1972]

Particular attention is called to the column headed "Total Returned to The W. P. R. R. Co." on statement 12 relating to the Sacramento Northern Railway, and also to the fact that Statement 13 shows that the Tidewater Southern Railway Company has repaid all advances made by the parent company except the portion expended for additions and betterments and converted to a long-term note on which interest is being earned and paid.

Statement 16 and supporting details on pages 2, 3, 4 and 5 thereof are presented to show an ap-

(Testimony of E. W. Englebright.)

proximate value of the physical properties of the system.

Statements 17, 18, 19 and 20 are presented as information intended to be helpful in connection with the historical record of revenues and maintenance accounts of the system companies.

Statement 21 is largely self-explanatory but particular attention is directed to Section 6, which relates to the Western Pacific Improvement Program under way from 1927 to 1931, inclusive. It will be noted that only approximately $8,000,000 of the contemplated $18,000,000 program was accomplished and further progress halted due to depression conditions.

All rail laid in the Feather River Canyon during 1927, 1928 and 1929 was for curve renewals only—not out of face renewals. As has been previously stated, much [1973] operating expense in connection with elimination of deferred maintenance was not accounted for as part of the improvement program but charged out through ordinary maintenance accounts.

Statement 22 is a record of the income account of The Western Pacific Railroad Company for the period 1922 to 1935, and is self-explanatory.

Testimony concerning statement 23 can be given by Mr. DeGraff, if desired.

Statement 24 contains supplementary data to aid in review of the income record of the Sacramento Northern Railway shown by statement 25.

(Testimony of E. W. Englebright.)

While the improvement program of the Sacramento Northern Railway carried only $202,719 of charges to maintenance expenses, there was also a large amount of deferred maintenance eliminated during the years 1929, 1930 and 1931 with consequent increase in such charges. The increase in mileage due to acquisition of the San Francisco-Sacramento Railroad on January 1, 1929, also required an increase in May and structures and equipment maintenance.

Testimony concerning statement 26 can be given by Mr. DeGraff, if desired.

Statements 27 and 28, relating to Tidewater Southern Railway Company, are self-explanatory, but the same remarks [1974] apply concerning improvements in 1929, 1930 and 1931 as were made in connection with similar elimination of deferred maintenance on the Western Pacific and Sacramento Northern.

Testimony concerning statement 28.1 can be given by Mr. DeGraff if desired.

Statements 29 and 30, relating to Deep Creek Railroad Company, are self-explanatory.

Testimony concerning statements 31 to 36, inclusive, can be given by Mr. DeGraff if desired. [1975]

Q. Have you in your notes, Mr. Englebright, a statement of the total amount earned and available for interest in the years 1922 to 1935 for the system? You have given certain percentages but you have not given the figures.

(Testimony of E. W. Englebright.)

A. The total for the 14 years is $30,322,881.

Q. Or a yearly average of what, in dollars?

A. $2,165,920.

Q. The same as on statement 22? A. Yes.

Q. Total available for interest for the years 1922 to 1935, inclusive?

A. $34,568,184. I do not have my figures here, but if it is all right to take Mr. Nicodemus' figures I will read them.

Q. Well, it is mathematical.

A. It is a matter of arithmetic. Total for 14 years, $34,568,184; yearly average, $2,469,156.

Mr. Nicodemus: That is all for Mr. Englebright.

Cross Examination

Q. (By Mr. Swaine) Those figures you just last mentioned are before deducting that $5,000,000 of under maintenance, are they not?

Mr. Nicodemus: They are.

The Witness: Yes, that is right. [1976]

Mr. Swaine: Have you made the mathematical computation to indicate what the average would have been?

Mr. Nicodemus: No, I have not made it, but it would be $5,000,000 divided by 14.

Mr. Swaine: It would be a little less than $400,000 a year; and what did you say the average was for your whole period down to date?

Mr. Nicodemus: 1.7.

Mr. Swaine: No, no, I am not talking about the percentage.

(Testimony of E. W. Englebright.)

The Witness: Money, you mean; for the system, Mr. Swayne, or the railroad?

Mr. Swayne: For the system. You had the average.

Mr. Nicodemus: $30,322,881.

Mr. Swaine: Oh, I know but what was the average?

Mr. Nicodemus: The average is $2,165,920.

Mr. Swaine: For the whole period?

Mr. Nicodemus: For the whole period including the depression years.

Q. (By Mr. Swaine) Now, take off your $400,000 and that gives you what? That will give you $1,700,000.

A. That is your average.

Q. I am trying to find out what the average was on a basis of normal maintenance.

A. Let us take the $5,000,000 off the $30,000,000 and [1977] then divide it. It is $25,322,881 divided by 14, is not that right?

Q. All right.

A. We will see if we can get that. That would be about $1,820,000, something in that neighborhood.

Q. Now, Mr. Englebright, as I understand the plan it takes about $1,650,000 before you begin to pay any interest at all on the income bonds, so that on the average the income bonds would have earned but 10 per cent of their interest during that entire period, is that right?

(Testimony of E. W. Englebright.)

A. You are looking at that original estimate that we had?

Q. No, I am talking your average figure then I am applying it to the plan. A. Yes.

Mr. Nicodemus: Of course, a great part of that period the northern California extension was not in operation.

Q. (By Mr. Swaine) Your computation had not put the capital fund in. On page 4 of the plan you show fixed charges of $1,148,000. Now, add your $500,000 capital fund even during the low stage and you get $1,600,000, which would have left——

A. About $172,000.

Q. And that is less than the amount of your advances to the various subsidiaries for amounts not charged to [1978] income.

A. It is less than those amounts have been in the past, yes.

Q. So that taking the average you would have paid no interest on any of your income bonds, is not that so?

A. I thought that we just agreed that in the plan $1,148,000 was the fixed charges.

Q Yes, and with the capital fund of $500,000, which Mr. Elsey says is too low and ought to be a million, on the average you would not have earned any interest on your income bonds? Is not that correct? I just want a factual statement.

A. Let me ask a question. This average that we

(Testimony of E. W. Englebright.)

were working with here, is that the system average?

Mr. Nicodemus: Yes.

The Witness: I just want to be sure that I understand this before I answer it.

Our $72,000 would have been what there would have been available for the income bonds, that is correct.

Q. (By Mr. Swaine) But you would have to use it really to make advances, you would have needed it for advances to these other subsidiaries; so that if you had had to pay it as interest, you would have had to have gone out and borrowed money, or else you would have had to trim the capital fund from what Mr. Elsey said it ought to have [1979] been. Of course, if your fund had been a million instead of five hundred thousand dollars, you would have been just $500,000 short of what Mr. Elsey thinks you ought to have.

Mr. Nicodemus: Mr. Elsey did not say he expected to spend that fund every year. That is the difficulty of putting a statement like that on the record.

Mr. Swaine: I am only taking what the plan says.

Mr. Nicodemus: I would like to answer Mr. Swayne on that, that Statement 12 shows a record of the advances to the Sacramento Northern, and after we take up the monies that immediately returned to the Western Pacific's pocket. In other words, you will find a column over here headed "To reimburse general cash." There is only one year,

(Testimony of E. W. Englebright.)

and that was the year 1932—and 1935—which were over the $72,000. In fact, there is only one other advance, and that is a minor amount of $15,094. I might say that in the 273,000 which shows "To reimburse general cash" during 1935, it must be considered that at the end of the year the Sacramento Northern had $137,000 of that money still on hand.

Q. (By Mr. Swaine). All right, we will say there is $75,000 applicable to $2,300,000 of income bond interest. That does not make the income bond very good, does it?

A. He would not get very much interest on that basis, no.

Q. You would have some doubt, would you not, as to the soundness of a plan which put $41,000,000 of indebtedness out which showed an average return of $75,000 a year?

I will waive the answer to the question. I think it is obvious.

Mr. Nicodemus: I do not think you should waive it. I think he should answer it and answer it fully.

The Witness: I was endeavoring to frame and answer. Stated in the way that Mr. Swaine states the question, in that simple manner, the answer is, of course, as you said, obvious. But I think that we get immediately back to the situation of interpreting what has happened in this income period, I mean in the way of extraordinary expenditures and things of that character.

(Testimony of E. W. Englebright.)

Q. (By Mr. Swaine). Those have been taken out, have they not?

A. The operating expenses and improvement program.

Q. I am not sure we have. From what period did we start? A. 1922 to 1935.

Q. A substantial part of that under maintenance occurred during that period, did it not?

A. Yes, some part of it.

Q. You get into a fairly speculative realm, then, if you [1981] try to figure out how much of it had occurred prior to 1922? A. Yes.

Q. So the figure is not very substantially distorted after all, is it?

A. Your thought being that the operating expenses of the program were working on deferments that had occurred at some previous period?

Q. Yes, that is right. That becomes aggravated when you add an additional $485,000 for a junior lien income interest, does it not? So you have some $2,763.000 of contingent interest here with an average of $75,000 a year to meet it.

Mr. Nicodemus: On the basis of the roads whose earnings are covered by that statement, is that correct?

The Witness: Yes.

Mr. Nicodemus: Which does not include the northern California extension except for the past few years.

The Witness: That is true. That is a very im-

(Testimony of E. W. Englebright.)

portant point, that the northern California extension did not come into the picture until November, 1931, and as I mentioned in my prepared testimony, there are a number of other branch lines with very substantial earning capacity which came into the picture late in that period. [1982]

Q. (By Mr. Swaine). Of course, so far as the past is any criterion, if you took the average from the time those particular properties were acquired or came into operation, your result would be worse instead of better?

A. I did not follow you, Mr. Swaine.

Q. Mr. Nicodemus' implication was that my inference was unfair, because a great number of lines were not being operated which have not been operated through the period for which the average was taken.

A. That is right.

Q. I agreed that that is an entirely fair comment on that. On the other hand, if you take the average for the period since these lines were acquired, you will get an even worse result on the fact.

A. But that would be a very unfair period to take, due to the fact that many of these lines were completed just before the beginning of the depression, and of course we got into a situation that was hardly a gauge for estimating what we hope will be the future.

(Testimony of E. W. Englebright.)

Q. I agree. I do not dissent from that. But so far as the actual record is concerned, it does not show any interest on any of these contingent obligations. That is correct, is it not?

A. I would have to look at that to be sure. That is, you say, this average—— [1983]

Q. An average since the acquisition. It is very obvious that it is, because all that it has done has been to earn—indeed, it has not earned the fixed charges under the plan in any year.

A. That is right.

Q. In the last five years, let alone anything toward the capital fund. A. That is correct.

Q. A little while ago you gave some adjusted figures for 1934 and 1935. A. Yes.

Q. I have forgotten your final adjustment. Would you give that again?

A. In 1934, it was reported——

Q. Do not give the detail, just give the total.

A. The adjusted total?

Q. That is right.

A. $1,422,000, in round numbers. And in 1935, $1,314,000, in round numbers.

Q. Would you say that after making that adjustment you had left an adequate charge for maintenance, an adequate, normal maintenance charge?

A. You mean that having made these changes—

Q. Having made these adjustments, is your remaining charge for maintenance of way and equip-

(Testimony of E. W. Englebright.)

ment a reasonable, [1984] normal, charge, adequate to keep the property in good condition?

A. I think it was for the level of revenues experienced in those two years.

Q. It would not be for what you regard as normal revenues?

A. No, it would not.

Q. Also, that would have resulted in the laying of no rail at all in either of the two years, would it not? A. That is correct.

Q. Do you regard it as normal not to lay any rail for a two year period? A. No.

Q. Therefore, how can you say it does leave a normal charge?

A. Because we feel that if the fiscal situation had been such that we could have programmed our rail in the way that it should be programmed for a proper financial handling of the matter, or in other words, if we had some sort of an equalization account that we could have resorted to, or something of that sort, I do not believe that we would have had 143 miles of rail to lay in a period only 24 months long. It would have been something less.

Q. How much would it have been?

A. On a 20-year life, the length of our principal mileage [1985] possibly something in the neighborhood of 50 miles.

Q. 25 miles a year?

A. No, no. I mean to say 50 miles in one year.

(Testimony of E. W. Englebright.)

Q. 50 miles a year. So you would really have had 100 miles under normal conditions?

A. That would be true.

Q. And you have taken out 140? A. Yes.

Q. Of what you have taken out, two-thirds is really normal and should not be taken out?

A. That is true. In the case of preparing these figures last night I do not believe that phase of the situation was fully considered.

Q. You also have not taken out anything for the capital expenditures, have you? I mean the kind that Mr. Elsey thinks ought to be covered by a fund of a million dollars a year.

A. No, because they do not get into the income account.

Q. Yes, I understand that, but they are out before any contingent interest.

A. They would be under the plan.

Q. They are under the plan, and Mr. Elsey definitely recommends that they should be in any plan affecting the property. A. Yes. [1986]

Q. In your prognostications for the future, can you answer the question that Mr. Elsey did not answer as to how you figure your coal costs? What have you done with reference to a possible increase by reason of the Guffey Act?

A. In estimating transportation costs, as is more fully explained in this exhibit 33, aside from the year 1936, the only practicable way to estimate transportation costs is on the basis of a ratio to

(Testimony of E. W. Englebright.)

revenues, and endeavoring in arriving at that ratio to take as best you can the various factors that exist, that is, increased fuel costs or increased wage costs or other things of that character.

I do not believe it practicable to attempt to prognosticate or break down the transportation account into wages and fuel and all these other factors for a period so far in advance, because transportation to a certain point depends on the characteristics of your traffic.

If a very large percentage of it consisted of fruit, for instance, it would require more trains, more train miles, and there would be a different level of revenues from that business as compared with hauling pig iron or some other different sort of a commodity. In other words, the average makeup of your business for the [1987] year would largely determine your revenues, but you cannot always determine the amount of cars and locomotives that will be required to handle that.

Q. In making this forecast you had to estimate some sort of a composition to that traffic, did you not? A. And that is lumped.

Q. Then you took an arbitrary percentage for transportation?

A. An arbitrary percentage.

Q. Therefore, that arbitrary percentage was based upon present prices for commodities of all sorts? A. Yes.

(Testimony of E. W. Englebright.)

Q. So that if there were any increase in commodity prices of any sort——

A. It would affect it.

Q. ——it would adversely affect your estimates?

A. It would. Of course, if there were any decrease it would be beneficial.

Q. Are you willing to be a prophet on the course of commodity prices?

A. No, not any more than you.

Q. Landslides and strikes have to be taken into account, have they not, in fixing any capital structure for a property of this sort?

A. You do not understand that the strike that I referred [1988] to had to do anything with our employees? You understand that?

Q. Oh, no, strikes in industries on your property

A. But the port strike on the Pacific Coast was certainly an unprecedented thing.

Q. That was a favorable effect, but you talked about a lumber mill strike having adversely affected you?

A. Yes, but that situation, which tied up almost a complete industry in the northwest, which was such a large part of our business on the northern California line, was also a very unusual thing. I do not recall any such situation in many, many years.

Q. But does not a plan have to take into account the possibility or, indeed, the probability of labor disturbances?

(Testimony of E. W. Englebright.)

Mr. Nicodemus: That is done by working capital, is it not, reserves?

Mr. Swaine: No, I am talking about the ability to earn interest on your securities.

The Witness: I think we have gone pretty far in an attempt to prognosticate revenues without endeavoring to prognosticate industrial conditions in other industries and things like that.

Q. (By Mr Swaine). So do I.

A. We have to assume that if everything goes along on [1989] an even keel and with reasonable expectations for improvement in business we would get a certain amount of that improvement due to the growth of the coast and the other favorable factors in our territory. All of those things have been taken into account in our estimates.

Q This landslide in the Feather River Canyon that you thought distorted income for one year—you have had landslides before, have you not?

A. Yes, but not for many years anything as serious as that. In fact, I imagine it is possibly ten years or more, maybe more—I cannot say accurately because I was not with the property at that time, but I have been with the property since 1929 and nothing of the character of that slide has happened before. We have had small slides that interrupted service for 12, 14, maybe 20 hours, but nothing of this character.

I do not recall the exact period—maybe Mr. Elsey can. Do you remember, Mr. Elsey, how long the road was tied up with the Isaiah slide?

(Testimony of E. W. Englebright.)

Mr. Elsey: Portions of it were tied up for about 12 days.

Mr. Swaine: I have no further cross examination.

Q. (By Examiner Wilkinson) Mr. Englebright, you read into the record the ratio between your maintenance [1990] expenditures and your revenues for the past years, and of course your exhibits in this case given for your forecast 1936 to 1940. Do you have those ratios before you?

A. Yes. I can put my hand on them here in just a minute.

Q. Will you say that during the period 1921 to 1926, inclusive, your maintenance on the property was normal?

A. Was normal? I am a little out of my depth in endeavoring to answer the question because I was not here. I was not with the property at that time.

Q. I thought perhaps you had studied the past records.

A. I have, but I am not familiar with the physical condition of the property at that time. All I can look at is the records.

Q. Just as a question of your judgment, then, during that period the total would be 33, 36, the average?

A. That is that five year average, but you have taken to 1926?

Q. Yes, 1921 to 1926. The average ratio would be 33.36?

A. Yes.

(Testimony of E. W. Englebright.)

Q. Do you consider that as a rule of thumb, I might say, a normal or average ratio?

A. I think that that ratio applied to the property as it will be during the carrying out of the program and as a result of the work done in this improvement program—by that I mean new rail, tie plates, which the original [1991] property did not have, which resulted in very high tie renewals due to cutting, improved ballast, and now during this three year program the laying of 100 and 112 pound rail will result, for instance, in very material benefit to our maintenance accounts, so that I think that a ratio of 33 per cent could be shaded quite materially for future years.

Q. Although as a matter of fact during that same period it is reasonable to assume that a certain amount of deferred maintenance was being incurred? A. Yes, that is true.

Q. During your period 1927 to 1931, which I understand was your rehabilitation program, your average was 34.56? A. Yes.

Q. Then from the period 1932 to 1935 your average was 32.05, and even with the extraordinary expenditures during your rehabilitation program your average for the period 1921 to 1935 is far in excess of the average which you have estimated for 1936 to 1940, is it not? A. Yes.

Mr. Nicodemus: Do you attribute that to advances in the art?

The Witness: I attribute the fact that we have

(Testimony of E. W. Englebright.)

used a lower ratio in the five year period facing us to the things that I have just mentioned to Mr. Wilkinson, that [1992] is, the improved property and the ease with which it can be maintained or the lessened expense at which it can be maintained.

Q. (By Examiner Wilkinson). I mentioned once before the fact that you charged these proposed rehabilitation expenses to operating expenses, so far as your plan is concerned, that is, in the future. Are you aware that the Commission has ruled that such expenditures must be charged to operations?

A. You mean the operating expenses of this rehabilitation program?

Q. Yes.

A. I understood that the matter was before them for decision, but I did not know what the answer had been. [1993]

Examiner Wilkinson: Mr. Elsey, can you answer that? Do you know what the Commission has done on that?

Mr. Nicodemus: Still under advisement.

Q. (By Examiner Wilkinson). And that if they do permit you to charge it to profit and loss, then your estimates for 1936 and 1940 will be materially changed, will they not?

A. Very much. You mean the estimated amounts available for interest?

Q. Yes.

(Testimony of E. W. Englebright.)

A. Very materially. They would be decreased by the amount of the program charges to operating.

Q. You show on your exhibit 22 for a so-called normal maintenance in 1940, $5,675,000.

A. Yes.

Q. For 1939, $5,100,000. That is supposed to be after your rehabilitation program.

A. That is correct, but immediately after, you might say.

Q. Immediately after? A. Yes.

Q. It would be reasonable to expect that in the future, then, that would increase rather than remain the same or decrease?

A. That is correct. As time passed on, and the effect [1994] of the renewal of box cars and the other work that is contemplated under the program and the improvements to track and other things commenced to depreciate, eventually, there would have to be some increase in that amount. But for the two years shown, 1939 and 1940, with such a large amount of track work done, and so much work done to freight cars, we feel that those amounts are more than ample to take care of that particular period.

Q. You feel that taking into consideration the past history of this property, the amount of deferred maintenance which has been incurred pretty regularly over certain periods, that the expenditures of around $5,000,000 would be sufficient for maintenance in the future, normal maintenance?

(Testimony of E. W. Englebright.)

A. That is the five million dollars chargeable to operating?

Q. Yes.

A. Of course, we would get some benefit from capital expense that goes into the heavier rail, which would affect operating expenses. We feel that the expenditure of the five million dollars on operating expenses of the program would bring the property up to what might be called a normal condition to give the service which it should give, economically, and for the level of revenues that are expected in the future, and the character of [1995] railroad that we operate.

Q. Have you ever computed from a percentage standpoint your transportation cost for the exhibit 22?

A. Yes, I think you have it, Mr. Wilkinson. It was submitted. It is the sheet immediately underneath, that photostat.

Q. You start out in 1937 and 1936 with transportation expenses of 37.7, and you drop down in 1940, to 32.1 per cent. Has it been your experience that a road such as the Western Pacific could operate with a ratio of 32.1 per cent transportation expenses as a rule?

A. Not as a rule, but I can show instances when it has operated at 32 per cent.

Q. Would you care to say offhand what you consider to be the average ratio or percentage of that figure?

(Testimony of E. W. Englebright.)

A. I cannot say the average, Mr. Wilkinson. Just how do you use that. for what level of revenues?

Q. Take so-called normal revenues.

A. If we consider normal revenues as something in the neighborhood of that shown by the 1940 estimate, I think the 32 per cent is reasonably attainable with careful management, because we have in the past. For instance, in 1926, on the level of revenues of $16,057,000, we had transportation expenses of $5,093,000, or a ratio of 31.72.

[1996]

In the subsequent year, 1927, we had revenues of $16,433,000, a transportation ratio of 32.82. I refer now wholly to the Western Pacific Railroad Company.

Q. Would you mind reading those into the record for the period 1922 to 1935? I do not think they are in the record.

A. Yes, I can. This is a compilation, this statement at which I am looking, an analysis of the operating expense accounts which have been filed with the Commission. I have a supply of those, and I can offer it as an exhibit, if you wish.

Examiner Wilkinson: Would you mind putting that in the record, please?

Mr. Nicodemus: Would you describe that document so I can offer it? Identify it on the record.

The Witness: The statement which is offered is an analysis of the Western Pacific Railroad

(Testimony of E. W. Englebright.)

Company's operating expenses and the ratio of those expenses to operating revenues for the years 1916 to 1935.

Examiner Wilkinson: Let the statement which is referred to be marked Exhibit 34.

(Exhibit No. 34, Witness Englebright, received in evidence.)

The Witness: The figures shown both as to revenues and expenses, are the figures reported to the Interstate Commerce Commission on the annual reports. However, this [1997] statement was actually prepared from a file of the annual reports to the company's stockholders, in case there are any minor discrepancies.

Q. (By Examiner Wilkinson). I also note that for your operating ratio for the period 1936 to 1940, you start out with 77.20 and gradually decrease it to 67.90 in 1940. A. Yes.

Q. With the exception of the years 1925 and 1926, the Western Pacific never operated at such a ratio since 1921, did it, or such a low ratio as that?

A. You are talking about the total operating ratio?

Q. Yes, the total operating ratio now.

A. 1921 was higher than that.

Q. 1921, you had operating ratio of 85.85.

A. That is correct. In 1916, the operating ratio was 59.86. In 1917, it was 62.54. In 1918, it was 71.25, or higher than the estimated ratio for 1940.

(Testimony of E. W. Englebright.)

Q. But I am speaking about for the period 1921 to 1935, it was only in the years 1925 and 1926 that you operated at a comparable ratio with what you estimate you will operate in the future.

A. That is true, but that was on a level of revenues, of course, of $15,569,000 for 1925, and $16,057,000 for 1926. When our revenues go up our ratio ought to drop

Q. I think you stated that in so far as you were concerned, [1998] it would be very difficult to allocate any of your deferred maintenance incurred during that year.

A. Yes, I believe that to be true. I have given it a good deal of thought and cannot arrive at any logical process by which we could ascertain or allocate a portion of that deferred maintenance in any specific year, for the reason that, for instance, on rail, the wearing out of that rail has been going on since the day it was first applied. Similarly with freight cars or other sorts of equipment, we feel that the repairs to freight cars have had to go during this depression period because there was no other alternative. The renewal of rail, which was commenced under the old improvement program in 1926, and had to be abandoned in 1931, we feel that that is overdue; but I do not see how any portion of that could be specifically allocated to any one or two years in the back period.

Q. Are you familiar with the formulas used

(Testimony of E. W. Englebright.)

by the Commission in Finance Docket 1606, in the matter of the final settlement under section 209 of the Transportation Act of 1920?

A. No, I do not recognize the formulas, that is, by that designation.

Q. At that time, when it came to a question of settling with the railroads, the question of deferred maintenance, [1999] under maintenance, and so forth, formulas were used by the Commission.

A. Yes.

Q You are not familiar with those formulas at all? A. No, I am not.

Q. Do you think it would be possible to take the period 1921 to 1930, and take the average during that period as being the normal amount of maintenance for the Western Pacific?

A. Do you mean on a ratio basis, Mr. Wilkinson?

Q. Yes.

A. For the reason that I have previously stated, I think that those figures were possibly higher than they would be on the property after the completion of our new program, for the reason that we still have many miles of track with no tie plates on it whatever, with 85 pound rail, which has always had a tendency to cut into the ties severely and cause adzing. Many ties have been removed from the track in the past, not due to decay wholly, but primarily due to cutting and mechanical wear. With the completion of our program, our entire

(Testimony of E. W. Englebright.)

main line road mileage will be tie-plated adequately, and there will be a large percentage of new ties inserted in connection with the ballast work.

For a period of years now we have been improving our [2000] bridges, trestles, and culverts, with permanent structures. We are improving our water supply and other facilities of that character. I feel that when that work has been accomplished, our maintenance must necessarily be reduced over what it was in some of this earlier period.

Examiner Wilkinson: That is all the questions I have, Mr. Englebright.

The Witness: Thank you.

Mr. Nicodemus: We have no questions to ask Mr. DeGraff ourselves. If any counsel or the Examiner wishes to cross examine the auditor, he is available. Otherwise we are finished.

Examiner Wilkinson: Mr. Swaine, do you have any questions?

Mr. Swaine: I have no cross examination.

Mr. Willard: Perhaps he is the right one to put in, Mr. Nicodemus, the use that was made of the money borrowed from the Railroad Credit Corporation.

The Witness: I think I have that here, if I may refer to another book.

The first note of the Railroad Credit Corporation was dated June 29, 1932. The original amount was $1,303,000. It was disposed of $1,231,500 at semi-annual interest due March 1, 1932, on out-

(Testimony of E. W. Englebright.)

standing first mortgage bonds, and $71,500, the semi-annual interest due [2001] March 1, 1932, on outstanding equipment trust certificates series B.

Note dated March 25, 1933, in the amount of $1,293,439, was disposed of $1,232,252 semi-annual interest due March 1, 1933, on outstanding first mortgage bonds, and $61,187 semi-annual interest due March 1, 1933, on outstanding equipment trust certificates.

As of January 31, 1936, distributions had been made by the Railroad Credit Corporation in the form of credits to the first note, the credits being due the Western Pacific Railroad Company and its subsidiary companies to a total amount of $71.532; so that the net amount of the notes still owed the Railroad Credit Corporation January 31, 1936, amounted to $2,524,907 in even figures.

Mr. Willard: Thank you.

Mr. Coulson: May I ask the witness whether the statement from which he was reading included similar information as to the application of the funds received from the other junior creditors?

The Witness: That particular statement, Mr. Coulson, was wholly the Railroad Credit Corporation.

Q. Have similar statements been prepared for the other junior creditors?

A. Just a moment, I will see if I have that.

Mr. Coulson: I would suggest that, Mr. Examiner, for the [2002] purpose of the record, if they

(Testimony of E. W. Englebright.)

have not been prepared they be prepared and made exhibits in the record for what signficance they have.

Mr. Swaine: I think that is a good suggestion, so we will not have any element of fact in dispute.

Examiner Wilkinson: Will you furnish that for the record, Mr. Englebright and Mr. Nicodemus?

Mr. Nicodemus: I understand that the A. C. James note, or the proceeds of that note or the debenture which was issued, were exclusively used for constructing the Northern California extension.

Mr. Coulson: That is correct; but I think so far as the information is placed of record as to one junior creditor, it ought to cover also the Reconstruction Finance Corporation advances.

Mr. Nicodemus: The Reconstruction Finance Corporation I cannot give from memory.

Mr. Coulson: It might as well be covered by an exhibit.

Mr. Nicodemus: There are some capital expenditures out of the Reconstruction Finance Corporation fund, are there not?

The Witness: The statements are quite lengthy, and it would be a difficult thing to read them into the record. I have no other extra copies, but the information is here if you wish it. [2003]

Mr. Nicodemus: We will undertake to file a single exhibit and give the information as to the disposition of the proceeds of all of the notes held by the junior creditors.

(Testimony of E. W. Englebright.)

Mr. Coulson: Can that be assigned an exhibit number now?

Examiner Wilkinson: No, I am sorry, we cannot do that until we receive it.

Mr. Nicodemus: We can reserve a number for it, however.

Examiner Wilkinson: We will give it a number when it is received. At the time it is put into the record, each party will be notified. If you will send us a sufficient number of copies to serve on counsel, we will serve it numbered.

Mr. Nicodemus: All right, I will do that.

The Witness: You mean to distribute them the way we did the last time, through Mr. Nicodemus?

Mr. Nicodemus: I distributed them direct the last time, and I will do it this time.

Examiner Wilkinson: Of course, if you have a future hearing it will be received at that time.

(Witness excused.)

Mr. Nicodemus: I understand that certain counsel want another hearing. Is that correct?

Mr. Swaine: I suggest this procedure, if the Examiner [2004] please. As I stated at the last hearing, our committee has accepted this plan. I think, however, that the testimony has developed several problems in which respect of which we will want modifications of the plan, at least in form. I have a feeling after hearing all this testimony that

the definitions of available net income and provisions for application need clarification. I have also discovered in the plan certain mathematical errors to which I would like to call Mr. Nicodemus' attention at the proper time and have them corrected.

So that apart from any substantive questions we have suggestions to make in respect of the plan.

Our acceptance of the plan was both predicated and conditioned upon its acceptance by the Reconstruction Finance Corporation, and its acceptance by the Railroad Corporation without modification which we would regard as material. In view of the opposition to the plan by the Reconstruction Finance Corporation and the Railroad Credit Corporation at the last hearing, and because of certain questions that the evidence raised in the minds of our committee, we had contemplated suggesting a modified plan. I think, however, and I understand certain other creditors feel that it would be preferable not to present the plan as merely the plan of one group of creditors but to see whether or not the creditors cannot [2005] agree before something is actually formally submitted before the Commission by any one group.

Therefore, my own feeling is that we should take about a three weeks' adjournment in order first that we can call to Mr. Nicodemus' attention the changes that we want in this plan—we have already suggested one modification at the last hearing, and I will have several more to suggest—and second, that in the interim the junior creditors can confer with

the first mortgage bondholders and see whether or not the creditors can agree upon any plan which might be substituted in case the Commission should feel that this plan was not sustained on the record.

Mr. Nicodemus: We are reconciled to a three weeks' adjournment, although we are very anxious to press this for submission to the Commission. I think perhaps it should be a month. Our witnesses all live on the Coast, Mr. Examiner.

Mr. Swaine: I doubt that we will need witnesses at the next hearing. Frankly, I think that we got all the statistical material in the record that we need to test out any plan.

Mr. Nicodemus: I agree with you.

Mr. Swaine: I wish there were some way of getting a preliminary indication from the Commission as to whether on this record it would be willing to sustain a plan which [2006] has charges of four and one-half million dollars before common stock.

Examiner Wilkinson: I do not think the Commission would care to indicate its decision on the plan other than in the ordinary, formal way.

Suppose we recess until two o'clock, and at that time all parties can come back and know pretty definitely as to what witnesses, if any, will be needed. Then we can agree upon a date for the next hearing. Will that be agreeable?

Mr. Nicodemus: I can say now that we need no further witnesses. I am perfectly willing to submit this on the record as it exists.

Mr. Swaine: I do not think we will, either. I think that if a substitute plan is brought forward it will be a plan which will be much more drastic than the one which is before the Commission now, and therefore if the record supports the present plan, a fortiori it will support the other one.

(Discussion off the record.)

H. E. POULTERER

was recalled and testified further as follows:

Cross Examination

Q. (By Examiner Wilkinson). Exhibit 27 is offered in support of the forecast contained in exhibit 22, is it not? A. Yes. [2007]

Q. Would you mind stating for the record in a general way in what way Exhibit 27 supports Exhibit 22?

A. The forecasted figures obtained in Exhibit 27 are the figures that are used as estimated or forecasted revenues in exhibit number 22.

Q. In preparing your forecast for freight revenues, did you analyze each commodity handled by the Western Pacific over a period of years?

A. We analyzed by a classification of commodities and the principal traffic movements contained within those classifications.

Q Did you give any consideration to the length of haul? A. Yes.

[Testimony of H. E. Poulterer.]

Q. As I recall, one of the things that Mr. Bon talked about a good deal was the possible change in freight rates. In just what way did that influence your forecast?

A. Very slightly. We do feel that the general level of freight rates is probably as low as it will go. If there is any change in that as to specific rates, we feel that the reduction in those specific rates is going to be productive of greater tonnage and will reflect a greater revenue.

I referred in my testimony to the action that has been taken by the California Commission. We carry a very [2008] large traffic in trucks in California. Of course, the conditions there with respect to regulation of other forms of transportation are somewhat different than they are interstate.

With that prospect of a possible increase in some rates that have been forced down to what we have considered an abnormally low level by reason of competition with other forms of transportation, that is probably going to increase these revenues that we have forecasted, and we feel on that basis that that represents a fairly conservative forecast.

Q. In connection with your estimate for passenger revenues, what rates did you have in mind, the prevailing rates? A. Yes.

Q What are they in that particular territory at the present time?

[Testimony of H. E. Poulterer.]

A. Our prevailing rates are, generally speaking, I believe, two cents a mile in coaches and slightly higher in Pullmans.

Q. Is that the same rate as the Commission's recent decision in the Passenger Fares Case?

A. I am not sufficiently familiar with the passenger fares to be able to state. I do know that it is no higher.

Q. Would you say that your forecast is largely a judgment figure giving weight to your analysis of the past revenues [2009] of the Western Pacific?

A. Yes, I think that is what a forecast necessarily consists of.

Q. An arbitrary increase for each year in the future until you arrive at your maximum in 1940?

A. Rather arbitrary, but still based on what you might call informed judgment.

Mr. Wilkinson: That is all the questions we have.

(Witness excused.)

Mr. Willard: The Railroad Credit Corporation had intended to put on a witness. We have tried to avoid it. But I think if we may put in evidence a copy of the Marshalling and Distributing Plan, with which almost everyone here is familiar to some extent, it may not be necessary to put on a witness.

Mr. Nicodemus: We will agree that that goes in.

Mr. Swaine: That is all right.

Mr. Coulson: I would like to state for the record that I appeared at a prior hearing and entered

an appearance on behalf of A. C. James Company. The A. C. James Company is a junior creditor in the principal amount of approximately five million dollars advanced in 1931 and 1932 for the building of the northern California extension.

The presiding Examiner at the last hearing directed me to file a formal petition of intervention to preserve [2010] my status as a party, although the A. C. James Company have been classified by the courts in California as a separate class of creditor. I have prepared such a petition of intervention in compliance with the direction of the Commission, and if the Examiner feels that this is an appropriate time, I will file it with the Commission at this time.

Mr. Wilkinson: We can receive it right here.

Mr. Coulson: I may say that the position of this junior creditor, as stated in the petition of intervention, is in support of the basic principle of the company's plan, if we understand it, but we do suggest to the Commission that in the exercise of its power under Section 77 it may make modifications in certain substantial features of the plan as framed and presented.

Mr. Nicodemus: If the Examiner please, I think there is one question that I neglected to ask Mr. Elsey, which I would like to ask him now, if it is not too late.

Examiner Wilkinson: Very good.

CHARLES ELSEY

was recalled and testified further as follows:

Direct Examination

Q (By Mr. Nicodemus) Assuming a four million dollar revenue from the Northern California Extension, in determining what part of that would be net, you would not apply [2011] the system ratio? A. No, sir.

Q. What is the cost now to operate the Northern California Extension?

A. Between $350,000 and $400,000.

Q. So that there would be $3,500,000 saved out of the four million dollars?

A. As far as the operation of the branch is concerned.

Mr. Nicodemus: That is all I wanted to ask.

(Witness excused.)

Mr. Nicodemus: I wonder whether the clients represented by Mr. Swaine should not also file separate petitions of intervention.

Mr. Swaine: I will have a petition of intervention at the next hearing.

Mr. Nicodemus: That will be a separate one for each creditor?

Mr. Swaine: No it will be an intervention for the group. I understand that in the other proceedings these fiduciaries have intervened as a group. That is what they did in the St. Paul, I know.

Examiner Wilkinson: Of course, I am not familiar with what they did in the St. Paul. When the petition comes in we can see then what it represents

Mr. Nicodemus: All right. [2012]

Examiner Wilkinson: The petition of A. C. James Company for leave to intervene, filed by the A. C. James Company by Robert E. Coulson, attorney for the petitioner, is received in the record.

(The petition of intervention of A. C. James Company was received.)

Mr. Nicodemus: Has Mr. Willard filed a similar petition of intervention?

Mr. Willard: Yes.

Examiner Wilkinson: Mr. Willard has already filed his and it has been passed on by the Commission.

We will adjourn at this time until May 13th.

(Whereupon, at 12:55 o'clock p. m., an adjournment herein was taken until May 13, 1936.)

[2013]

Hearing Room B, I.C.C. Building,
Washington, D. C.,
Wednesday, May 13, 1936.

The hearing was resumed at 10 o'clock a.m., pursuant to adjournment.

Before:

Harvey Wilkinson, Examiner.

Appearances:

Same as heretofore noted, and

J. R. Turney, appearing for J. R. Nicodemus, Jr., Western Pacific Railroad Company.

H. C. Kilpatrick, appearing for Robert E. Coulson, A. C. James Company. [2015]

PROCEEDINGS

Examiner Wilkinson: The Interstate Commerce Commission has assigned for further hearing at this time and place the matter of the reorganization of the Western Pacific Railroad Company, which is Finance Docket No. 10913.

Are there any additional appearances?

Mr. Turney. J. R. Turney is appearing merely by courtesy for Mr. Nicodemus, who is compelled to attend a session of the Court of Appeals of New York.

Mr. Kilpatrick. H. C. Kilpatrick, appearing for Mr. Coulson, who represents the A. C. James Company.

Examiner Wilkinson. I believe you gentlemen should fill out the appearance blanks furnished by the reporter.

You may proceed, Mr. Turney.

Mr. Turney. If the Examiner please, Mr. Nicodemus, who is counsel for the debtor was unable to be here today. He was called to New York by a case which was advanced in the Court of Appeals. Matters have arisen which led the various parties in the case to enter into a stipulation, or, rather, an agreement, whereby the Reconstruction Finance Corporation will make an engineering investigation of the costs which will be necessary for certain improvements to the property. Mr. Jones of that organization estimates that it will require sixty days to complete that investigation. Mr. Nicodemus asked me to state that [2017] all of the counsel of record, that is, Mr. Coulson, Mr. Alley, Mr. Swaine, Mr. Wood, and Mr. Willard had agreed upon the continuance or resetting of this case at least sixty days distant to enable that investigation by the Reconstruction Finance Corporation to be completed.

Examiner Wilkinson. We have before us, of course, a plan of reorganization which contemplates the expenditure of about $10,000,000 for rehabilitation of the property. Is it your understanding that the Commission is going to be given the benefit of whatever study is made and some form of exhibit showing the study which will be made as a basis for any modification of plan?

Mr. Turney. Mr. Examiner, I cannot answer that: I assume so. But that matter was not discussed with Mr. Nicodemus. As a matter of fact, my conversation with Mr. Nicodemus occurred in a taxicab between my office and the station while he was catching a train yesterday afternoon. But I can see no reason why it should not. If you wish to postpone the hearing while I get Mr. Nicodemus on the 'phone, I shall be glad to give you a definite answer.

Examiner Wilkinson: I do not believe that is necessary.

It appears to the examiner that any modification of the plan should have supporting exhibits indicating what is the basis for the modification.

The Bureau of Finance is in receipt of information [2018] in the form of an exhibit submitted pursuant to a provision on page 245 of the record. The information shows the use of funds borrowed by the debtor from the Reconstruction Finance Corporation. from the Railroad Credit Corporation and from the A. C. James Company. I assume copies of these exhibits have been transmitted to all of the parties of record. These statements will be received in evidence as exhibit No. 36 subject to any motion to strike which may be offered by parties of record. I take it there is no objection on the part of any one here to their receipt.

Mr. Kilpatrick. Mr. Examiner, I feel I have not authority to either consent or object. I did not anticipate this and am not familiar with the issues. I hope, so far as the A. C. James Company is

concerned, counsel may have an opportunity to make any motion to strike he deems advisable.

Examiner Wilkinson. You may do so.

Off the record.

(Discussion off the record.)

(Exhibit No. 36, received in evidence.)

Examiner Wilkinson. Pursuant to the request of counsel, this hearing is adjourned until July 1, 1936, at 10 o'clock in the morning.

(Whereupon, at 10 o'clock a.m., adjourned until 10 o'clock a.m., July 1, 1936.) [2019]

Before the Interstate Commerce Commission

Finance Docket 10913

WESTERN PACIFIC RAILROAD COMPANY
REORGANIZATION

Room 5230, I.C.C. Building,
Washington, D. C.,
Wednesday, July 1, 1936

Met pursuant to adjournment at 10 o'clock, a.m.

Before:

Examiner R. T. Boyden, and
Examiner Harvey H. Wilkinson.

Appearances:

The same as heretofore noted.

Additional appearance:

W. Meade Fletcher, Jr., Attorney, and John Barriger, Chief Examiner, Railroad Division, appearing for the Reconstruction Finance Corporation, Washington, D. C. [2021]

PROCEEDINGS

Examiner Boyden: Are you ready to proceed, gentlemen?

Mr. Nicodemus: On behalf of the Debtor, we are obliged to inform the Examiners that it will be necessary to have a further extension. We suggest an adjournment until approximately the middle of August. The reason for the adjournment is that the experts in the Railroad Division of the Reconstruction Finance Corporation have not yet filed their final report, and considerable time will be required to study the report, and when we have reached our own conclusions we have to prepare further evidence in the light of the facts as developed.

Examiner Boyden: Has the report been made available to you yet for study?

Mr. Nicodemus: I have not seen a report. I was uptown in New York yesterday afternoon attending the Railway Express meeting and did not go back to my office afterwards, but Colonel Coulsen indicates that perhaps some data were sent. That would have been in late yesterday afternoon.

Mr. Coulsen: I believe that is so, but not a complete report, as I understand it, only some basic charts and data.

Mr. Willard: We have received nothing yet.

Mr. Nicodemus: The bondholders are not here, but my [2022] understanding is that they have appointed an expert who has been out over the road, and he is to comment on the report of the Railroad

Division. I presume it will take some time for him to make a study of the Railroad Division's report.

Examiner Boyden: Is any representative of the bondholders' committee here this morning?

Mr. Fletcher, could you advise us when the report of the Reconstruction Finance Corporation will be complete, so that the various parties can institute study of it?

Mr. Fletcher: I was advised about ten days ago that they expected it to be ready before the hearing of July 1st. As to when it will be ready I am not sure.

Examiner Boyden: It has not been presented yet to the parties, has it?

Mr. Fletcher: I do not believe so.

Examiner Boyden: Have any other parties any suggestions with respect to when we should proceed further with this hearing?

Mr. Willard: It all depends on when the report will come in from the Reconstruction Finance Corporation. If we could get something more definite from the Reconstruction Finance Corporation we could tell better how much time will be required.

(Discussion off the record.) [2023]

(A short recess was taken.)

Mr. Fletcher: The report prepared by the Reconstruction Finance Corporation is here and can be presented. The Reconstruction Finance Corporation has no objection to the continuance of this hearing to a date not later than 30 days from now.

Examiner Boyden: If the report is here ready

to be submitted, have you witnesses to submit the report?

Mr. Barriger: I have one witness here. The man principally in charge is not here, primarily because I understood that the bondholders were going to request an adjournment, and the Reconstruction Finance Corporation would have no objection thereto, which I supposed was proof positive that the adjournment would be granted. Therefore, there was no occasion to bring one of our men all the way from California to Washington, since there was some other work in California which he could advantageously do.

Our principal witness is in California, but one man is here, and we could get the other one on by airplane tomorrow.

Mr. Nicodemus: Is the man in California still engaged on this job?

Mr. Barriger: No, on another job.

Examiner Boyden: What is the desire of the parties? [2024] Do they wish to have the testimony taken as far as possible this morning, or copies of the report distributed and the report not be presented for the record until they have had an opportunity to review it?

Mr. Nicodemus: We think the latter is the only course that is practicable. The bond holders are not here. They relied upon an adjournment.

Examiner Boyden: There was no indication that there would be an adjournment.

Mr. Coulsen: If the Commission please, on behalf of A. C. James Company I would like to join in the suggestion made by Mr. Nicodemus on behalf of the company that a substantial adjournment be made, and at the same time urge that the parties to the proceeding be given an opportunity to look over the data that has been worked out by the Railroad Division of the Reconstruction Finance Corporation and give a careful study prior to the hearing at which it is brought up.

It seems to me that this study which Mr. Barriger's forces have made goes to the heart of the whole problem of readjusting the capital structure of the company, because until there is a sound determination as to the amount of new money required, you do not even have a starting point for a definitive plan, whatever talk we may have about the general scope. [2025]

I feel that under the circumstances here, with Mr. Barriger's report possibly and even presumably, from such indications as we have had, taking a position somewhat at variance with the proposals of the actual operating organization of the Western Pacific Railroad, and taking that in connection with the fact that that operating organization is in California, I think if we try to get along with an adjournment for the shorter period than the middle of August we are merely going to put the burden on the Commission of having another hearing at which all the parties will be forced to ask further adjournment.

Taking the necessity of bringing men on from California in conjunction with the fact that we are in the summer months, where so many people are not available for one reason or another for different periods, it seems to me that we will save time in the long run if we take an adjournment until the second half of August, which will give us all time to study these reports, and to contact with this expert whom the insurance companies have employed, as I understand the situation, and to endeavor to come before the Commission with some agreement on that one basic question that we need to start from, how much new money this property is going to require.

Examiner Boyden: If we adjourn now without having the Reconstruction Finance Corporation report formally [2026] presented for the record, is it going to be necessary for us to have a further adjournment to examine the testimony and the report when it is formally presented, or will the parties be able to go ahead from their study of the report at a later date when it is presented?

Mr. Coulsen: It seems to me that it would be quite feasible for us to proceed promptly at an adjourned hearing. The number of parties here is relatively small. There is no reason why we cannot all get together and make more rapid progress in informal consideration of the data that the Reconstruction Finance Corporation is going to present, and be ready, all of us, to present to the Commission such facts as seem necessary and proper for the formal record for consideration by the Commission,

all at one hearing, provided time enough is given for full consideration of these data and of the possibly conflicting viewpoints of the actual operating organization of the road, Mr. Barriger's organization, and this expert who I understand has been hired by the insurance companies who hold a substantial block of bonds in the property.

Mr. Willard: Perhaps Mr. Barriger can tell us whether his witnesses will go beyond the report.

Mr. Barriger: No, I think the report will speak for itself in its entirety. [2027]

Mr. Willard: The witnesses will just support the report?

Mr. Barriger: Yes.

Mr. Nicodemus: Why can you not file the report?

Mr. Barriger: We will do that and send you copies.

Might I ask one indulgence? If you had proceeded this morning we would have talked from our manuscript copy. I would like to have your indulgence to mail to you tonight or tomorrow the duplicate copies which are being prepared. Because we were working under considerable pressure to have everything done this morning, we would have talked from our manuscript copy today and asked permission to give you all the extra copies in 24 hours.

But I have the complete report here, and I think it says everything that any of our witnesses will say. If you want to develop the report further on cross examination, the witnesses will be available.

Mr. Nicodemus: Necessarily we would have to study it before we could do that.

(Discussion off the record.)

Examiner Boyden: Our calendar will require that this be set about August 25th. Is that acceptable to the parties?

Mr. Coulsen: It is acceptable.

Mr. Nicodemus: That is satisfactory. [2028]

Examiner Boyden: If we continue the hearing to that date, we should be able to proceed to a conclusion at that session?

Mr. Nicodemus: Yes.

Mr. Coulsen: Yes.

Examiner Boyden: I believe I should correct the statement I made to Mr. Nicodemus. There was a letter from the Director to the effect that if extension was asked for a date somewhere about the one I have suggested would have to be set.

Mr. Coulsen: Mr. Examiner, in connection with this matter of proceeding to a conclusion if possible on August 25th, which I think seems desirable to all parties here, I would like to ask whether there is any information as to whether there will be before the Commission at that time this plan which was referred to at the last extended hearing as a plan contemplated to be proposed by the insurance companies as an alternative to the company plan.

If that plan is to be before the Commission for consideration at the hearing on August 25th, I think we might save time by knowing about it before hand. I understand there was a certain informal fil-

ing with the Commission of that plan, but no formal presentation.

Examiner Boyden: Was there an informal submission of [2029] that plan to the other parties?

Mr. Coulsen: I think we have all seen proofs of the plan.

Examiner Boyden: Then if the plan is presented at that time, probably all of the parties will be ready to offer their objections to it at that time, do you not think so?

Mr. Coulsen: I think it would be helpful in preparing for the hearing if one knew more definitely whether it would be presented.

I think we could probably save time at that hearing.

Mr. Nicodemus: Mr. Examiner, in that connection, when the hearing on the Debtor's plan is under way, as I understand Section 77, no right exists to file another or different plan without leave.

Examiner Boyden: That is correct.

Mr. Nicodemus: So I think if there is any proponent of a new plan, he should be warned to apply to the Commission for leave to file it, then we will know who the proponents of the plan are and what the plan is.

Mr. Coulsen: I think Mr. Nicodemus has answered my question, Mr. Examiner.

Examiner Boyden: With respect to that, we are in receipt of a petition by Frederick H. Ecker, John W. Stedman, and Reeve Schley, as a committee representing [2030] certain institutional holders of

first mortgage bonds of the Western Pacific Railroad Company, and that petition has not as yet been acted upon by the Commission. It will be submitted to the Division and parties will be advised of the Commission's action.

We are also in receipt of a motion filed by counsel for the Western Pacific Railroad Company for an order striking from the files the petition to which I have just referred, or in the alternative for an order denying said petition, for reasons set forth in the motion. Have copies for this petition for leave to intervene and the motion with respect thereto been delivered to the parties?

Mr. Nicodemus: Copies have been delivered to Mr. Swaine. We understood that the Commission would distribute the extra copies under their own rule. If not, I will undertake to have the copies distributed.

Examiner Boyden: I believe you are correct in that. The Commission will distribute them.

This petition and the motion will be submitted to the Division and appropriate action taken and the parties advised. That will be attended to immediately, so that parties will have notice of what the situation will be when the hearing reconvenes.

Mr. Nicodemus: I furnished a copy to Colonel Coulsen. I am not sure that it was a final copy. [2031]

Mr. Coulsen: I do not believe so. I saw it yesterday or the day before. You furnished it rather tentatively.

Examiner Boyden: Is there anything further to come before this hearing?

If not, we will adjourn until August 25th at 10 o'clock, a. m.

(Whereupon, at 10:30 o'clock, a. m., an adjournment was taken until August 25, 1936, at 10 o'clock, a. m.) [2032]

Before the
Interstate Commerce Commission.

Finance Docket 10913

WESTERN PACIFIC RAILROAD COMPANY REORGANIZATION.

Anteroom B, I. C. C. Building,
Washington, D. C.,
Monday, September 28, 1936.

Met pursuant to adjournment at 10:00 o'clock a. m.

Before:

Examiner R. T. Boyden and
Examiner Harvey H. Wilkinson.

Appearances:

The same as heretofore noted.

Additional Appearances:

J. W. Barriger, III, T. A. Hamilton, and C. H. Halsper, Washington, D. C., appearing for Reconstruction Finance Corporation.

Orville W. Wood, (of counsel, Milbank, Tweed, Hope & Webb), 15 Broad Street, New York City, appearing for Trustees under Debtor's Mortgages. [2034]

PROCEEDINGS

Examiner Boyden: The Commission has assigned for further hearing this morning the matter of the Western Pacific Railroad Company Reorganization, Finance Docket No. 10913.

Are there any additional appearances?

Mr. Hamilton: Our appearance has already been entered, Mr. Boyden. Mr. Halsper and I are here. Mr. Barriger will be along in a little while.

Examiner Boyden: Are there any petitions of intervention to be filed?

(No response.)

Will you proceed, gentlemen?

Mr. Nicodemus: The Debtor is prepared to go forward. May counsel proceed?

Examiner Boyden: Yes.

Mr. Nicodemus: As the Examiners will recall, some months back an adjournment was taken to enable the Railroad Division of the Reconstruction Finance Corporation to make a survey of the property, and to analyze and consider the Debtor's rehabilitation program, and report whether in the judgment of its experts the program was sound and adequate.

At the same time the Institutional Bondholders' Committee designated Mr. E. P. Bracken to make a similar [2036] survey and report to them.

The experts of both the Reconstruction Finance Corporation and the Committee have completed their surveys and submitted reports.

We are very pleased to offer as one of the Debtor's exhibits the report submitted by the Railroad Division under date of July 1, 1936. We offer that without putting on any witnesses, believing that the report speaks for itself.

I do note that Mr. Barriger is present, and Mr. Hamilton, who participated in the work, is also present. If either of those gentlemen would like to submit any statement, we would be very glad to have them submit it at this time.

The Debtor has no comment to make other than to commend the report as an admirable document, and one that entirely confirms the judgment that had previously been reached by the management of the railroad company.

Unless those gentlemen have some statement to make, we offer the report as an exhibit. I should state that Mr. Swaine, counsel for the Institutional Bondholders Committee, has also requested that this report be filed as an exhibit.

Examiner Boyden: Has the Debtor any assurance or has the Commission any assurance that if there are any ques- [2037] tions that anyone wants to ask with respect to the report or its method of preparation, witnesses will be available to answer those questions?

Mr. Barriger: I think we may answer "Yes" to that question, Mr. Examiner.

Mr. Nicodemus: We make the same answer.

Mr. Barriger: I do not think that any statement is required now. Witnesses will be available at any time to answer questions about that report.

Mr. Swaine: I think it is only fair that I should state for the record that Mr. Bracken's report is substantially identical with the Reconstruction Finance Corporation report. It is my understanding that the report really was the composite work of Mr. Bracken and Mr. Hamilton, working together.

There is no substantial difference between the report as rendered by Mr. Bracken and that which has been introduced in evidence.

Mr. Boyden: Have you any witness that can identify the report? I mean, the Reconstruction Finance Corporation report.

Mr. Nicodemus: Mr. Hamilton is present.

Mr. Barriger: Mr. Hamilton will identify the report and answer any questions.

Mr. Nicodemus: I have one or two questions I would like [2038] to ask Mr. Hamilton, if he could be sworn as a witness and identified.

T. A. HAMILTON

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Nicodemus) Mr. Hamilton, I hand you a document mimeographed in two volumes, entitled "Reconstruction Finance Corporation, Railroad Division, Report, Western Pacific Railroad."

(Testimony of T. A. Hamilton.)

This bears the facsimile signature of T. A. Hamilton and F. E. Lyford. I ask you if you are the Hamilton mentioned in that document.

A. Yes, sir.

Q. Do you identify that report in two volumes as a counterpart of the report which you submitted to the Railroad Division of the date which the report bears? I think it is July 1, 1936.

A. Yes, sir.

Q. Have you supplied copies of that to the Commission and interested counsel?

A. We have them here now, if they are desired, and we will see that they are supplied.

Mr. Nicodemus: We offer that in evidence.

Examiner Boyden: That will be marked Debtor's exhibit No. 37.

(Exhibit 37, Witness Hamilton, received in evidence.) [2039]

Examiner Boyden: Have you any further questions, Mr. Nicodemus?

Mr. Nicodemus: No, sir.

Examiner Boyden: Is there any cross examination?

Cross Examination

Q. (By Mr. Swaine) Mr. Hamilton, with reference to the estimated gross revenues of the property from January 1, 1936 through 1940, did you or your associates make any analysis of the estimates which had been supplied to you by the Debtor and

(Testimony of T. A. Hamilton.)

which I understand are the same estimates that have been introduced in evidence in this record?

A. No, sir, we made no such analysis. What we did was to take the revenues estimated for the future and their ton mile counterpart, turn that into the job of work which would be required of the plant, and we accepted those estimates for that purpose.

We did not analyze them or in any way compute them.

Q. Is it fair to say that the chart which follows page 38 of volume 1 and contains a projection of total operating revenues and freight revenues, with the word "estimate" in the upper right hand corner, does not represent your estimate but represents only the Debtor's estimate that we have heretofore had?

A. That is correct, sir.

Q. I do not understand that you are passing any opinion [2040] one way or the other on that estimate? A. No, sir.

Mr. Swaine: That is all.

Mr. Nicodemus: Thank you very much.

Examiner Wilkinson: I should like to ask one question, Mr. Hamilton:

Q. Would your report have been any different in the event that the revenues estimated for the future had been less than the amount estimated by the Debtor?

A. That would depend on how much less.

(Testimony of T. A. Hamilton.)

May I perhaps answer the question by telling you what use we made of those revenue estimates in our compilation?

Accepting them, we had them reduced by the officers of the company who made the revenue estimates to terms of ton miles. The freight movement of the property, of course, is by far the major basis of the earnings. We reduced those to terms of net ton miles. That is, they had computed the revenue based on those net ton miles spread over the years. We converted those into gross ton miles based upon their past relationship of net and gross, empty car haul, and all that sort of thing, and in doing that job of work by gross ton miles, by train districts, and operating divisions, we based our judgment of the physicial plant that would be required to economic- [2041] ally handle that volume of work, the weight of rail based on the gross ton miles expected to pass over it, the new engines that we recommended based upon the number of ton miles to be hauled; so that unless the reduction had been substantial or the increase in the revenues substantial, our figures would not have been much affected by them.

Does that make it quite clear?

Mr. Wilkinson: Yes.

Examiner Boyden: Are there any further questions?

Witness excused.

(Witness excused.)

Examiner Boyden: Have you anything further, Mr. Nicodemus?

Mr. Nicodemus: We have received from counsel for the Institutional Bondholders Committee a counterpart of the report submitted to them by Mr. E. P. Bracken. We should like to introduce as supplementary to the Reconstruction Finance Corporation's report the Bracken report. I recognize that to some extent, at least, it overlaps; certain of the exhibits are the same, and those have been omitted. But we would like to have this offered and accepted as the Debtor's exhibit.

In that connection, counsel for the Institutional Bondholders Committee have requested us to introduce one [2042] of the principal exhibits embodied in the Bracken report. They have not asked for the whole report, but as it seems to be logical to file with and as complementary and supplementary to the Reconstruction Finance Corporation report, I should like to offer it.

I have no way here to identify it. It is a photostat, but it is taken from the negative supplied by counsel for the Institutional Bondholders Committee.

Examiner Boyden: This is not the whole of the Bracken report, then?

Mr. Nicodemus: It is the whole of the Bracken report except the exhibits that also appear in the Reconstruction Finance Corporation's report.

Examiner Boyden: With this exhibit which you offered, the Reconstruction Finance Corporation re-

port, all of the Bracken report will be part of the record?

Mr. Nicodemus: Yes.

Examiner Boyden: But we do not know which of the Reconstruction Finance Corporation exhibits are part of the Bracken report.

Mr. Swaine: I think you can tell by the identification.

Mr. Nicodemus: They are identified in the body of this report.

Mr. Swaine: The references indicate which they were. In fact, my recollection is that they are numbered iden- [2043] tically as they are in the Reconstruction Finance Corporation report.

Mr. Nicodemus: I think they are.

Mr. Swaine: My recollection is that there are only two sentences in the entire report that differ from the Reconstruction Finance Corporation report.

Mr. Nicodemus: No, I think this exhibit 1 is entirely different.

Mr. Swaine: The supplemental letter?

Mr. Nicodemus: This exhibit 1 is different, the one that you asked to be put in.

Mr. Swaine: You mean, the revised estimate?

Mr. Nicodemus: The revised estimate dated June 24, 1936.

Mr. Swaine: Yes. I think it would be perhaps helpful if the Examiners knew what that was.

As a result of changes in the rehabilitation program, not very substantial, but some changes, the estimates of earnings made by the management were

changed, and Mr. Bracken supplied an exhibit showing the changes which would be required in the management's estimates of future earnings by reason of changes in the rehabilitation program. That is the exhibit to which Mr. Nicodemus referred.

Mr. Nicodemus: That would be exhibit 38. [2044]

Examiner Boyden: If any of the parties require it or if the Commission asks it, will you present a witness who will identify the exhibit and answer any questions with respect to it?

Mr. Swaine: We will assume that obligation; if either the Commission or any party wants Mr. Bracken, we will produce him.

Mr. Nicodemus: We could produce Mr. Bracken, but we could not produce him today.

Examiner Boyden: You have seen this exhibit, Mr. Swaine?

Mr. Swaine: Yes.

Examiner Boyden: Is there any objection to the receipt of exhibit 38?

Mr. Willard: May I see a copy of it? I have not yet seen it.

Mr. Swaine: I think in order to avoid any confusion it should be stated at this point that Mr. Bracken, like Mr. Hamilton, accepted the management's estimates of future earnings.

Mr. Nicodemus: The report so states, I believe. If it does not, it is a fact

Mr. Swaine: So that it should not be deemed to be his estimate?

Mr. Wilkinson: Mr. Swaine, when you say Mr. Bracken accepted the estimates, do you mean that he adopted them [2045] or that he agrees that the estimates as to the future are correct?

Mr. Swaine: No, I mean that, just as Mr. Hamilton stated, he assumed those estimates, and then from those computed the capital expenditures that might be necessary to do that volume of business. He made no independent analysis of future earnings or future operating expenses.

Examiner Boyden: Have you anything further to offer, Mr. Nicodemus? We will pass for the time being the ruling on this exhibit, until Mr. Willard has had an opportunity to look it over.

Mr. Willard: I notice that the letter dated July 1st on Mr. Hamilton's report states that the report has not been analyzed or examined with care by the directors of the Reconstruction Finance Corporation.

Has the Reconstruction Finance Corporation, since that time, had an opportunity to study it and to take any position with reference to it?

Mr. Barriger: You may recall that the chairman left Washington very early in July, and only returned last week. While he was away I do not believe that he had any opportunity to study this report.

Mr. Willard: It is still to be regarded as an individual report?

Mr. Barriger: Yes. [2046]

Mr. Willard: I have no objection to these going in as exhibits, then.

Examiner Boyden: Both exhibits 37 and 38 are received in evidence.

(Exhibit 38 was received in evidence.)

[Here follows Exhibit No. 38 continuing to page 2233.]

EXHIBIT NO. 38

E. P. BRACKEN
547 West Jackson Blvd.
Chicago

July 1, 1936.

Frederick H. Ecker, Esq.,
Chairman of the Board,
Metropolitan Life Insurance Co.,
New York, N. Y.

Robert T. Swaine,
15 Broad Street,
New York, N. Y.

Gentlemen:

I attach herewith to each of you, copy of report I have prepared in connection with the rehabilitation of the Western Pacific Railroad Company, the funds for which it is proposed to secure from the Reconstruction Finance Corporation in an amount not to exceed $10,000,000. The report is explanatory in itself, and was prepared after having spent a month's time on the property.

I shall hold myself in readiness to render any further service that may be desired in answering in detail any questions that may arise, or attending whatever conferences may be called where my presence is desired.

Very truly yours,

E. P. BRACKEN.

REPORT TO

Frederick H. Ecker, Esq.,
Chairman of the Board,
Metropolitan Life Insurance Co.,
New York, N. Y.

In the matter of a reorganization of the Western Pacific Railroad Company. Submitted by Mr. E. P. Bracken.

The adequacy of the proposed $10,000,000 loan to properly rehabilitate the road and furnish necessary additional facilities having been questioned by the Reconstruction Finance Corporation, it assigned a party to make an exhaustive study and report of the Railway's present and future requirements.

The party, consisting of representatives of the Reconstruction Finance Corporation, Bondholder's Committee, and the Railway Management, left Salt Lake City June 8, 1936 on inspection special, reaching San Francisco June 10, 1936. Inasmuch as the leaders of the RFC party had inspected the property in 1935 they, together with the officers of the Western Pacific and representative of the Bondholder's Committee, immediately considered the situation.

The recommendations contained in the report of the Reconstruction Finance Corporation are those finally agreed upon by the three interests, i. e., Reconstruction Finance Corporation, Bondholder's Committee and Western Pacific Railroad Company, as being necessary. (See Exhibits 1 to 4, inclusive, attached.)

Items requiring an additional expenditure approximating $600,000 were considered essential, but the inclusion of that sum will still make it possible to keep well within the proposed loan of $10,000,000.

The installation of treated ties will be started in 1937, the cost of which will be assumed by the Railway and currently charged to operating expenses.

The acquisition of new freight engines and cars, and a wrecking derrick will be handled by the Railway through an Equipment Trust, thus eliminating the necessity of any new money for these items.

Ruling of the Interstate Commerce Commission that operating charges incident to the rehabilitation program cannot be charged to Profit and Loss, will result in distortion of the Income Account. It is hoped that a modification of this ruling may be secured, in connection with which the attached Revised Forecast of Consolidated Income (Exhibit 1), which includes the additional expenditures involved, has been prepared showing the charges in each of the three years under review, i. e., 1936, 1937 and 1938.

This report does not deal with the financial status of the property, past or present.

The purpose of the report and exhibits attached, is to set forth, as determined by the studies under-

lying it, the needs of the property in improvement of fixed plant, existing motive power and cars, and the acquisition of additional motive power, other rolling stock, and appurtenances.

No improvements of any importance are needed on the branch line mileage, or on the Keddie-Bieber line. This report covers the Salt Lake-Oakland main line only.

Respectfully submitted,

E. P. BRACKEN.

Chicago, Illinois,
July 1, 1936.

EXHIBIT No. 1

The Western Pacific Railroad System
Comprised of
The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
Deep Creek Railroad Company

Income Account Revised 6-24-36

A REVISED FORECAST OF CONSOLIDATED INCOME

STATEMENT SHOWING CORRECTIONS TO "FORECAST OF CONSOLIDATED REVENUES, EXPENSES AND INCOME" WHICH WAS FILED IN FINANCE DOCKET NO. 10913 AS STATEMENTS NOS. 1 AND 2 OF EXHIBIT 29, SUCH CHANGES BEING OCCASIONED BY REVISION OF 3-YEAR REHABILITATION PROGRAM AS OF JUNE 24, 1936, INTRODUCTION OF CREOSOTED TIES, AND ADDITION OF ESTIMATED CARRYING CHARGES FOR COSTS OF PROPOSED NEW EQUIPMENT PURCHASES TO BE MADE IN 1937 AND 1938.

Item		1936	1937	1938	1939	1940
1	Assumed System Operating Revenues (From Line 6, Statement No. 2, Exhibit 29)	$15,050,200	$16,761,200	$18,325,200	$20,288,200	$21,632,200
2	Total Income (Line 28, Statement No. 2, Exhibit 29)—See Note A below	1,647,936(A)	2,465,236(A)	3,049,136(A)	3,769,836	4,171,736
	Deductions from Total Income Account Changes Since Exhibit 29 Was Filed:					
3	Account Operating Expenses incident to use of creosoted ties	—	140,000	200,000	286,650	286,650
4	Account changes in Excise Taxes due to revision of Rehabilitation Program	2,700	22,000	9,300*	—	—
5	Revised Total Income (After deduction of Items 3 and 4 hereof)—See Note A below	1,645,236(A)	2,303,236(A)	2,858,436(A)	3,483,186	3,885,086
6	Miscellaneous deductions from Income (Line 30, Statement No. 2, Exhibit 29)	123,850	122,650	119,550	117,350	115,250
7	Revised Amount Available for Interest on All Funded Debt—See Note A below	1,521,386(A)	2,180,586(A)	2,738,886(A)	3,365,836	3,769,836
	Deductions for Interest on Certain Funded Debt:					
8	WP-RR existing Equipment Trusts and Lease Conditional Sale Agreement (Line 32, Statement No. 2, Exhibit 29)	121,680	82,875	45,215	24,772	17,976
9	Proposed Equipment Trusts for purchases in 1937 and 1938	—	83,360	103,723	96,438	89,152
10	At 4% on securities sold to finance Rehabilitation Program (Line 34, Statement No. 2, Exhibit 29)	65,000	190,000	330,000	400,000	400,000
11	Funded Debt of Subsidiaries (Line 35, Statement No. 2, Exhibit 29)	2,940	2,580	2,220	1,860	1,500
12	Total Interest on Certain Funded Debt (Items, 8, 9, 10 and 11 hereof)	189,620	358,815	418,158	523,070	508,628
13	Available for Interest on Debt Other Than Provided for Above—See Note A below	$ 1,331,766(A)	$ 1,821,771(A)	$ 2,257,728(A)	$ 2,842,766	$ 3,261,208
14	Note A: Figures shown by Statement 2 of Exhibit 29 and by Items 2, 5, 7 and 13 of this statement, do not include effect of Operating Charges incident to the Rehabilitation Program for 1936, 1937 and 1938. Finance Division of the Interstate Commerce Commission has ruled that such Program operating charges must be included in appropriate Operating Expense Accounts. Such handling of the accounting will reduce the amounts shown by Items 2, 5, 7 and 13, above, to the following extent: Operating Charges incident to Rehabilitation Program as revised June 24th, 1936, are	$ 1,747,284	$ 2,021,312	$ 1,280,074	None	None

Office of the President,
San Francisco, California,
June 24th, 1936.

*Denotes red figures.

[Printer's Note: Exhibit 1A is here omitted because same is identical with Statements 1 and 2 of Exhibit No. 29 (Pages 2023 to 2027) of this printed record.]

EXHIBIT No. 1-B

Revised 6-24-36

The Western Pacific Railroad Company

ESTIMATED EXPENDITURES FOR REHABILITATION PROGRAMMED FOR 1936, 1937, 1938

Recapitulation

(Not Including New Equipment Required in 1937-1938)

	Gross Operating				
	Total Charges	Salvage	Net Operating	Capital Charges	Estimated Cash Required
EXTRAORDINARY—1936					
Way and Structures	$ 2,475,426	$ 498,309	$1,169,781	$ 807,336	$2,341,207
Equipment Rehabilitation	748,404	13,931	577,503	156,970	734,868
Total 1936	$ 3,223,830	$ 512,240	$1,747,284	$ 964,306	$3,076,075
100 New Hopper Cars	232,960			232,960	232,960
Grand Total 1936	$ 3,456,790	$ 512,240	$1,747,284	$1,197,266	$3,309,035
EXTRAORDINARY—1937					
Way and Structures	$ 2,806,096	$ 490,145	$1,220,380	$1,094,971	$2,624,254
Equipment Rehabilitation	1,143,650	20,119	800,332	323,199	1,123,136
Total 1937	$ 3,949,746	$ 510,264	$2,021,312	$1,418,170	$3,747,390
EXTRAORDINARY—1938					
Way and Structures	$ 2,162,583	$ 375,363	$ 935,745	$ 851,475	$2,004,119
Equipment Rehabilitation	579,414	4,052	344,329	231,033	575,362
Total 1938	$ 2,741,997	$ 379,415	$1,280,074	$1,082,508	$2,579,481
EXTRAORDINARY—THREE YEARS					
Way and Structures	$ 7,444,105	$1,363,817	$3,326,506	$2,753,782	$6,969,580
Equipment Rehabilitation	2,471,468	38,102	1,722,164	711,202	2,433,366
Total Three Years	$ 9,915,573	$1,401,919	$5,048,670	$3,464,984	$9,402,946
100 New Hopper Cars	232,960			232,960	232,960
Grand Total Three Years	$10,148,533	$1,401,919	$5,048,670	$3,697,944	$9,635,906

(Exhibit No. 1-B—Continued)

NEW EQUIPMENT PROPOSED FOR 1937-1938

(Not included in Rehabilitation Program. To be financed by Equipment Trusts.)

Item			1937	1938
	LOCOMOTIVES			
1	4 Simple Articulated 2-8-8-2 Locomotives	$150,000 each	$ 600,000	$ ———
2	7 Simple Articulated 4-6-6-4 Locomotives	140,000 each	980,000	———
3	Total Locomotives		$1,580,000	$ ———
	FREIGHT CARS AND MISCELLANEOUS			
4	400 Box Cars—all steel, 40-foot, 50-ton	$ 3,000 each	$ 600,000	$600,000
5	100 Flat Cars—all steel, 50-foot, 50-ton	2,000 each	100,000	100,000
6	50 Gondolas—all steel, 50-foot, 50-ton	2,200 each	———	110,000
7	100 Hopper Cars—All steel, selective dump	2,400 each	240,000	———
8	1 Wrecking Crane—200 ton capacity	85,000 each	85,000	———
9	Total Freight Cars and Miscellaneous		$1,025,000	$810,000
10	TOTAL NEW EQUIPMENT PURCHASES—1937, 1938		$2,605,000	$810,000

NOTE: If forecasts of revenues for 1936 to 1940, inclusive, are realized, additional motive power and cars will be required in addition to that shown above to properly handle such traffic in 1939 and 1940, but such requirements cannot be accurately forecast at this time. Two of the Company's present Equipment Trusts will be retired in 1938, another in 1941 and the last in 1943, and charges for future new equipment required in next 5 years can be expected after 1938 to total less than present charges.

Office of the President,
San Francisco, June 24, 1936.

EXHIBIT No. 1-C

The Western Pacific Railroad Company

PROGRAM OF WORK FOR REHABILITATION DURING APPROXIMATELY THREE YEARS, 1936, 1937, 1938

MAINTENANCE OF WAY AND STRUCTURES

M W & S—3 Years
Revised 6-24-36

Line	Character of Work	Total Charges	Gross Operating		Capital Charges	Estimated Cash Required (Note B)
			Salvage	Net Operating		
	Extraordinary Maintenance of Way & Structures—1936					
1	55.10 Miles 112-lb. Rail (Feather River Canyon)	$ 730,497	$ 142,541	$ 401,268	$ 186,688	$ 715,968
2	47.62 Miles 112-lb. Rail (In Paired Track District)	390,740(A)	176,705	72,113(A)	141,922	381,115(A)
3	80.33 Miles 100-lb. Rail (Various locations—Eastern Division)	881,183	179,063	481,678	220,442	834,869
4	183.05 Miles Total New Rail—1936	2,002,420(A)	498,309	955,059(A)	549,052	1,931,952(A)
5	22.20 Miles Ballast—Crushed Rock (Feather River Canyon)	117,673	—	77,502	40,171	113,403
6	17.36 Miles Ballast—Gravel (West of Weso on Eastern Division)	84,385	—	48,066	36,319	73,465
7	50.00 Miles Ballast—Gravel (In Paired Track District)	160,328(A)	—	41,716(A)	118,612	123,168(A)
8	21.00 Miles Ballast—Gravel (East of Alazon on Eastern Division)	70,620	—	47,438	23,182	59,219
9	110.56 Miles Total New Ballast—1936	433,006(A)	—	214,722(A)	218,284	369,255(A)
10	Roadway Machines and Tools for Program Work	40,000	—	—	40,000	40,000
11	Total Extraordinary Maintenance of Way & Structures—1936	$2,475,426(A)	$ 498,309	$1,169,781(A)	$ 807,336	$2,341,207(A)
	Extraordinary Maintenance of Way & Structures—1937					
12	41.00 Miles 112-lb. Rail (Feather River Canyon)	$ 545,300	$ 126,034	$ 279,866	$ 139,400	$ 533,000
13	32.61 Miles 112-lb. Rail (Various locations—Eastern Division)	394,418	93,754	181,996	118,668	362,949
14	98.59 Miles 100-lb. Rail (Various locations—Eastern and Western Divisions)	1,082,518	266,588	544,808	271,122	1,024,350
15	172.20 Miles Total New Rail—1937	2,022,236	486,376	1,006,670	529,190	1,920,299
16	17.67 Miles Ballast—Crushed Rock (Feather River Canyon)	99,853	—	61,686	38,167	90,258
17	45.00 Miles Ballast—Gravel (Eastern Division)	189,798	—	100,350	89,448	162,941
18	30.00 Miles Ballast—Gravel (In Paired Track District)	97,646(A)	—	25,256(A)	72,390	74,156(A)
19	92.67 Miles Total New Ballast—1937	387,297(A)	—	187,292(A)	200,005	327,355(A)
20	Passing Track Extensions—Feather River Canyon (Note C)	65,674	200	757	64,717	63,000
21	Passing Track at Wells, Nevada	14,489	569	661	13,259	9,000
22	Roundhouse—6 additional stalls at Oroville	96,800	—	7,000	89,800	87,000
23	Roundhouse—2 additional stalls at Elko	14,300	—	300	14,000	13,800
24	Roundhouse—2 additional stalls at Wendover	14,300	—	300	14,000	13,800
25	Turntable—New 120-foot at Elko	45,500	1,500	9,000	35,000	45,000
26	Turntable—New 120-foot at Wendover	45,500	1,500	9,000	35,000	45,000
27	Bridges—Strengthen various bridges for heavier power	100,000	—	—	100,000	100,000
28	Total Miscellaneous—Items 20 to 27, inclusive	396,563	3,769	27,018	365,776	376,600
29	Total Extraordinary Maintenance of Way & Structures—1937	$2,806,096(A)	$ 490,145	$1,220,980(A)	$1,094,971	$2,624,254(A)

22	[illegible]					
23	Roundhouse—2 additional stalls at Elko	14,300	—	300	14,000	13,800
24	Roundhouse—2 additional stalls at Wendover	14,300	—	300	14,000	13,800
25	Turntable—New 120-foot at Elko	45,500	1,500	9,000	35,000	45,000
26	Turntable—New 120-foot at Wendover	45,500	1,500	9,000	35,000	45,000
27	Bridges—Strengthen various bridges for heavier power	100,000	—	—	100,000	100,000
28	Total Miscellaneous—Items 20 to 27, inclusive	396,563	3,769	27,018	365,776	376,600
29	Total Extraordinary Maintenance of Way & Structures—1937	$2,806,096(A)	$ 490,145	$1,220,980(A)	$1,094,971	$2,624,254(A)
	Extraordinary Maintenance of Way & Structures—1938					
30	43.26 Miles 112-lb. Rail (Various locations—Eastern Division)	$ 523,230	$ 124,373	$ 241,434	$ 157,423	$ 492,515
31	92.60 Miles 100-lb. Rail (Various locations—Eastern and Western Divisions)	1,016,748	250,390	511,708	254,650	962,114
32	135.86 Miles Total New Rail—1938	1,539,978	374,763	753,142	412,073	1,454,629
33	24.17 Miles Ballast—Crushed Rock (Feather River Canyon)	133,999	—	84,377	49,622	123,460
34	22.08 Miles Ballast—Gravel (Eastern Division)	100,618	—	56,517	44,101	87,134
35	45.00 Miles Ballast—Gravel (In Paired Track District)	152,943(A)	—	38,868(A)	114,075	112,398(A)
36	91.25 Miles Total New Ballast—1938	387,560(A)	—	179,762(A)	207,798	322,922(A)
37	Section living quarters on Northern California Extension	100,569	—	—	100,569	98,498
38	Passing Track Extensions—Feather River Canyon (Note C)	59,476	200	1,241	58,035	53,500
39	Shop Facilities, South Sacramento (To handle added motive power)	75,000	400	1,600	73,000	74,500
40	Total Miscellaneous—Items 37, 38 and 39	235,045	600	2,841	231,604	226,498
41	Total Extraordinary Maintenance of Way & Structures—1938	$2,162,583(A)	$ 375,363	$ 935,745(A)	$ 851,475	$2,004,119
	Extraordinary Maintenance of Way & Structures—1936, 1937, 1938					
42	96.10 Miles 112-lb. Rail (Feather River Canyon)	$1,275,797	$ 268,575	$ 681,134	$ 326,088	$1,248,968
43	47.62 Miles 112-lb. Rail (In Paired Track District)	390,740(A)	176,705	72,113(A)	141,922	381,115(A)
44	75.87 Miles 112-lb. Rail (Various locations—Eastern Division)	917,648	218,127	423,430	276,091	855,464
45	271.52 Miles 100-lb. Rail (Various locations—Eastern and Western Divisions)	2,980,449	696,041	1,538,194	746,214	2,821,333
46	491.11 Miles Total New Rail	5,564,634(A)	1,359,448	2,714,871(A)	1,490,315	5,306,880(A)
47	64.04 Miles Ballast—Crushed Rock (Feather River Canyon)	351,525	—	223,565	127,960	327,121
48	105.44 Miles Ballast—Gravel (Eastern Division)	445,421	—	252,371	193,050	382,759
49	125.00 Miles Ballast—Gravel (In Paired Track District)	410,917(A)	—	105,840(A)	305,077	309,722(A)
50	294.48 Miles Total New Ballast	1,207,863(A)	—	581,776(A)	626,087	1,019,602(A)
51	Miscellaneous Items 10, 20-27, incl., 37, 38 and 39 above	671,608	4,369	29,859	637,380	643,098
52	Total Extraordinary Maintenance of Way & Structures—1936, 1937, 1938	$7,444,105(A)	$1,363,817	$3,326,506(A)	$2,753,782	$6,969,580(A)

Note A: Southern Pacific proportion of Paired Track expense is not included.

Note B: Cash required includes amounts equal to salvage of which a part will be subsequently sold as scrap, thus reimbursing cash to extent realized at time of sale.

Note C: Present plans contemplate passing track extensions at Bidwell, David, Blairsden and Merlin.

Note D: Program for 1936 now under way as shown above, but work proposed for the years 1937 and 1938 may eventually be modified as to order of precedence by changed requirements.

Office of the President,
San Francisco, June 24, 1936

EXHIBIT No. 1-D

The Western Pacific Railroad Company

PROGRAM OF WORK FOR REHABILITATION DURING APPROXIMATELY THREE YEARS, 1936, 1937, 1938

MAINTENANCE OF EQUIPMENT

(Not Including New Equipment Required)

M of E—3 Years
Revised 6-24-36

Line	Character of Work	Total Charges	Gross Operating		Capital Charges	Estimated Cash Required
			Salvage	Net Operating		
	Extraordinary Maintenance of Equipment—1936					
1	Auto Box Cars, 14000 Series—Rebuild 50 with steel sides and Evans Loaders	$ 112,550	$ 750	$ 47,100	$ 64,700	$ 111,800
2	Box Cars, 16/17/18000 Series—Rehabilitate 500 cars	200,000(X)	720	199,280(X)	— (X)	199,280(X)
3	Stock Cars, Single Deck—Convert 100 from 15000 Series Box Cars	36,000(X)	150	35,850(X)	— (X)	35,850(X)
4	Air-condition 4 units of passenger equipment	43,846	14	1,533	42,299	43,832
5	Replace arch bar trucks with cast steel—1600 various cars (Note Y)	341,800	12,200	292,000	37,600	329,995
6	Application Economy Devices to various locomotives	14,208	97	1,740	12,371	14,111
7	Total Extraordinary Maintenance of Equipment—1936 (Note A)	$ 748,494(A)	$13,931	$ 577,503	$156,970(A)	$ 734,868(A)
	Extraordinary Maintenance of Equipment—1937					
8	Auto Box Cars, 14000 Series—Rebuild 75 with steel sides and Evans Loaders	$ 168,825	$ 1,125	$ 70,650	$ 97,050	$ 167,700
9	Auto Box Cars, 14000 Series—Rebuild 25 with steel sides without loaders	36,075	375	23,925	11,775	35,700
10	Box Cars, 16/17/18000 Series—Rehabilitate 500 cars	200,000(X)	720	199,280(X)	— (X)	199,280(X)
11	Stock Cars, Single Deck—Convert 100 from 15000 Series Box Cars	36,000(X)	150	35,850(X)	— (X)	35,850(X)
12	Stock Cars, Double Deck—Convert 100 from SD to DD in 75501 Series	14,000(X)	—	1,000(X)	13,000(X)	14,000(X)
13	Air-condition 3 units of passenger equipment	33,717	12	690	33,015	33,705
14	Replace arch bar trucks with cast steel—2520 various cars (Note Y)	525,033	17,737	465,812	41,484	506,901
15	Application Economy Devices to various locomotives	25,000	—	3,125	21,875	25,000
16	Additional Shop Tools, Sacramento Shops	50,000	—	—	50,000	50,000
17	Motor Drives for Shop Tools and Economy Devices at various roundhouses	55,000	—	—	55,000	55,000
18	Total Extraordinary Maintenance of Equipment—1937 (Note B)	$1,143,650(B)	$20,119	$ 800,332	$323,199(B)	$1,123,136(B)
	Extraordinary Maintenance of Equipment—1938					
19	Auto Box Cars, 14000 Series—Rebuild 98 with steel sides without loaders	$ 141,414	$ 1,470	$ 93,786	$ 46,158	$ 139,944
20	Box Cars, 16/17/18000 Series—Rehabilitate 300 cars	120,000(X)	432	119,568(X)	— (X)	119,568(X)
21	Stock Cars, Single Deck—Convert 100 from 15000 Series Box Cars	36,000(X)	150	35,850(X)	— (X)	35,850(X)
22	Additional Shop Tools, Sacramento Shops	65,000	—	—	65,000	65,000
23	Application Economy Devices to various locomotives	25,000	—	3,125	21,875	25,000
24	Initiate program application Type "AB" Air Brakes—1000 cars	192,000	2,000	92,000	98,000	190,000
25	Total Extraordinary Maintenance of Equipment—1938 (Note B)	$ 579,414(B)	$ 4,052	$ 344,329	$231,033(B)	$ 575,362(B)
	Extraordinary Maintenance of Equipment—1936, 1937, 1938					
26	Auto Box Cars, 14000 Series—Rebuild 125 with steel sides and Evans Loaders	$ 281,375	$ 1,875	$ 117,750	$161,750	$ 279,500
27	Auto Box Cars, 14000 Series—Rebuild 123 with steel sides without loaders	177,489	1,845	117,711	57,933	175,644
28	Box Cars, 16/17/18000 Series—Rehabilitate 1300 cars	520,000(X)	1,872	518,128(X)	— (X)	518,128(X)
29	Stock Cars, Single Deck—Convert 300 from 15000 Series Box Cars	108,000(X)	450	107,550(X)	— (X)	107,550(X)
30	Stock Cars, Double Deck—Convert 100 from SD to DD in 75501 Series	14,000(X)	—	1,000(X)	13,000(X)	14,000(X)
31	Additional Shop Tools	115,000	—	—	115,000	145,000
32	Air-condition 7 units of passenger equipment	77,563	26	2,223	75,314	77,537
33	Motor Drives for Shop Tools and Economy Devices at various roundhouses	55,000	—	—	55,000	55,000
34	Replace arch bar trucks with cast steel—4120 various cars (Note Y)	866,833	29,937	757,812	79,084	836,896
35	Application Economy Devices to various locomotives	64,208	97	7,990	56,121	64,111

	Extraordinary Maintenance of Equipment—1937					
8	Auto Box Cars, 14000 Series—Rebuild 75 with steel sides and Evans Loaders	$ 163,825	$ 1,125	$ 70,650	$ 97,050	$ 167,700
9	Auto Box Cars, 14000 Series—Rebuild 25 with steel sides without loaders	36,075	375	23,925	11,775	35,700
10	Box Cars, 16/17/18000 Series—Rehabilitate 500 cars	200,000(X)	720	199,280(X)	— (X)	199,280(X)
11	Stock Cars, Single Deck—Convert 100 from 15000 Series Box Cars	36,000(X)	150	35,850(X)	— (X)	35,850(X)
12	Stock Cars, Double Deck—Convert 100 from SD to DD in 75501 Series	14,000(X)	—	1,000(X)	13,000(X)	14,000(X)
13	Air-condition 3 units of passenger equipment	33,717	12	690	33,015	33,705
14	Replace arch bar trucks with cast steel—2520 various cars (Note Y)	525,033	17,737	465,812	41,484	506,901
15	Application Economy Devices to various locomotives	25,000	—	3,125	21,875	25,000
16	Additional Shop Tools, Sacramento Shops	50,000	—	—	50,000	50,000
17	Motor Drives for Shop Tools and Economy Devices at various roundhouses	55,000	—	—	55,000	55,000
18	Total Extraordinary Maintenance of Equipment—1937 (Note B)	$1,143,650(B)	$20,119	$ 800,332	$323,199(B)	$1,123,136(B)
	Extraordinary Maintenance of Equipment—1938					
19	Auto Box Cars, 14000 Series—Rebuild 98 with steel sides without loaders	$ 141,414	$ 1,470	$ 93,786	$ 46,158	$ 139,944
20	Box Cars, 16/17/18000 Series—Rehabilitate 300 cars	120,000(X)	432	119,568(X)	— (X)	119,568(X)
21	Stock Cars, Single Deck—Convert 100 from 15000 Series Box Cars	36,000(X)	150	35,850(X)	— (X)	35,850(X)
22	Additional Shop Tools, Sacramento Shop	65,000	—	—	65,000	65,000
23	Application Economy Devices to various locomotives	25,000	—	3,125	21,875	25,000
24	Initiate program application Type "AB" Air Brakes—1000 cars	192,000	2,000	92,000	98,000	190,000
25	Total Extraordinary Maintenance of Equipment—1938 (Note B)	$ 579,414(B)	$ 4,052	$ 344,329	$231,033(B)	$ 575,362(B)
	Extraordinary Maintenance of Equipment—1936, 1937, 1938					
26	Auto Box Cars, 14000 Series—Rebuild 125 with steel sides and Evans Loaders	$ 281,375	$ 1,875	$ 117,750	$161,750	$ 279,500
27	Auto Box Cars, 14000 Series—Rebuild 123 with steel sides without loaders	177,489	1,845	117,711	57,933	175,644
28	Box Cars, 16/17/18000 Series—Rehabilitate 1300 cars	520,000(X)	1,872	518,128(X)	— (X)	518,128(X)
29	Stock Cars, Single Deck—Convert 300 from 15000 Series Box Cars	108,000(X)	450	107,550(X)	— (X)	107,550(X)
30	Stock Cars, Double Deck—Convert 100 from SD to DD in 75501 Series	14,000(X)	—	1,000(X)	13,000(X)	14,000(X)
31	Additional Shop Tools	115,000	—	—	115,000	115,000
32	Air-condition 7 units of passenger equipment	77,563	26	2,223	75,314	77,537
33	Motor Drives for Shop Tools and Economy Devices at various roundhouses	55,000	—	—	55,000	55,000
34	Replace arch bar trucks with cast steel—4120 various cars (Note Y)	866,833	29,937	757,812	79,084	836,896
35	Application Economy Devices to various locomotives	64,208	97	7,990	56,121	64,111
36	Initiate program application Type "AB" Air Brakes—1000 cars	192,000	2,000	92,000	98,000	190,000
37	Total Extraordinary Maintenance of Equipment—1936, 1937, 1938	$2,471,468(AB)	$38,102	$1,722,164	$711,202(AB)	$2,433,366(AB)

Note A:—Program for 1936 now under way as shown, but the work proposed for 1937 and 1938 may be modified as to precedence by changed requirements. The cost of 100 new selective dump hopper cars delivered in May, 1936, shown on Recapitulation of the Three-Year Program.

Note B:—For estimate of New Equipment required in 1937 and 1938, see separate statement. Such new equipment is expected to be acquired through the medium of Equipment Trusts and is not included as an integral part of the Rehabilitation Program.

Note X:—Items marked "X" do not include costs of required replacement of arch bar truck frames on such cars with cast steel integral side frames. All arch bar truck replacements are grouped as one item for 1936 and 1937.

Note Y:—Under Association of American Railroad rules all cars in interchange after January 1st, 1938, must have cast steel integral side frame trucks.

Estimated Schedule	40-Ton	50-Ton
Year 1936	600	1,000
" 1937	2,423	97
Total	3,023	1,097

Office of the President,
San Francisco, June 24, 1936.

EXHIBIT No. 3

ESTIMATED COST FOR LAYING 112-LB. RAIL IN PLACE OF 100-LB. RAIL ON HILLS

Material	100 Lb. Track Cost				112-Lb. Track Cost			
Rail	159.48 G. T.	at	$ 39.46	$6,293	176.63 G. T.	at	$ 39.46	$6,970
Joints 100%	271	at	2.57	696	271	at	3.02	818
Bolts	23.85 Cwt.	at	3.84	92	26.02 Cwt.	at	3.84	100
Nutlocks	10.84	at	0.041	44	10.84	at	0.041	44
Tie plates	6400	at	0.26	1,664	6400	at	0.26	1,664
Rail anchors	1920	at	0.10	192	1920	at	0.196	376
Spikes 50%	65 Cwt.	at	2.55	166	65 Cwt.	at	2.55	166
Turnout complete	½ No. 10	at	563.00	282	½ No. 10	at	656.00	328
Company freight on excess wt.								10
Purchase expense				92				105
				$ 9,521				$10,581
Total labor				1,320				1,375
Total material				$10,841				$11,956
Total cost per mile								$ 1,115
Excess cost per mile								

75.87 miles at $1.115 per mile = $84,595.00—Total Increased Cost.

Chilcoot	M.P. 339.56 to Omira	M.P. 358.25 =	18.69	miles
Sulphur	M.P. 474.67 to Jungo	M.P. 497.00 =	22.33	miles
Sonar	M.P. 747.20 to Jaster	M.P. 754.80 =	7.60	miles
Silver Zone	M.P. 775.25 to Clifside	M.P. 782.00 =	6.75	miles
Pilot	M.P. 787.00 to Wendover	M.P. 807.50 =	20.50	miles
		Total	75.87	miles

CAN-SH
6/22/36

(Exhibit No. 3—continued)

The Western Pacific Railroad Company

TREATED CROSS TIES, SWITCH TIES AND BRIDGE TIMBER. ESTIMATED ADDED YEARLY EXPENSE FOR TREATED MATERIAL BASED ON STUDIES AS OF JUNE 1, 1936.

Year	Added Operating Expense: Cross and Switch Ties	Added Capital: Bridge Timber	Total Added Expense
1937	$ 140,000	$ 27,559	$ 167,559
1938	200,000	27,559	227,559
1939	286,649	27,559	314,208
1940	286,649	27,559	314,208
1941	286,649	27,559	314,208
1942	286,649	27,559	314,208
1943	286,649	27,559	314,208
1944	286,649	30,968*	255,681
Total	$2,059,894	$161,945	$2,221,839
1945	142,118*	30,968*	173,086*
1946	202,118*	30,968*	233,086*
1947	502,208*	30,968*	533,176*
1948 to 1955—Same savings annually as for Year 1947.			

*Denotes red figures.

Red figures denote reduction in yearly expense as compared with present expense.

Note: The above additional expense for treated ties is based on continuing the use of untreated ties under that portion of the main line laid with old rail until the old rail has been replaced with new, a part of which will be done in 1937 and the balance completed in 1938.

Office of Chief Engineer,
San Francisco, California,
June 18, 1936.

[Endorsed]: Finance Docket No. 10913. Exhibit No. 38. Witness ..... Filed Sept. 28, 1936.

[End of Exhibit No. 38]

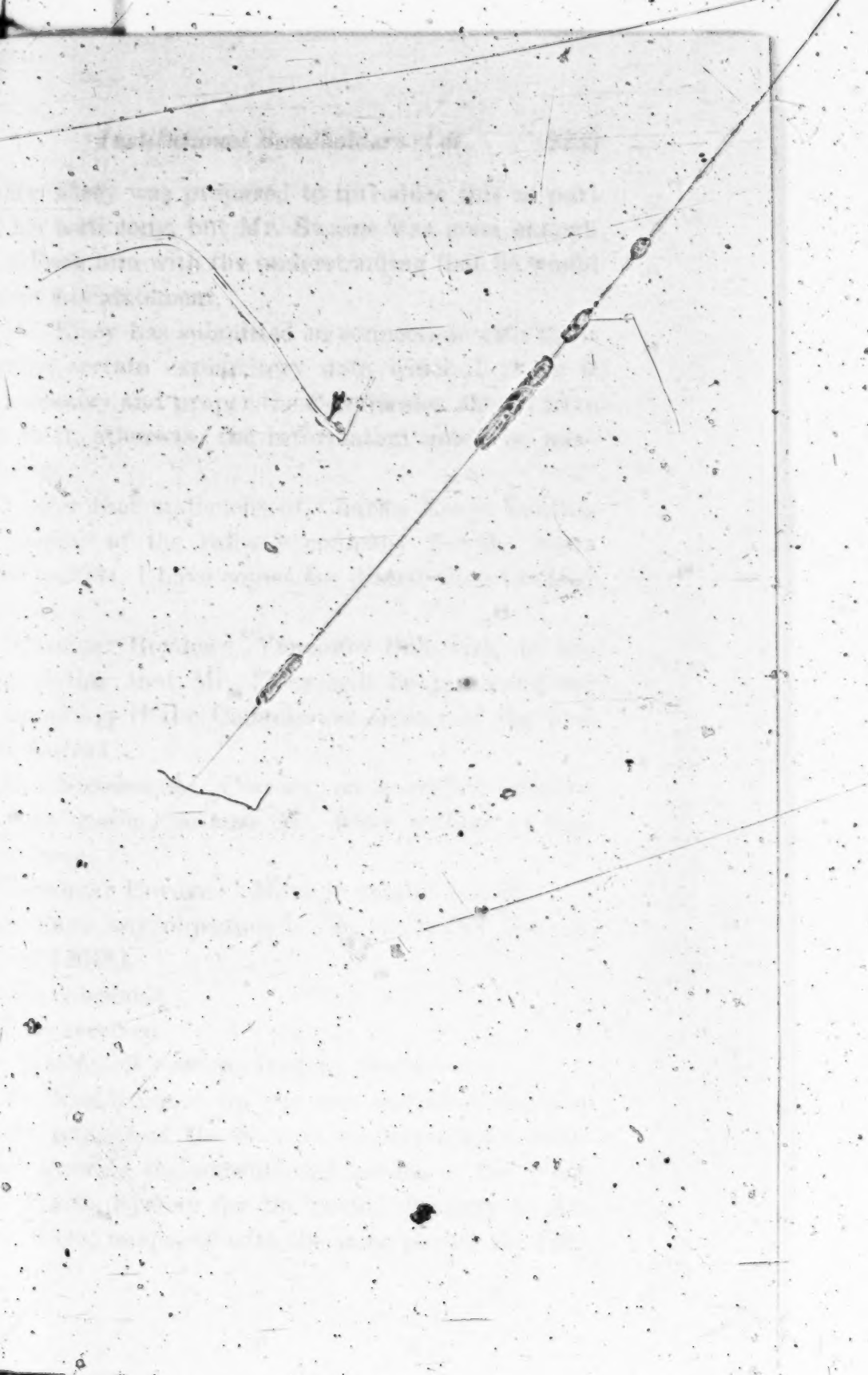
Mr. Nicodemus: Under date of August 25, 1936, the Interstate Commerce Commission, Division 4, filed in this proceeding a report of an accounting investigation of net income of the Western Pacific Railroad Company for the years 1930 to 1934, inclusive.

This was filed pursuant to paragraph 11 of subsection C of Section 77 of the Amended Bankruptcy Act.

Attached to this report is a theoretical income account of the Western Pacific Railroad Company for the years 1930 to 1934, that is, an income account restated so as to project backwards certain new items of expense and other adjustments.

Included in the income of the railroad company for each of these years was certain income accrued on the books and representing interest paid by or due from subsidiary companies. Certain of that interest was not earned, and counsel for the Institutional Bondholders Committee has requested that we submit to the Commission a statement showing the amounts of those respective items.

Incidentally, I wish to state that in this entire [2047] proceeding the carrier is relying upon the system accounts and not upon the accounts of the railroad company. That is to say, it is relying upon the consolidated income accounts while all intercompany items are eliminated; so it is not material from our standpoint, but we do wish to submit this statement pursuant to the request of counsel for the committee.



Mr. Elsey was prepared to introduce this as part of his testimony, but Mr. Swaine was good enough to release him with the understanding that he would accept his statement.

Mr. Elsey has submitted in connection with these figures certain explanatory data which I think it is necessary and proper the Commission should have before it, otherwise the information might be misleading.

I offer that statement of Charles Elsey, relating to income of the railway company for the years 1930 to 1934. I have copies for distribution to other counsel.

Examiner Boyden: You offer that with the understanding that Mr. Elsey will be presented for examination if the Commission or any of the parties desire?

Mr. Nicodemus: Correct, on a certain number of days' notice, because Mr. Elsey resides in San Francisco.

Examiner Boyden: Mark it exhibit No. 39.

Is there any objection to the receipt of this exhibit? [2048]

(No response.)

It is received.

(Exhibit 39 was received in evidence.)

Mr. Nicodemus: On our own initiative and also at the request of Mr. Swaine, we introduce a statement showing the consolidated income of the Western Pacific System for the period January to August, 1936, compared with the same period for 1935.

In that connection I should like to state that for many, many years, all of the net railway income of the carrier has been earned in the last quarter, so an eight months' statement is necessarily misleading unless it is made comparative, and unless you have some reasonably accurate estimate for what the next four months will be.

In offering this I should like to ask leave, after the case is closed, if practicable, to supply all of the counsel and the Commission from month to month with the actual results, so that if this case is held over until January 1st, you will have the actual for that 12 months.

Examiner Boyden: For what period do you want to figure those monthly statements?

Mr. Nicodemus: I would like to put them in as rapidly as they come in. It will be available each successive month on the 24th day of the following month. The information will ultimately be filed with the Commission, but [2049] it may be later.

Mr. Swaine: I think it would be very helpful to do that, to have the consolidated system income account sent down each month and by stipulation among counsel made part of the record, as long as the case is under advisement by the Commission.

Mr. Willard: I think so, too.

Examiner Boyden: Perhaps it would be helpful, too, Mr. Nicodemus, if you could give us the monthly figures for 1935 for the purpose of comparison.

Mr. Nicodemus: I will do that.

Mr. Swaine: They are on that.

Mr. Nicodemus: He means the subsequent statements.

Mr. Swaine: They can be in the same form as this one. This is a comparison of 1936 with 1935. Then if we ever get into 1937, I suppose you could make the same comparison as against 1936.

Mr. Nicodemus: Correct.

Examiner Boyden: My suggestion would be that you supplement this exhibit which your are now offering at this time as soon as possible with the monthly figures for the rest of 1935, which is not shown in that exhibit.

Mr. Nicodemus: Correct.

The next statement will be a nine months' statement, which will be compared as against September of 1935. [2050]

I offer this exhibit in evidence.

Examiner Boyden: Is there any objection?

(No response.)

Who prepared this exhibit?

Mr. Nicodemus: This was prepared by the president on the basis of data supplied him by the auditor.

Examiner Boyden: If necessary, you will present a witness to identify it and answer questions with respect to it?

Mr. Nicodemus: We will, with pleasure.

Examiner Boyden: Any objection?

(No response.)

It is received in evidence.

(Exhibit No. 40 was received in evidence.)

Examiner Boyden: As I understand it, counsel has stipulated that after the close of the record in this proceeding you may furnish monthly income system statements.

Mr. Swaine: Which will be part of the record?

Examiner Boyden: Which will be part of the record.

Mr. Nicodemus: That is very nice. Thank you.

Examiner Boyden: You may furnish those statements.

This exhibit No. 40, Mr. Nicodemus, sets forth information which was contained in your previous exhibits?

Mr. Nicodemus: Correct.

Examiner Boyden: And was prepared and represents the [2051] same information continued forward?

Mr. Nicodemus: Correct.

CLERK'S COPY.

Vol. VI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING INTERNATIONAL BONDHOLDERS COMMITTEE, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 30, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED — DECEMBER 30, 1941. JANUARY 17, 1942. FEBRUARY 28, 1942. MARCH 30, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

Transcript of Record

(Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.)

In Six Volumes

VOLUME VI

Page 2239 to 2626

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Exhibit #127

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

	MONTH OF OCTOBER				PERIOD JANUARY 1ST TO OCTOBER 31ST			
			Increase or Decrease				Increase or Decrease	
	1936	1935	Amount	Per Cent	1936	1935	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,596.73	5.64	.35	1,591.09	1,596.73	5.64	.35
OPERATING REVENUES								
Freight	$1,897,113.17	$1,932,528.07	$ 35,414.90	1.83	$12,458,942.31	$10,876,447.44	$1,582,494.87	14.55
Passenger	87,943.30	77,179.09	10,764.21	13.95	696,095.15	621,954.21	74,140.94	11.92
Mail	4,280.97	4,244.23	36.74	.87	41,613.43	45,295.92	3,682.49	8.13
Express	7,685.24	7,158.00	527.24	7.37	112,284.43	89,263.89	23,020.54	25.79
Dining Car, Hotel & Restaurant	5,765.02	5,776.09	11.07	.21	63,096.35	54,974.61	8,121.74	14.77
Miscellaneous	25,443.96	22,960.63	2,483.33	10.82	179,986.08	164,896.09	15,089.99	9.15
Total Railway Operating Revenues	$2,028,231.66	$2,050,846.91	$ 21,615.25	1.05	$13,552,017.75	$11,852,832.16	$1,699,185.59	14.34
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 198,266.87	$ 302,788.19	$ 104,521.32	34.52	$ 2,040,035.69	$ 2,341,949.31	$ 301,913.62	12.89
M. of W. & S.-Rehabil. Program (W.P.RR Co.)	65,178.59	-	65,178.59	-	1,058,884.47	-	1,058,884.47	-
Total	263,445.46	302,788.19	39,342.73	12.99	3,098,920.16	2,341,949.31	756,970.85	32.32
M. of E.-Ord. and Budget	229,832.25	208,254.11	21,578.14	10.22	2,061,013.60	1,903,152.23	157,861.37	8.29
M. of E.-Rehabil. Program (W.P.RR Co.)	72,616.82	-	72,616.82	-	477,940.37	-	477,940.37	-
Total	302,149.07	208,254.11	93,894.96	45.09	2,538,953.97	1,903,152.23	635,801.74	33.41
Power	14,007.35	14,869.22	861.87	5.80	134,079.41	131,913.40	2,166.01	1.64
Traffic	59,222.80	57,476.23	1,747.57	3.04	606,323.09	598,596.13	7,726.96	1.29
Transportation - Rail Line	661,914.40	605,337.85	56,576.55	9.35	5,222,317.27	4,574,804.11	647,513.16	14.15
Miscellaneous Operations	10,098.75	7,592.81	2,505.94	33.00	90,658.91	72,995.23	17,663.68	24.20
General	59,170.02	55,784.92	3,385.10	6.08	550,929.57	419,241.86	131,687.71	31.41
Transportation for Inv.-Cr.	9,875.64	1,471.37	7,404.27	-	47,485.32	9,173.63	38,311.69	-
Total Railway Operating Expenses	$1,361,132.21	$1,250,630.96	$ 110,501.25	8.84	$12,194,697.06	$10,033,478.64	$2,161,218.42	21.54
NET REVENUE FROM RAILWAY OPERATIONS	667,099.45	799,215.95	132,116.50	16.53	1,357,320.69	1,819,353.52	462,033.83	25.40
Excise and Use Tax Accruals-Ord. and Budget	$ 33,558.99	$ -	$ 33,558.99	-	$ 265,170.00	$ -	$ 265,170.00	-
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	1,827.43	-	1,827.43	-	33,120.20	-	33,120.20	-
Railway Tax Accruals-All Other	58,826.12	60,070.93	1,244.81	2.07	593,663.67	635,018.10	41,354.43	6.51
Railway Operating Income	$ 572,886.91	$ 739,145.02	$ 166,258.11	22.49	$ 465,366.82	$ 1,184,335.42	$ 718,968.60	60.71
Hire of Equipment - Net Debit	$ 145,006.48	$ 197,139.01	$ 52,132.53	26.44	$ 939,075.17	$ 880,627.41	$ 58,447.76	6.64
Joint Facility Rents - Net Credit	15,285.80	8,802.25	6,883.55	77.70	104,865.22	98,385.68	6,479.54	6.59
Net Railway Operating Income	$ 443,166.23	$ 550,608.26	$ 107,442.03	19.51	$ 368,843.13	$ 402,093.69	$ 770,936.82	-
NON-OPERATING INCOME								
Rental of Property	$ 31,660.03	$ 40,908.69	$ 9,248.66	22.61	$ 361,816.24	$ 403,854.34	$ 42,038.10	10.41
Interest Accruals	1,627.19	1,398.79	228.40	16.33	14,587.49	14,585.75	1.74	.01
Miscellaneous	16.28	2.00	14.28	-	125.08	343.55	218.47	63.59
Total Non-Operating Income	$ 33,303.50	$ 42,309.48	$ 9,005.98	21.29	$ 376,528.81	$ 418,783.64	$ 42,254.83	10.09
GROSS INCOME	$ 476,469.73	$ 592,917.74	$ 116,448.01	19.64	$ 7,685.68	$ 820,877.33	$ 813,191.65	99.06
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	2,636.61	2,651.76	15.15	.57	25,473.96	35,370.84	9,896.88	27.98
Miscellaneous Tax Accruals	4,527.98	3,393.41	1,134.57	33.43	42,182.82	39,590.60	2,592.22	6.55
Amortization of Discount	11,760.26	11,917.79	157.53	1.32	117,844.80	119,660.12	1,815.32	1.52
Miscellaneous	7,233.37	9,696.80	2,473.33	-	28,137.87	32,224.60	4,086.73	12.68
Total Miscellaneous Deductions	$ 11,701.58	$ 8,266.36	$ 3,435.22	41.56	$ 213,639.45	$ 226,846.16	$ 13,206.71	5.82
AVAILABLE FOR INTEREST	$ 464,768.15	$ 584,651.38	$ 119,883.23	20.51	$ 205,953.77	$ 594,031.17	$ 799,984.94	-
Interest on Funded Debt	$ 276,095.30	$ 278,990.04	$ 2,894.74	1.04	$ 2,764,705.26	$ 2,793,397.72	$ 28,692.46	1.03
Interest on Unfunded Debt	13,542.58	3,356.19	10,186.39	303.51	91,409.35	33,128.23	58,281.12	175.93
Total Interest Deductions	$ 289,637.88	$ 282,346.23	$ 7,291.65	2.58	$ 2,856,114.61	$ 2,826,525.95	$ 29,588.66	1.05
NET INCOME	$ 175,130.27	$ 302,305.15	$ 127,174.88	42.06	$ 3,082,068.38	$ 2,232,494.78	$ 829,573.60	-

Accounting Department
San Francisco, Calif.
December 14, 1936.

Note-Italics denote red.

F. D. 10913

Exhibit #128

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS - CONSOLIDATED
(All Inter-Company Items Eliminated)

	MONTH OF NOVEMBER				PERIOD JANUARY 1ST TO NOVEMBER 30TH			
			Increase or *Decrease*				Increase or *Decrease*	
	1936	1935	Amount	Per Cent	1936	1935	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,586.73	5.64	.35	1,591.09	1,586.73	5.64	.35
OPERATING REVENUES								
Freight	$1,351,233.81	$1,325,930.97	$ 25,302.84	1.91	$13,810,176.12	$12,202,378.41	$1,607,797.71	13.18
Passenger	54,432.70	55,638.58	*1,205.88*	2.17	750,527.85	677,592.79	72,935.06	10.76
Mail	4,313.88	4,267.37	46.51	1.09	45,927.31	49,563.29	*3,635.98*	*7.34*
Express	8,363.00	4,361.48	4,221.52	96.78	120,847.43	93,625.37	27,242.06	29.10
Dining Car, Hotel & Restaurant	4,586.96	4,428.37	158.59	3.58	67,683.31	59,402.98	8,280.33	13.94
Miscellaneous	25,129.39	21,217.18	3,912.21	18.44	205,115.47	186,113.27	19,002.20	10.21
Total Railway Operating Revenues	$1,448,279.74	$1,415,843.95	$ 32,435.79	2.29	$15,000,297.49	$13,268,676.11	$1,731,621.38	13.05
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 158,051.03	$ 189,997.87	$ *31,946.84*	*16.81*	$ 2,198,086.72	$ 2,531,947.18	$ *333,860.46*	*13.19*
M. of W. & S.-Rehabil. Program (W.P.RR Co.)	1,706.13	-	1,706.13	-	1,060,590.60	-	1,060,590.60	-
Total	159,757.16	189,997.87	30,240.71	15.92	3,258,677.32	2,531,947.18	726,730.14	28.70
M. of E.-Ord. and Budget	232,159.59	217,243.64	14,915.95	6.87	2,293,173.19	2,120,395.87	172,777.32	8.15
M. of E.-Rehabil. Program (W.P.RR Co.)	38,415.01	-	38,415.01	-	516,355.38	-	516,355.38	-
Total	270,574.60	217,243.64	53,330.96	24.55	2,809,528.57	2,120,395.87	689,132.70	32.50
Power	12,723.80	14,006.64	*1,282.84*	*9.15*	146,803.21	145,920.04	883.17	.61
Traffic	61,395.55	56,099.14	5,296.41	5.87	667,718.64	656,695.27	11,023.37	1.68
Transportation - Rail Line	562,652.14	532,908.28	29,743.86	5.58	5,[illegible]4,969.41	5,107,712.39	677,257.02	13.26
Miscellaneous Operations	7,986.33	6,495.17	1,491.16	22.96	98,645.24	79,490.40	19,154.84	24.10
General	55,178.63	53,533.07	1,645.56	3.07	406,108.20	472,774.93	*133,333.27*	*28.20*
Transportation for Inv.-Cr.	149.63	1,327.82	*1,178.19*	*88.73*	*37,634.95*	10,501.45	37,133.50	*353.60*
Total Railway Operating Expenses	$1,130,118.58	$1,070,955.99	$ 59,162.59	5.52	$13,324,815.64	$11,104,434.63	$2,220,381.01	20.00
NET REVENUE FROM RAILWAY OPERATIONS	318,161.16	344,887.96	*26,726.80*	*7.75*	1,675,481.85	2,164,241.48	*488,759.63*	*22.58*
Excise and Use Tax Accruals-Ord. and Budget	$ 29,294.40	$ -	$ 29,294.40	-	$ 294,464.40	$ -	$ 294,464.40	-
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	365.30	-	365.30	-	33,485.50	-	33,485.50	-
Railway Tax Accruals-All Other	47,187.58	80,852.16	*-33,664.58*	*-41.64*	640,851.25	685,870.26	*45,019.01*	*6.56*
Railway Operating Income	$ 241,313.88	$ 294,035.80	$ *52,721.92*	*17.93*	$ 806,680.70	$ 1,478,371.22	*771,690.52*	*52.20*
Hire of Equipment - Net Debit	$ 124,373.52	$ 134,419.25	*10,045.73*	*7.47*	$ 1,063,448.69	$ 1,015,046.65	$ 48,402.04	4.77
Joint Facility Rents - Net Credit	9,111.51	10,582.74	*1,471.23*	*13.90*	113,976.73	108,968.42	5,008.31	4.60
Net Railway Operating Income	$ 126,051.87	$ 170,199.29	$ *44,147.42*	*25.94*	$ *242,791.25*	$ 572,292.98	$ *815,084.24*	-
NON-OPERATING INCOME								
Rental of Property	$ 34,791.29	$ 38,730.18	$ *3,938.89*	*10.10*	$ 396,607.53	$ 442,554.52	$ *45,946.99*	*10.38*
Interest Accruals	1,609.42	1,514.35	95.07	6.28	16,198.91	16,100.10	96.81	.60
Miscellaneous	1.00	1.00	-	-	126.08	344.55	*218.47*	*63.41*
Total Non-Operating Income	$ 36,401.71	$ 40,245.53	$ *3,843.82*	*9.46*	$ 412,930.52	$ 458,999.17	$ *46,068.65*	*10.04*
GROSS INCOME	$ 162,453.58	$ 210,444.82	$ *47,991.24*	*22.89*	$ 170,139.26	$ 1,031,292.15	*861,152.89*	*83.50*
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,713.59	$ 2,672.78	$ 40.81	1.53	$ 28,187.55	$ 38,043.62	*9,856.07*	*25.91*
Miscellaneous Tax Accruals	4,368.06	4,865.21	*497.15*	*10.22*	46,550.88	44,455.81	2,095.07	4.71
Amortization of Discount	11,733.25	11,890.94	*157.69*	*1.33*	129,578.05	131,551.06	*1,973.01*	*1.50*
Miscellaneous	3,109.32	3,883.12	*773.80*	*19.93*	31,247.19	36,107.72	*4,860.53*	*13.46*
Total Miscellaneous Deductions	$ 21,924.22	$ 23,312.05	$ *1,387.83*	*5.95*	$ 235,563.67	$ 250,158.21	$ *14,594.54*	*5.83*
AVAILABLE FOR INTEREST	$ 140,529.36	$ 187,102.77	$ *46,573.41*	*24.89*	$ *65,424.41*	$ 781,133.94	*846,558.35*	-
Interest on Funded Debt	$ 275,244.10	$ 278,160.24	$ *2,916.14*	*1.05*	$ 3,039,949.36	$ 3,071,557.96	$ *31,608.60*	*1.03*
Interest on Unfunded Debt	13,113.64	3,383.03	9,732.61	287.69	104,524.92	36,511.26	68,013.72	186.28
Total Interest Deductions	$ 288,357.74	$ 281,543.27	$ 6,816.47	2.42	$ 3,144,474.35	$ 3,108,069.22	$ 36,405.13	1.17
NET INCOME	$ *147,827.38*	$ *94,440.50*	$ *53,389.88*	-	$ *3,209,898.76*	$ *2,326,935.28*	$ *882,963.48*	-

1690

Accounting Department
San Francisco, Calif.
January 5th, 1937.

Note-Italics denote red.

F. D. No. 10910

Exhibit #129

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
[illegible] RAILROAD COMPANY
OPERATING REVENUES - CONTINUED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1ST TO DECEMBER 31ST			
			Increase or Decrease				Increase or Decrease	
	1936	1935	Amount	Per Cent	1936	1935	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,886.73	5.64	.35	1,891.09	1,886.73	5.64	.35
OPERATING REVENUES								
Freight -	$1,454,499.88	$1,045,150.56	$ 409,348.30	39.17	$15,264,676.28	$13,247,529.97	$2,017,146.01	15.23
Passenger	38,146.73	32,059.31	6,088.44	5.99	808,972.60	730,628.10	78,020.50	10.37
Mail	8,048.78	8,278.19	167.57	2.86	51,970.07	55,436.48	3,468.41	6.26
Express	8,717.12	7,306.00	1,411.12	19.31	189,984.38	100,921.37	89,063.18	88.29
Dining Car, Hotel & Restaurant	4,916.80	4,497.41	38.89	1.52	72,199.81	63,860.59	8,339.22	13.06
Miscellaneous	18,125.82	14,990.46	3,169.36	21.14	282,241.29	201,073.73	22,167.56	11.02
Total Railway Operating Revenues	$1,847,044.81	$1,136,809.83	$ 416,234.98	36.61	$16,547,343.70	$14,399,488.64	$2,147,859.06	14.92
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 199,985.08	$ 161,590.67	$ 38,392.36	23.76	$ 2,398,069.73	$ 2,092,637.65	$ 305,432.10	10.57
M. of W. & S.-Rehabil. Program (W.P.RR Co.) Note "A"	2,439.51	-	2,439.51	-	1,098,151.09	-	1,098,151.09	-
Total	197,545.57	161,590.67	35,952.85	22.25	3,496,220.64	2,092,537.65	766,682.99	36.62
M. of E.-Ord. and Budget	198,786.28	198,807.86	2,638.42	1.46	2,486,930.47	2,313,592.73	173,338.74	7.49
M. of E.-Rehabil. Program (W.P.RR Co.) Note "A"	11,023.60	-	11,023.60	-	527,378.98	-	527,378.98	-
Total	209,779.86	198,807.86	13,662.02	7.20	3,014,309.45	2,313,592.73	700,716.72	30.29
Power	13,118.80	13,108.24	10.56	.08	159,916.01	159,088.28	827.73	.52
Traffic	38,141.90	38,729.99	588.09	.97	728,600.54	718,423.26	10,177.28	1.41
Transportation - Rail Line	584,250.13	473,142.67	111,107.26	23.48	5,369,219.94	5,260,038.26	709,181.68	13.48
Miscellaneous Operations	7,616.35	8,779.89	836.44	12.34	106,241.59	86,270.26	19,971.33	23.17
General	39,549.13	38,784.79	2,764.34	6.98	644,687.33	538,589.72	106,097.61	19.73
Transportation for Inv.-Cr.	1,884.60	1,773.72	110.89	12.34	49,189.78	12,273.17	36,916.61	300.75
Total Railway Operating Expenses	$1,134,488.80	$ 960,256.59	$ 164,206.29	17.10	$14,449,274.82	$13,044,669.22	$2,386,588.30	19.76
NET REVENUE FROM RAILWAY OPERATIONS	422,387.35	170,884.04	252,038.39	147.77	2,098,089.18	2,354,796.42	256,727.24	10.14
Excise and Use Tax Accruals-Ord. and Budget	$ 30,987.96	$ 11,487.50	$ 19,500.44	169.76	$ 325,488.34	$ 11,487.50	$ 313,984.84	-
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	29.08	-	29.08	-	33,514.89	-	33,514.89	-
Railway Tax Accruals-All Other	48,375.99	44,677.20	4,303.21	9.17	589,825.24	738,847.46	49,022.22	6.68
Railway Operating Income	$ 343,199.32	$ 106,390.34	$ 236,808.98	222.58	$ 1,049,877.02	$ 1,804,761.46	$ 534,884.44	33.75
Hire of Equipment - Net Debit	$ 116,087.96	$ 107,315.52	$ 8,772.44	8.18	$ 1,179,806.62	$ 1,122,362.18	$ 57,144.47	5.09
Joint Facility Rents - Net Credit	15,147.22	13,072.80	1,925.38	12.77	187,123.98	184,041.02	3,082.96	2.49
Net Railway Operating Income	$ 240,285.58	$ 14,147.38	$ 226,138.36	-	$ 2,303.68	$ 866,440.30	$ 588,945.98	100.43
NON-OPERATING INCOME								
Rental of Property	$ 37,830.00	$ 38,582.24	$ 752.24	1.96	$ 434,237.32	$ 480,936.76	46,699.33	9.71
Interest Accruals	1,671.17	1,431.39	239.78	16.75	17,866.08	17,321.49	544.59	1.92
Miscellaneous	3.00	322.26	322.26	99.08	129.09	369.81	240.73	80.72
Total Non-Operating Income	$ 39,504.17	$ 40,136.89	$ 634.72	2.08	$ 452,234.69	$ 499,138.06	$ 46,903.37	9.40
GROSS INCOME	$ 279,589.75	$ 54,284.21	$ 225,305.54	415.08	$ 449,729.01	$ 1,365,578.36	$ 635,849.35	58.57
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 12,730.14	$ 2,847.41	$ 117.27	4.12	$ 30,917.69	$ 40,891.03	$ 9,973.34	24.39
Miscellaneous Tax Accruals	3,678.88	4,943.04	1,264.99	25.63	50,287.75	49,349.46	938.29	1.88
Amortization of Discount - Note "A"	12,872.77	11,861.98	9,988.81	33.59	148,450.82	148,432.08	2,017.80	1.41
Miscellaneous	10,762.87	10,197.33	426.38	6.17	42,021.06	46,255.27	4,234.21	9.15
Total Miscellaneous Deductions	$ 39,043.46	$ 29,830.76	$ 9,212.87	10.84	$ 288,687.30	$ 279,926.97	$ 11,361.67	3.06
AVAILABLE FOR INTEREST - Note "A"	$ 240,536.13	$ 24,455.45	$ 222,070.67	-	$ 161,101.71	$ 606,809.39	$ 624,487.68	77.33
Interest on Funded Debt	$ 276,819.38	$ 277,732.34	$ 2,912.99	1.05	$ 3,314,760.71	$ 3,349,290.30	$ 34,521.39	1.03
Interest on Unfunded Debt	19,262.34	3,287.65	16,294.69	-	184,107.33	39,798.91	84,308.42	211.84
Total Interest Deductions	$ 296,401.69	$ 281,019.99	$ 19,381.76	4.76	$ 3,498,868.04	$ 3,389,089.21	$ 49,780.83	1.47
NET INCOME	$ 47,875.57	$ 256,564.54	$ 208,688.97	-	$ 3,357,774.33	$ 2,783,499.82	$ 674,274.51	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 45 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month		Period	
	1936	1935	1936	1935
Operating Expense-Rehabil. Program - M. of W. & S.	$ 2,439.51	$ -	$1,098,151.09	$ -
M. of E.	11,023.60	-	527,378.98	-
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,988.44	11,988.44	143,861.28	143,861.28
Available for Interest - Adjusted	$ 265,398.68	$ 38,738.89	$1,908,053.06	$ 960,990.67

Italics denote red.

1694 Accounting Department, San Francisco, Calif.

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS - CONSOLIDATED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF JANUARY		Increase or Decrease	
	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-
OPERATING REVENUES				
Freight	$1,252,536.97	$ 931,184.63	$ 321,352.34	34.51
Passenger	85,454.76	80,981.70	4,473.06	5.53
Mail	4,430.64	4,391.58	39.06	.89
Express	4,345.00	4,339.00	6.00	.14
Dining Car, Hotel & Restaurant	6,208.38	4,036.29	2,172.09	53.81
Miscellaneous	18,205.90	14,200.87	4,005.03	28.20
Total Railway Operating Revenues	$1,841,181.65	$1,018,104.07	$ 323,077.58	31.73
OPERATING EXPENSES				-
M. of W. & S.-Ord. and Budget	$ 150,781.74	$ 134,980.09	$ 4,199.35	3.71
M. of W. & S.-Rehabil. Program (W.P.RR Co.) Note "A"	6,930.03	956.97	7,877.00	-
Total	143,861.71	136,937.06	12,073.35	7.74
M. of E.-Ord. and Budget	226,126.53	208,498.35	17,638.18	8.46
M. of E.-Rehabil. Program (W.P. RR Co.) Note "A"	50,103.77	30.00	50,073.77	-
Total	276,240.30	208,528.35	67,711.95	32.47
Power	13,487.99	13,236.14	251.85	1.90
Traffic	61,657.41	59,629.84	2,028.57	3.40
Transportation - Rail Line	564,272.89	464,264.00	100,008.89	25.85
Miscellaneous Operations	8,689.53	6,828.46	1,860.87	27.25
General	56,193.09	54,392.77	1,800.32	3.31
Transportation for Inv.-Cr.	912.17	831.67	80.50	9.68
Total Railway Operating Expenses	$1,143,490.95	$ 961,983.95	$ 181,506.30	18.87
NET REVENUE FROM RAILWAY OPERATIONS	$ 197,691.40	$ 56,120.12	$ 141,571.28	252.26
Excise and Use Tax Accruals-Ord. and Budget	$ 37,013.08	$ 6,156.68	$ 30,856.40	501.22
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	817.63	.30	817.33	-
Railway Tax Accruals-All Other	61,423.10	59,393.85	2,029.25	3.42
Railway Operating Income	$ 98,436.59	$ 9,430.71	$ 107,868.30	-
Hire of Equipment - Net Debit	$ 84,564.47	$ 76,286.86	$ 8,278.61	10.85
Joint Facility Rents - Net Credit	2,897.58	5,481.78	3,184.36	58.09
Net Railway Operating Income	$ 16,769.64	$ 80,337.79	$ 96,406.43	-
NON-OPERATING INCOME				
Rental of Property	$ 37,088.13	$ 40,782.11	$ 3,733.98	9.13
Interest Accruals	2,933.57	1,322.81	1,610.96	121.80
Miscellaneous	183.00	4.00	189.00	-
Total Non-Operating Income	$ 40,184.70	$ 42,108.92	$ 1,924.02	4.84
GROSS INCOME	$ 56,953.34	$ 38,129.07	$ 94,482.41	-
MISCELLANEOUS DEDUCTIONS				
Miscellaneous Rents	$ 2,683.29	$ 2,652.34	$ 30.95	1.17
Miscellaneous Tax Accruals	4,180.55	4,124.12	56.43	1.37
Amortization of Discount - Note "A"	14,966.21	11,881.96	3,084.25	25.96
Miscellaneous	4,657.32	5,138.89	481.57	9.37
Total Miscellaneous Deductions	$ 26,487.37	$ 23,797.31	$ 2,690.06	11.30

OPERATING EXPENSES				
M. of W. & S.-Ord. and Budget	$ 150,781.74	$ 154,980.09	$ 4,198.35	2.71
M. of W. & S.-Rehabil. Program (W.P.RR Co.) Note "A"	6,920.03	956.97	7,877.00	-
Total	143,861.71	155,937.06	12,075.35	7.74
M. of E.-Ord. and Budget	328,136.53	308,498.35	17,638.18	5.46
M. of E.-Rehabil. Program (W.P. RR Co.) Note "A"	50,103.77	30.00	50,073.77	-
Total	278,240.30	308,528.35	67,711.95	32.47
Power	13,487.99	13,236.14	251.85	1.90
Traffic	61,257.41	59,238.84	2,018.57	3.40
Transportation - Rail Line	364,272.89	464,284.00	120,008.89	25.85
Miscellaneous Operations	8,689.33	6,829.46	1,860.87	27.25
General	56,193.09	54,392.77	1,800.32	3.31
Transportation for Inv.-Cr.	912.17	831.67	80.50	9.68
Total Railway Operating Expenses	$1,143,490.85	$ 961,983.98	$ 181,506.30	18.87
NET REVENUE FROM RAILWAY OPERATIONS	$ 197,691.60	$ 56,190.12	$ 141,871.28	252.26
Excise and Use Tax Accruals-Ord. and Budget	$ 37,016.08	$ 6,126.68	$ 30,888.40	501.22
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	817.63	.30	817.33	-
Railway Tax Accruals-All Other	61,423.10	59,393.85	2,029.25	3.42
Railway Operating Income	$ 98,434.79	$ 9,430.71	$ 107,866.30	-
Hire of Equipment - Net Debit	$ 84,864.47	$ 76,986.86	$ 8,878.61	10.85
Joint Facility Rents - Net Credit	8,297.52	5,481.78	2,184.26	58.09
Net Railway Operating Income	$ 18,188.64	$ 80,937.79	$ 98,404.43	-
NON-OPERATING INCOME				
Rental of Property	$ 37,058.13	$ 40,788.11	$ 3,729.98	9.13
Interest Accruals	3,983.87	1,988.61	1,810.98	121.80
Miscellaneous	183.00	4.00	189.00	-
Total Non-Operating Income	$ 40,184.70	$ 42,100.72	$ 1,884.02	4.34
GROSS INCOME	$ 58,388.34	$ 38,139.07	$ 94,488.41	-
MISCELLANEOUS DEDUCTIONS				
Miscellaneous Rents	$ 2,683.29	$ 2,683.34	$ 30.95	1.17
Miscellaneous Tax Accruals	4,180.55	4,124.12	56.43	1.37
Amortization of Discount - Note "A"	14,966.21	11,881.96	3,084.25	25.96
Miscellaneous	4,657.32	5,138.89	481.57	9.37
Total Miscellaneous Deductions	$ 26,487.37	$ 23,797.31	$ 2,690.06	11.30
AVAILABLE FOR INTEREST - Note "A"	$ 29,838.97	$ 61,936.38	$ 91,782.35	-
Interest on Funded Debt	$ 274,483.33	$ 277,613.89	$ 3,130.56	1.13
Interest on Unfunded Debt	20,423.23	3,315.53	17,107.70	515.99
Total Interest Deductions	$ 294,906.56	$ 280,929.42	$ 13,977.14	4.98
NET INCOME	$ 365,070.59	$ 343,855.80	$ 77,785.21	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month	
	1937	1936
Operating Expense-Rehabil. Program - M. of W.& S.	$ 6,920.03	$ 956.97
M. of E.	50,103.77	30.00
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,283.44	11,283.44
Available for Interest - Adjusted	$ 84,303.15	$ 49,655.97

Accounting Department,
San Francisco, Calif.
March 15th, 1937.

Note - Italics denote red.

1692

F. D. 10913
Exhibit #130

2212

F. D. 10913

Exhibit #131

THE SOUTHERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
VISALIA ELECTRIC RAILROAD COMPANY
WEST SIDE RAILROAD COMPANY
OPERATING REPORT - CONSOLIDATED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF FEBRUARY		Increase or Decrease		PERIOD JANUARY 1ST TO FEBRUARY 28TH		Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$1,806,997.98	$ 932,167.49	$ 874,830.46	45.04	$3,459,934.98	$1,763,822.12	$ 696,112.80	39.48
Passenger	43,748.24	41,983.82	1,760.42	4.24	99,201.00	101,947.82	2,746.82	2.69
Mail	4,324.97	4,256.59	68.38	1.61	9,736.61	9,648.17	107.44	1.24
Express	8,147.81	6,222.20	1,925.61	30.96	12,992.81	10,861.20	1,931.61	18.29
Dining Car, Hotel & Restaurant	4,671.46	3,639.84	1,032.32	28.37	10,880.04	7,678.63	3,204.41	41.75
Miscellaneous	13,682.94	11,869.07	4,186.87	38.70	33,891.84	25,759.94	8,131.90	31.57
Total Railway Operating Revenues	$1,883,574.87	$ 899,610.31	$ 983,964.06	42.65	$3,624,736.28	$1,917,914.88	$ 706,841.64	36.85
OPERATING EXPENSES:								
M. of W. & S.-Ord. and Budget	$ 184,971.49	$ 163,172.91	$ 21,798.58	13.36	$ 330,783.22	$ 313,183.00	$ 17,600.23	5.38
M. of W. & S.-Rehabil. Program (W.P.RR Co.) Note "A"	1,284.12	1,757.50	733.21	41.73	2,695.91	2,714.30	8,810.21	-
Total	186,955.61	164,930.84	21,068.27	12.77	329,887.32	320,867.30	8,990.02	2.80
M. of E.-Ord. and Budget	220,984.14	186,272.97	34,661.17	18.62	447,090.67	394,771.32	52,319.35	13.25
M. of E.-Rehabil. Program (W.P.RR Co.) Note "A"	62,894.73	402.07	62,492.66	-	112,998.50	432.07	112,566.43	-
Total	283,878.87	186,675.04	97,173.83	52.06	560,089.17	395,203.39	164,885.78	41.72
Power	12,170.84	12,989.71	759.17	5.87	25,658.53	26,165.85	507.32	1.94
Traffic	58,874.32	58,637.88	363.36	.63	119,931.73	118,266.42	1,665.31	1.41
Transportation - Rail Line	583,087.15	430,491.45	152,595.70	35.43	1,167,299.74	894,728.45	272,544.29	30.46
Miscellaneous Operations	7,484.16	5,996.61	1,487.55	24.81	16,173.49	12,825.07	3,348.42	26.11
General	55,572.55	53,580.40	1,992.15	3.72	111,765.62	107,972.17	3,792.45	3.51
Transportation for Inv.-Cr.	677.90	989.60	311.70	31.50	1,891.07	1,621.27	231.20	13.69
Total Railway Operating Expenses	$1,188,693.22	$ 915,251.43	$ 273,443.85	29.97	$2,329,153.53	$1,974,230.38	$ 454,950.16	24.27
NET REVENUE FROM RAILWAY OPERATIONS	$ 97,879.29	$ 13,440.93	$ 110,380.21	-	$ 295,570.69	$ 43,679.20	$ 251,891.49	576.69
Excise and Use Tax Accruals-Ord. and Budget	$ 36,449.79	$ 6,342.72	$ 30,107.07	474.67	$ 73,464.87	$ 12,499.40	$ 60,965.47	487.75
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	823.20	.91	822.29	-	1,700.91	1.21	1,699.70	-
Railway Tax Accruals-All Other	56,380.29	45,192.65	4,812.34	9.30	120,003.39	122,586.48	2,583.09	2.11
Railway Operating Income	$ 1,965.98	$ 81,977.19	$ 83,943.11	-	$ 100,401.52	$ 91,407.89	$ 191,809.41	-
Hire of Equipment - Net Debit	$ 44,911.40	$ 49,204.37	$ 17,857.03	38.88	$ 131,475.87	$ 122,543.23	$ 23,932.64	20.66
Joint Facility Rents - Net Credit	9,766.84	11,609.67	4,839.13	41.70	9,064.06	17,087.45	8,023.39	46.95
Net Railway Operating Income	$ 38,178.93	$ 119,625.88	$ 81,446.95	-	$ 42,010.29	$ 199,863.67	$ 157,853.38	-
NON-OPERATING INCOME								
Rental of Property	$ 32,704.42	$ 30,284.13	$ 2,877.71	7.31	$ 69,734.86	$ 76,066.24	$ 6,301.69	8.28
Interest Accruals	6,177.23	1,681.59	4,495.64	267.34	9,110.80	3,004.20	6,106.60	203.27
Miscellaneous	5.00	5.00	-	-	164.00	7.00	159.00	-
Total Non-Operating Income	$ 38,886.65	$ 36,968.72	$ 1,917.93	5.19	$ 79,041.38	$ 79,077.44	36.06	.05
GROSS INCOME	$ 19,292.28	$ 82,657.16	$ 63,364.88	-	$ 37,031.06	$ 120,786.23	$ 157,917.29	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 3,441.78	$ 2,294.83	$ 146.93	4.40	$ 5,125.07	$ 4,947.19	$ 177.88	3.60
Miscellaneous Tax Accruals	4,180.68	4,124.12	56.43	1.37	8,361.10	8,248.24	112.86	1.37
Amortization of Discount - Note "A"	14,943.87	11,881.95	3,061.62	25.77	29,909.78	23,763.91	6,145.87	25.86
Miscellaneous	5,316.92	6,807.26	1,190.32	18.29	9,974.24	11,646.13	1,671.89	14.36
Total Miscellaneous Deductions	$ 28,982.82	$ 24,808.16	$ 2,074.66	8.36	$ 53,370.19	$ 48,605.47	$ 4,764.72	9.80
AVAILABLE FOR INTEREST - Note "A"	$ 48,275.10	$ 107,465.32	$ 61,190.22	-	$ 16,339.13	$ 169,391.70	$ 153,052.57	-
Interest on Funded Debt	$ 272,845.61	$ 276,540.39	$ 3,693.78	1.34	$ 547,329.94	$ 554,154.28	$ 6,824.34	1.23
Interest on Unfunded Debt	17,612.00	4,871.76	12,740.24	261.51	38,035.23	8,187.29	29,847.94	364.56
Total Interest Deductions	$ 290,458.61	$ 281,412.15	$ 9,046.46	3.21	$ 585,365.17	$ 562,341 97	$ 23,023.60	4.09
NET INCOME	$ 338,833.71	$ 388,877.47	$ 52,143.76	-	$ 801,704.30	$ 731,733.27	$ 130,028.97	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month		Period	
	1937	1936	1937	1936
Operating Expense-Rehabil. Program - M. of W.& S.	$ 1,024.12	$ 1,757.50	$ 2,695.91	$ 2,714.30
M. of E.	62,894.73	402.07	112,998.50	432.07
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,283.44	11,283.44	22,566.88	22,566.88
Available for Interest - Adjusted	$ 29,027.19	$ 94,033.49	$ 113,330.34	$ 143,978.45

Accounting Department,
San Francisco, Calif.
April 8th, 1937.

Note-Italics denote red.

1693

F. D. 10913

Exhibit #132

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEER CREEK RAILROAD COMPANY
OPERATING RESULTS - CONSOLIDATED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF MARCH				PERIOD JANUARY 31st TO MARCH 31st			
			Increase or Decrease				Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$ 1,235,999.43	$1,048,153.79	$ 187,445.64	17.88	$ 3,696,134.25	$2,811,472.91	$ 883,661.34	31.43
Passenger	58,631.85	48,401.71	9,930.14	9.27	158,065.65	187,165.85	9,711.80	5.47
Mail	4,264.19	4,237.29	26.89	.63	13,019.79	12,885.46	134.33	1.04
Express	17,451.96	11,410.12	6,241.84	54.70	36,144.77	21,971.32	8,173.45	37.20
Dining Car, Hotel & Restaurant	5,457.19	4,994.00	463.19	10.79	14,337.83	12,300.83	4,037.00	33.15
Miscellaneous	19,891.15	14,329.81	5,561.37	38.81	53,785.08	40,099.78	13,685.97	34.16
Total Railway Operating Revenues	$ 1,341,696.77	$1,147,926.72	$ 193,760.05	16.88	$ 3,966,422.99	$3,065,841.80	$ 900,881.69	29.37
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 211,066.71	$ 180,792.38	$ 30,264.33	16.74	$ 546,809.94	$ 498,945.38	$ 47,864.56	9.90
M. of W. & S.-Rehabil. Program (W.P.RR Co.) Note "A"	30,342.97	4,272.17	26,070.40	610.36	24,446.66	6,986.47	17,460.19	249.91
Total	241,309.38	185,064.55	56,334.73	30.44	571,256.60	505,931.85	65,324.75	12.91
M. of E.-Ord. and Budget	235,747.36	209,276.08	26,471.30	12.65	682,636.08	604,047.38	78,790.68	13.04
M. of E.-Rehabil. Program (W.P.RR Co.)' , Note "A"	96,536.20	3,706.62	92,829.58	-	209,534.70	4,138.69	205,396.01	-
Total	332,283.56	212,982.68	119,300.88	56.01	892,272.73	608,186.07	284,186.66	46.73
Power	13,782.72	13,310.01	472.71	3.55	39,441.25	39,475.86	34.61	.09
Traffic	61,428.12	59,738.06	1,686.04	2.78	181,383.65	178,022.30	3,351.35	1.87
Transportation - Rail Line	592,227.88	485,353.74	106,874.12	22.04	1,759,627.62	1,380,109.21	379,518.41	27.50
Miscellaneous Operations	8,102.85	6,960.85	1,142.00	16.41	24,276.34	19,785.92	4,490.42	22.70
General	55,808.86	54,024.65	1,861.21	3.93	167,371.68	161,997.82	5,373.86	3.32
Transportation for Inv.-Cr.	10,277.21	798.41	9,478.80	-	11,667.88	2,619.68	9,247.80	353.00
Total Railway Operating Expenses	$ 1,294,647.06	$1,016,684.17	$ 277,992.89	27.34	$ 3,623,632.80	$2,890,889.55	$ 732,943.04	25.36
NET REVENUE FROM RAILWAY OPERATIONS	$ 47,049.71	$ 131,272.55	$ 84,222.84	64.18	$ 342,790.20	$ 174,951.75	$ 167,838.65	95.93
Excise and Use Tax Accruals-Ord. and Budget	$ 55,684.02	$ 30,192.80	$ 25,491.22	84.43	$ 129,118.89	$ 42,692.20	$ 86,426.69	202.44
Excise and Use Tax Accruals-Rehabil. Program (W.P.RR Co.)	1,484.68	132.22	1,352.46	-	3,185.59	133.43	3,052.16	-
Railway Tax Accruals-All Other	58,808.01	58,129.38	678.63	.82	178,608.40	180,714.84	2,106.44	1.17
Railway Operating Income	$ 69,734.00	$ 42,819.15	$ 111,843.15	-	$ 31,877.32	$ 48,588.74	$ 80,366.26	-
Hire of Equipment - Net Debit	$ 87,818.81	$ 82,890.06	$ 4,928.46	5.95	$ 229,294.38	$ 208,433.29	$ 20,861.09	14.81
Joint Facility Rents - Net Credit	14,112.06	5,770.86	8,341.19	144.54	23,176.11	22,856.31	317.80	1.39
Net Railway Operating Income	$ 142,430.48	$ 34,360.05	$ 108,130.41	-	$ 184,440.75	$ 234,189.72	$ 49,722.97	-
NON-OPERATING INCOME								
Rental of Property	$ 38,881.92	$ 38,092.61	$ 789.32	2.07	$ 108,646.48	$ 114,158.85	$ 5,512.37	4.83
Interest Accruals	3,130.39	1,322.68	1,807.90	136.70	12,241.18	4,326.68	7,914.50	182.98
Miscellaneous	12.00	2.00	10.00	500.00	178.00	9.00	169.00	-
Total Non-Operating Income	$ 42,024.31	$ 39,417.09	$ 2,607.22	6.61	$ 121,065.66	$ 118,494.53	$ 2,571.13	2.17
GROSS INCOME	$ 100,406.15	$ 5,117.04	$ 105,523.19	-	$ 63,375.09	$ 115,689.19	$ 52,294.10	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,682.59	$ 2,638.61	$ 18.98	.64	$ 7,777.66	$ 7,582.80	$ 194.86	2.57
Miscellaneous Tax Accruals	4,109.40	4,124.12	14.72	.36	12,470.50	12,372.36	98.14	.79
Amortization of Discount - Note "A"	14,871.70	11,790.09	3,081.61	26.03	44,731.48	35,524.00	9,207.48	25.92
Miscellaneous	6,836.40	6,372.21	464.19	7.28	18,810.64	18,018.34	1,207.70	6.70
Total Miscellaneous Deductions	$ 28,420.09	$ 24,892.03	$ 3,528.06	14.17	$ 81,790.28	$ 73,497.50	$ 8,292.78	11.28
AVAILABLE FOR INTEREST - Note "A"	$ 128,826.24	$ 19,774.99	$ 109,051.25	-	$ 145,165.37	$ 189,186.69	$ 44,001.32	-
Interest on Funded Debt	$ 272,722.11	$ 275,864.94	$ 3,142.83	1.14	$ 820,062.05	$ 820,019.22	$ 9,987.17	1.20
Interest on Unfunded Debt	18,008.10	3,804.92	14,200.18	413.71	56,040.33	11,692.21	44,348.12	379.30
Total Interest Deductions	$ 290,727.21	$ 279,369.86	$ 11,357.35	4.07	$ 876,092.38	$ 841,711.43	$ 34,380.95	4.08
NET INCOME	$ 419,553.45	$ 299,144.85	$ 120,408.60	-	$ 1,021,257.75	$1,030,878.12	$ 9,620.37	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month		Period	
	1937	1936	1937	1936
Operating Expense-Rehabil. Program - M. of W. - S.	$ 30,342.97	$ 4,272.17	$ 24,446.66	$ 6,986.47
- M. of E.	96,536.20	3,706.62	209,534.70	4,138.69
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,283.44	11,283.44	33,850.32	33,850.32
Available for Interest - Adjusted.	$ 9,335.97	$ [illegible]12.76	$122,666.31	$144,191.21

Note - Italics denote red.

1694

Accounting Department,
San Francisco, Calif.
May 11, 1937

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #133

ITEM OR ACCOUNT	MONTH OF APRIL 1937	MONTH OF APRIL 1936	Increase or Decrease Amount	Increase or Decrease Per Cent	PERIOD JANUARY 1st TO APRIL 30th 1937	PERIOD JANUARY 1st TO APRIL 30th 1936	Increase or Decrease Amount	Increase or Decrease Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,227,911.56	$1,044,436.45	$ 183,515.10	17.57	$ 4,923,086.90	$3,855,912.34	$ 1,067,173.84	27.68
Passenger	74,581.19	62,887.80	11,693.39	11.80	332,585.02	234,697.03	1,452.01	.62
Mail	4,297.98	4,250.77	47.21	1.11	17,317.77	17,136.23	181.54	1.06
Express	15,806.00	11,763.12	4,042.88	34.37	48,980.77	32,734.44	12,216.33	36.21
Dining Car, Hotel & Restaurant	5,244.00	4,525.83	718.17	15.87	21,581.23	16,795.46	4,785.77	28.49
Miscellaneous	17,211.34	16,241.49	969.85	5.97	70,994.36	56,331.24	14,663.12	26.03
Total Railway Operating Revenues	$ 1,345,092.06	$1,148,105.46	$ 196,986.60	17.16	$ 5,311,515.05	$4,213,946.76	$ 1,097,568.29	26.05
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 278,612.78	$ 207,332.71	$ 71,280.07	34.38	$ 832,244.74	$ 706,278.09	$ 125,966.65	17.84
M. of W. & S.-1937 Rehabil. Program (W.P.RR Co) Note "A"	228,003.24	147,717.28	80,285.96	54.35	243,627.884	154,703.78	90,924.13	58.77
Total	506,616.02	355,049.99	151,566.03	42.69	1,077,872.62	860,981.84	216,890.78	25.19
M. of E.-Ord. and Budget	263,356.29	201,323.02	62,032.27	30.81	946,193.32	805,370.60	140,822.92	17.49
M. of E.-1937 Rehabil. Program (W.P.RR Co) Note "A"	76,016.90	43,688.83	32,328.07	74.00	285,551.60	47,827.52	237,724.08	497.04
Total	339,372.19	245,011.85	94,360.34	38.51	1,231,744.92	853,197.92	378,547.00	44.37
Power	12,894.03	12,961.97	387.94	7.84	52,035.28	52,437.85	402.55	.77
Traffic	60,325.29	56,799.46	3,525.83	6.21	241,679.14	234,821.96	6,857.18	2.92
Transportation - Rail Line	572,966.29	498,409.16	74,557.12	14.96	2,332,593.90	1,778,518.37	484,075.53	24.17
Miscellaneous Operations	7,502.82	7,008.72	494.10	6.33	31,869.16	26,794.64	5,074.52	18.94
General	55,284.26	64,284.24	8,999.98	13.99	222,635.74	223,252.06	616.32	1.60
Transportation for Inv.-Cr.	13,394.50	1,525.77	11,870.83	778.08	25,261.58	4,143.45	21,118.13	509.80
Total Railway Operating Expenses	$ 1,547,336.89	$1,237,971.62	$ 303,364.97	24.51	$ 5,165,169.18	$4,128,861.17	$ 1,036,308.01	25.10
NET REVENUE FROM RAILWAY OPERATIONS	$ 196,244.53	$ 89,866.16	$ 106,378.37	-	$ 146,345.87	$ 85,085.59	$ 61,260.28	72.00
Excise and Use Tax Accruals-Ord. and Budget	$ 46,748.52	$ 34,960.36	$ 11,788.17	33.72	$ 175,867.41	$ 77,652.55	$ 98,214.86	126.40
Excise and Use Tax Accruals-1937 Rehabil.Program (W.P.RR Co)	4,065.81	9,300.70	5,234.89	56.28	7,251.40	9,434.13	2,182.73	23.14
Railway Tax Accruals-All Other	50,696.14	57,944.42	7,248.28	12.51	229,304.54	238,659.28	9,354.74	3.92
Railway Operating Income	$ 297,755.00	$ 192,071.83	$ 105,683.31	-	$ 266,077.48	$ 340,660.37	$ 25,417.11	-
Hire of Equipment - Net Debit	$ 81,614.37	$ 81,652.25	$ 37.88	.05	$ 320,908.75	$ 290,085.54	$ 30,823.21	10.63
Joint Facility Rents - Net Credit	11,439.01	10,691.18	747.83	6.99	34,615.12	33,549.49	1,065.63	3.18
Net Railway Operating Income	$ 227,930.36	$ 283,032.70	$ 104,897.66	-	$ 552,371.11	$ 497,196.42	$ 55,174.69	-
NON-OPERATING INCOME								
Rental of Property	$ 36,358.87	$ 38,026.43	$ 1,667.56	4.39	$ 145,005.35	$ 152,185.98	$ 7,179.93	4.72
Interest Accruals	3,330.31	1,417.61	1,912.70	134.92	15,571.49	5,744.29	9,827.20	171.08
Miscellaneous	1.00	72.80	71.80	98.63	179.00	81.60	97.70	118.83
Total Non-Operating Income	$ 39,690.18	$ 39,516.84	$ 173.34	.44	$ 160,755.84	$ 158,011.37	$ 2,744.47	1.74
GROSS INCOME	$ 328,240.18	$ 223,515.86	$ 104,224.32	-	$ 391,615.27	$ 339,185.05	$ 52,430.22	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,639.42	$ 2,764.10	$ 124.68	4.51	$ 10,417.08	$ 10,346.90	$ 70.18	.68
Miscellaneous Tax Accruals	4,131.63	4,114.75	16.88	.41	16,602.13	16,487.11	115.02	.70
Amortization of Discount - Note "A"	14,821.70	11,760.09	3,061.61	26.03	59,553.18	47,284.09	12,269.09	25.95
Miscellaneous	5,795.04	5,698.98	96.06	1.69	22,605.68	23,717.32	1,111.64	4.69
Total Miscellaneous Deductions	$ 27,387.79	$ 24,337.92	$ 3,049.87	12.53	$ 109,178.07	$ 97,835.42	$ 11,342.65	11.59
AVAILABLE FOR INTEREST - Note "A"	$ 355,627.97	$ 247,853.78	$ 107,774.19	-	$ 500,793.34	$ 437,020.47	$ 63,772.87	-
Interest on Funded Debt	$ 272,178.71	$ 275,339.52	$ 3,160.81	1.15	$ 1,092,230.76	$1,105,358.74	$ 13,127.98	1.19
Interest on Unfunded Debt	18,666.28	3,488.84	15,177.44	435.03	74,706.61	15,181.05	59,525.56	392.10
Total Interest Deductions	$ 290,844.99	$ 278,828.36	$ 12,016.63	4.31	$ 1,166,937.37	$1,120,539.79	$ 46,397.58	4.14
NET INCOME	$ 64,782.98	$ 26,662.14	$ 119,790.82	-	$ 1,867,730.71	$1,557,560.26	$ 110,170.45	-

NOTE "A".

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month 1937	Month 1936	Period 1937	Period 1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$226,003.24	$147,717.28	$243,627.88	$154,703.78
" " " - M. of E.	76,016.90	43,688.83	285,551.60	47,827.52
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,283.44	11,283.44	45,133.76	45,133.76
Available for Interest - Adjusted	40,324.89	45,164.23	76,519.90	189,355.44

* Adjusted to exclude January, February and March 1937 charges account 1936 Rehabilitation Program, amounting to $ 6,829.02*

NOTE - Italics denote red.

Accounting Department,
San Francisco, California.
June 5, 1937

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #134

ITEM OR ACCOUNT	MONTH OF MAY		Increase or Decrease		PERIOD JANUARY 1st TO MAY 31st		Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,398,038.56	$1,169,758.50	$ 228,280.06	19.52	$ 6,321,184.46	$5,025,670.86	$ 1,295,453.60	25.78
Passenger	67,212.74	56,570.32	10,642.42	18.81	289,707.76	280,277.35	9,190.41	3.16
Mail	4,307.74	4,263.68	43.96	1.03	21,635.51	21,400.11	225.40	1.05
Express	10,378.85	24,991.60	*14,612.75*	*58.47*	58,389.62	58,726.04	*2,336.42*	*4.08*
Dining Car, Hotel & Restaurant	8,676.26	5,425.30	1,250.96	23.06	28,287.49	22,220.76	6,066.73	27.17
Miscellaneous	16,616.99	14,548.29	2,068.70	14.22	87,611.35	70,879.53	16,731.82	23.61
Total Railway Operating Revenues	$ 1,503,231.14	$1,278,557.89	$ 227,673.25	17.85	$ 6,814,746.19	$5,489,504.65	$ 1,325,241.54	24.14
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 253,141.74	$ 224,605.18	$ 28,536.56	12.71	$ 1,085,386.48	$ 930,883.27	$ 154,503.21	16.60
M. of W. & S.-1937 Rehabil. Program (W.P.RR Co) Note "A"	245,721.15	123,233.33	122,487.82	99.40	491,349.03	277,937.08	213,411.95	76.78
Total M. of W. & S.	498,862.89	347,838.51	151,024.38	43.42	1,576,735.51	1,208,820.35	367,915.16	30.44
M. of E.-Ord. and Budget	255,930.59	201,046.35	54,884.24	27.30	1,202,123.91	1,006,416.75	195,707.16	19.45
M. of E.-1937 Rehabil. Program (W.P.RR Co) Note "A"	72,370.04	51,568.12	20,801.92	40.34	357,921.64	99,395.64	258,526.00	260.10
Total M. of E.	328,300.63	252,614.47	75,686.16	29.96	1,560,045.55	1,105,812.39	454,233.16	41.08
Power	12,410.53	12,475.77	*65.24*	*.52*	64,445.81	64,913.60	*467.79*	*.72*
Traffic	64,169.38	63,539.45	629.90	.83	305,848.49	298,461.41	7,387.08	2.48
Transportation - Rail Line	598,462.28	518,926.50	79,535.78	15.33	2,931,056.18	2,397,444.87	533,611.31	22.26
Miscellaneous Operations	8,889.62	7,709.86	1,179.76	15.30	40,758.76	34,504.50	6,254.26	18.13
General	110,782.51	53,133.72	57,648.79	108.50	333,418.25	279,385.78	54,032.47	19.34
Transportation for Inv.-Cr.	7,945.80	11,755.72	*3,811.83*	*32.43*	33,205.47	18,899.17	17,306.30	108.85
Total Railway Operating Expenses	$ 1,613,933.92	$1,244,582.56	$ 369,351.36	29.68	$ 6,779,103.10	$6,372,443.73	$ 1,406,659.37	26.16
NET REVENUE FROM RAILWAY OPERATIONS	$ *110,702.78*	$ 30,975.33	$ *141,678.11*	-	$ 35,643.09	$ 116,060.92	$ *80,417.83*	*69.29*
Excise and Use Tax Accruals-Ord. and Budget	$ 43,188.38	$ 31,593.68	$ 11,594.70	36.70	$ 219,055.79	$ 109,846.23	$ 109,809.56	100.82
Excise and Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co)	4,394.50	3,440.31	954.27	27.74	11,645.98	12,874.44	*1,228.46*	*9.54*
Railway Tax Accruals-All Other	2,020.964	58,551.43	*56,530.45*	*96.55*	231,325.82	297,210.71	*65,885.19*	*22.17*
Railway Operating Income	$ *160,306.73*	$ *62,610.09*	$ 97,696.63	-	$ *436,384.30*	$ *303,370.46*	$ *133,113.74*	-
Hire of Equipment - Net Debit	$ 102,316.38	$ 113,585.80	*11,269.77*	*9.92*	$ 423,224.93	$ 403,671.44	$ 19,553.49	4.84
Joint Facility Rents - Net Credit	25,918.66	14,140.45	11,778.21	83.29	80,533.72	47,889.94	12,643.84	26.93
Net Railway Operating Income	$ *236,704.24*	$ *162,055.54*	$ 74,648.70	-	$ *789,075.35*	$ *659,351.96*	$ *139,823.39*	-
NON-OPERATING INCOME								
Rental of Property	$ 34,536.07	$ 30,395.72	$ 4,852.65	13.34	$ 179,541.42	$ 191,581.00	$ *13,039.58*	*6.28*
Interest Accruals	3,067.95	1,292.66	1,775.29	137.34	18,639.44	7,036.95	11,602.49	164.88
Miscellaneous	2.00	2.00	-	-	181.00	83.80	97.20	115.99
Total Non-Operating Income	$ 37,606.02	$ 40,690.38	$ *3,084.36*	*7.58*	$ 198,361.86	$ 198,701.75	$ *339.89*	*.17*
GROSS INCOME	$ *199,098.22*	$ *121,365.16*	$ 77,733.06	-	$ *590,713.49*	$ *460,650.21*	$ *130,163.28*	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,784.80	$ 2,552.60	$ 212.20	8.31	$ 13,181.68	$ 12,899.50	$ 282.18	2.19
Miscellaneous Tax Accruals	4,141.24	3,822.23	319.01	8.35	20,743.37	20,309.34	434.03	2.14
Amortization of Discount - Note "A"	14,821.70	11,760.09	3,061.61	26.03	74,374.88	59,044.18	15,330.70	25.96
Miscellaneous	5,609.19	5,985.99	*376.80*	*6.29*	28,214.84	29,703.31	*1,488.44*	*5.01*
Total Miscellaneous Deductions	$ 27,356.93	$ 24,120.91	$ 3,216.02	13.33	$ 136,516.00	$ 121,956.33	$ 14,559.67	11.94
AVAILABLE FOR INTEREST - Note "A"	$ *226,431.15*	$ *145,488.07*	$ *80,949.08*	-	$ *727,228.49*	$ *582,506.84*	$ *144,721.95*	-
Interest on Funded Debt	$ 275,613.23	$ 275,859.84	$ *246.61*	*.09*	$ 1,367,843.99	$1,381,218.58	$ *13,374.59*	*.97*
Interest on Unfunded Debt	18,039.32	9,967.82	8,071.50	80.98	92,745.93	25,148.97	67,597.06	268.79
Total Interest Deductions	$ 293,652.55	$ 285,827.66	$ 7,824.89	2.74	$ 1,460,589.92	$1,406,367.45	$ 54,222.47	3.86
NET INCOME	$ *532,087.70*	$ *431,313.73*	$ *98,773.97*	-	$ *2,187,818.41*	$ *1,988,873.99*	$ *198,944.42*	-

NOTE "A"

Per comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month		Period	
	1937	1936	1937	1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$240,721.15	$123,233.33	$491,349.03	$277,937.08
- M. of E.	72,370.04	51,568.12	357,921.64	99,395.64
Amortization of Discount on W.P. RR Co. First Mortgage Bonds	11,283.44	11,283.44	56,417.20	56,417.20
Available for Interest - Adjusted	102,989.48	40,598.82	178,459.36	148,758.62

* Credit of $ 51,383.30 in month of May 1937, by Western Pacific Railroad Company settlement with State of Nevada for year 1931 taxes.

NOTE - *Italics denote red.*

Accounting Department,
San Francisco, California
June 1937.

F. D. 10913

Exhibit #135

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DELTA CREEK RAILROAD COMPANY
OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF JUNE				PERIOD JANUARY 1st TO JUNE 30th			
			Increase or Decrease				Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,272,945.54	$1,031,340.28	$ 241,605.26	23.43	$ 7,284,068.02	$6,027,011.14	$ 1,257,056.88	20.86
Passenger	80,170.70	72,901.70	7,268.01	9.97	372,988.46	363,809.14	16,459.32	4.53
Mail	4,233.28	3,181.58	1,081.70	34.32	25,856.76	24,551.66	1,307.10	5.32
Express	39,934.36	23,601.00	16,333.36	69.21	96,265.97	82,327.04	13,938.93	16.93
Dining Car, Hotel & Restaurant	9,294.62	7,596.35	1,698.27	22.36	37,552.11	29,817.11	7,735.00	25.94
Miscellaneous	17,449.88	21,081.18	3,631.30	17.23	105,061.23	91,960.71	13,100.52	14.25
Total Railway Operating Revenues	$ 1,424,028.36	$1,159,672.18	$ 264,356.21	22.80	$ 8,236,774.55	$6,669,176.80	$ 1,309,597.75	23.91
OPERATING EXPENSES								
M. of W. & S.-Ord. and Budget	$ 274,858.06	$ 258,725.70	$ 16,132.36	6.24	$ 1,369,136.86	$1,189,608.97	$ 179,527.89	15.09
M. of W. & S.-1937 Rehabil. Program (W.P.RR Co)-Note "A"	192,854.54	216,622.90	23,768.36	11.79	675,311.25	496,559.98	178,751.27	36.00
Total M. of W. & S.	467,712.60	477,348.60	9,635.00	2.02	2,044,448.11	1,686,168.95	358,279.16	21.25
M. of E.-Ord. and Budget	239,777.01	213,605.22	26,171.79	12.25	1,441,900.92	1,220,021.97	221,878.95	18.19
M. of E.-1937 Rehabil. Program (W.P.RR Co) Note "A"	89,055.00	66,920.62	22,134.38	33.08	446,976.84	186,316.26	260,660.58	168.75
Total M. of E.	328,832.01	280,525.84	48,306.17	17.22	1,888,877.76	1,386,338.23	502,539.53	36.25
Power	11,985.43	12,681.38	695.95	5.49	76,431.24	77,594.98	1,163.74	1.50
Traffic	64,223.70	67,759.39	3,535.69	5.22	370,072.19	366,220.80	3,851.39	1.05
Transportation - Rail Line	565,497.55	476,087.24	89,410.31	18.78	3,496,563.73	2,873,532.11	623,031.62	21.68
Miscellaneous Operations	11,737.21	9,976.10	1,761.11	17.65	52,495.99	44,480.60	8,015.39	18.02
General	62,117.96	51,923.96	10,194.00	19.63	395,536.21	331,309.74	64,226.47	19.39
Transportation for Inv.-Cr.	1,790.88	1,880.30	89.44	5.73	34,998.33	17,759.47	17,238.86	97.06
Total Railway Operating Expenses	$ 1,510,315.60	$1,374,442.21	$ 135,873.39	9.86	$ 8,289,418.70	$6,747,885.94	$ 1,541,532.76	22.84
NET REVENUE FROM RAILWAY OPERATIONS	$ 86,287.24	$ 214,770.06	$ 128,482.82	-	$ 50,644.15	$ 98,709.14	$ 48,064.99	-
Excise and Use Tax Accruals-Ord. and Budget	$ 42,882.39	$ 34,993.48	$ 7,888.91	22.54	$ 261,638.18	$ 144,139.71	$ 117,498.47	81.52
Excise and Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co)	3,926.89	3,676.17	263.72	7.17	16,585.87	16,550.61	964.74	5.83
Railway Tax Accruals-All Other	55,008.27	86,559.45	3,551.18	9.48	284,333.79	355,770.16	71,436.37	20.08
Railway Operating Income	$ 185,817.79	$ 311,899.16	$ 126,081.37	-	$ 613,301.99	$ 515,169.82	$ 2,967.63	-
Hire of Equipment - Net Debit	$ 87,485.76	$ 86,491.85	$ 963.91	1.11	$ 510,680.69	$ 490,163.29	$ 20,517.40	4.19
Joint Facility Rents - Net Credit	16,278.53	13,352.02	2,926.51	21.92	76,812.31	61,041.96	15,770.35	25.84
Net Railway Operating Income	$ 256,995.02	$ 383,039.99	$ 128,043.97	-	$ 1,046,070.37	$ 944,290.95	$ 1,779.42	-
NON-OPERATING INCOME								
Rental of Property	$ 32,382.15	$ 34,195.96	$ 1,813.81	5.30	$ 211,923.35	$ 225,776.96	$ 13,853.61	6.14
Interest Accruals	3,597.80	1,379.97	2,217.83	160.69	22,236.94	8,416.92	13,820.02	164.19
Miscellaneous	8.00	3.00	5.00	-	189.00	86.80	102.20	117.74
Total Non-Operating Income	$ 35,987.63	$ 35,578.93	$ 408.70	1.15	$ 234,349.49	$ 234,280.68	$ 68.81	.03
GROSS INCOME	$ 331,007.39	$ 349,480.06	$ 128,452.67	-	$ 811,730.89	$ 810,010.27	$ 1,710.61	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,852.80	$ 2,852.64	$ 99.96	3.92	$ 15,834.48	$ 15,452.14	$ 382.34	2.47
Miscellaneous Tax Accruals	4,131.64	3,822.24	309.40	8.09	24,875.01	24,131.38	743.63	3.08
Amortization of Discount - Note "A"	14,821.70	11,760.09	3,061.61	26.03	89,196.58	70,804.27	18,392.31	25.98
Miscellaneous	6,765.27	6,139.72	625.55	10.19	34,980.14	35,843.03	862.89	2.41
Total Miscellaneous Deductions	$ 28,371.21	$ 24,274.69	$ 4,096.52	16.88	$ 164,886.71	$ 146,231.02	$ 18,655.19	12.76
AVAILABLE FOR INTEREST - Note "A"	$ 302,636.18	$ 325,734.75	$ 124,356.15	-	$ 976,807.09	$ 956,241.29	$ 20,365.80	-
Interest on Funded Debt	$ 274,074.66	$ 272,705.38	$ 1,369.28	.48	$ 1,641,918.65	$1,656,553.16	$ 14,634.51	.88
Interest on Unfunded Debt	17,770.27	15,112.88	4,657.69	35.52	110,516.20	38,261.45	72,254.75	188.84
Total Interest Deductions	$ 291,844.93	$ 288,447.16	$ 3,397.77	1.18	$ 1,752,434.85	$1,694,814.61	$ 57,620.24	3.40
NET INCOME	$ 341,323.53	$ 662,181.91	$ 120,958.38	-	$ 2,729,041.94	$2,651,055.90	$ 77,986.04	-

NOTE "A"

For comparison with estimates filed as Exhibit 39 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	Month		Period	
	1937	1936	1937	1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$192,854.54	$216,622.90	$675,311.25	$496,559.98
- M. of E.	89,055.00	66,920.62	446,976.84	186,316.26
Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,283.44	11,283.44	67,700.64	67,700.64
Available for Interest - Adjusted	43,814.38	78,907.79	213,381.44	225,884.44

NOTE - Italics denote red.

Accounting Department,
San Francisco, California
August 3, 1937

1697

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMPARED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #136

ITEM OR ACCOUNT	MONTH OF JULY		Increase or Decrease		PERIOD JANUARY 1 TO JULY 31		Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$ 1,304,534.85	$ 1,309,364.24	$ 14,729.41	1.12	$ 8,888,702.87	$ 7,366,375.40	$ 1,522,327.47	20.67
Passenger	88,092.02	85,222.89	2,869.13	3.37	468,060.54	448,932.73	19,127.81	4.31
Mail	4,254.47	4,262.27	- 7.80	.18	30,113.83	28,813.83	1,299.30	4.51
Express	6,560.48	6,167.00	193.48	3.14	102,628.45	88,494.04	14,132.41	15.97
Dining Car, Hotel & Restaurant	10,341.68	9,655.13	686.55	7.11	47,693.78	39,452.24	8,421.55	21.34
Miscellaneous	19,130.84	20,662.40	1,531.56	7.41	124,192.07	112,683.11	11,508.96	10.27
Total Railway Operating Revenues	$ 1,432,814.40	$ 1,435,333.93	$ 12,519.53	.87	$ 9,661,389.95	$ 8,084,510.75	$ 1,577,079.20	19.51
OPERATING EXPENSES								
M. of W.&S.-Ordinary and Budget	$ 270,123.13	$ 214,418.80	$ 55,704.33	25.98	$ 1,639,259.99	$ 1,404,027.77	$ 235,232.22	16.75
M. of W.&S.-1937 Rehabil. Program (W.P.RR Co) Note "A"	194,470.84	192,405.62	2,015.22	1.05	869,732.09	688,965.60	180,766.49	26.24
Total M. of W.&S.	461,543.97	406,824.42	57,719.55	14.19	2,508,992.08	2,092,993.37	415,998.71	19.88
M. of E.-Ordinary and Budget	261,383.91	198,621.20	62,762.71	31.58	1,703,254.83	1,419,643.17	284,611.66	20.06
M. of E.-1937 Rehabil. Program (W.P.RR Co) Note "A"	63,929.27	67,953.56	3,994.29	5.88	510,935.91	234,769.82	276,166.09	118.10
Total M. of E.	325,313.18	266,574.76	58,738.42	22.03	2,214,190.74	1,652,912.99	561,277.75	33.96
Power	13,463.35	13,364.46	98.89	.72	89,894.89	90,961.44	1,066.83	1.17
Traffic	62,066.26	63,974.31	1,908.05	2.98	432,138.45	430,185.11	1,943.34	.45
Transportation - Rail Lines	884,094.81	803,844.39	80,250.42	15.93	4,080,648.54	3,377,376.50	703,272.04	20.82
Miscellaneous Operations	12,801.54	12,570.77	230.23	2.94	64,697.53	57,051.37	7,646.16	13.40
General	50,863.69	55,021.38	5,842.31	11.08	454,799.90	384,731.12	70,068.78	18.23
Transportation for Investment-Cr.	2,456.17	13,972.19	11,516.02	82.42	37,452.50	31,731.66	5,720.84	18.03
Total Railway Operating Expenses	$ 1,518,090.63	$ 1,306,804.30	$ 211,286.33	16.22	$ 9,907,509.33	$ 8,054,090.24	$ 1,753,419.09	21.77
NET REVENUE FROM RAILWAY OPERATIONS	$ 85,276.23	$ 129,129.63	$ 324,405.86	-	$ 145,930.38	$ 30,420.51	$ 176,340.69	-
Excise and Use Tax Accruals-Ordinary and Budget	$ 223,307.58*	$ 28,157.93	$ 251,465.51	-	$ 38,130.59	$ 172,297.64	$ 134,167.05	77.87
Excise and Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co)	10,583.08*	3,799.86	6,783.22	178.53	26,168.69	20,350.27	5,818.42	28.59
Railway Tax Accruals - All Other	37,346.74	61,515.08	24,168.34	39.28	341,490.53	417,893.24	76,402.71	18.07
Railway Operating Income	$ 60,101.80	$ 35,688.96	$ 24,412.84	68.38	$ 332,100.39	$ 379,310.84	$ 47,210.25	-
Hire of Equipment - Net Debit	$ 102,306.94	$ 103,718.19	$ 1,411.25	1.36	$ 612,987.43	$ 593,876.48	$ 19,111.15	3.22
Joint Facility Rents - Net Credit	1,780.88	2,488.01	707.13	28.36	78,593.19	63,527.97	15,065.22	23.71
Net Railway Operating Income	$ 40,424.46	$ 65,558.20	$ 25,133.74	-	$ 1,086,494.83	$ 1,109,859.15	$ 23,364.32	-
NON-OPERATING INCOME								
Rental of Property	$ 34,857.46	$ 35,414.13	$ 556.67	1.63	$ 246,761.01	$ 261,191.09	$ 14,430.08	5.53
Interest Accruals	2,368.57	1,288.64	1,079.93	82.52	24,625.51	9,725.56	14,899.95	153.20
Miscellaneous	7.00	12.00	5.00	41.67	196.00	98.80	97.20	98.38
Total Non-Operating Income	$ 37,233.03	$ 36,734.77	$ 498.26	1.36	$ 271,582.52	$ 271,015.45	$ 567.07	.21
GROSS INCOME	$ 3,191.43	$ 28,833.43	$ 25,642.00	-	$ 814,912.31	$ 838,843.70	$ 23,931.39	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,505.10	$ 2,610.80	$ 105.70	4.04	$ 18,339.80	$ 18,062.94	$ 276.86	1.53
Miscellaneous Tax Accruals	4,613.99	4,509.10	104.89	2.33	29,479.00	29,440.68	038.32	2.68
Amortization of Discount - Note "A"	14,821.70	11,760.09	3,061.61	26.03	104,018.27	82,584.36	21,433.91	25.98
Miscellaneous	6,694.45	5,540.73	1,153.72	20.82	41,674.59	41,383.76	290.83	.70
Total Miscellaneous Deductions	$ 28,635.24	$ 24,420.52	$ 4,214.71	17.26	$ 193,521.45	$ 170,651.34	$ 22,869.91	13.40
AVAILABLE FOR INTEREST - Note "A"	$ 31,826.67	$ 53,253.95	$ 21,427.28	-	$ 1,008,433.76	$ 1,009,495.24	$ 1,061.48	-
Interest on Funded Debt	$ 274,493.41	$ 275,749.11	$ 1,256.70	.45	$ 1,916,411.06	$ 1,932,302.27	$ 15,891.21	.82
Interest on Unfunded Debt	17,899.39	13,286.70	4,612.67	34.72	128,415.57	51,528.15	76,887.42	149.21
Total Interest Deductions	$ 292,391.78	$ 289,035.81	$ 3,355.97	1.17	$ 2,044,826.63	$ 1,983,830.42	$ 60,996.21	3.07
NET INCOME	$ 324,218.43	$ 342,269.76	$ 18,051.31	-	$ 3,053,260.39	$ 2,893,325.66	$ 59,934.73	-

NOTE "A"		Month		Period	
		1937	1936	1937	1936
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:	Operating Expense-1937 Rehabil. Program - M. of W. & S.	$ 194,470.84	$ 192,405.62	$ 869,732.09	$ 688,965.60
	" " " - M. of E.	63,929.27	67,953.56	510,935.91	234,769.82
	Amortization of Discount on W.P.RR Co. First Mortgage Bonds	11,993.44	11,993.44	78,984.08	78,984.08
	Available for Interest - Adjusted	297,836.88	218,389.67	451,719.32	7,273.74

*Include credit of $ 216,261.89 by cancellation of accruals for year 1936 under Railroad Retirement Tax Act of 1935 and credit of $ 27,869.61 by adjustment of accruals for period January 1 to May 31, 1937 to basis of "Carriers Taxing Act of 1937".

NOTE - Italics denote red.

Accounting Department
San Francisco, California
September 10,1937

1698

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #137

ITEM OR ACCOUNT	MONTH OF AUGUST		Increase or Decrease		PERIOD JANUARY 1 to AUGUST 31		Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,536,151.22	$ 1,496,561.17	$ 39,590.05	2.65	$10,424,884.09	$ 8,862,936.57	$ 1,561,947.52	17.62
Passenger	88,677.35	82,669.55	6,014.80	7.28	554,737.85	531,394.58	25,343.31	4.77
Mail	4,153.84	4,271.19	117.35	2.75	34,267.07	33,085.12	1,181.95	3.57
Express	4,307.85	6,589.61	2,281.76	34.63	106,934.30	95,063.65	11,870.65	12.49
Dining Car, Hotel & Restaurant	10,629.65	9,809.08	820.57	8.37	58,523.44	49,281.32	9,242.12	18.75
Miscellaneous	24,823.10	21,183.32	3,639.78	17.18	149,015.17	133,806.43	15,208.74	11.37
Total Railway Operating Revenues	$ 1,668,743.01	$ 1,621,056.92	$ 47,685.09	2.94	$11,330,331.96	$ 9,705,567.67	$ 1,624,764.29	16.74
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 306,869.66	$ 213,320.96	$ 93,338.70	43.76	$ 1,945,919.65	$ 1,617,348.73	$ 328,570.92	20.31
M. of W. & S.--Rehabil. Prog. (W.P.RR Co) Note "A"	130,912.49	175,787.05	44,874.56	25.53	1,000,644.58	864,752.85	135,891.93	15.71
Total M. of W. & S.	437,872.15	389,108.01	48,464.14	12.46	2,946,564.23	2,482,101.58	464,462.85	18.71
M. of E.--Ordinary and Budget	276,805.80	218,340.51	58,465.29	26.78	1,980,060.63	1,636,983.68	343,076.95	20.96
M. of E.--Rehabil. Prog. (W.P.RR Co) Note "A"	71,577.68	70,857.62	720.06	1.02	582,513.59	305,127.44	277,386.15	90.91
Total M. of E.	348,383.48	289,198.13	59,185.35	20.47	2,562,574.22	1,942,111.12	620,463.10	31.95
Power	14,568.21	14,307.60	257.61	1.80	104,489.80	105,289.04	809.24	
Traffic	66,463.06	58,268.90	8,196.16	14.07	498,603.51	488,464.01	10,139.50	2.08
Transportation - Rail Line	632,582.13	567,948.07	64,634.06	11.38	4,713,230.67	3,945,324.57	767,906.10	19.46
Miscellaneous Operations	12,188.22	11,947.45	240.77	2.02	76,695.75	68,998.82	7,886.93	11.43
General	63,317.68	54,511.71	8,805.97	16.15	517,717.58	438,842.83	78,874.75	17.97
Transportation for Investment - Cr.	9,501.09	3,127.19	6,373.90	203.82	46,963.59	34,858.85	12,094.74	34.70
Total Railway Operating Expenses	$ 1,565,872.84	$ 1,382,162.68	$ 183,410.16	13.27	$11,373,082.17	$ 9,436,252.92	$ 1,936,829.25	20.53
NET REVENUE FROM RAILWAY OPERATIONS	$ 103,170.17	$ 238,894.24	$ 135,724.07	56.81	$ 42,750.21	$ 269,314.75	$ 312,064.96	-
Excise & Use Tax Accruals-Ordinary & Budget	$ 43,073.84	$ 32,911.73	$ 10,162.11	60.89	$ 81,204.43	$ 205,209.37	$ 124,004.94	60.43
Excise & Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co)	6,986.15	3,430.55	3,555.60	103.65	33,155.04	23,780.82	9,374.22	39.42
Railway Tax Accruals-All Other	55,608.09	61,072.56	5,464.47	8.95	307,488.62	478,355.80	80,867.18	16.91
Railway Operating Income	$ 2,497.91	$ 141,479.40	$ 143,977.31	-	$ 594,599.30	$ 436,031.24	$ 116,567.06	-
Hire of Equipment-Net Debit	$ 99,727.66	$ 69,221.54	$ 30,506.14	44.07	$ 712,715.31	$ 663,098.02	$ 49,617.29	7.48
Joint Facility Rents-Net Credit	11,020.04	13,311.10	2,291.06	17.21	89,613.23	76,839.07	12,774.16	16.62
Net Railway Operating Income	$ 91,205.55	$ 85,568.96	$ 176,774.51	-	$ 1,177,700.38	$ 1,024,290.19	$ 153,410.19	-
NON-OPERATING INCOME								
Rental of Property	$ 31,881.70	$ 33,776.06	$ 1,894.36	5.61	$ 278,642.71	$ 294,967.15	$ 16,324.44	5.53
Interest Accruals	2,327.68	1,454.30	873.38	60.06	28,953.19	11,179.86	15,773.33	141.09
Miscellaneous	8.00	4.00	4.00	100.00	204.00	102.80	101.20	98.44
Total Non-Operating Income	$ 34,217.38	$ 35,234.36	$ 1,016.98	2.89	$ 305,799.90	$ 306,249.81	$ 449.91	.15
GROSS INCOME	$ 56,988.17	$ 120,803.32	$ 177,791.49	-	$ 871,900.48	$ 718,040.38	$ 153,860.10	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,067.01	$ 2,103.00	$ 35.99	1.71	$ 20,406.59	$ 20,165.74	$ 240.85	1.19
Miscellaneous Tax Accruals	4,664.98	4,508.17	156.81	3.48	34,153.98	33,148.85	1,005.13	3.03
Amortization of Discount-Note "A"	14,821.70	11,760.09	3,061.61	26.03	118,839.98	94,324.45	24,515.53	25.99
Miscellaneous	5,540.25	3,972.56	1,567.69	39.46	47,214.84	45,356.32	1,858.52	4.10
Total Miscellaneous Deductions	$ 27,093.94	$ 22,343.82	$ 4,750.12	21.26	$ 220,615.39	$ 192,995.36	$ 27,620.03	14.31
AVAILABLE FOR INTEREST-Note "A"	$ 84,082.11	$ 98,459.50	$ 182,541.61	-	$ 1,092,515.87	$ 911,035.74	$ 181,480.13	-
Interest on Funded Debt	$ 274,457.29	$ 280,948.22	$ 6,490.93	2.31	$ 2,190,968.35	$ 2,213,250.49	$ 22,282.14	1.01
Interest on Unfunded Debt	17,736.66	13,236.21	4,500.45	34.00	146,152.23	64,764.36	81,387.87	125.67
Total Interest Deductions	$ 292,193.95	$ 294,184.43	$ 1,990.48	.68	$ 2,337,020.58	$ 2,278,014.85	$ 59,005.73	2.59
NET INCOME	$ 376,276.06	$ 195,724.93	$ 180,551.13	-	$ 3,429,536.45	$ 3,189,050.59	$ 240,485.86	-

NOTE "A"		MONTH		PERIOD	
		1937	1936	1937	1936
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:	Operating Expense-1937 Rehabil. Program - M. of W. & S.	$ 130,912.49	$ 175,787.05	$ 1,000,644.58	$ 864,752.85
	" " " - M. of E.	71,577.68	70,857.62	582,513.59	305,127.44
	Amortization of Discount on W.P.RR.Co. First Mortgage Bonds	11,283.44	11,283.44	90,267.52	90,267.52
	Available for Interest - Adjusted	129,691.50	356,387.61	580,909.82	349,111.87

NOTE - Italics denote red.

Accounting Department
San Francisco, California

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #138

ITEM OR ACCOUNT	MONTH OF SEPTEMBER				PERIOD JANUARY 1 to SEPTEMBER 30			
	1937	1936	Increase or Decrease Amount	Per Cent	1937	1936	Increase or Decrease Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$ 1,727,030.89	$ 1,698,882.87	$ 28,147.72	1.66	$ 12,181,884.36	$10,841,889.14	$ 1,339,995.24	12.36
Passenger	78,588.43	78,757.37	168.94	.21	852,703.52	852,137.85	565.67	.06
Mail	4,256.06	4,247.34	8.72	.20	36,593.13	37,336.46	743.33	1.99
Express	9,072.15	9,538.54	466.39	4.89	113,088.45	104,599.19	8,489.26	8.12
Dining Car, Hotel & Restaurant	9,560.14	9,050.01	510.13	5.64	87,183.68	87,351.53	167.85	.19
Miscellaneous	27,617.90	20,736.89	6,881.01	33.19	176,632.97	154,542.12	22,090.85	14.29
Total Railway Operating Revenues	$ 1,856,601.87	$ 1,818,218.42	$ 36,383.43	2.00	$ 13,184,933.83	$11,583,786.09	$ 1,601,147.74	14.41
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 266,568.21	$ 224,420.09	$ 42,148.12	18.78	$ 2,212,487.86	$ 1,841,768.82	$ 370,719.04	20.13
M. of W. & S.--Rehabil. Prog. (W.P.RR Co) Note "A"	41,027.00	126,953.23	87,926.23	69.16	1,041,671.58	993,706.88	47,965.70	4.83
Total M. of W. & S.	307,595.21	351,373.32	43,778.11	12.46	3,254,159.44	2,835,474.70	418,684.74	14.77
M. of E.--Ordinary and Budget	287,748.97	220,859.07	66,889.90	30.29	2,267,809.60	1,831,481.36	436,328.25	23.82
M. of E.--Rehabil. Prog. (W.P.RR Co) Note "A"	47,216.38	73,834.71	26,618.33	36.05	629,729.97	406,323.55	224,406.42	55.36
Total M. of E.	334,965.35	294,693.78	40,271.57	13.67	2,897,539.57	2,236,804.90	660,734.67	29.54
Power	14,546.60	14,803.04	256.42	1.73	119,006.40	120,072.08	1,065.68	.89
Traffic	62,022.30	58,636.28	3,386.02	5.77	560,625.81	547,100.29	13,525.52	2.47
Transportation - Rail Line	665,742.02	615,078.30	50,663.72	8.24	5,378,972.69	4,560,402.87	818,569.82	17.95
Miscellaneous Operations	11,790.40	11,561.34	229.06	1.98	88,676.15	80,560.16	8,115.99	10.07
General	60,988.96	52,916.73	8,072.24	15.25	578,706.54	491,759.55	86,946.99	17.68
Transportation for Inv.-Cr.	843.78	3,750.83	2,907.05	77.50	47,797.37	38,609.68	9,187.69	23.80
Total Railway Operating Expenses	$ 1,456,807.06	$ 1,397,311.93	$ 59,495.13	4.26	$ 12,929,889.23	$10,833,564.95	$ 1,996,324.38	18.43
NET REVENUE FROM RAILWAY OPERATIONS	$ 397,794.81	$ 420,906.49	$ 23,111.68	5.49	$ 255,044.60	$ 690,221.24	$ 395,176.64	48.56
Excise & Use Tax Accruals-Ordinary & Budget	$ 36,003.98	$ 26,401.64	$ 9,602.34	36.37	$ 117,208.41	$ 231,611.01	$ 114,402.60	49.39
Excise & Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co)	3,297.00	7,511.95	4,214.95	56.11	36,452.04	31,292.77	5,159.27	16.49
Railway Tax Accruals - All Other	54,507.66	56,481.75	1,974.09	3.50	451,996.28	534,837.36	82,841.37	15.49
Railway Operating Income	$ 303,986.17	$ 330,511.15	$ 26,524.98	8.03	$ 250,613.13	$ 107,530.09	$ 143,083.04	-
Hire of Equipment - Net Debit	$ 110,286.87	$ 130,970.67	$ 20,684.10	15.79	$ 823,001.88	$ 794,088.69	$ 28,933.19	3.64
Joint Facility Rents - Net Credit	14,265.47	12,740.35	1,525.12	11.97	103,878.70	89,579.42	14,299.28	15.96
Net Railway Operating Income	$ 207,965.07	$ 212,280.83	$ 4,315.76	2.03	$ 969,735.31	$ 813,009.36	$ 157,725.95	-
NON-OPERATING INCOME								
Rental of Property	$ 31,209.30	$ 35,189.06	$ 3,959.67	11.25	$ 309,872.10	$ 330,156.21	$ 20,284.11	6.14
Interest Accruals	2,202.55	1,780.44	422.11	23.71	29,155.74	12,960.30	16,195.44	124.96
Miscellaneous	11.00	6.00	5.00	83.33	215.00	108.80	106.20	97.61
Total Non-Operating Income	$ 33,442.94	$ 36,975.50	$ 3,532.56	9.55	$ 339,242.84	$ 343,225.31	$ 3,982.47	1.16
GROSS INCOME	$ 241,408.01	$ 249,256.33	$ 7,848.32	3.15	$ 630,492.47	$ 468,784.05	$ 161,708.42	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,579.60	$ 2,671.61	$ 92.01	3.44	$ 22,986.19	$ 22,837.36	$ 148.84	.65
Miscellaneous Tax Accruals	4,626.55	4,506.99	119.56	2.65	38,789.53	37,654.84	1,134.69	3.01
Amortization of Discount - Note "A"	14,921.70	11,760.09	3,061.61	26.03	133,661.68	106,084.54	27,577.14	26.00
Miscellaneous	9,833.71	9,993.18	159.47	1.60	37,392.13	36,361.14	2,030.99	5.74
Total Miscellaneous Deductions	$ 12,214.14	$ 8,942.51	$ 3,271.63	36.59	$ 232,829.53	$ 201,937.87	$ 30,891.66	15.30
AVAILABLE FOR INTEREST - NOTE "A"	$ 229,193.87	$ 240,313.82	$ 11,119.95	4.63	$ 863,322.00	$ 670,721.92	$ 192,600.08	-
Interest on Funded Debt	$ 273,915.30	$ 275,359.47	$ 1,444.17	.52	$ 2,464,783.65	$ 2,488,609.96	$ 23,826.31	.96
Interest on Unfunded Debt	16,734.02	13,102.41	3,631.61	27.72	162,886.25	77,866.77	85,019.48	109.19
Total Interest Deductions	$ 290,649.32	$ 288,461.88	$ 2,187.44	.76	$ 2,627,669.90	$ 2,566,476.73	$ 61,193.17	2.38
NET INCOME	$ 61,455.45	$ 48,148.06	$ 13,307.39	-	$ 3,490,991.90	$ 3,237,198.65	$ 253,793.25	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1937	1936	1937	1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$ 41,027.00	$ 126,953.23	$ 1,041,671.58	$ 993,706.88
M. of E.	47,216.38	73,834.71	629,729.97	406,323.55
Amortization of Discount on W.P.RR.Co. First Mortgage Bonds	11,283.44	11,283.44	101,580.96	101,580.96
Available for Interest - Adjusted	328,720.69	454,368.20	909,630.51	829,868.47

NOTE - Italics denote red.

1700 Accounting Department
San Francisco, California

November 12, 1937

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #139

ITEM OR ACCOUNT	MONTH OF OCTOBER				PERIOD JANUARY 1 to OCTOBER 31			
	1937	1936	Increase or Decrease Amount	Per Cent	1937	1936	Increase or Decrease Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,691.09	1,691.09	-	-	1,691.09	1,691.09	-	-
OPERATING REVENUES								
Freight	$ 2,044,947.30	$ 1,877,113.17	$ 167,834.13	8.98	$ 14,216,831.66	$12,458,942.61	$ 1,757,889.37	14.11
Passenger	75,440.13	57,943.30	17,496.79	14.21	711,151.45	696,095.15	15,056.30	2.15
Mail	4,291.57	4,280.97	10.60	.25	42,814.70	41,613.43	1,201.27	2.89
Express	6,943.91	7,888.24	741.33	9.65	121,950.36	112,284.43	9,665.93	8.61
Dining Car, Hotel & Restaurant	7,117.96	5,765.02	1,352.94	23.47	74,301.54	63,096.35	11,206.19	17.76
Miscellaneous	26,806.74	25,443.96	1,362.78	5.36	203,439.71	179,986.08	23,453.63	13.03
Total Railway Operating Revenues	$ 2,186,585.61	$ 2,028,231.66	$ 157,323.95	7.76	$ 15,370,489.44	$13,552,017.75	$ 1,818,471.69	13.42
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 259,193.84	$ 198,266.87	$ 60,926.97	30.73	$ 2,471,661.70	$ 2,040,035.69	$ 431,646.01	21.16
M. of W. & S.--1937 Rehabil. Prog. (W.P.RR Co) Note "A"	15,645.38	65,178.59	49,533.21	76.00	1,057,316.98	1,056,884.47	1,567.51	.15
Total M. of W. & S.	274,839.22	263,445.46	11,393.76	4.32	3,528,998.68	3,098,920.16	430,078.50	13.88
M. of E.--Ordinary and Budget	$ 274,449.28	229,532.25	44,917.03	19.57	2,542,258.88	2,061,013.60	481,245.28	23.36
M. of E.--1937 Rehabil. Prog. (W.P.RR Co) Note "A"	58,460.30	72,616.82	14,156.52	19.49	688,190.27	477,940.37	210,249.90	43.99
Total M. of E.	332,909.58	302,149.07	30,760.51	10.18	3,230,449.15	2,538,953.97	691,495.18	27.24
Power	14,108.60	14,007.35	100.95	.72	133,214.70	134,079.41	864.71	.72
Traffic	61,331.25	59,222.80	2,108.45	3.56	621,957.06	606,323.09	15,633.97	2.58
Transportation - Rail Line	757,599.91	661,914.40	95,685.51	14.46	6,136,572.60	5,222,317.27	914,255.33	17.51
Miscellaneous Operations	10,108.93	10,098.75	10.18	.10	98,786.08	90,656.91	8,126.17	8.96
General	85,099.27	59,170.02	25,929.25	43.82	663,805.81	560,929.57	102,876.24	20.48
Transportation for Investment - Cr.	12,543.55	8,875.64	3,667.91	41.56	60,360.92	47,485.32	12,875.60	27.11
Total Railway Operating Expenses	$ 1,523,432.91	$ 1,361,132.21	$ 162,300.70	11.92	$ 14,383,329.14	$12,194,697.06	$ 2,188,625.08	17.70
NET REVENUE FROM RAILWAY OPERATIONS	$ 662,122.70	$ 667,099.45	$ 4,976.75	.75	$ 1,017,167.30	$ 1,357,320.69	$ 340,153.39	25.06
Excise & Use Tax Accruals-Ordinary & Budget	$ 40,789.26	$ 33,558.99	$ 7,230.27	21.54	$ 157,997.67	$ 265,170.00	$ 107,172.33	40.42
Excise & Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR Co.)	1,936.17	1,827.43	108.74	5.95	38,368.21	33,120.20	5,248.01	15.91
Railway Tax Accruals - All Other	58,928.04	58,826.12	101.92	.17	510,924.32	593,661.37	82,739.35	13.94
Railway Operating Income	$ 560,469.23	$ 572,886.91	$ 12,417.68	2.17	$ 309,857.10	$ 465,366.92	$ 155,509.73	38.42
Hire of Equipment - Net Debit	$ 186,516.86	$ 142,006.48	$ 43,510.38	30.01	$ 1,011,518.74	$ 939,075.17	$ 72,443.57	7.71
Joint Facility Rents - Net Credit	12,032.25	15,286.80	3,253.55	21.32	115,910.96	104,865.22	11,045.73	10.53
Net Railway Operating Income	$ 385,984.62	$ 445,166.23	$ 59,181.61	13.38	$ 585,759.69	$ 368,843.13	$ 216,907.56	-
NON-OPERATING INCOME								
Rental of Property	$ 34,387.16	$ 31,660.03	$ 2,727.13	8.61	$ 344,259.26	$ 361,816.24	$ 17,556.98	4.85
Interest Accruals	2,205.67	1,627.19	578.48	35.55	31,361.41	14,587.49	16,773.92	114.99
Miscellaneous	1.00	16.28	15.28	93.86	216.00	125.08	90.92	72.69
Total Non-Operating Income	$ 36,593.83	$ 33,303.50	$ 3,290.33	9.88	$ 375,836.67	$ 376,528.81	$ 692.14	.18
GROSS INCOME	$ 420,578.45	$ 478,469.73	$ 55,891.28	11.73	$ 209,914.02	$ 7,685.68	$ 217,599.70	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,638.61	$ 2,636.61	$ 2.00	.08	$ 25,624.80	$ 25,473.96	$ 150.84	.59
Miscellaneous Tax Accruals	4,746.76	4,527.98	218.78	4.83	43,536.29	42,182.82	1,353.47	3.21
Amortization of Discount - Note "A"	14,964.95	11,760.26	3,204.69	27.25	148,628.33	117,844.80	30,781.53	26.12
Miscellaneous	9,359.93	7,223.37	2,036.85	-	28,132.21	28,137.97	5.86	.03
Total Miscellaneous Deductions	$ 13,090.40	$ 11,701.58	$ 1,388.82	11.87	$ 245,919.93	$ 213,639.45	$ 32,280.48	15.11
AVAILABLE FOR INTEREST - NOTE "A"	$ 407,488.05	$ 464,768.15	$ 57,280.10	12.32	$ 455,833.95	$ 208,953.77	$ 249,880.18	-
Interest on Funded Debt	$ 274,438.14	$ 276,095.30	$ 1,657.16	.60	$ 2,739,231.79	$ 2,764,705.26	$ 25,473.47	.92
Interest on Unfunded Debt	17,249.86	13,542.58	3,707.28	27.37	190,136.11	91,409.35	98,726.76	97.07
Total Interest Deductions	$ 291,688.00	$ 289,637.88	$ 2,050.12	.71	$ 2,919,367.90	$ 2,856,114.61	$ 63,245.29	2.21
NET INCOME	$ 115,800.05	$ 175,130.27	$ 59,330.22	33.88	$ 3,375,191.85	$ 3,062,068.38	$ 313,123.47	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1937	1936	1937	1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$ 15,645.38	$ 65,178.59	$ 1,057,316.98	$ 1,056,884.47
- M. of E.	58,460.30	72,616.82	688,190.27	477,940.37
Amortization of Discount on W.P.RR.Co. First Mortgage Bonds	11,283.44	11,283.44	112,834.40	112,834.40
Available for Interest - Adjusted	492,877.17	613,847.00	1,402,507.68	1,443,705.47

Note - Italics denote red.

1701

Accounting Department
San Francisco, California

December 10, 1937

SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #140

ITEM OR ACCOUNT	MONTH OF NOVEMBER				PERIOD JANUARY 1 to NOVEMBER 30			
			Increase or Decrease				Increase or Decrease	
	1937	1936	Amount	Per Cent	1937	1936	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,396,570.96	$ 1,351,253.81	$ 44,337.14	3.28	$ 15,612,402.63	$ 13,810,176.12	$ 1,802,226.51	13.04
Passenger	51,665.13	54,452.70	2,787.57	5.09	762,816.36	750,527.85	12,288.73	1.64
Mail	4,243.54	4,313.88	70.34	1.63	47,058.24	45,927.31	1,130.93	2.46
Express	839.59	8,583.00	7,743.41	90.22	122,789.95	120,867.43	1,922.52	1.59
Dining Car, Hotel & Restaurant	4,851.04	4,586.96	264.08	5.76	79,152.58	67,683.31	11,469.27	16.94
Miscellaneous	22,899.70	25,129.39	2,229.69	8.87	226,339.41	205,115.47	21,223.94	10.35
Total Railway Operating Revenues	$ 1,480,069.96	$ 1,448,279.74	$ 31,790.21	2.20	$ 16,850,559.39	$ 15,000,297.49	$ 1,850,261.90	12.33
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 266,911.63	$ 158,051.03	$ 108,860.60	68.87	$ 2,738,593.33	$ 2,198,086.72	$ 540,506.61	24.59
M. of W. & S.--1937 Rehabil. Prog. (W.P.RR.Co) Note "A"	37,384.24	1,706.13	35,678.11	-	1,094,701.20	1,060,590.60	34,110.60	3.22
Total M. of W. & S.	304,295.87	159,757.16	144,538.71	90.47	3,833,294.53	3,258,677.32	574,617.21	17.63
M. of E.--Ordinary and Budget	316,611.84	232,159.59	84,452.25	36.38	2,858,870.72	2,293,175.19	565,697.53	24.67
M. of E.--1937 Rehabil. Prog. (W.P.RR.Co) Note "A"	26,451.67	38,415.01	11,963.34	31.14	714,641.94	516,355.38	198,286.56	38.40
Total M. of E.	343,063.51	270,574.60	72,488.91	26.79	3,573,512.66	2,809,530.57	763,984.09	27.19
Power	13,928.22	12,723.80	1,204.42	9.47	147,042.92	146,803.21	239.71	.16
Traffic	61,681.87	61,395.55	286.32	.47	683,638.93	667,718.64	15,920.29	2.38
Transportation - Rail Line	643,440.27	562,652.14	80,797.13	14.36	6,780,021.87	5,784,969.41	995,052.46	17.20
Miscellaneous Operations	8,453.02	7,986.33	466.69	5.84	107,236.10	98,645.24	8,592.86	8.71
General	62,475.96	55,178.63	7,297.33	13.22	726,281.77	606,108.20	120,173.57	19.83
Transportation for Investment - Cr.	231.07	149.63	81.44	54.42	60,591.99	47,634.96	12,957.04	27.20
Total Railway Operating Expenses	$ 1,437,116.65	$ 1,130,118.58	$ 306,998.07	27.16	$ 15,790,438.79	$ 13,324,815.64	$ 2,465,623.15	18.51
NET REVENUE FROM RAILWAY OPERATIONS	$ 42,953.30	$ 318,161.16	$ 275,207.86	86.49	$ 1,060,120.60	$ 1,675,481.85	$ 615,361.25	36.73
Excise & Use Tax Accruals-Ordinary & Budget	$ 43,280.12	$ 29,294.40	$ 13,985.72	47.74	$ 201,277.79	$ 294,464.40	$ 93,186.61	31.64
Excise & Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR.Co)	465.28	366.20	99.08	27.36	38,853.49	33,485.50	5,367.99	16.03
Railway Tax Accruals - All Other	54,451.10	47,187.58	7,263.52	15.39	565,375.42	640,851.25	75,475.83	11.77
Railway Operating Income	$ 55,243.20	$ 241,313.88	$ 296,557.08	122.89	$ 254,613.90	$ 706,680.70	$ 452,066.80	63.97
Hire of Equipment - Net Debit	$ 100,346.97	$ 124,373.52	$ 24,026.55	19.32	$ 1,111,865.71	$ 1,063,448.69	$ 48,417.02	4.55
Joint Facility Rents - Net Credit	8,181.93	9,111.51	929.58	10.20	124,092.88	113,976.73	10,116.15	8.88
Net Railway Operating Income	$ 147,408.24	$ 126,051.87	$ 273,460.11	216.94	$ 733,158.93	$ 242,791.26	$ 490,367.67	-
NON-OPERATING INCOME								
Rental of Property	$ 31,826.45	$ 34,791.29	$ 2,964.84	8.52	$ 376,088.71	$ 396,607.53	$ 20,521.82	5.17
Interest Accruals	2,208.87	1,609.42	599.45	37.24	33,570.28	16,196.91	17,373.37	107.26
Miscellaneous	1.00	1.00	-	-	217.00	126.08	90.92	72.00
Total Non-Operating Income	$ 34,036.32	$ 36,401.71	$ 2,365.39	6.49	$ 409,872.99	$ 412,930.52	$ 3,057.53	.74
GROSS INCOME	$ 113,371.92	$ 162,453.58	$ 275,825.50	169.79	$ 323,285.94	$ 170,139.26	$ 493,425.20	290.00
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,561.67	$ 2,713.59	$ 151.92	5.60	$ 28,186.47	$ 28,187.55	$ 1.08	-
Miscellaneous Tax Accruals	4,915.90	4,368.06	547.84	12.54	48,452.19	46,550.88	1,901.31	4.38
Amortization of Discount - Note "A"	14,651.65	11,733.25	2,918.40	24.87	163,278.28	129,578.05	33,700.23	26.01
Miscellaneous	9,526.98	3,109.32	6,417.66	206.40	37,659.19	31,247.19	6,412.00	20.52
Total Miscellaneous Deductions	$ 31,656.20	$ 21,924.22	$ 9,731.98	44.39	$ 277,576.13	$ 235,563.67	$ 42,012.46	17.83
AVAILABLE FOR INTEREST - NOTE "A"	$ 145,028.12	$ 140,529.36	$ 285,557.48	203.20	$ 600,862.07	$ 65,424.41	$ 535,437.66	-
Interest on Funded Debt	$ 272,100.27	$ 275,244.10	$ 3,143.83	1.14	$ 3,011,322.06	$ 3,039,949.36	$ 28,627.30	.94
Interest on Unfunded Debt	17,501.24	13,115.64	4,385.60	33.44	197,637.35	104,524.99	93,112.36	89.08
Total Interest Deductions	$ 289,601.51	$ 288,359.74	$ 1,241.77	.43	$ 3,208,959.41	$ 3,144,474.35	$ 64,485.06	2.05
NET INCOME	$ 434,629.63	$ 147,830.38	$ 286,799.25	-	$ 3,809,821.48	$ 3,209,898.76	$ 599,922.72	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1937	1936	1937	1936
Operating expense-1937 Rehabil. Program - M. of W. & S.	$ 37,384.24	$ 1,706.13	$ 1,094,701.20	$ 1,060,590.60
" " " " - M. of E.	26,451.67	38,415.01	714,641.94	516,355.38
Amortization of Discount on W.P.RR.Co. First Mortgage Bonds	11,283.44	12,283.44	124,117.84	124,117.84
Available for Interest - Adjusted	69,908.77	191,933.94	1,332,998.91	1,638,630.41

NOTE - Italics denote red.

Accounting Department
San Francisco, California

January 8, 1938

1702

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY
OPERATING RESULTS COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #141

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1 to DECEMBER 31			
	1937	1936	Increase or Decrease. Amount	Per Cent	1937	1936	Increase or Decrease. Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 976,440.67	$ 1,454,499.26	$ 478,058.59	32.87	$ 16,896,943.80	$ 15,284,678.38	$ 1,384,167.98	8.87
Passenger	51,815.46	55,144.75	3,329.29	6.04	814,638.04	806,678.60	8,959.44	1.11
Mail	5,083.18	6,042.76	959.58	15.88	52,141.42	51,970.07	171.35	.33
Express	8,274.00	8,717.13	443.13	5.08	131,085.65	129,584.55	1,479.40	1.14
Dining Car, Hotel & Restaurant	3,793.10	4,516.60	723.48	16.02	82,945.88	72,199.81	10,746.87	14.88
Miscellaneous	22,518.73	18,125.82	4,392.91	24.24	248,858.14	223,241.39	25,616.85	11.47
Total Railway Operating Revenues	$ 1,067,925.14	$ 1,547,046.21	479,121.07	30.97	$ 17,918,484.53	$ 16,547,343.70	$ 1,371,140.83	8.29
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 206,504.75	$ 199,983.03	$ 6,521.72	3.26	$ 2,945,098.08	$ 2,398,089.75	$ 547,008.33	22.81
M. of W. & S.--1937 Rehabil. Prog. (W.P.RR.Co) Note "A"	10,803.55	2,439.51	13,243.06	-	1,105,504.75	1,058,151.09	47,353.66	4.48
Total M. of W. & S.	217,308.30	197,543.52	19,764.78	10.00	4,050,602.83	3,456,220.84	594,381.99	17.20
M. of E.--Ordinary and Budget	251,522.09	196,756.28	55,765.80	28.49	3,110,392.80	2,488,929.67	621,463.33	24.97
M. of E.--1937 Rehabil. Prog. (W.P.RR.Co) Note "A"	17,348.46	11,023.60	6,324.86	57.38	731,990.40	527,378.98	204,611.42	38.80
Total M. of E.	268,870.54	206,779.88	62,090.66	30.03	3,842,383.20	3,016,308.65	826,074.75	27.39
Power	13,497.45	13,112.80	384.65	2.93	160,640.37	159,918.01	684.36	.39
Traffic	59,800.85	58,161.90	1,638.95	2.82	743,439.78	725,880.84	17,558.94	2.42
Transportation - Rail Line	570,449.86	584,250.13	13,800.38	2.36	7,360,471.72	6,369,219.34	991,252.18	15.41
Miscellaneous Operations	7,271.52	7,616.36	344.82	4.53	114,509.63	106,261.59	8,248.04	7.76
General	62,649.93	58,549.13	4,096.80	7.00	788,286.70	664,657.33	124,289.37	18.70
Transportation for Investment - Cr.	2,792.56	1,554.83	1,237.53	79.59	63,384.36	49,190.78	14,194.57	28.86
Total Railway Operating Expenses	$ 1,197,051.09	$ 1,124,456.88	$ 72,592.21	6.46	$ 16,987,489.88	$ 14,449,274.82	$ 2,538,215.36	17.57
NET REVENUE FROM RAILWAY OPERATIONS	$ 129,125.95	$ 422,587.33	$ 551,713.28	-	$ 930,994.65	$ 2,098,069.18	$ 1,167,074.53	55.63
Excise & Use Tax Accruals-Ordinary & Budget	$ 29,020.74	$ 30,987.94	$ 1,967.20	6.35	$ 230,298.53	$ 325,452.34	$ 95,153.81	29.24
Excise & Use Tax Accruals-1937 Rehabil.Prog.(W.P.RR.Co)	3,128.84	29.08	3,099.76	-	41,982.33	33,514.58	8,467.75	25.27
Railway Tax Accruals - All Other	53,851.33	46,373.99	7,477.34	10.91	619,026.75	699,980.24	70,193.49	10.19
Railway Operating Income	$ 314,926.86	$ 343,196.32	$ 558,123.18	-	$ 39,687.04	$ 1,049,877.02	$ 1,010,189.98	96.22
Hire of Equipment - Net Debit	$ 104,456.24	$ 116,057.96	$ 11,601.72	10.00	$ 1,216,321.95	$ 1,179,506.65	$ 36,815.30	3.12
Joint Facility Rents - Net Credit	22,070.83	13,147.22	8,923.61	67.87	146,163.71	127,133.95	19,029.76	14.96
Net Railway Operating Income	$ 237,313.37	$ 240,285.58	$ 537,597.85	-	$ 1,030,471.20	$ 5,505.68	$ 1,037,965.52	-
NON-OPERATING INCOME								
Rental of Property	53,777.35	$ 37,630.00	$ 3,853.65	10.24	$ 409,863.06	$ 434,237.53	$ 24,374.47	5.61
Interest Accruals	2,208.06	1,671.17	536.89	32.13	35,778.34	17,868.08	17,910.26	100.24
Miscellaneous	258.23	3.00	255.23	-	456.23	139.08	336.15	252.67
Total Non-Operating Income	$ 36,223.64	$ 39,304.17	$ 3,080.53	7.84	$ 446,096.63	$ 452,234.69	$ 6,138.06	1.36
GROSS INCOME	$ 281,088.83	$ 279,589.75	$ 540,678.38	-	$ 584,374.57	$ 449,729.01	$ 1,034,103.58	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,778.04	$ 2,730.14	$ 47.90	1.75	$ 30,964.51	$ 30,917.89	$ 46.62	.15
Miscellaneous Tax Accruals	4,847.25	3,676.86	1,170.40	31.83	53,299.44	50,227.73	3,071.71	6.12
Amortization of Discount - Note "A"	15,040.41	15,872.77	832.36	5.24	176,318.69	145,450.82	32,867.87	22.60
Miscellaneous	18,495.38	10,783.87	7,711.51	71.51	86,154.57	42,031.06	14,123.51	33.60
Total Miscellaneous Deductions	$ 41,161.08	$ 33,063.63	$ 8,097.45	24.49	$ 318,737.21	$ 268,627.30	$ 50,109.91	18.65
AVAILABLE FOR INTEREST - NOTE "A"	$ 302,249.71	$ 246,526.12	$ 544,775.83	-	$ 909,111.78	$ 181,101.71	$ 1,084,213.49	-
Interest on Funded Debt	$ 273,129.63	$ 274,819.35	$ 1,689.72	.61	$ 3,284,451.69	$ 3,314,768.71	$ 30,317.02	.91
Interest on Unfunded Debt	17,453.49	19,582.34	2,128.85	10.87	215,090.84	124,107.33	90,983.51	73.31
Total Interest Deductions	$ 290,583.12	$ 294,401.69	$ 3,818.57	1.30	$ 3,499,542.53	$ 3,438,876.04	$ 60,666.49	1.76
NET INCOME	$ 593,832.83	$ 47,875.57	$ 544,957.26	-	$ 4,402,654.31	$ 3,257,774.33	$ 1,144,879.98	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1937	1936	1937	1936
Operating Expense-1937 Rehabil. Program - M. of W. & S.	$ 10,803.55	$ 2,439.51	$ 1,105,504.75	$ 1,058,151.09
- M. of E.	17,348.46	11,023.60	731,990.40	527,378.98
Amortization of Discount on W.P.RR.Co. First Mortgage Bonds	11,283.44	11,283.44	135,401.28	135,401.28
Available for Interest - Adjusted	983,814.38	986,598.65	1,069,784.65	1,902,038.06

NOTE - Italics denote red.

Accounting Department
San Francisco, California

February 16, 1938

1703

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

F. D. 10913

Exhibit #142

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

Item or Account	MONTH OF JANUARY		Increase or Decrease	
	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-
OPERATING REVENUES				
Freight	$ 990,363.19	$ 1,252,536.97	$ 262,173.78	20.93
Passenger	52,047.86	55,454.76	3,406.90	6.14
Mail	4,315.66	4,430.64	114.98	2.60
Express	2,721.39	4,345.00	1,623.61	37.14
Dining Car, Hotel & Restaurant	4,483.69	6,204.28	1,734.69	28.26
Miscellaneous	16,948.85	18,206.90	1,257.05	6.90
Total Railway Operating Revenues	$ 1,070,880.64	$ 1,341,181.65	$ 270,321.01	20.16
OPERATING EXPENSES				
W. of W. & S.-Ordinary and Budget	$ 199,437.38	$ 180,781.74	$ 48,655.64	32.27
W. of W. & S.-Rehabilitation Program (W.P.R.R.Co)-Note "A"	6,262.33	6,920.03	13,182.36	-
Total W. of W. & S.	205,699.71	143,861.71	61,838.00	42.98
W. of E.-Ordinary and Budget	292,042.38	226,136.83	65,905.82	29.14
W. of E.-Rehabilitation Program (W.P.R.R.Co)-Note "A"	3,568.48	50,103.77	46,535.29	92.88
Total W. of E.	295,610.83	276,240.60	19,370.83	7.01
Power	12,614.16	13,487.99	873.83	6.48
Traffic	63,113.83	61,657.41	1,456.42	2.36
Transportation - Rail Line	542,741.92	584,272.59	41,530.67	7.11
Miscellaneous Operations	6,149.76	6,689.33	539.57	8.27
General	65,807.97	56,193.09	9,614.88	16.78
Transportation for Investment Credit	12,561.96	912.17	11,649.78	-
Total Railway Operating Expenses	$ 1,180,978.23	$ 1,143,490.25	$ 37,486.98	3.28
NET REVENUE FROM RAILWAY OPERATIONS	$ 110,115.59	$ 197,691.40	$ 307,806.99	-
Excise and Use Tax Accruals-Ordinary and Budget	$ 43,242.73	$ 37,015.08	$ 6,227.65	16.82
Excise and Use Tax Accruals-Rehabil. Prog.(W.P.R.R.Co)	600.03	817.63	217.60	26.61
Railway Tax Accruals - All Other	61,701.53	61,423.10	278.43	.45
Railway Operating Income	$ 215,859.88	$ 98,435.59	$ 314,095.47	-
Hire of Equipment - Net Debit	$ 80,793.97	$ 84,564.47	$ 3,770.50	4.46
Joint Facility Rents - Net Credit	21,176.47	2,297.52	23,473.99	-
Net Railway Operating Income	$ 317,830.32	$ 16,168.64	$ 333,799.96	-
NON-OPERATING INCOME				
Rental of Property	$ 35,034.66	$ 37,058.13	$ 2,023.47	5.46
Interest Accruals	2,787.48	2,933.57	166.09	5.66
Miscellaneous	255.82	163.00	92.82	56.94
Total Non-Operating Income	$ 38,057.96	$ 40,154.70	$ 2,096.74	5.22
GROSS INCOME	$ 279,572.36	$ 56,323.34	$ 335,895.70	-
MISCELLANEOUS DEDUCTIONS				
Miscellaneous Rents	$ 2,693.02	$ 2,683.09	$ 9.93	.04
Miscellaneous Tax Accruals	4,691.73	4,180.55	511.18	12.23
Amortization of Discount - Note "A"	14,815.65	14,966.21	150.56	1.01
Miscellaneous	5,123.72	4,657.32	466.40	10.01
Total Miscellaneous Deductions	$ 27,324.32	$ 26,487.37	$ 836.95	3.16
AVAILABLE FOR INTEREST - Note "A"	$ 306,896.68	$ 29,836.97	$ 336,732.65	-
Interest on Funded Debt	$ 273,015.19	$ 274,483.33	$ 1,468.14	.53
Interest on Unfunded Debt	16,857.96	20,423.23	3,565.27	17.46
Total Interest Deductions	$ 289,873.15	$ 294,906.56	$ 5,033.41	1.71
NET INCOME	$ 596,769.83	$ 265,070.59	$ 331,699.24	-

NOTE "A"		MONTH	
		1938	1937
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:	Operating Expense - Rehabil. Program - W. of W. & S.	$ 6,262.33	$ 6,920.03
	" " " - W. of E.	3,568.48	50,103.77
	Amortization of Discount on W.P.R.R.Co.First Mortgage Bonds	11,983.44	11,283.44
	Available for Interest - Adjusted	285,782.43	84,303.15

NOTE - Italics denote red.
Accounting Department
San Francisco, California

March 12, 1938

1704

1704

SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

F. D. 10913

Exhibit #143

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF FEBRUARY		Increase or Decrease		PERIOD JANUARY 1 to FEBRUARY 28		Increase or Decrease	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 745,944.41	$ 1,206,977.95	$ 461,033.54	38.36	$ 1,734,307.60	$ 2,469,634.98	$ 735,327.32	29.48
Passenger	41,158.93	43,746.24	2,613.31	5.97	93,180.79	99,301.00	6,120.21	6.07
Mail	4,133.34	4,324.97	191.63	4.43	8,449.00	8,758.61	306.61	3.50
Express	3,941.94	8,147.81	4,205.87	52.60	6,493.33	12,492.81	5,999.48	47.23
Dining-Car, Hotel & Restaurant	4,514.31	4,671.68	157.35	3.37	8,958.00	10,880.04	1,913.04	17.57
Miscellaneous	14,164.79	15,685.94	1,521.15	9.70	31,113.84	35,891.84	3,778.20	8.20
Total Railway Operating Revenues	$ 811,781.72	$ 1,283,574.57	$ 471,922.85	36.76	$ 1,882,612.36	$ 2,634,756.22	$ 742,143.86	28.36
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 220,357.01	$ 184,971.49	$ 35,385.52	19.14	$ 419,804.39	$ 335,753.23	$ 84,051.16	25.03
M. of W. & S.--Rehabil. Prog. (S.P.R.R.Co.) Note "A"	3,481.07	1,024.12	2,456.95	239.91	9,743.40	5,895.91	15,639.31	-
Total M. of W. & S.	223,848.08	185,995.61	37,852.47	20.36	429,547.79	329,857.32	99,690.47	30.22
M. of E.--Ordinary and Budget	233,193.06	220,954.14	12,238.94	5.54	525,236.43	447,090.67	78,144.76	17.48
M. of E.--Rehabil. Prog. (W.P.R.R.Co.) Note "A"	4,044.90	62,894.73	58,849.83	93.57	7,613.38	112,998.50	105,385.12	93.26
Total M. of E.	237,237.96	283,848.87	46,610.91	16.42	532,849.81	560,089.17	27,240.36	4.86
Power	11,665.10	12,170.84	505.74	4.15	24,279.26	25,658.53	1,379.27	5.38
Traffic	59,097.96	58,274.52	823.43	1.41	122,211.78	119,931.73	2,280.05	1.90
Transportation - Rail Line	512,708.91	583,027.15	70,318.24	12.06	1,055,450.85	1,167,299.74	111,848.91	9.59
Miscellaneous Operations	7,289.79	7,484.16	346.63	4.62	15,979.55	16,173.49	193.94	1.20
General	74,553.08	56,574.53	18,980.56	34.15	140,181.06	111,765.62	28,396.43	25.41
Transportation for Investment Credit	2,211.75	677.90	1,533.85	226.26	14,773.68	1,590.07	13,183.61	-
Total Railway Operating Expenses	$ 1,124,729.16	$ 1,188,995.98	$ 60,966.12	5.14	$ 2,336,705.37	$ 2,389,185.55	$ 33,480.14	1.01
NET REVENUE FROM RAILWAY OPERATIONS	$ 313,977.44	$ 97,879.89	$ 410,856.73	-	$ 422,093.03	$ 296,570.69	$ 718,663.72	-
Excise and Use Tax Accruals-Ordinary and Budget	$ 42,793.16	$ 36,449.79	$ 6,343.37	17.40	$ 86,435.89	$ 73,464.87	$ 12,971.02	17.11
Excise and Use Tax Accruals-Rehabil.Prog.(W.P.R.R.Co.)	301.88	863.88	562.00	65.09	901.32	1,700.91	799.60	47.01
Railway Tax Accruals - All Other	55,840.93	58,580.29	2,739.36	4.68	117,542.46	120,005.39	2,462.93	2.05
Railway Operating Income	$ 414,913.81	$ 1,965.93	$ 413,878.74	-	$ 237,573.69	$ 100,401.52	$ 737,974.21	-
Hire of Equipment - Net Debit	$ 54,[illegible].79	$ 66,911.40	$ 12,785.61	19.11	$ 134,919.76	$ 151,475.87	$ 16,556.11	10.93
Joint Facility Rents - Net Credit	8,[illegible]9.07	6,766.84	1,958.53	28.51	13,157.49	9,664.06	22,821.46	-
Net Railway Operating Income	$ 458,[illegible].53	$ 58,178.53	$ 399,840.60	-	$ 775,649.85	$ 43,010.39	$ 738,639.56	-
NON-OPERATING INCOME								
Rental of Property	$ 27,253.31	$ 32,706.42	$ 5,453.11	16.67	$ 62,287.97	$ 69,764.55	$ 7,476.58	10.72
Interest Accruals	1,884.46	6,177.23	4,292.77	69.49	4,661.94	9,110.80	4,448.86	48.84
Miscellaneous	18.00	3.00	15.00	-	273.82	168.00	107.82	64.96
Total Non-Operating Income	$ 29,155.77	$ 38,886.65	$ 9,730.88	25.02	$ 67,213.73	$ 79,041.35	$ 11,827.62	14.96
GROSS INCOME	$ 488,863.76	$ 19,293.18	$ 409,571.48	-	$ 709,436.12	$ 37,051.06	$ 745,467.18	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,662.48	$ 2,441.78	$ 210.70	8.63	$ 5,345.70	$ 5,125.07	$ 220.63	4.30
Miscellaneous Tax Accruals	4,760.29	4,180.55	579.74	13.87	9,452.02	8,361.10	1,090.92	13.05
Amortization of Discount - Note "A"	14,785.91	14,933.57	157.66	1.06	29,601.66	29,909.78	308.12	1.03
Miscellaneous	5,875.41	5,316.92	558.49	10.50	10,999.13	9,974.84	1,024.89	10.28
Total Miscellaneous Deductions	$ 28,074.09	$ 26,872.82	$ 1,191.27	4.43	$ 55,398.41	$ 53,370.19	$ 2,028.22	3.80
AVAILABLE FOR INTEREST - Note "A"	$ 456,937.85	$ 46,178.10	$ 410,762.73	-	$ 763,834.53	$ 16,339.13	$ 747,493.40	-
Interest on Funded Debt	$ 271,000.34	$ 272,846.61	$ 1,846.07	.68	$ 544,015.73	$ 547,329.94	$ 3,314.21	.61
Interest on Unfunded Debt	16,512.51	17,612.00	1,099.49	6.31	33,370.47	38,036.23	4,664.76	12.26
Total Interest Deductions	$ 287,513.06	$ 290,458.61	$ 2,945.56	1.01	$ 577,386.20	$ 585,366.17	$ 7,978.97	1.36
NET INCOME	$ 744,450.90	$ 336,633.71	$ 407,817.19	-	$ 1,341,220.73	$ 601,704.30	$ 739,516.43	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10915, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1938	1937	1938	1937
Operating Expense - Rehabil. Program - M. of W. & S.	$ 3,481.07	$ 1,024.12	$ 9,743.40	$ 5,895.91
" " " - M. of E.	4,044.90	62,894.73	7,613.38	112,998.50
Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,283.44	11,283.44	22,566.88	22,566.88
Available for Interest - Adjusted	438,728.44	29,027.19	739,910.87	113,330.34

NOTE - Italics denote red.

1705

Accounting Department
San Francisco, California

April 7, 1938

F. D. 10913

Exhibit #144

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF MARCH		Increase or Decrease		PERIOD JANUARY 1 to MARCH 31		Increase or Decrease	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$ 910,897.31	$ 1,238,899.43	$ 328,013.13	26.30	$ 2,844,894.91	$ 3,995,134.35	$ 1,150,239.44	28.42
Passenger	35,736.45	54,068.83	18,061.38	33.33	138,919.24	158,068.83	19,064.59	12.41
Mail	4,123.18	4,264.18	141.03	3.31	12,572.16	13,019.79	447.63	3.44
Express	9,978.48	17,651.96	7,673.50	43.47	16,571.79	30,184.77	13,573.98	45.03
Dining Car, Hotel & Restaurant	4,308.59	5,467.19	1,071.60	19.64	13,353.59	16,357.23	3,003.64	18.36
Miscellaneous	18,197.77	19,691.18	1,493.41	8.51	69,311.41	65,783.08	3,471.61	8.31
Total Railway Operating Revenues	$ 983,010.74	$ 1,341,666.77	$ 358,656.03	26.73	$ 2,885,623.10	$ 3,986,488.99	$ 1,100,789.89	27.75
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 228,387.39	$ 211,056.71	$ 17,330.68	8.21	$ 648,191.78	$ 546,809.94	101,381.84	18.54
M. of W. & S.--Rehabil. Prog. (W.P.R.R.Co.) Note "A"	144,984.87	30,342.57	114,642.30	377.73	154,690.27	24,446.66	130,251.61	532.80
Total M. of W. & S.	373,372.26	241,399.28	131,972.98	54.66	802,882.05	571,256.60	231,633.45	40.55
M. of E.--Ordinary and Budget	281,481.97	236,747.36	45,734.61	19.40	806,717.40	688,536.03	127,879.37	18.14
M. of E.--Rehabil. Prog. (W.P.R.R.Co.) Note "A"	5,790.44	96,536.20	90,745.76	94.00	11,393.82	209,534.70	198,140.88	94.56
Total M. of E.	287,272.41	333,283.56	46,011.15	13.80	818,111.22	898,372.73	74,261.51	8.32
Power	11,783.06	13,782.72	1,999.67	14.94	36,008.31	39,441.25	3,432.94	8.72
Traffic	57,299.98	51,454.12	4,122.20	8.71	179,511.70	181,353.85	1,842.15	1.02
Transportation - Rail Line	553,157.36	592,327.88	39,170.52	6.61	1,608,608.19	1,759,627.62	151,019.43	8.58
Miscellaneous Operations	9,041.63	9,182.85	958.78	11.59	25,021.18	24,276.34	744.84	3.07
General	82,618.27	86,606.86	7,018.41	12.61	208,779.32	167,371.48	38,407.84	21.16
Transportation for Investment Credit	2,850.37	10,277.21	7,426.84	72.27	17,624.06	11,867.88	5,756.77	48.51
Total Railway Operating Expenses	$ 1,349,394.83	$ 1,294,647.06	$ 54,947.47	4.24	$ 3,686,299.02	$ 3,623,838.89	$ 31,467.33	.87
NET REVENUE FROM RAILWAY OPERATIONS	$ 366,583.79	$ 47,019.71	$ 413,603.50	-	$ 789,676.93	$ 342,650.40	$ 1,132,327.33	-
Excise and Use Tax Accruals - Ordinary and Budget	$ 47,940.08	$ 58,664.02	$ 7,713.94	13.86	$ 133,975.97	$ 129,118.69	$ 4,857.08	3.76
Excise and Use Tax Accruals - Rehabil.Prog.(W.P.R.R.Co.)	144.42	1,484.68	1,340.26	90.27	1,045.73	3,188.59	2,139.86	67.17
Railway Tax Accruals - All Other	57,377.20	58,608.01	1,227.81	2.10	174,919.66	178,608.40	3,688.74	2.07
Railway Operating Income	$ 472,048.49	$ 68,734.00	$ 403,331.45	-	$ 1,099,618.18	$ 31,677.52	$ 1,151,295.70	-
Hire of Equipment - Net Debit	$ 64,494.36	$ 87,818.51	$ 23,324.16	26.56	$ 199,414.11	$ 239,294.38	$ 39,880.27	16.67
Joint Facility Rents - Net Credit	9,478.37	14,112.05	4,633.68	32.83	9,879.03	32,176.11	36,855.14	-
Net Railway Operating Income	$ 537,061.47	$ 143,430.46	$ 384,631.01	-	$ 1,302,911.32	$ 184,449.75	$ 1,118,370.57	-
NON-OPERATING INCOME								
Rental of Property	$ 31,777.08	$ 38,881.93	$ 7,104.87	18.27	$ 94,065.03	$ 108,636.48	$ 14,581.45	13.42
Interest Accruals	1,668.75	3,130.38	1,477.63	47.20	6,304.69	12,241.18	5,936.49	48.50
Miscellaneous	22.00	12.00	10.00	83.33	295.82	178.00	117.82	66.19
Total Non-Operating Income	$ 33,451.81	$ 42,024.31	$ 8,572.50	20.40	$ 100,665.54	$ 121,055.66	$ 20,390.12	16.85
GROSS INCOME	$ 493,609.68	$ 100,406.15	$ 393,203.51	-	$ 1,303,048.78	$ 63,373.09	$ 1,139,970.69	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,454.40	$ 2,652.59	$ 198.19	7.47	$ 7,800.10	$ 7,777.66	$ 22.44	.29
Miscellaneous Tax Accruals	4,560.95	4,109.40	451.55	10.99	14,012.97	12,470.50	1,542.47	12.37
Amortization of Discount - Note "A"	14,912.94	14,821.70	91.24	.62	44,514.50	44,731.48	216.98	.49
Miscellaneous	6,168.66	6,836.40	667.74	9.77	17,167.79	16,810.64	357.15	2.12
Total Miscellaneous Deductions	$ 28,096.95	$ 28,420.09	$ 323.14	1.14	$ 83,495.36	$ 81,790.28	$ 1,705.08	2.08
AVAILABLE FOR INTEREST - NOTE "A"	$ 521,706.61	$ 139,834.34	$ 393,867.37	-	$ 1,385,841.14	$ 145,165.37	$ 1,140,373.77	-
Interest on Funded Debt	$ 270,979.94	$ 272,722.11	$ 1,742.17	.64	$ 814,996.67	$ 820,082.06	$ 5,085.39	.62
Interest on Unfunded Debt	17,214.31	18,005.10	790.79	4.39	50,584.78	56,040.33	5,455.55	9.74
Total Interest Deductions	$ 288,194.25	$ 290,727.21	$ 2,532.96	.87	$ 865,580.45	$ 876,092.38	$ 10,511.93	1.20
NET INCOME	$ 233,512.36	$ 151,107.13	$ 391,334.41	-	$ 520,260.69	$ 730,927.01	$ 1,251,187.70	-

NOTE "A"

For comparison with estimates filed as exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1938	1937	1938	1937
Operating Expense - Rehabil. Program - M. of W. & S.	$ 144,984.87	$ 30,342.57	$ 154,690.27	$ 24,446.66
- M. of E.	5,790.44	96,536.20	11,393.82	209,534.70
Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,913.44	11,292.44	33,650.32	33,650.32
Available for Interest - Adjusted	161,687.75	138,171.21	199,734.41	267,631.68

Note - Italics denote Red.

Accounting Department
San Francisco, California

May 5, 1938.

1706

F. D. 10913

Exhibit #145

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF APRIL		Increase or Decrease		PERIOD JANUARY 1 to APRIL 30		Increase or Decrease	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,891.09	1,891.09	-	-	1,891.09	1,891.09	-	-
OPERATING REVENUES								
Freight	$ 969,345.60	$ 1,227,951.55	$ 258,605.95	21.63	$ 3,607,240.51	$ 4,923,056.90	$ 1,315,845.39	26.73
Passenger	54,235.59	74,581.19	20,345.60	27.28	185,152.65	232,585.02	49,432.19	21.25
Mail	5,763.21	4,297.96	304.77	7.09	16,565.37	17,317.77	753.40	4.34
Express	18,550.87	15,806.00	193.13	.98	32,222.66	45,950.77	13,728.11	29.88
Dining Car, Hotel & Restaurant	4,940.71	5,244.00	403.29	7.69	18,194.30	21,581.23	3,386.93	15.69
Miscellaneous	19,992.02	17,211.34	1,680.68	9.76	68,203.43	70,994.36	2,790.93	3.93
Total Railway Operating Revenues	$ 1,069,956.00	$ 1,345,096.06	$ 385,138.06	21.20	$ 3,925,579.10	$ 5,311,515.05	$ 1,385,935.95	26.09
OPERATING EXPENSES								
M. of W. & S.--Ordinary and Budget	$ 230,984.68	$ 278,612.78	$ 47,628.10	17.09	$ 879,176.46	$ 832,244.74	$ 46,931.72	5.64
M. of W. & S.--Rehabil. Prog. (W.P.R.R.Co.) Note "A"	274,463.57	228,003.24	46,460.33	20.38	429,161.84	845,627.88	183,533.96	74.72
Total M. of W. & S.	505,448.25	506,616.02	1,167.77	.23	1,308,338.30	1,077,972.62	230,465.68	21.36
M. of E.--Ordinary and Budget	322,426.36	263,355.29	40,928.94	15.54	1,029,143.78	946,193.32	82,950.43	8.77
M. of E.--Rehabil. Prog. (W.P.R.R.Co.) Note "A"	1,792.83	76,016.90	74,224.07	97.64	13,186.65	286,561.60	273,364.95	95.38
Total M. of E.	324,219.18	339,372.19	115,153.01	33.93	1,042,330.40	1,231,744.92	189,414.52	15.38
Power	12,614.58	12,594.03	20.55	.16	48,216.89	52,035.28	3,818.39	6.57
Traffic	62,380.46	60,328.29	2,038.17	3.37	241,872.16	241,679.14	193.02	.08
Transportation - Rail Line	560,196.10	572,966.28	12,771.18	2.22	2,166,803.29	2,332,593.90	163,790.61	7.02
Miscellaneous Operations	7,484.47	7,592.82	108.35	1.43	32,505.65	31,869.16	636.49	2.00
General	68,983.42	86,964.28	7,659.16	15.86	265,702.74	222,635.74	43,067.00	19.34
Transportation for Investment Credit	7,698.42	13,394.50	5,701.88	42.57	25,516.47	25,861.58	84.89	.22
Total Railway Operating Expenses	$ 1,427,553.04	$ 1,541,336.50	$ 113,783.55	7.38	$ 5,082,852.96	$ 5,166,169.18	$ 82,316.22	1.59
NET REVENUE FROM RAILWAY OPERATIONS	$ 367,597.04	$ 196,244.53	$ 171,352.51	-	$ 1,157,273.86	$ 146,345.87	$ 1,303,619.73	-
Excise and Use Tax Accruals - Ordinary and Budget	$ 46,283.60	$ 46,748.98	$ 464.93	.99	$ 180,889.65	$ 175,867.41	$ 4,992.25	2.80
Excise and Use Tax Accruals - Rehabil.Prog.(W.P.R.R.Co.)	1,965.54	4,068.81	2,103.27	51.71	2,009.27	7,281.40	4,242.13	58.50
Railway Tax Accruals - All Other	52,819.86	50,696.14	2,123.72	4.19	227,739.52	229,304.84	1,565.02	.68
Railway Operating Income	$ 266,564.13	$ 297,758.00	$ 170,909.13	-	$ 1,568,232.31	$ 266,077.48	$ 1,302,204.83	-
Hire of Equipment - Net Debit	$ 58,857.05	$ 81,614.37	$ 22,757.32	27.88	$ 358,271.16	$ 320,906.75	$ 62,637.59	19.82
Joint Facility Rents - Net Credit	11,508.79	11,439.01	69.78	.61	7,829.76	34,615.12	26,785.36	77.38
Net Railway Operating Income	$ 516,012.39	$ 367,930.36	$ 148,082.03	-	$ 1,819,733.71	$ 553,371.11	$ 1,366,362.60	-
NON-OPERATING INCOME								
Rental of Property	$ 32,743.90	$ 36,358.87	$ 3,614.97	9.94	$ 126,808.93	$ 145,008.34	$ 18,199.41	12.55
Interest Accruals	1,640.04	3,350.31	1,710.27	50.75	7,944.75	15,571.49	7,626.74	48.98
Miscellaneous	6.00	1.00	5.00	-	301.82	179.00	122.82	68.61
Total Non-Operating Income	$ 34,389.94	$ 39,690.18	$ 5,300.24	13.35	$ 135,055.50	$ 160,758.84	$ 25,700.36	15.99
GROSS INCOME	$ 481,622.45	$ 338,240.18	$ 153,382.27	-	$ 1,683,668.23	$ 391,615.27	$ 1,292,052.96	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,754.17	$ 2,639.42	$ 114.75	4.35	$ 10,554.27	$ 10,417.08	$ 137.19	1.32
Miscellaneous Tax Accruals	4,582.53	4,131.63	450.90	10.91	18,595.50	16,602.13	1,993.37	12.01
Amortization of Discount - Note "A"	1,555.58	14,821.70	13,266.12	89.50	46,070.38	59,553.18	13,483.10	22.64
Miscellaneous	6,588.53	5,796.04	792.49	13.69	23,756.32	22,606.68	1,150.64	5.09
Total Miscellaneous Deductions	$ 15,480.81	$ 27,387.79	$ 11,906.98	43.48	$ 98,976.47	$ 109,178.07	$ 10,201.90	9.34
AVAILABLE FOR INTEREST - Note "A"	$ 497,103.26	$ 355,627.97	$ 141,475.29	-	$ 1,783,644.40	$ 500,793.34	$ 1,281,851.06	-
Interest on Funded Debt	$ 141,693.83	$ 272,178.71	$ 130,484.88	47.94	$ 956,889.50	$ 1,092,230.76	$ 135,341.26	12.41
Interest on Unfunded Debt	169,206.07	18,666.28	150,539.79	-	219,789.85	74,706.61	145,083.24	194.20
Total Interest Deductions	$ 310,898.90	$ 290,844.99	$ 20,053.91	6.90	$ 1,176,679.35	$ 1,166,937.37	$ 9,841.98	.82
NET INCOME	$ 186,203.36	$ 64,782.98	$ 121,420.38	-	$ 606,965.05	$ 333,855.97	$ 273,109.08	-

NOTE "A"		MONTH		PERIOD	
		1938	1937	1938	1937
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:	Operating Expense - Rehabil. Program - M. of W. & S.	$ 274,463.57	$ 228,003.24	$ 429,161.84	$ 845,627.88
	" " " - M. of E.	1,792.83	76,016.90	13,186.65	286,561.60
	Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,283.44	11,283.44	45,133.76	45,133.76
	Available for Interest - Adjusted	309,583.42	48,324.39	$ 1,295,182.15	75,529.90

Note - Italics denote red.

Accounting Department
San Francisco, California

June 2, 1938

1707

F. D. 10913

Exhibit #146

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS - COMBINED
(All Inter-Company Items eliminated)

ITEM OR ACCOUNT	MONTH OF MAY				PERIOD JANUARY 1 to MAY 31			
			Increase or Decrease				Increase or Decrease	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,171,186.93	$ 1,399,030.56	$ 226,851.63	16.23	$ 4,778,427.44	$ 6,351,124.46	$ 1,572,697.02	24.41
Passenger	52,182.21	67,212.74	15,030.53	22.41	236,305.04	299,797.76	64,492.72	21.51
Mail	4,239.82	4,307.74	77.92	1.81	20,795.19	21,625.51	830.32	3.84
Express	11,227.03	10,578.85	648.18	6.17	43,449.69	56,329.62	12,979.93	22.97
Dining Car, Hotel & Restaurant	5,102.44	6,676.96	1,513.92	22.67	23,356.74	28,257.49	4,900.75	17.34
Miscellaneous	15,975.41	16,616.99	641.18	3.86	84,179.24	87,611.35	3,432.11	3.92
Total Railway Operating Revenues	$ 1,259,954.24	$ 1,503,231.14	$ 243,296.90	16.19	$ 5,186,513.34	$ 6,814,746.19	$ 1,629,232.85	23.91
OPERATING EXPENSES								
M. of W. & S. - Ordinary and Budget	$ 194,909.90	$ 253,141.74	$ 58,231.84	23.00	$ 1,074,086.36	$ 1,085,386.48	$ 11,300.12	1.04
M. of W. & S. - Rehabilitation Program (W.P.R.R.Co.) Note "A"	348,322.76	245,721.15	100,601.61	40.94	775,484.60	491,349.03	284,135.57	57.83
Total M. of W. & S.	541,232.66	498,862.89	42,369.77	8.49	1,849,570.96	1,576,738.51	272,836.45	17.30
M. of E. - Ordinary and Budget	187,318.02	255,930.59	68,612.57	26.81	1,216,461.77	1,202,123.91	14,337.86	1.19
M. of E. - Rehabilitation Program (W.P.R.R.Co.) Note "A"	28,586.04	72,370.04	43,784.00	60.50	41,772.69	367,921.64	326,148.95	88.33
Total M. of E.	215,904.06	328,300.63	112,396.57	34.24	1,258,234.46	1,560,045.55	301,811.09	19.35
Power	11,837.87	12,410.53	572.66	4.62	60,454.86	64,445.81	3,991.25	6.19
Traffic	61,782.43	64,189.35	2,406.92	3.75	302,634.59	305,848.49	3,213.90	.72
Transportation - Rail Line	584,996.02	598,462.28	73,467.26	12.28	2,693,798.31	2,931,066.18	237,267.87	9.09
Miscellaneous Operations	7,506.97	8,889.62	1,382.65	15.55	40,012.82	40,758.78	746.16	1.83
General	62,871.22	110,782.51	47,911.29	43.25	388,573.90	333,418.25	4,844.29	1.46
Transportation for Investment Credit	1,404.92	7,943.89	6,538.97	82.31	26,721.39	33,205.47	6,484.08	19.53
Total Railway Operating Expenses	$ 1,424,705.11	$ 1,613,933.92	$ 189,228.81	11.72	$ 6,507,558.07	$ 6,779,103.10	$ 271,545.03	4.01
NET REVENUE FROM RAILWAY OPERATIONS	$ 164,770.87	$ 110,702.78	$ 54,068.09	-	$ 1,322,044.73	$ 35,643.09	$ 1,357,687.82	-
Excise and Use Tax Accruals - Ordinary and Budget	$ 39,714.49	$ 43,188.38	$ 3,473.89	8.04	$ 219,974.15	$ 219,055.79	$ 918.36	.42
Excise and Use Tax Accruals - Rehabilitation Program (W.P.R.R.Co.)	4,921.81	4,394.58	527.23	12.00	7,921.08	11,645.98	3,724.90	31.90
Railway Tax Accruals - All Other	53,719.11	2,080.98	53,638.13	-	283,458.63	231,325.52	52,133.11	22.54
Railway Operating Income	$ 265,126.38	$ 160,366.72	$ 104,819.56	-	$ 1,833,498.59	$ 496,384.20	$ 1,407,024.39	-
Hire of Equipment - Net Debit	$ 60,195.43	$ 102,316.18	$ 42,120.75	41.17	$ 318,466.59	$ 423,284.93	$ 104,758.34	24.75
Joint Facility Rents - Net Credit	16,438.83	25,916.66	9,479.83	36.59	24,868.59	60,533.78	35,665.19	58.91
Net Railway Operating Income	$ 308,882.89	$ 236,764.24	$ 72,178.64	-	$ 2,127,606.59	$ 789,075.35	$ 1,338,531.24	-
NON-OPERATING INCOME								
Rental of Property	$ 23,078.49	$ 34,536.07	$ 11,459.58	33.18	$ 149,885.42	$ 179,841.42	$ 29,956.00	16.62
Interest Accruals	2,715.33	3,067.96	352.63	11.49	10,660.06	18,639.44	7,979.38	42.81
Miscellaneous	22.00	2.00	20.00	-	323.92	181.00	142.82	78.91
Total Non-Operating Income	$ 25,813.82	$ 37,606.03	$ 11,792.20	31.36	$ 160,869.30	$ 198,361.86	$ 37,492.56	18.90
GROSS INCOME	$ 283,069.05	$ 199,098.22	$ 83,970.84	-	$ 1,966,737.29	$ 590,713.49	$ 1,376,023.80	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,539.17	$ 2,764.80	$ 225.63	8.16	$ 13,093.44	$ 13,181.88	$ 88.44	.67
Miscellaneous Tax Accruals	4,601.97	4,141.24	460.73	11.13	23,197.47	20,743.37	2,454.10	11.83
Amortization of Discount - Note "A"	11,453.48	14,821.70	3,368.22	22.72	57,523.56	74,374.88	16,851.32	22.66
Miscellaneous	7,601.03	5,609.19	1,991.84	35.51	31,357.35	28,214.87	3,142.48	11.14
Total Miscellaneous Deductions	$ 26,195.65	$ 27,336.93	$ 1,141.28	4.17	$ 125,171.82	$ 136,515.00	$ 11,343.18	8.31
AVAILABLE FOR INTEREST - Note "A"	$ 309,264.71	$ 226,435.15	$ 82,829.56	-	$ 2,091,909.11	$ 727,228.49	$ 1,364,680.62	-
Interest on Funded Debt	$ 242,917.70	$ 275,613.28	$ 32,695.53	11.86	$ 1,199,607.20	$ 1,367,843.99	$ 168,236.79	12.30
Interest on Unfunded Debt	50,336.37	18,039.32	41,297.05	228.93	279,126.29	92,745.93	186,380.29	200.96
Total Interest Deductions	$ 293,254.07	$ 293,652.58	$ 8,601.52	2.93	$ 1,478,733.49	$ 1,460,589.92	$ 18,143.50	1.24
NET INCOME	$ 16,010.64	$ 520,087.70	$ 91,431.08	-	$ 3,570,642.53	$ 2,187,818.41	$ 1,382,824.12	-

NOTE "A"

For comparison with estimates filed as Exhibit #9 and also the record in similar form set forth by exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1938	1937	1938	1937
Operating Expense - Rehabil. Program - M. of W. & S.	$ 346,322.76	$ 245,721.15	$ 775,484.60	$ 491,349.03
- M. of E.	28,586.04	72,370.04	41,772.69	367,921.64
Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds.	11,283.44	11,283.44	56,417.20	56,417.20
Available for Interest - Adjusted	76,987.53	102,959.48	1,217,732.62	176,459.36

Note - Italics denote red.

1708

Accounting Department
San Francisco, California
July 1, 1938

F. D. 10913

Exhibit #147

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF JUNE		Increase or Decrease		PERIOD JANUARY 1 to JUNE 30		Increase or Decrease	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,156,356.10	$ 1,272,943.56	$ 116,587.46	9.16	$ 6,951,783.54	$ 7,894,068.02	$ 1,889,284.48	21.83
Passenger	70,700.97	80,170.70	9,469.73	11.81	362,008.81	375,988.48	73,982.15	19.47
Mail	3,431.13	4,233.25	802.12	18.95	24,226.32	25,858.76	1,632.44	6.31
Express	29,354.00	39,936.36	10,582.36	26.73	72,703.69	96,265.97	23,562.28	24.48
Dining Car, Hotel & Restaurant	9,038.62	9,294.62	256.30	2.76	32,395.16	37,552.11	5,156.95	13.73
Miscellaneous	17,165.52	17,449.88	284.36	1.63	101,344.76	105,061.23	3,716.47	3.54
Total Railway Operating Revenues	$ 1,286,946.14	$ 1,424,028.36	$ 138,082.22	9.70	$ 6,471,459.48	$ 8,238,776.55	$ 1,787,315.07	21.45
OPERATING EXPENSES								
M. of W. & S.-Ordinary and Budget	$ 225,743.18	$ 274,858.06	$ 49,114.88	17.87	$ 1,299,839.54	$ 1,369,136.86	$ 69,307.32	5.06
M. of W. & S.-Rehabilitation Program (W.P.R.R.Co.) Note "A"	263,521.79	192,854.54	70,667.25	36.65	1,039,006.39	675,311.25	363,695.14	53.86
Total M. of W. & S.	$ 489,264.97	$ 467,712.60	$ 21,552.37	4.61	$ 2,338,836.93	$ 2,044,448.11	$ 294,387.82	14.40
M. of E.-Ordinary and Budget	$ 177,219.99	$ 239,777.01	$ 62,557.12	26.09	$ 1,393,681.86	$ 1,441,900.92	$ 48,219.36	3.34
M. of E.-Rehabilitation Program (W.P.R.R.Co.) Note "A"	51,409.14	89,065.00	37,655.86	42.27	93,181.83	446,976.64	353,794.81	79.15
Total M. of E.	$ 228,629.03	$ 328,832.01	$ 100,202.98	30.47	$ 1,486,863.49	$ 1,888,877.56	$ 402,014.07	21.28
Power	$ 10,831.83	$ 11,985.43	$ 1,153.60	9.63	$ 71,286.39	$ 76,431.24	$ 5,144.85	6.73
Traffic	67,840.49	64,223.70	3,616.72	5.63	371,475.01	370,072.19	1,402.82	.38
Transportation - Rail Line	510,374.38	565,497.55	55,123.17	9.75	3,204,172.69	3,496,563.73	292,391.04	9.36
Miscellaneous Operations	11,678.05	11,737.21	59.16	.55	51,617.67	52,496.99	878.32	1.54
General	59,068.75	62,117.96	3,049.21	4.91	387,642.71	395,536.21	7,893.50	2.00
Transportation for Investment Credit	16,531.55	1,790.86	14,740.69	-	43,252.94	34,996.33	8,256.61	23.59
Total Railway Operating Expenses	$ 1,361,132.88	$ 1,510,315.60	$ 149,182.72	9.88	$ 7,965,710.95	$ 8,289,418.70	$ 420,707.75	5.08
NET REVENUE FROM RAILWAY OPERATIONS	$ 75,306.74	$ 86,287.24	$ 11,080.50	-	$ 1,297,251.47	$ 80,644.15	$ 1,346,607.32	-
Excise and Use Tax Accruals-Ordinary and Budget	$ 40,943.37	$ 42,582.39	$ 1,639.02	3.85	$ 260,917.82	$ 261,638.18	720.66	.28
Excise and Use Tax Accruals-Rehabilitation Program (W.P.R.R.Co.)	3,449.61	3,939.89	490.28	12.44	11,380.69	15,585.87	4,205.18	26.98
Railway Tax Accruals-All Other	53,796.11	53,006.27	789.84	1.49	337,256.74	284,333.79	52,922.95	18.61
Railway Operating Income	$ 173,397.83	$ 185,817.79	$ 12,419.96	-	$ 3,006,806.42	$ 612,301.99	$ 1,394,504.43	-
Hire of Equipment-Net Debit	$ 79,402.15	$ 87,455.76	$ 8,053.61	9.21	$ 397,868.74	$ 510,680.69	$ 112,811.95	22.09
Joint Facility Rents-Net Credit	24,421.04	16,278.53	8,142.51	50.03	48,688.63	76,812.31	28,123.68	36.61
Net Railway Operating Income	$ 228,379.94	$ 256,995.03	$ 28,616.08	-	$ 2,355,985.53	$ 1,046,070.37	$ 1,309,915.16	-
NON-OPERATING INCOME								
Rental of Property	$ 12,552.25	$ 21,382.13	$ 8,829.88	30.36	$ 172,437.97	$ 211,923.35	$ 39,485.38	18.63
Interest Accruals	1,783.80	3,597.30	1,813.52	50.41	12,443.94	22,236.94	9,793.00	44.04
Miscellaneous	1.00	8.00	7.00	87.50	324.82	189.00	135.82	71.86
Total Non-Operating Income	$ 24,337.13	$ 36,987.63	$ 11,650.50	32.37	$ 185,206.43	$ 234,349.49	$ 49,143.06	20.97
GROSS INCOME	$ 204,041.81	$ 221,007.39	$ 16,965.58	-	$ 2,170,779.10	$ 811,730.88	$ 1,359,058.22	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,489.42	$ 2,652.60	$ 163.18	6.15	$ 15,582.86	$ 15,834.48	$ 251.62	1.59
Miscellaneous Tax Accruals	4,596.58	4,131.64	464.94	11.25	27,794.05	24,875.01	2,919.04	11.73
Amortization of Discount - Note "A"	11,453.48	14,821.70	3,368.22	22.73	68,977.04	99,196.58	30,219.54	30.47
Miscellaneous	5,801.85	6,765.27	963.42	14.24	37,159.80	34,980.14	2,179.06	6.23
Total Miscellaneous Deductions	$ 24,341.33	$ 28,371.21	$ 4,029.88	14.20	$ 149,513.15	$ 164,886.21	$ 15,373.06	9.32
AVAILABLE FOR INTEREST - Note "A"	$ 228,383.14	$ 249,378.60	$ 20,995.46	-	$ 2,320,292.25	$ 976,507.09	$ 1,343,685.16	-
Interest on Funded Debt	$ 241,299.57	$ 274,074.66	$ 32,775.09	11.96	$ 1,440,906.77	$ 1,641,918.65	$ 201,011.88	12.24
Interest on Unfunded Debt	61,800.84	17,770.27	44,030.57	247.77	340,927.06	110,516.20	230,410.86	208.49
Total Interest Deductions	$ 303,100.41	$ 291,844.93	$ 11,255.48	3.86	$ 1,781,833.83	$ 1,752,434.85	$ 29,398.98	1.68
NET INCOME	$ 531,483.55	$ 541,223.53	$ 9,739.98	-	$ 4,102,126.08	$ 2,729,041.94	$ 1,373,084.14	-

NOTE "A"		MONTH		PERIOD	
		1938	1937	1938	1937
For comparison with estimates filed as Exhibit 29 and also the record in similar form as set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases	Operating Expense - Rehabil. Program - M. of W. & S.	$ 263,521.79	$ 192,854.54	$ 1,039,006.39	$ 675,311.25
	- M. of E.	51,409.14	89,065.00	93,181.83	446,976.64
	Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,283.44	11,223.44	67,700.64	67,700.64
	Available for Interest - Adjusted	97,831.23	43,814.38	1,130,403.39	213,381.44

Note - Italics denote red.

Accounting Department
San Francisco, California

August 4, 1938

1709

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS - COMBINED
(All Inter-Company Items Eliminated)

F. D. 10913

Exhibit #148

ITEM OR ACCOUNT	MONTH OF JULY		Increase or Decrease		PERIOD JANUARY 1 to JULY 31		Increase or Decrease.	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,211,649.16	$ 1,294,634.85	$ 82,985.69	6.41	$ 7,146,432.70	$ 8,888,702.87	$ 1,742,270.17	19.59
Passenger	81,511.92	88,090.08	6,780.16	7.70	387,317.93	468,060.54	80,742.61	17.25
Mail	3,425.76	4,254.47	828.71	19.48	27,652.08	30,113.23	2,461.15	8.17
Express	5,021.00	6,360.48	1,339.48	21.06	77,724.89	102,626.45	24,901.76	24.26
Dining Car, Hotel & Restaurant	8,506.36	10,341.68	1,835.32	17.75	40,901.52	47,893.79	6,992.27	14.60
Miscellaneous	17,821.23	19,130.84	1,309.61	6.85	119,165.99	194 92.07	5,026.08	4.05
Total Railway Operating Revenues	$ 1,327,736.43	$ 1,422,814.40	$ 95,078.97	6.68	$ 7,799,194.91	$ 9,681 88.96	$ 1,882,394.04	19.28
OPERATING EXPENSES								
M. of W. & S.-Ordinary and Budget	$ 236,769.48	$ 270,123.13	$ 33,353.65	12.35	$ 1,536,599.02	$ 1,639,259.99	$ 102,660.97	6.26
M. of W. & S.-Rehabilitation Program (W.P.R.R.Co.) Note "A"	39,728.34	194,420.84	154,692.50	79.57	1,078,734.73	889,732.09	209,002.64	24.03
Total M. of W. & S.	$ 276,497.82	$ 464,543.97	$ 188,046.15	40.48	$ 2,615,333.75	$ 2,528,992.08	$ 106,341.67	4.24
M. of E.-Ordinary and Budget	$ 178,980.54	$ 261,353.91	$ 82,373.37	31.52	$ 1,572,662.80	$ 1,703,254.63	$ 130,592.83	7.67
M. of E.-Rehabilitation Program (W.P.R.R.Co.) Note "A"	62,141.08	63,959.27	1,818.19	2.84	155,322.91	510,936.91	355,613.00	69.60
Total M. of E.	$ 241,121.62	$ 325,313.18	$ 84,191.56	25.88	$ 1,727,985.11	$ 2,214,190.74	$ 486,205.63	21.96
Power	11,202.07	13,463.35	2,261.28	16.80	82,488.46	89,894.89	7,406.13	8.24
Traffic	62,926.55	62,066.26	862.29	1.39	434,403.56	432,138.45	2,265.11	.52
Transportation-Rail Line	539,210.41	584,094.81	44,884.40	7.68	3,743,383.10	4,080,648.54	337,265.44	8.26
Miscellaneous Operations	10,154.82	13,201.54	3,046.72	16.77	61,842.49	64,697.53	2,855.04	4.41
General	60,284.09	58,863.69	1,420.40	2.41	447,926.80	454,399.90	6,473.10	1.42
Transportation for Investment Credit	3,066.40	2,456.17	610.23	24.84	46,319.34	37,452.50	8,866.84	23.67
Total Railway Operating Expenses	$ 1,198,332.98	$ 1,518,090.63	$ 319,757.65	21.06	$ 9,067,043.93	$ 9,907,509.33	$ 740,465.40	7.55
NET REVENUE FROM RAILWAY OPERATIONS	$ 129,402.45	$ 95,276.33	$ 224,678.68	-	$ 1,267,849.02	$ 148,920.38	$ 1,121,929.64	-
Excise and Use Tax Accruals-Ordinary and Budget	$ 33,150.73	$ 223,307.58e	$ 256,658.32	-	$ 294,068.25	$ 38,130.59	$ 255,937.66	671.21
Excise and Use Tax Accruals-Rehabilitation Program (W.P.R.R.Co.)	7,030.41	10,583.02e	3,552.61	33.57	18,411.10	36,168.89	2,757.79	29.85
Railway Tax Accruals-All Other	57,790.66	57,948.74	248.91	.43	392,082.39	341,990.53	52,171.86	15.65
Railway Operating Income	$ 31,425.66	$ 60,101.60	$ 28,675.94	47.71	$ 1,975,380.76	$ 552,100.39	$ 1,423,280.37	-
Hire of Equipment-Net Debit	$ 85,199.15	$ 102,306.94	$ 17,107.79	16.72	$ 483,087.89	$ 612,987.63	$ 129,919.74	21.19
Joint Facility Rents-Net Credit	9,203.90	1,780.89	7,423.02	416.82	57,993.53	78,593.19	20,599.66	26.34
Net Railway Operating Income	$ 44,569.59	$ 40,424.46	$ 4,145.13	-	$ 2,400,555.12	$ 1,086,494.93	$ 1,314,060.29	-
NON-OPERATING INCOME								
Rental of Property	$ 22,507.92	$ 34,337.46	$ 11,829.54	35.39	$ 194,945.59	$ 246,761.01	$ 51,815.42	21.00
Interest Accruals	2,788.17	2,388.57	396.60	16.60	15,229.11	24,625.51	9,396.40	38.16
Miscellaneous	12.00	7.00	5.00	71.43	336.82	196.00	140.82	71.85
Total Non-Operating Income	$ 25,308.09	$ 37,233.03	$ 11,927.94	32.04	$ 210,511.52	$ 271,582.52	$ 61,071.00	22.49
GROSS INCOME	$ 19,264.50	$ 3,191.43	$ 16,073.07	-	$ 2,190,043.60	$ 814,912.31	$ 1,375,131.29	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	2,519.43	$ 2,505.10	$ 14.33	.57	$ 18,102.29	$ 18,330.58	$ 237.29	1.29
Miscellaneous Tax Accruals	4,819.41	4,613.99	206.42	4.48	32,613.46	29,489.00	3,124.46	10.60
Amortization of Discount - Note "A"	11,453.48	14,821.70	3,368.22	22.72	80,430.82	104,018.28	23.587.76	22.68
Miscellaneous	4,928.69	6,694.45	1,765.76	26.38	42,087.99	41,674.59	413.30	.99
Total Miscellaneous Deductions	$ 23,721.01	$ 28,635.24	$ 4,914.23	17.16	$ 173,234.16	$ 193,521.45	$ 20,287.29	10.48
AVAILABLE FOR INTEREST - Note "A"	$ 42,985.51	$ 31,826.67	$ 11,158.84	-	$ 2,363,277.76	$ 1,008,433.76	$ 1,354,844.00	-
Interest on Funded Debt	$ 241,307.76	$ 274,492.41	$ 33,184.65	12.09	$ 1,682,214.53	$ 1,918,411.06	$ 234,196.53	12.22
Interest on Unfunded Debt	62,348.12	17,899.37	44,448.75	248.33	403,275.18	128,415.57	274,859.61	214.04
Total Interest Deductions	$ 303,655.88	$ 292,391.78	$ 11,264.10	3.85	$ 2,085,489.71	$ 2,044,826.63	$ 40,663.08	1.99
NET INCOME	$ 346,841.39	$ 324,218.45	$ 22,622.94	-	$ 4,448,787.47	$ 3,053,260.39	$ 1,395,507.08	-

NOTE "A"		MONTH		PERIOD	
		1938	1937	1938	1937
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases	Operating Expense - Rehabil. Program - M. of W. & S.	$ 39,728.34	$ 194,420.84	$ 1,078,734.73	$ 889,732.09
	- M. of E.	62,141.08	63,959.27	155,322.91	510,936.91
	Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,283.44	11,283.44	78,984.08	78,984.08
	Available for Interest - Adjusted	70,167.35	237,836.88	1,050,238.04	451,214.32

*Include credit of $ 216,861.89 by cancellation of accruals for year 1936 under Railroad Retirement Tax Act of 1936 and credit of $ 27,869.61 by adjustment of accruals for period January 1 to May 31, 1937 to basis of "Carriers Taxing Act of 1937".

NOTE - Italics denote red.

Accounting Department
San Francisco, California

September 9, 1938

(Endorsed) FILED
Oct 3, 1939

If you will permit me to go one step further, we made an estimate for the year 1936 in exhibit 29. I should now like to offer a comparison of the actual for the eight months with the estimate for the eight months as set forth in exhibit 29. That is similarly prepared. It was not requested by Mr. Swaine, but I am quite confident it is desired by Mr. Swaine.

Mr. Swaine: That is all right.

Mr. Wilkinson: Mr. Nicodemus, your estimate for 1936, which is already in the record, has not been broken down by months, has it? It was not broken down by months.

Mr. Nicodemus: My impression is that it was. I would have to check back.

Examiner Wilkinson: And this that you show here as exhibit 29 is your own computation of what you estimated for the eight months in exhibit 29, which has not been in the record heretofore?

Mr. Nicodemus: I think that is correct. Of course, it was necessarily a monthly breakdown for his work sheets.

Examiner Boyden: Is there any objection?

(No response.)

Examiner Boyden: It will be received, with the understanding that if witnesses are desired to be presented, the [2052] Debtor will present them.

(Exhibit 41 was received in evidence.)

Mr. Nicodemus: The Debtor's plan provides for a voting trust. This provision in the plan was insisted upon by the Institutional Bondholders Committee. We assented to it with great reluctance.

The condition upon which we accepted the voting trust was that the voting trustees should be nominated by the railroad company and approved by the bondholders' committee. The right of original selection was expressly reserved to the railroad company.

We have made nominations and the Committee has approved two. They have approved Mr. Albert G. Milbank and Mr. Frank L. Polk, but we have been unable to secure their approval of any other voting trustee.

We have refrained from offering any evidence as to the reason for that deadlock, but the fact is we have been unable to get their approval of a third trustee. In that situation we have no alternative but to submit to the Commission suitable names from which the Commission, if it approves our plan in its present form or in its modified form, may select a third voting trustee, if it goes forward with the voting idea.

We expect to submit four names.

First, Mr. Edward D. Duffield, president of Prudential Life Insurance Company. We have not consulted Mr. [2053] Duffield, but we are quite hopeful that if he is selected by the Commission, he will be willing to serve.

Mr. Swaine: I think I should say that we have already told you that Mr. Duffield will not serve, and cannot serve.

Mr. Nicodemus: We never received any such information.

Mr. Swaine: I told you that last summer when the name was first suggested, in April, long before we came down here, because his other engagements are such that he does not feel that he should serve. He would be an entirely acceptable person, of course.

Mr. Nicodemus: We are quite unaware of that communication.

Mr. Swaine: I told you or Mr. Schumacher at the time when the name came up.

Mr. Nicodemus: The second name we mention is the name of Mr. William Morgan Kingsley. Mr. Kingsley is president of the United States Trust Company, which is the trustee of the income mortgage, and he is the most logical person, it seems to us, to be on the voting trust that is primarily responsible to the income bondholders.

We also suggest Mr. William Church Osborn, and Mr. James H. Perkins.

Any one of those four men would be equally agreeable to us. [2054]

Examiner Boyden: Who are the two last mentioned gentlemen?

Mr. Nicodemus: Mr. William Church Osborn is a member of the New York bar, and very well known to a very large number of our security holders.

Mr. Perkins is president of the City Bank Farmers Trust Company.

Examiner Boyden: Can you give us the same information about the two nominees of the Debtor whom you first mentioned?

Mr. Nicodemus: Taking them in reserve order, Mr. Frank L. Polk was former Undersecretary of State, and he is a member of the firm of Davis, Polk, Wardwell, Gardner & Reed.

Mr. Milbank is, I think, president of the Milbank Foundation, and he is also head of the firm of Milbank, Tweed, Pope & Webb.

Examiner Bowden: A law firm?

Mr. Nicodemus: The Debtor rests, and is prepared to submit the case to the Commission.

Mr. Swaine: If the Examiners please, the persons who now constitute the formal Institutional Bondholders Committee, at a time before they were formerly organized as a Committee but were acting not only for their own three respective institutions, namely, the Metropolitan Life In- [2055] surance Company, the Prudential Life Insurance Company of America, and the Chase National Bank of the City of New York, but also informally for various institutions which subsequently constituted them a formal committee, participated in the negotiation of the Debtor's plan, and a number of the provisions of the Debtor's Plan as offered by the Debtor were the suggestions of that committee.

The plan as finally prepared by the Debtor and proposed by the Debtor in this proceeding was accepted by the three members of the then informal committee in behalf of their own institutional holdings, and in the sense that they had agreed that they would recommend it to other institutional holders, but conditioned on the acceptance of the plan by

the principal creditors of the other classes, particularly the acceptance of the commitment by the Reconstruction Finance Corporation and also acceptance by the Railroad Credit Corporation.

In connection with the matter of the Railroad Credit Corporation, certain legal questions were pointed out by counsel to the Committee to counsel for the Debtor, and a statement was made that certain modifications within defined limits might be made in the treatment accorded Railroad Credit Corporation as a condition of getting its acceptance to the plan. [2056]

At the hearings which we have thus far had in the reorganization proceeding, every class of creditors or every important creditor other than the institutional bondholders, being particularly Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company, have appeared and objected to the plan and stated it was unacceptable to them.

The evidence introduced has also raised great questions in the minds of the Committee as to whether it would be wise to proceed with a capitalization of this character, particular whether the debt structure that is contemplated would be regarded as in the public interest by the Interstate Commerce Commission, quite apart from the question as to whether it was wise from the standpoint of the investors in the property.

In order, therefore, that the Commission might not be left without any alternative suggestion or

any plan based upon a different approach to the problem, the committee has prepared, and I now desire to propose on behalf of Metropolitan Life Insurance Company as the holder of $6,852,400 principal amount of first mortgage bonds of the Debtor; the Prudential Insurance Company of America, as the holder of $3,000,000 of the principal amount of said bonds; Travelers Insurance Company, as the holder of $200,000 principal amount of said bonds; New York Life [2057] Insurance Company, as the holder of $1,300,000 of said bonds; the Mutual Benefit Life Insurance Company, as the holder of $500,000 of said bonds; Home Life Insurance Company as the holder of $300,000 of said bonds; John Hancock Mutual Life Insurance Company, as the holder of $300,000 of said bonds, and the Chase National Bank of the City of New York as the owner of $25,000 of said bonds, and so far as it has an interest therein, as pledgee of $4,464,000 principal amount of said bonds which are pledged with it to secure obligations of the Western Pacific Corporation which are now in default, a plan of reorganization of the Western Pacific Railroad Company, which I now offer.

Mr. Nicodemus: The Debtor objects to the filing of the plan and asks permission to state its grounds in the record.

Examiner Boyden: Proceed with the statement.

Mr. Nicodemus: By the terms of Section 77 (d) of the Bankruptcy Act, no plan of reorganization may be filed during the hearings provided for by

that section, except with the consent of the Commission.

The Commission should decline to permit the Institutional Bondholders Committee or any group of bondholders represented by said Committee, to file a plan of reorganization, for each and all of the following reasons: [2058]

First, that said Committee and the two principal bondholders represented by said Committee, namely, the Metropolitan Life Insurance Company and the Prudential Insurance Company, prepared, promulgated, and procured the filing by the Debtor as its plan, to which they agreed to give their unconditional support, the plan filed herein on February 7, 1936, and these same interests cannot now file a new plan consistently with the principles of good faith to the Debtor.

Second, that the Debtor's plan filed herein on February 7, 1936, was a compromise plan which involved substantial concessions to such Committee and the said institutions, which would not have been made except for the unconditional commitment of said Committee and said institutions to support said plan and to cooperate with the Debtor in bringing about an early and economical reorganization of the Debtor, and the Commission should not aid the Committee in withholding their part of the bargain and thereby hindering and delaying an early reorganization of the property.

Third, that the Debtor's plan filed herein on February 7, 1936, is based upon sound principles and

may readily be modified in detail to meet any new views consistent therewith which said Committee may now desire to submit to the Commission. [2059]

Fourth, that there are more than 4500 individual and corporate holders of First Mortgage Bonds of the Debtor, only 9 of whom are represented by this Committee. In many respects, the interests of these small individual and corporate bondholders are different from and in conflict with the interests and objectives of the nine institutions represented by said Committee.

The individual and small corporate bondholders as a class need their income currently, whereas the nine institutions represented by said Committee not only do not need their income currently, but may for many reasons find it greatly to their interest to delay reorganization and take their income five or ten years hence in the form of an increment to capital.

The Debtor submits that the filing of a new plan by said Committee before the Commission has acted upon the pending plan is not necessary and will invite long and costly litigation.

If however, a new plan is to be filed on behalf of first mortgage bondholders, the Commission should not permit it to be filed by said Committee, but should require the organization under Section 77 (p) of a representative committee that will sponsor an early reorganization on terms fair and equitable to junior creditors and stockholders. [2060]

Examiner Boyden: Referring to your last statement there, you do not, as I understand it, take the position that this Committee cannot legally present the plan?

Mr. Nicodemus: I think it is very misleading to the public to have a committee that under the law cannot represent the small bondholders.

Examiner Boyden: But your answer to my question is "No", is that correct?

Mr. Nicodemus: No.

Mr. Swaine: In that connection, it should be pointed out that this plan provides that if the plan is approved by the Commission, the Committee will qualify to represent all bondholders as a general committee. It is my understanding that in the other proceedings, plans have been proposed by such committees.

Mr. Nicodemus: With reference to the conditions, I am obliged to state that at no conference at which I was present—and I have been present at all of them—was any condition ever imposed by this Committee on its approval of our plan. At the very last conference, which immediately preceded the filing of the plan, counsel for the Committee asked that the Committee impose as a condition that the Debtor first obtain the approval of the plan by the Reconstruction Finance Corporation. We protested, and counsel was overruled, and the Committee [2061] agreed that the plan might be filed without any such condition as was asked by their own counsel.

Therefore, I am at a loss to understand how counsel for the Committee has repeatedly reasserted that there was a condition imposed. The approval of this plan by the Debtor, its submission by these Institutional Bondholders to the Debtor, took place on June 23, 1935, and the minutes clearly show that no condition was imposed.

These bondholders submitted the plan to the Debtor and the Debtor was the interest that accepted the plan.

So for all the reasons that we have outlined above, we ask that the Commission refuse to exercise its discretionary authority to permit this new plan to be filed.

Mr. Swaine: I think it is unfortunate a perhaps irrelevant question of personal veracity should be introduced. All I can say is that I, too, attended every one of the conferences except one, and the members of the Committee agreed with me, first, that this plan was not promulgated at any time by this Committee.

As I stated in introducing our own plan, we participated in the negotiations, and many things in the Debtor's plan were the result of concessions to the Committee.

But the plan was not prepared by the Committee. As its counsel I had absolutely nothing to do with the [2062] printing of the plan. The printing was entirely in the hands of Mr. Nicodemus, and many suggestions which I made were rejected.

The Committee is also entirely in accord with me in the view that our commitment has at all times been conditioned on, first, that the plan proceed promptly; second, that it be accepted by the Reconstruction Finance Corporation; third, that it be made acceptable to the Railroad Credit Corporation; and fourth, that the modification which I proposed at the first hearing with regard to insuring dissenting classes of creditors a cash alternative, should be embodied in the plan.

I do not believe, however, that that is relevant. Let us assume for the sake of the argument that the Committee did accept this plan unconditionally in the summer of 1935. I submit that there is nothing, either in law or morals, which prevents the Committee in the face of all the evidence in this record, in the face of the additional evidence that we have of the Commission's point of view through statements that have been made in the hearings, not only in this proceeding but in many other reorganization proceedings.

At this time, from coming forward and saying that it perhaps was mistaken before, and that it feels that in the interest, not only of the bondholders but of the [2063] public a plan more along some other lines to be suggested

For that reason I will adhere to the proposal of the plan and ask the Commission's leave to propose it.

Examiner Boyden: The objections of counsel for the Debtor with respect to the proposing of this

plan are overruled, and the plan received for the purposes of this hearing.

In order that the record may be clear, I believe it should be assigned exhibit No. 42.

(Exhibit No. 42 was received in evidence.)

[Printer's Note: Exhibit No. 42 is here omitted as same is identical with "Suggested Plan of Reorganization of the Western Pacific Railroad Company. Effective Date January 1, 1937" set out at page 48 of this printed record.]

Mr. Swaine: The Institutional Bondholders Committee desires to introduce no additional evidence. It rests the plan upon the evidence introduced by the Debtor.

I want to make, however, one statement in respect to a provision of the plan:

The plan contemplates that the new money shall be raised by the issue of ten million dollars of new first mortgage bonds.

The plan states that it is hoped that those can be 4 per cent bonds, maturing in 1967, redeemable at par and accrued interest.

Inasmuch, however, as the time at which the new bonds will be offered to raise the new money cannot now be definitely foretold, and the conditions that may exist in [2064] the money market at that time cannot now be known, the plan provides that with the approval of the Commission and the court, the interest rate on those bonds may be increased to not more than 5 per cent, the period of their

maturity may be shortened to not earlier than February 1, 1952, and a premium for redemption may be granted not exceeding 5 per cent.

The plan contemplates that these bonds, together with blocks of stock, shall be offered to raise the new money, first, to the sole stockholder and junior creditor of the Debtor, namely, the Western Pacific Corporation.

To the extent that the offer is not availed of by that corporation, the right is granted to the holders of the junior mortgage bonds of the Debtor as collateral, namely, the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Corporation, in the proportions in which they held those junior bonds as collateral, with the right in any one of them to take any part of the new bonds and stock not taken by the other holders of those bonds as collateral; and to the extent that they do not take the new bonds and stock and provide the new money, the right is afforded to the first mortgage bondholders to take the new bonds with blocks of stock.

The plan contemplates the possibility of underwriting. No underwriting agreement has been made as yet, because [2065] you cannot tell either what the terms of the bonds will be, if they are offered some time in the next year, or what a proper underwriting commission would then be, it being felt that that is a detail which should be passed upon by the Commission and the court at the time the plan is ready to go forward.

The Institutional First Mortgage Bondholders, were the plan to be promulgated today, authorize me to state that they do not believe any underwriting would be necessary, as the bonds upon the terms provided in the plan, namely 4 per cent bonds maturing in 1967, together with the stock which goes with them, would in their judgment be sufficiently attractive that they themselves would be willing not only to take the bonds which are attributable to their own bonds, but to arrange for taking up the balance of the ten million dollars.

They ask that that assurance be given in the light of present conditions, and with the understanding that as conditions change, it might be necessary to make modifications within the framework provided in this plan.

Examiner Boyden: Was this plan worked out, Mr. Swaine, in the light of the reports which we have now in the record as to the probable amount of money which it would take to restore the property of the Debtor?

Mr. Swaine: Yes. [2066]

Mr. Coulson: Is it proper, in view of the fact that this plan is not presented by a witness, to ask counsel for the Committee of Institutional Bondholders a question or two about it for information?

Examiner Boyden: Yes, indeed.

Mr. Coulson: Mr. Swaine, in the original plan which was presented as the Company plan, as I understand it the new money came in on an equal footing as to security with a part of the first mortgage

bond money. I understood the justification for that to be that it was expected the Reconstruction Finance Corporation would furnish that new money and would receive as part compensation therefor the advance of their existing debt to a higher rank as a creditor than it would otherwise have.

In a hasty examination of your plan today, I note that you still have the new money come in with an equal footing as to security with a part of your first mortgage debt and without the feature of it being provided by the Reconstruction Finance Corporation, with the resultant acceleration of part of the debt.

What are the factors which lead your Committee to suggest making this new money, which is to be offered initially to stockholders and then to junior debtors, take equal rank with a part of your first mortgage debt, instead of being prior to it, as would normally be the [2067] situation?

Mr. Swaine: I object to your statement, "as would normally be the situation."

Mr. Coulson: I do not know of any instances where that would be the fact.

Mr. Swaine: I could go to most of the reorganizations of recent years and show you many, the last St. Paul reorganization, for instance.

Mr. Coulson: I should be glad to.

Mr. Swaine: There the assessment was over sixty millions of dollars. The bond was not a first mortgage bond, indeed, it was a third mortgage bond on part of the property.

As I understand the ruling principle, it is that the bonds should be sufficiently good to attract the new money but not so good as to do any unnecessary damage to any other interest in the situation.

It is the view of our Committee that with the reduced amount of first mortgage bonds which this plan contemplates—in that connection, let me interpolate the Debtor's plan gives the first mortgage bondholders 30 per cent of the fixed charge obligations.

We doubted that we could get that good treatment in the light of the earnings record and have our bonds really good, and therefore, ourselves suggested that we be cut to 20 per cent. That means that there is a total issue [2068] under this plan of twenty million dollars of first mortgage bonds.

It is the view of our Committee that those bonds are absolutely good, that the probability is that their interest will be earned twice over within a few years, so that they can very quickly become legal investments, and ought to stay legal investments; and they are, therefore, good enough to provide the new money, and the best evidence of that is that we are prepared to take them ourselves on the terms on which the plan proposes to offer them, to provide the new money.

We therefore do not think it either advisable or necessary that the bonds to be issued to provide the new money should be the sole first lien, that is, should be so issued that there would be only ten million dollars instead of twenty million dollars

of first mortgage bonds, as our plan contemplates, for by so doing the position of the first mortgage bondholders would be unnecessarily depressed.

Mr. Coulson: I still think it is proper to suggest to counsel for the Institutional Bondholders that if this failure to make new a prior lien on the property is to be pressed by his Committee, the Commission might well be furnished with instances of reorganizations other than the St. Paul reorganization, which, for obvious reasons, [2069] both because it was Mr. Swaine's workmanship and because it has not been particularly successful, ought not to be an example.

I would like to know of instances where new money comes in.

Mr. Swaine: Has there been any successful reorganization over the last twenty years?

Mr. Coulson: Oh, there have been many. History has not changed much.

Mr. Swaine: No, there have not.

Mr. Coulson: I think it would be proper to ask, and I would like to know for my own information whether there are justifications for this new money coming in, if it is to be offered to the equity and then the junior debt, except as prior lien money.

Examiner Boyden: I think this is a matter that might well be discussed on brief.

Mr. Coulson: I think it is, but I would be glad to have the information as to other instances, if I could get that pertinent information.

Mr. Swaine: We will supply for the Commission a statement of the securities that have been issued

for new money in all the railroad reorganizations in the last say 25 years.

Mr. Coulson: I would like to ask one further question [2070] about it, whether your Committee has considered and determined whether the securities issued to the first mortgage bondholders and other creditors for accrued and unpaid interest, unearned interest, will constitute taxable income to the security holders receiving such securities.

Mr. Swaine: We have considered the problem, and if you will note, it is not stated that these securities are received in respect of interest, it is merely stated that the first mortgage bondholders, and, similarly, the three junior creditors, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company, will receive something which is equal to the aggregate value of their present obligations, plus all interest accrued to January 1, 1937.

It is not stated that they are receiving it specifically for interest.

Mr. Coulson: Was there any determination by your Committee as to its taxable character?

Mr. Swaine: No. Indeed, I understand that there is a certain lack of unanimity among lawyers on that question.

Mr. Coulson: Has any estimate been made by your Committee as to the taxable burdens involved in accumulating the capital fund contemplated by this plan?

Mr. Swaine: Yes, we have, and they are substantially the same as the tax burdens which would re-

sult from the [2071] Debtor's plan. We have made computations under both plans, and there is no substantial difference in that respect.

Mr. Coulson: I may say to the Commission that, of course, as representing the A. C. James Company, I am very much interested in the feature that I note in this plan of putting the A. C. James Company in a relative status in its class of junior creditors based not on the debt, not on its advances, but on the gross amount of security by way of collateral held by that creditor and other creditors.

However, that is a matter which is perhaps, as the Examiner suggested, one that may be dealt with better by brief than by an attempt to find out the theory or basis of such classification of junior creditors at this time.

Examiner Boyden: Of course, that may be a matter considering which counsel could present expert testimony, if you desire to do so. I am not trying to foreclose you at this time from doing that if you desire to.

Mr. Coulson: I make this suggestion, Mr. Examiner: If we are to have before the Commission in this proceeding not one plan, but with suggestions for modification, which is the theory on which I had hoped these proceedings would go forward, but a number of plans, I think it might be well and desirable for the Commission to bear in [2072] mind that ample time after today's hearing ought to be given to other creditors to present plans, if the pres-

entation of ideas as to the plan is to be in that fashion.

I was not entirely happy with Mr. Swaine's statement that the A. C. James Company objected to the company plan. It did object strenuously to certain features of that plan, which it outlined in its petition of intervention, which seemed to make this attempted plan of reorganization unnecessarily complicated and be undesirable in many respects.

It did state, however, an adherence to the general principle of the plan.

As to the plan which Mr. Swaine has now presented, it seems to me so far as the creditor I represent is concerned, equally objectionable, not merely from the standpoint of that creditor's interest as a junior debtor, but objectionable in many many respects that run to the public interest and are matters which will be considered before the Commission.

I would like, myself, opportunity to consider the question whether those factors and those conditions are best presented to the Commission through briefs submitted which comment on the features which seem to us clearly undesirable as to both the plans, or whether it would be better to make the attempt to further complicate the [2073] target here by putting in the third suggested plan, which might be somewhat simpler—at least, I hope it would be somewhat simpler—in structure than either of those now before the Commission.

I do ask, therefore, that the parties be given ample time to consider and determine that question.

Mr. Swaine: As far as I am concerned, of course, I would expect ample time, which I would say would be about thirty days, but I want in that connection to point out to the Examiners that Mr. Coulson as well as all the other counsel have had proofs of this plan substantially as it is ever since back in March or April, and that it was, as they knew, the intention to propose this plan in April but at their request it was withheld in the hope that as the result of meetings that we might have an agreement could be reached.

We have spent all the time without any agreement having been reached, and therefore there should not be any surprise on the part of anybody, and we ought to be able to move with reasonable expedition.

Mr. Coulson: Let me just a moment correct on the record the implication, which I do not like, that I have been riding on my oars here. I wrote Mr. Swaine early in the summer and asked him whether there was any intention of presenting this plan, when I first received a [2074] copy, and was told no determination had been made at all. I talked to Mr. Stedman of his Committee, Mr. Ecker being in England, more than three weeks ago and asked him the specific question whether the plan was going to be presented, as, if it was to be presented, I wanted to study it.

He said no decision had been made. I have not been resting on my oars here.

Mr. Swaine: The absence of decision was looking toward a possible agreement.

Mr. Coulson: I did not request that you not file the plan.

Mr. Swaine: No, you did not.

Mr. Nicodemus: We certainly never made any such request.

Examiner Boyden: If any of the parties desire a witness to be put on the stand with respect to your plan, you will present such a witness?

Mr. Swaine: I am wiling to be the witness, myself, right here and now.

Mr. Nicodemus: The 30-day period that Mr. Swaine mentioned is for filing briefs or to give creditors an opportunity to file a third plan? I did not quite understand. The thirty days is not an adequate time for us to prepare a brief in support of our plan and to analyze his. [2075]

Mr. Coulson: I do not think it is adequate for either purpose. With two plans before us, we then are faced with equal complications, wholly aside from this controversy as to the voice of Jacob and the hand of Esau, and vice versa. But they both are complicated, they both need to be studied in the light of the record, and I think that thirty days is a quite inadequate period to put in a brief. It is certainly inadequate if any of us undertake the labors of preparing a plan which does strive for some simplicity.

Examiner Boyden: Could you not advise the Commission within thirty days whether or not you desire to present a plan, Mr. Coulson?

Mr. Coulson: I could not prepare either an

adequate brief or a plan within thirty days. I might very well arrive at a conclusion then, but it seems to me thirty days is a short period for the problem that is presented by this double target that has been set up for us, if we are going to be genuinely helpful to the Commission in its consideration.

Mr. Swaine: The A. C. James Company intervening petition specified in great detail the modifications, I will call them, instead of objections, in order to be more euphonious, Mr. Coulson, which the A. C. James Company desire to have made in the Debtor's plan. That was filed [2076] in April, so that Mr. Coulson had fairly well matured his ideas as early as April. And with cogitation interrupted only by a short vacation, perhaps he can do this in less time than he anticipates.

Mr. Coulson: That was not at all in the light of the record, that was merely an attempt to specify for the Commission some of the incidents of the Company plan which we thought deserved consideration in the hearings, and it was the purpose of the summary specification in the intervention petition.

Mr. Swaine: All counsel should, of course, have adequate opportunity to analyze and attempt to solve any problem that lies in this record. On the other hand, this is a comparatively simple situation, and I think we ought to strive to make good on the statements that were given out by the Debtor's management in the summer of the 1936 that this was going to be one of the earliest reorganized railroads.

Mr. Nicodemus: It would have been.

Mr. Swaine: We would like to move ahead with as great expedition as is consistent with giving all parties reasonable opportunity to present their views.

Mr. Nicodemus: We came down here at the first hearing and found that we had a bitter adversary that we had not anticipated. [2077]

Examiner Boyden: Mr. Nicodemus, with respect to my request that you furnish monthly income statements for the last part of 1935, I was under the impression at that time that you had in the record, in your exhibit 40, monthly figures for the first part of 1936.

Since you do not have those, may I ask that you furnish those with the other?

Mr. Nicodemus: I will be glad to. You want a monthly breakdown of exhibit 40?

Examiner Boyden: Yes, for the first eight months of 1936, as well as of the monthly figures for all of 1935.

Mr. Nicodemus: I will have that within ten days.

Examiner Boyden: It seems advisable that this proceeding be adjourned in order to give counsel an opportunity to review the record and determine the course of action that they desire to follow.

For that reason, the hearing is adjourned until October 26th. In the meantime, counsel for the Debtor will furnish the information that has been requested.

Mr. Swaine: Is the purpose of this adjustment

to have oral argument if counsel decides not to present another plan?

Examiner Boyden: If counsel desires not to present another plan, it would seem that the hearing could be closed and a date set for briefs by order of the Commission [2072] without calling the hearing again.

Mr. Nicodemus: That is what we would like to have.

Examiner Boyden: If Mr. Coulson or other parties will advise the Commission of their conclusions as to whether or not anything further will be presented, that will facilitate a decision in that matter. Otherwise, the Commission will have to call the hearing on that date.

Mr. Swaine: That is, on the 26th?

Examiner Boyden: On the 26th.

Mr. Swaine: Otherwise we will get a notice fixing the date for the filing of briefs and argument before the Commission?

Examiner Boyden: If the Commission is advised that no further proceedings are necessary sufficiently in advance of October 26th so that the order can be issued and the parties notified, the proceeding will be terminated in that way.

Mr. Coulson: Do I understand, Mr. Examiner, that if it is desired to have further testimony introduced at that time, because of questions that are suggested by careful examination of Mr. Swaine's plan as presented today, it will be possible to do that

by timely notice at that adjourned hearing on the 26th of October?

Examiner Boyden: That will be perfectly proper, but I believe that any party should notify the other parties [2079] sufficiently in advance of the hearing so that the parties can have the witnesses here on that date.

Mr. Coulson: Yes.

Mr. Nicodemus: If no witnesses are required, then what happens? The Commission closes the case and fixes a date for filing briefs?

Examiner Boyden: If the parties decide that no hearing is necessary on that date, the Commission will close the case and set a date for filing briefs.

Mr. Nicodemus: We could shorten up that time if we started to work on the briefs right away on the theory that there would be no hearing on the 26th.

Mr. Swaine: That is a very happy suggestion.

(Whereupon, at 11:30 o'clock a. m, an adjournment was taken until 10:00 o'clock a. m., Monday, October 26, 1936.) [2080]

Before the
Interstate Commerce Commission
Finance Docket 10913
WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION.

Anteroom A, I. C. C. Building,
Washington, D. C.,
Monday, October 26, 1936.

Met pursuant to adjournment at 10 o'clock a. m.
Before:

Examiner Harvey H. Wilkinson.

Appearances:
Same as heretofore noted, and
James L. Homire, Washington, D. C. appearing for Reconstruction Finance Corporation. [2082]

Proceedings

Examiner Wilkinson: Are you ready to proceed with the hearing in Finance Docket No. 10913?

Mr. Nicodemus: The Debtor is prepared to go forward.

Mr. Wood: Before we proceed, Mr. Examiner, I would like to file a petition of the trustees of the Western Pacific Company first mortgage for leave to intervene.

Mr. Nicodemus: No objection on the part of the Debtor.

Mr. Swaine: No objection on the part of the bondholders.

Examiner Wilkinson: The petition of trustees of the Western Pacific Railroad Company First Mortgage, dated June 26, 1916, for leave to intervene is received and granted.

(The petition for leave to intervene of the trustees of the Western Pacific Railroad Company First Mortgage, dated June 26, 1916, was received and granted.)

Examiner Wilkinson: Will you supply copies to the parties to the proceeding, please?

Mr. Wood: I have as many copies as you will need here.

Examiner Wilkinson: In that connection I note from the record that while the petition of the A. C. James Company for leave to intervene was received, the record does not show that it was granted. [2085]

Let the record show that it is granted on the date that it was filed.

Mr. Coulson: Thank you.

Mr. Nicodemus: There are one or two things that we would like to clear up first this morning.

Examiner Boyden asked for an exhibit which I would like to get in. We offer, pursuant to the request of the Examiner, a new exhibit which is the "Consolidated Revenues, Expenses and Income" of the Western Pacific System for the months January to August, 1936, broken down by months, and a similar statement for the calendar year 1935.

Examiner Wilkinson: Are they two separate statements?

Mr. Nicodemus: No. They are separate, but we will offer them as a single exhibit. We have enough copies for distribution to counsel.

Examiner Wilkinson: The two statements just referred to by counsel will be received as Exhibit No. 43, if there are no objections.

(Exhibit No. 43, by counsel, received in evidence.)

Mr. Nicodemus: Section 8 of the Debtor's plan, in subdivision A and subdivision C refers to certain unsecured claims against the Debtor.

Since the last hearing counsel for the Institutional Bondholders has requested a statement showing the [2086] amount of those claims. I have received such a statement from the general auditor, and introduce it as our exhibit tendered at the request of Mr. Swaine. That is also in sufficient numbers for distribution.

Examiner Wilkinson: Is there any objection to the receipt of this statement in evidence?

(No response.)

Statement entitled "Estimate of the Probable Payments after October 24, 1936 on claims incurred Prior to August 2, 1935," is received as Exhibit No. 44.

(Exhibit No. 44 received in evidence.)

Mr. Nicodemus: That concludes the Debtor's case on direct.

Mr. Swaine: The plan proposed by the Institutional Bondholders' Committee on page 3 in the introductory statement makes this statement:

"Since all other classes of securities of the railroad company other than the equipment obligations are entirely junior in lien to the first mortgage, obviously any stock so allotted to the present first mortgage bondholders should have rights as to both assets and income prior to those stocks allotted to such other creditors and stockholders of the railroad company."

In correspondence since the last hearing Mr. Willard, representing the Railroad Credit Corporation, [2087] has indicated that he questions the accuracy of the statement upon which the conclusion is based, namely, that all other classes of securities other than equipment obligations are entirely junior in lien to the first mortgage.

When I drew that I honestly believe it was so, because it so stated in the manuals and in all the documents which I had ever read describing the bonds.

I have just checked, and I find that there are certain stocks of certain subsidiary companies as to which there is a record indicating whether or not they have value in this proceeding. At this hearing I would like to have the trustee bring more precise proof as to the exact lien of the first mortgage and the securities that are pledged under the General and Refunding Mortgage.

Also since the last hearing there has been a question raised by some bondholders as to the exact meaning of Clause 3 on page 8 of the Bondholders' Plan. That clause provides that "any then remain-

ing available net income"—that is, after the capital fund—"shall be applied to the payment on October 1st and April 1st in each year commencing October 1, 1937, of interest on the then outstanding new income mortgage bonds, * * * accrued during the income period ending on the next preceding June 30 or December 31, respectively, and to the [2088] extent unpaid any interest which shall be accrued on said bonds in respect of six income periods next preceding such income period."

The question that has been raised is whether the income is applied in order of seniority of those various unpaid income coupons, or in reverse order or pari passu.

The same question would apply to a corresponding provision in the Debtor's plan.

The thing that would have been intended is perfectly obvious, and to that end I wish to add to that provision these words:

", such payments to be applied first to unpaid interest for the earliest of such income periods for which interest remains unpaid in whole or in part."

Examiner Wilkinson: This last statement of yours is in the nature of an amendment to your plan?

Mr. Swaine: It is a clarification of the plan, yes.

Similarly, on page 17 of the Institutional Bondholders' Committee Plan, the first full paragraph, the question has been raised by certain of the Institutional Bondholders as to what would happen if the court should fix a prohibitively high upset price. The provision is that upon such sale the property

shall be purchased for the benefit of the new company in the reorganization.

It was pointed out that if the court should set an [2089] upset price of $100,000,000 this seemed to make it mandatory to go and pay it, and of course there would be no way the committee could raise the cash to pay it. It has to pay with securities.

Therefore, to clear that point up, I want to make this modification of that paragraph, after the word "shall," being the seventh word of the paragraph, inserting this clause, "if the upset price shall not exceed the amount at the time of sale due for principal and interest on first mortgage bonds, and otherwise if the Committee shall so determine, may," so that it makes it mandatory up to the full payment of the first mortgage bonds and permissive in respect of any upset price fixed by the court above that amount.

At the last hearing, page 311 of the record indicates this colloquy:

"Mr. Coulson: I think it would be proper to ask, and I would like to know for my own information, whether there are justifications for this new money coming in, if it is to be offered to the equity and then the junior debt, except as prior lien money.

"Examiner Boyden: I think this is a matter that might well be discussed on brief.

"Mr. Coulson: I think it is, but I would be glad to have the information as to other instances, if I could [2090] get that pertinent information.

"Mr. Swaine: We will supply for the Commis-

sion a statement of the securities that have been issued for new money in all the railroad reorganizations in the last, say, twenty-five years."

Pursuant to that agreement on my part, Mr. Groome, my associate, has examined all the plans of reorganization of railroads of any size commencing with the Richmond & Danville, now the Southern Railway, in 1892, down to date. I have prepared an exhibit which shows under the first column the name of the railroad, under the second column the date of its reorganization, under the third column the amount of the money received in the reorganization, under the fourth column the source of new money, under the fifth column the securities issued in exchange for the new money, and under the sixth column the total capital structure of the reorganized company, from which can be determined, of course, the relative position of the new money in the new capital structure.

Pursuant to Mr. Coulson's request that that be furnished, I now furnish it, and Mr. Groome, who prepared it from the original sources, is here for cross examination if anybody would like to cross examine him.

Mr. Nicodemus: Debtor objects to it on the specific ground that none of those reorganizations was affected [2091] under Section 77 of the Bankruptcy Act, and therefore this entire statement is irrelevant.

Mr. Coulson: And I object, Mr. Examiner, not only because this is incompetent, irrelevant, and im-

material, as we say in the courts of law, but it is clearly not the best evidence or even any evidence. I agree entirely with Examiner Boyden that any such material belongs in the briefs and not cluttering up this record. Mr. Swaine took quite too seriously my inquiry, which was designed to bring out whether his draftsman here was using the St. Paul as a model. I did not mean to clutter up this record by that innocent question after it had served its purpose. I certainly had no desire to have an exhibit here in this record.

Examiner Wilkinson: As I understand it, then, if you have made such a request you now withdraw that request?

Mr. Coulson: My request was that I personally would be glad to see it, but I quite agree with Examiner Boyden it ought not to be in the record. I think it is purely historical, Mr. Examiner.

Examiner Wilkinson: In the light of that, do you care to pursue that?

Mr. Swaine: The tender was a tender made pursuant to his request. That seemed to satisfy Mr. Coulson at the time. If the objection is that the analysis is not the [2092] best evidence, I think we have all of the original plans here, and we would be very glad to introduce all of those plans of reorganization.

Mr. Nicodemus: Our objection did not go to that point. Our objection was fundamental.

Examiner Wilkinson: In view of Mr. Coulson's

statement and the objection, do you still wish to offer it as an exhibit?

Mr. Swaine: Yes.

Mr. Clay: We object also that it is incompetent, irrelevant, and immaterial.

Examiner Wilkinson: The objection is sustained.

Mr. Swaine: We will put it in our brief, as Mr. Coulson suggests.

Examiner Wilkinson: Are you through, Mr. Swaine?

Mr. Swaine: Yes. I want the First Mortgage Trustee to make further proof as to that matter.

Examiner Wilkinson: Are you in a position to comply with that request at the present time?

Mr. Wood: If I understand Mr. Swaine, you are not speaking now of the pledged securities? I am not prepared to introduce evidence on that.

Mr. Nicodemus: Do I understand that you amended page 3 of your plan?

Mr. Swaine: No, I have not amended it. There is a [2093] technical error there. I want the exact proof. The statement on page 3, I said, was that the other creditors were in all respect junior to the first mortgage bonds. On inquiry I find there are a few stocks under the junior mortgage that perhaps are not pledged under the senior mortgage. I think there may be some question about that.

Mr. Coulson: Yes; there is a further question also as to the relative liens as to the Northern Extension, which at an appropriate time might be called to the attention of the Commission.

Mr. Swaine: That is the point which the trustee will proceed on with proof.

Mr. Wood: I am prepared to go ahead on that.

On this question of the securities, Mr. Swaine, I was not anticipating that the point would be raised. Mr. Groome has handed me this, which is the Debtor's annual report, but of course that may or may not be the same as the trustee's records under the two indentures. I offer this for what it is worth.

Mr. Swaine: I am perfectly willing to accept Mr. Curry's statement as to where those pledged stocks are.

Mr. Nicodemus: Let me clarify the record to find out whether this proof is going in in support of the intervention of the first mortgage, or is it a part of the plan? [2094]

Mr. Swaine: It is a fact upon which the Commission will draw every one of the plans here or adopt its own plan. The record is rather unsatisfactory on the question of the relative liens. Mr. Elsey on the stand made the statement that the first mortgage was a first lien upon all the property. That is all there is. Mr. Willard in a letter to me has disputed that. On investigation I find that he may be right as to certain stocks, and I therefore think that the Commission ought to have the facts.

For that reason I asked the first mortgage trustee to establish before the Commission——

Mr. Nicodemus: Is this part of your proof, that is what I am trying to ascertain.

Mr. Swaine: Yes, it is part of our proof.

Mr. Clay: I would like to remark that if it is a dispute between the first mortgage trustee and the second mortgage trustee, the holders of the General and Refunding Bonds would want the trustee of the General and Refunding Mortgage to state its position also.

Mr. Wood: I think perhaps I ought to make perfectly clear the relative positions of the trustees here.

Mr. Nicodemus asked whether we were putting this in in support of Mr. Swaine's Committee's plan. Of course, the first mortgage trustees represent not only the bonds [2095] that are held by the committee but all of the outstanding bonds, many of which are not represented by the committee, so that we are not taking a position as to one plan or the other.

We are here prepared to put in evidence to sustain the priority of the lien of the first mortgage.

We filed a petition of intervention on behalf of the first mortgage trustees. One of those trustees is Mr. Samuel Armstrong, who is a vice president of the Chase National Bank. The Chase National Bank as a bank is trustee under the General and Refunding Mortgage. There is a clear conflict of interest indicated by these questions that the General and Refunding Mortgage Bondholders I understand are going to raise as to the priority of the lien.

We learned that only last week and in view of that conflict, last Friday the General and Refunding

Mortgage Trustee, the Chase National Bank, sent out notices of resignation as trustee under the General and Refunding Mortgage, and wrote letters to each of the holders of those bonds telling them of its position. Therefore, the General and Refunding Mortgage Trustee is not participating in this hearing as trustee, and as counsel I am not participating, although my appearance has heretofore been included under both mortgages, as counsel for the [2096] General and Refunding Mortgage Trustee.

I believe that that will not prejudice the General and Refunding Mortgage Bondholders because I think they are all represented here individually by their own counsel, but I think that ought to be made clear on the record.

Mr. Clay: We have not as yet been able to obtain a statement from the General Mortgage Trustee of what it claims a first lien on. You see, the first mortgage trustee and the General and Refunding Mortgage trustee are represented by the same counsel, or have been until today.

Mr. Wood: They have been until today.

Mr. Clay: Yes.

Mr. Wood: But in view of the shortness of time the most we could do was to send out these letters and notices of resignation. There has not been time to substitute trustees, and we cannot appear here in two capacities with a conflict of interest.

Mr. Nicodemus: What is the procedure for substituting a trustee?

Mr. Wood: Under the General and Refunding Mortgage?.

Mr. Nicodemus: Yes.

Mr. Wood: There is a notice to the railroad company which has gone out last Friday and a publication in two newspapers, one in San Francisco and one in New York. [2097] That I understand is being made I think Wednesday. Then 30 to 60 days have to elapse after the notice unless a substitution is made prior to that time, in which case it takes effect immediately.

Mr. Groome: Who can make the substitution?

Mr. Wood: A majority of the bondholders have the right to appoint and the railroad company has the right to make an interim appointment by resolution of its board or, I think, its executive committee.

Mr. Clay: When does the resignation of the General Mortgage trustee become effective?

Mr. Wood: The provision of the mortgage is thirty to sixty days from the date of the publication of the notice, but if a substitution and appointment of a new trustee is made before that time it becomes effective immediately. In other words, you can substitute a trustee immediately without waiting for the period to elapse. I think the date fixed in the resignation is December 23. I am not sure; some time in December.

Mr. Swaine: I would like to say that I agree entirely with Mr. Wood's statement that this testimony is not offered in support of any plan, it is offered to give the Commission the facts as to the lien. It bears equally upon the Debtor's plan.

Mr. Clay: If the second mortgage trustee does not agree [2098] with the first mortgage trustee, there will be a dispute, and it will have to be determined which has the superior lien.

Mr. Swaine: Oh, quite.

Examiner Wilkinson: Proceed, Mr. Wood.

Mr. Wood: On the question of the pledged securities I will ask Mr. Curry to take the stand, please.

M. J. CURRY

testified further as follows

Direct Examination

Examiner Wilkinson: Mr. Curry, you were sworn before in this proceeding?

The Witness: I was sworn at the first hearing.

Q. (By Mr. Wood) Mr. Curry, you are a vice president and assistant secretary of the Western Pacific Railroad Company?

A. Vice president, assistant secretary, and assistant treasurer of the Western Pacific Railroad Company, yes.

Q. You are familiar with the annual reports published by the railroad company? A. Yes.

Q. I show you what purports to be a copy of the report for the year ending December 31, 1935. Is that a copy of the annual report as published?

A. Yes, sir. [2099]

Q. I wish to call attention to the list of investments in affiliated companies under date of December 31, 1935, appearing on page 15 of the report.

(Testimony of M. J. Curry.)

It is marked Table No. 5. It contains first a list of securities, which are described as pledged under the first mortgage, then a list of securities which are described as pledged under the General and Refunding Mortgage, then a list of unpledged securities, and then a list of other investments.

Mr. Curry, are you able to say from your knowledge of the records of the railroad company that the list of securities appearing under the heading "Pledged under the first mortgage", and the list headed "Pledged under the General and Refunding Mortgage", are correct as indicating the securities actually pledged?

A. To the best of my knowledge and belief, yes. This annual report is prepared in our San Francisco headquarters.

Mr. Wood: I offer this in evidence.

Examiner Wilkinson: Do you want to offer the whole report, or do you just want to offer that schedule?

Mr. Wood: I think I will offer the whole report, since it may have some bearing.

Mr. Nicodemus: Did we not stipulate in at the first hearing the annual report of the carrier to the Interstate Commerce Commission, which has the same information? [2100]

The Witness: Yes, reported on form A to the Commission.

Examiner Wilkinson: That is what I thought.

The Witness: It has already been in their possession.

(Testimony of M. J. Curry.)

Mr. Nicodemus: I do not think we should reintroduce the same document.

Examiner Wilkinson: Did you hear Mr. Nicodemus say that? You understand that there is already a stipulation incorporating by reference the Debtor's annual report, which contains that same information to which you have referred? That is, I presume it is the same information. It is the same character of information.

The Witness: Yes.

Mr. Nicodemus: Except it is more in detail, that is all.

The Witness: That is true. I say that statement is correct.

Mr. Wood: That is satisfactory.

The Witness: It is the report on Form A to this Commission, which is more in detail than this published report.

Mr. Wood: But it contains the same list of securities?

The Witness: It contains the same list of securities to the best of my knowledge, yes.

Mr. Nicodemus: You adopt that list as an accurate statement of the securities pledged under that mortgage?

The Witness: As an accurate statement of the facts.

Mr. Wood: I withdraw that exhibit, then.

[2101]

Mr. Swaine, unless you have objection, I think I will prefer to withhold the other evidence until

(Testimony of M. J. Curry.)

we have heard from the General and Refunding Mortgage bondholders.

Mr. Swaine: I think we should go ahead. I think it is part of the affirmative case to show what the lien is.

Q. (By Mr. Wood) Mr. Curry, will you please produce from the railroad company's files the application to the Interstate Commerce Commission for authority to construct the Northern California Extension? That is dated about February 14, 1929.

Mr. Nicodemus: In that connection, Mr. Examiner, request was made on the Debtor late last week for a large number of documents. Mr. Curry is in a position to produce one of each document, but we have not had an opportunity to have them reproduced.

The Witness: They were taken from the files.

Mr. Nicodemus: They are the file copies. I do not want to introduce them or have Mr. Curry introduce them and surrender dominion over them, because they are the only ones we have.

(Discussion off the record.)

The Witness: In that connection I feel that I should say, too, that with the short space of time given us to assemble this—we did not get it until about 4 o'clock Friday afternoon, and Saturday we spent assembling it—I have [2102] not had an opportunity to examine these papers to see if they are absolutely the correct papers that were asked to be produced at this hearing. Some of them are, but as to all of them I cannot say at this time.

(Testimony of M. J. Curry.)

Examiner Wilkinson: If the statement would be made here identifying the papers that are to be produced, then we will have something in the record as the basis for the introduction of them later on.

The Witness: That is all right; I understand.

(Discussion off the record.)

Mr. Wood: I am requesting Mr. Curry to produce this application to the Interstate Commerce Commission. It is headed,

"In the Matter of Application of the Western Pacific Railroad Company under Paragraphs 18 to 21, Inclusive, of Section 1 of the Interstate Commerce Act for a Certificate of Public Convenience and Necessity for the Construction and/or Acquisition of a New Line of Railroad in the Counties of Plumas, Lassen, and Modoc, California."

That was the original application relating to the Northern California Extension. It is dated February 8, 1929, signed in the name of the railroad company by H. M. Adams, president, and verified by him.

Mr. Swaine: I want to say that if there is any objection on the part of any party here to putting in that copy on [2103] the ground that it is not the best evidence, I want to insist on the original document being put in evidence. Therefore, as a condition to the substitution of copies, I would like a waiver on the record from all the other parties of the best evidence rule.

Mr. Coulson: I do not think that is likely to be

(Testimony of M. J. Curry.)

inserted on behalf of the client I represent, because this hearing here has been conducted like all hearings on the basis of putting in copies of different schedules.

Mr. Wood: Mr. Curry, would you please produce the answer of the railroad company to the questionnaire which the Interstate Commerce Commission sent out after this application was filed in connection with the Northern California Extension financing?

The Witness: Finance Docket No. 7440, "In the Matter of Application of the Western Pacific Railroad Company under Paragraphs 18 to 21, Inclusive, of Section 1 of the Interstate Commerce Act for a Certificate of Public Convenience and Necessity for the Construction and/or Acquisition of a new line of railroad in the Counties of Plumas, Lassen, and Modoc, California."

Return to the questionnaire is herewith presented.

Mr. Nicodemus: It is a big order to reproduce some of these things.

The Witness: Yes, it is. [2104]

Mr. Nicodemus: Would it be sufficient for your purposes to put in the pertinent extracts from these documents that you wish, or do you have to have the whole document?

Mr. Wood: I think in most cases we would like the whole document.

Mr. Nicodemus: That covers a big territory, that one there (indicating).

(Testimony of M. J. Curry.)

Mr. Wood: It might be that by going over them we could eliminate some of the parts.

The Witness: This bears date of September 11, 1929.

(Discussion off the record.)

Mr. Wood: This document is one of the documents that we are asking Mr. Curry to produce. I think he has already described it. It is the return of the railroad company to the questionnaire in Finance Docket No. 7440.

Q. Mr. Curry, will you please produce a letter from A. C. James Company to the Western Pacific Railroad Company dated May 14, 1929?

A. I have here a copy of such a letter.

Q. You identify the original, Mr. Curry?

A. The original is in our files in New York. We brought this copy along.

Q. Are you prepared to testify that that is a true copy of the original? [2105]

A. A true copy; I am, yes.

Mr. Wood: Is there any objection to putting that in as an exhibit without putting in the original?

Examiner Wilkinson: There is no objection on the part of the Commission if there is no objection on the part of the parties here.

Mr. Wood: I am asking whether the parties are objecting.

This is a letter dated May 14, 1929, A. C. James Company, signed by W. W. Carman, treasurer, and

(Testimony of M. J. Curry.)

it refers to the proposed Northern Extension from your main line at a point near Paxton or Keddie to connect with a line to be built by the Great Northern Railway Company from Klamath Falls southerly, for which extension application was made to the Interstate Commerce Commission under date of February 8, 1929.

"In the event your application for a certificate of public convenience and necessity is granted by the Interstate Commerce Commission, this company is prepared to advance to you, from time to time, as requested by you, all moneys required for the construction of the proposed Northern Extension."

Then follow details as to securities to be issued, then this statement,

"In view of the fact that Mr. A. C. James, a direc- [2106] tor of your company, is substantially interested in this company, we are advised that this offer on our part necessarily takes the form of an offer to bid at par for the securities mentioned above upon a public sale."

This statement appears after describing the securities that are to be issued:

"Said bonds or notes are to be secured by a trust indenture creating a first lien upon the proposed Northern Extension as security for said bonds or notes."

Q. Mr. Curry, was that financing done on the basis indicated in this letter?

A. It is my recollection that it was not. A sub-

(Testimony of M. J. Curry.)

sequent letter was delivered by the A. C. James Co. modifying that proposal.

Mr. Wood: I wish to offer this copy in evidence as an exhibit.

Mr. Coulson: I of course object to that since it is obvious that it refers to the arrangement which was not made effective. If it could have any significance in this proceeding it would be solely as an admission against interest on the part of A. C. James Company. It does not seem to me we have any issue here which makes it competent or relevant on any such point at the present time.

Mr. Wood: Mr. Examiner, I am offering this because it does have a bearing in interpreting the terms of the later [2107] offer which I am going to ask Mr. Curry to produce. The part that I read I think is quite significant when it is read with the terms of the later offer.

Mr. Swaine: To be specific, we understand that it is now contended that because the A. C. James Company furnished five million dollars that went with five million dollars of money provided by the proceeds of the first mortgage bonds, they got some kind of a pari passu lien upon the Northern California Extension. The purpose of this letter is to show that they started out, that is, the A. C. James Company, with the express intention of having a lien upon the Northern California lines. Now, as Mr. Curry has testified, that transaction was abandoned, and the next letter—I assume it is the next

(Testimony of M. J. Curry.)

one Mr. Wood is *call* for—will show the changed transaction. This letter is of evidentiary value in showing the intent to abandon the lien upon the property. In other words, they started out asking a lien and now come to a second letter which does not mention a lien. Our point is that by the two letters it is perfectly clear that it was not the intention of A. C. James Company to take a lien in respect of its five million dollar advance, but to take a junior position.

Mr. Coulson: If your Honor please, the necessary basis for the admission of such correspondence is an admission [2108] that the documents which set out the relative liens of the parties are ambiguous. Otherwise, this collateral evidence by prior correspondence as to incompleted transactions cannot have any significance.

If counsel for the mortgage bond trustee and counsel for the Committee of Institutional Bondholders are prepared to concede that on the documentary record there is ambiguity as to the relative liens of the various creditors here as to the Northern Extension, I am quite prepared to see all correspondence go in and see it fully supplemented. But I do not think we have reached that point yet.

As a matter of fact, I find it quite hard to see that all of this is not just for the present tilting at windmills. We have before the Commission the record as to liens of the first mortgage bondholders. The first mortgage has been filed. The General and

(Testimony of M. J. Curry.)

Refunding Mortgage has been filed. We have on the record the application of the funds secured from each series. I think the Commission already has before it all the factual data it needs on which any of us can array in a brief, if we desire, contentions that can be taken into account by the Commission in determining what is a fair and reasonable plan as to all the creditors and security holders in the property. [2109]

I think this building up of data that may or may not be interesting some day to a court if this property is not reorganized under Section 77 is quite unsound. It will create a record, if we follow this practice, which will be quite unworkable if the parties do not ultimately by a two-thirds vote of each class of creditor and security holder arrive at an agreement here. Our record will be quite unworkable if we are going to meet each contention that may come up in the course of the proceeding now by piling in a lot of documents which can hardly serve a useful purpose for the Commission's consideration.

Mr. Swaine: Mr. Examiner, the state of the record is this:

The first mortgage is in the record. Its granting clauses describe only the line as it existed before the building of the Northern California Extension. It has an after-acquired clause dealing with extensions. It has also a clause in the granting clauses covering property any part of which is constructed with the proceeds of the first mortgage bonds.

(Testimony of M. J. Curry.)

There is no evidence in the record at the present time as to the taking down of money under the first mortgage or the bonds under the first mortgage for the building of this line. There is not even any evidence in the record showing the precise time at which the Northern [2110] California line was built. Then the record contains the General and Refunding Mortgage, and the record shows it was executed on February 29, 1932. It in its granting clauses expressly describes the Northern California Extension.

I say that it is perfectly clear that that record is inadequate and that the first mortgage trustee on that state of the record, when the only thing that is here as to the first lien of the first mortgage on the Northern California Extension is Mr. Elsey's statement that it was a first lien, and in the light of the dispute that has arisen—it is perfectly clear that dispute is here—should go ahead and establish the facts as to the time that extension was built and the facts as to the taking down of the money under the first mortgage, so as to bring it within that clause.

Now, that is not an ambiguity. It is simply demonstrating that this property was within the after-acquired clause of the first mortgage. It is not a fact that has to be put in in order to tie up the complete story.

Mr. Clay: Mr. Examiner, may I make a suggestion, that the record might be shortened if the first

(Testimony of M. J. Curry.)

mortgage trustee merely put in the supplemental indenture subjecting the California extension to the first mortgage?

Mr. Swaine: There is no supplemental indenture and none [2111] was necessary. The Board of Directors of the Railroad Company adopted a resolution to the effect that this was subject to the first mortgage, and the first mortgage trustee, as I understand it, is proving that it is within the after-acquired clause without a supplemental indenture. It would have been merely a matter of further assurance.

Mr. Clay: That is a matter of a question of law.

Mr. Swaine: That is a question of law, yes.

Mr. Coulson: Conceding the full force of what Mr. Swaine says, Mr. Examiner, it leaves us, *to* seems to me, with the Commission in a position of needing for this record only two facts of testimony, one, if it be true that this record does not show when the money was taken down under the first mortgage, and applied to the Northern Extension and the amounts thereof, as it does to the application of the money of the so-called junior creditors to the Northern Extension,—if this record is incomplete as to the application of money, then that is a fact and a fact of the type the Commission properly takes into account.

If it is also a fact, conceded, but we might perhaps show it on the record by the testimony of this witness, that there was no supplemental indenture

(Testimony of M. J. Curry.)

subordinating the Northern Extension to the lien of the first mortgage [2112] by express language, then all this other testimony is utterly unimportant to the Commission at this stage of the proceeding. It might be important in a foreclosure proceeding if the property is not reorganized, but is utterly unimportant now, and could only be admissible, if we are going to apply any rules of evidence at this proceeding, if it be conceded that the indentures are ambiguous as to the lien on the Northern Extension.

On the basis of that concession I would withdraw any objection to the admissibility of these data. Otherwise, I object strongly to the admissibility of anything further than the two items I have referred to.

Examiner Wilkinson: It seems to the Examiner that the question has been raised of record here——

Mr. Coulson: Only by Mr. Swaine.

Examiner Wilkinson: —as to the conflict between the first mortgage and the General and Refunding Mortgage as a question of priorities. As much as the Commission would be loath to attempt to pass on that, under Section 77, the question of priorities, a plan cannot be approved unless those priorities are in accordance with the law. The issue is before us, and since it is here we want to get all the evidence in the record that we can that would help the Commission to decide that question, if it ultimately has to decide it, as it looks as if it is going to, on the [2113] state of this record.

(Testimony of M. J. Curry.)

I might make a statement here, that there is a question as to whether there is a supplemental indenture or not.

Mr. Swaine: No, there is no question.

Examiner Wilkinson: It was my understanding that all of the indentures concerning this property were in the record. At least, we asked for that.

Mr. Nicodemus, do we have all the indentures here concerning this property?

Mr. Nicodemus: So far as I am aware, everything has been introduced.

Mr. Coulson: I suggest that question be asked of the witness, Mr. Examiner.

Examiner Wilkinson: All right. Mr. Curry, are you aware of any additional debenture which has not been placed in this record, assuming that you know what has been placed in this record?

The Witness: According to my recollection they have all been introduced, all indentures, with the possible exception, perhaps, of the issuance of five million dollars of indentures. Whether that is in the record or not I do not recall at this moment.

Mr. Clay: According to your best recollection, there are no supplemental indentures to the first mortgage? [2114]

The Witness: According to my best recollection there was no supplemental indenture to the first mortgage.

Mr. Clay: Indentures, plural.

The Witness: Indenture or indentures, yes.

(Testimony of M. J. Curry.)

Mr. Nicodemus: My understanding is the indenture mortgage has been released and discharged.

The Witness: Yes.

Mr. Wood: Not formally released. The indenture was retired, but I think there was no formal satisfaction executed.

The Witness: I do not recall that.

Mr. Coulson: Mr. Curry, would you recollect if a supplemental indenture had been drawn subjecting the Northern Extension by direct language to the lien of the first mortgage?

The Witness: I would recollect that, yes, sir.

Mr. Coulson: And there has been to your knowledge no such supplemental indenture drawn?

The Witness: There has not.

Mr. Coulson: Or executed?

The Witness: That is right; they have not.

Mr. Swaine: Mr. Examiner, that affords the most full basis for going into the whole question of whether or not that fell within the after acquired clause. It also raises the question as to whether when it came in under the after- [2115] acquired clause it came in subject to anybody's vendor's lien. The purpose of this letter was to show that the A. C. James Company initially intended to get a vendor's lien, and the purpose of the next letter would be to show that it abandoned the vendor's lien and allowed the property to go into the first mortgage instead. So there is no question of ambiguity. It is purely a question of whether it fell

(Testimony of M. J. Curry.)

within the after-acquired clause, and if so, whether it came in subject to a vendor's lien.

Examiner Wilkinson: The letter will be received.

Mr. Coulson: Subject to the objection I have stated?

Examiner Wilkinson: Subject to the objection, yes.

You have only this one copy?

The Witness: Yes.

Examiner Wilkinson: That will go into the record and you will get the extra copies here for counsel and for the Commission.

Mr. Wood, you will supply sufficient copies?

Mr. Wood: Mr. Curry, can you do that, please?

The Witness: I will undertake to do that, yes, sir.

Examiner Wilkinson: The letter of May 14, 1929, just referred to, will be received as Exhibit No. 45.

(Exhibit No. 45, Witness Curry, received in evidence.)

Q. (By Mr. Wood) Mr. Curry, will you please produce the amended application of the railroad company to the Inter- [2116] state Commerce Commission for authority to construct the Northern California Extension, that was dated about August 1, 1929?

A. I find in my papers here a copy of application in Finance Docket No. 7440 for amendment

(Testimony of M. J. Curry.)

of certificate of public convenience and necessity granted under date of June 9, 1930, such amendment being necessary to permit of joint use of Southern Pacific Company's line 5.27 miles northward from Westwood.

Q. That does not relate to the Northern California Extension, I take it?

A. 7440 is the docket number on the Northern California Extension, is it not?

Q. I believe that is right, but the description you have just read of the line does not seem to correspond with the——

A. Well, it is part of that proposal.

Q. Oh, it is part of the same proposal?

A. It is part of the same construction, as I understand it.

Q. Pardon me. Does this involve a change in the method of financing the new extension, this one that you are reading?

A. I cannot answer that. I do not know. I have not read it. [2117]

Mr. Nicodemus: I think this is germane. This relates to a certain part of the Northern Extension that was not constructed, and trackage substituted. I am not sure that is what you asked for.

The Witness: As I say, I did not have time to go carefully through the papers. There may be some things here that you asked for that are not complete. I cannot complete them until I have an opportunity to search the records and see.

(Testimony of M. J. Curry.)

Q. (By Mr. Wood) Mr Curry, the application that I am asking for is an amendment to the first application, which involves a change in the route and a change of the method of financing the Northern California Extension. It was an amended application asking for authority to construct the line and finance in a different way.

A. I regret I seem to have no such document with me.

Q. Filed with the Commission, I think, on August 12, 1929. A. August 12, 1929?

Q. Will you produce that from your files later, Mr. Curry, if you can locate it? A. I will.

Q. Mr. Curry: will you please produce a letter from the A. C. James Company to the Western Pacific Railroad Company dated June 19, 1929? That is the letter which contains [2118] the new offer in connection with the financing of the Northern California Extension.

A. I submit copy of such letter.

Q. You have the original in your files?

A. I have the original in my files.

Q. Is that a true copy?

A. This is a true copy, yes.

Mr. Nicodemus: Dated what?

The Witness: Dated June 19, 1929, signed by the A. C. James Company, by E. H. Ferry, vice president.

Mr. Wood: Mr. Examiner, this letter is a revision of the previous offer made by the A. C. James Com-

(Testimony of M. J. Curry.)

pany in connection with the financing of the Northern California Extension, and it states that 50 per cent of the money up to five million dollars is to be advanced against the debentures which were later issued. This letter says nothing about a first lien being given to the A. C. James Company for the money that it advanced. It states:

"It is further understood that this offer is in lieu of and in substitution for our offer of May 14, 1929, which contemplated the issue to us of bonds or notes secured by a first lien on the Northern Extension as then proposed and described in the original application for a certificate of public convenience and necessity filed February 8, 1929." [2119]

I would like to offer this in evidence.

Examiner Wilkinson: Letter of June 19, 1929, just referred to by counsel, will be received by Exhibit No. 46.

(Exhibit No. 46, Witness Curry, received in evidence.)

The Witness: I will see that copies are furnished to all interested counsel.

Q. (By Mr. Wood) Mr. Curry, will you please produce the application of the railroad company to the Interstate Commerce Commission dated October 28, 1930, for authority to issue and sell the five million dollars of debentures?

A. I submit copy of such application in the matter of the Western Pacific Railroad Company for authority to issue securities, five million dollars

(Testimony of M. J. Curry.)

of 5 per cent gold debentures, dated October 28, 1930, which contains as an exhibit copy of the indenture referred to.

Mr. Nicodemus: This is your file copy, is it?

The Witness: That is my file copy.

Mr. Nicodemus: You have no copies available for distribution?

The Witness: No.

Mr. Wood: This is one of the documents which we are asking be produced subject to the understanding that you will produce it later and it will be offered as an exhibit when you have copies.

I wish to call attention to Exhibit VII in this ap-
[2120] plication, which is an extract from the minutes of the Executive Committee of the railroad company at the meeting on Wednesday, June 19, 1929:

"The chairman called attention to the fact that at the May 14 meeting of the Executive Committee, a letter was submitted from the A. C. James Company offering to finance the cost of constructing the proposed new line of railroad to extend from this Company's main line at or near Paxton, or Keddie, Plumas County, California, to a connection with the line of the Great Northern Railway at Lookout, California, through the purchase of notes or bonds of the company secured by a first mortgage on such new line, and that such proposal was accepted by the Committee.

"The Chairman then stated that the negotiations

(Testimony of M. J. Curry.)

between this Company and the A. C. James Company leading up to the proposal by the A. C. James Co. were based upon the understanding on both sides that the proposed new line could be constructed for approximately $5,000,000; but that it now developed that if the route proposed in the Company's application to the Interstate Commerce Commission for permission to build the new line is followed the cost will be very greatly in excess of $5,000,000. The Chairman also stated that a study was now being made to adopt a somewhat different route with the view to greatly reduc- [2121] ing the estimated cost and that if it seemed desirable to adopt a different location it would be necessary for the Company to amend such pending application to the Interstate Commerce Commission.

"The Chairman said that in view of these facts the A. C. James Co. very properly desire to modify their previous offer, and to that end had written a letter reading as follows:"

Then follows the letter of June 19, 1929, which has already been offered.

"The letter of June 19, 1929, from the A. C. James Co. was then discussed, and thereupon the following resolution was adopted, Mr. A. C. James not voting:

"Resolved, That the offer of the A. C. James Co. set forth in their letter of June 19, 1929, submitted at this meeting to purchase, under certain conditions, up to $5,000,000 principal amount of the 5 per

(Testimony of M. J. Curry.)

cent debenture of this company be and the same is hereby approved, and the Chairman is authorized to advise the A. C. James Co. of the acceptance by this company of such offer.

"Further Resolved that the offer so made by the A. C. James Co. to this Company dated June 19, 1929, presented at this meeting, be accepted in place of the offer of the A. C. James Co. contained in its letter of May 14, 1929, and submitted to the Executive Committee of this [2122] Company at its meeting on May 14, 1929."

Then follows a resolution directing the amendment of the reply to the questionnaire of the Commission, which I shall not read.

Q. Mr. Curry, you certified these resolutions in this application. Can you say who were present at the meeting of that Executive Committee?

A. What was the date, please?

Q. The date of the meeting is Wednesday, June 19, 1929.

A. I cannot at this time. It was not listed in your memo as being information you desired at this hearing. The minute books are in New York. I cannot answer that question.

Q. Will you supply that, please, Mr. Curry?

A. I will, yes.

Q. In the portion of the minute which I read it is stated, "Mr. A. C. James not voting." Mr. James was a director of the Western Pacific at that time?

A. Yes.

(Testimony of M. J. Curry.)

Q. And a member of the Executive Committee?

A. Yes.

Mr. Nicodemus: He must have been present, must he not?

The Witness: He was present, but not voting.

Mr. Nicodemus: That is all you want to know, whether he was present? [2123]

The Witness: He would not be listed as present.

Mr. Wood: I think that answers my question, yes.

I offer in evidence a certified copy of the order of the Interstate Commerce Commission in Finance Docket No. 8548, which is a report and order entered November 20, 1930, authorizing the issue of the five million dollars principal amount of debentures.

Examiner Wilkinson: Is this the order to which Mr. Clay has been referring?

Mr. Homire: One of them, yes.

Mr. Swaine: I do not think it is the one.

Mr. Homire: He may not have referred to it yet, but he would refer to it later if it was brought up.

Mr. Swaine: This is one of a series of orders.

Examiner Wilkinson: Is there any objection to the receipt of this order?

Mr. Coulson: Except the objection that I made to the receipt of this material of course applies to all this data, that it is hardly relevant unless we have the basis for it also by showing that there is ambiguity in the documents before the Commission. That is the only objection to the receipt of any of this material.

(Testimony of M. J. Curry.)

Examiner Wilkinson: Objection over-ruled. The document will be received as Exhibit No. 47.

(Exhibit No. 47, Witness Curry, received in evidence.) [2124]

Q. (By Mr. Wood) Will you next produce an affidavit which you made under date of March 2, 1931, having attached copy of the published notice calling for bids, copy of the specifications, and copy of the formal bid on the proposed issue?

A. I submit affidavit of mine re bids for five million dollars 5 per cent gold debentures of the Western Pacific Railroad Company, dated March 2, 1931, with copy of notice and copy of specifications of securities offered for sale, No. 2935, dated January 7, 1931.

This happens to be an extra copy and can be offered.

Mr. Wood: I will offer it in evidence, if your Honor please.

This has a notice attached to it requesting bids for the five million dollars principal amount of the debentures and also this notice was published in the New York Times on January 8 and 9 and 15th and 16th, 1931.

Under the specifications of the securities offered for sale I would like to call attention to certain provisions in these specifications.

These specifications state, among other things, that

(Testimony of M. J. Curry.)

"The main line of railroad of the Company extends from San Francisco, California to Salt Lake City, Utah with branches, and aggregates 1050.5 miles, more or less, [2125] of first track. Upon the completion of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed."

Then it states: "The first mortgage of this company dated June 26, 1916, securing this Company's first mortgage bonds, whereunder not more than $50,000,000 thereof may be outstanding at any one time, is a first lien on said main line of railroad."

You will notice that the main line is described as including the extension when the extension is completed.

Then follows the bid.

The Witness: The bid is not included with those papers.

Mr. Wood: That is right.

Q. I ask you, Mr. Curry, to produce the bid of the A. C. James Company, dated January 22, 1931.

A. It is submitted. That is an extra copy, a true copy of the bid.

Mr. Wood: I will offer this in evidence.

Examiner Wilkinson: Just a moment. As to the other document you had right before that——

Mr. Swaine: That was the published notice calling for bids, prescribing the securities.

Examiner Wilkinson: —do you want to put that physically into the record? [2126]

(Testimony of M. J. Curry.)

Mr. Wood: I understand these are extra copies. I will offer them in evidence.

Mr. Coulson: I would like to register an objection to this putting in of published notices in an attempt to prove that the Northern Extension is a part of the main line by a characterization of the Northern Extension as such. At best it could be but an admission as against the Debtor company. I fail to see its propriety in a proceeding as factual data on which the Commission could base a judgment, even if it ever needed to base a judgment on this technical law point that Mr. Swaine is tilting at.

Mr. Swaine: The notice described the securities on which the A. C. James Company was to bid. That was the notice pursuant to which they bid, and their bid refers to the notice, so that you have to have the notice in order to describe the things that they were bidding on.

Examiner Wilkinson: The objection is over-ruled and the statement, consisting of five sheets, will be received as Exhibit No. 48.

(Ex. No. 48, Witness Curry, received in evidence.)

Mr. Coulson: May the record show an exception?

Examiner Wilkinson: Yes.

Q. (By Mr. Wood) Have you a copy of the map that is annexed to the specifications?

A. I can furnish that later. I do not have it with me. [2127]

Q. I think to make the exhibit complete we ought to do that. A. All right.

(Testimony of M. J. Curry.)

Mr. Wood: I now offer in evidence the bid of the A. C. James Company, dated January 22, 1931. I would like to read it in part:

"In accordance with and subject to all the terms of the notice dated January 8, 1931, published by your Company in newspapers of New York and San Francisco, and in accordance with the specifications referred to in said notice, which notice and specifications have been examined by the undersigned, the price of $5,000,000, 100 percentum of the face amount thereof and accrued interest to the date of delivery is hereby bid by the undersigned for the five million dollar face amount of 5 per cent gold debentures of your company offered for sale."

Then follows a list of the names and addresses of the officers, directors, and general manager, and the purchasing officer or agent of the A. C. James Company, including Arthur Curtiss James, president and director.

Examiner Wilkinson: Any objection?

Mr. Coulson: I take it, Mr. Examiner, I have a running objection to this line of testimony?

Examiner Wilkinson: Yes.

The bid dated January 22, 1931 will be received as [2128] Exhibit No. 49.

(Exhibit No. 49, Witness Curry, received in evidence.)

Mr. Wood: I offer in evidence copy of the debenture agreement under which the five million dollars of debentures were issued.

(Testimony of M. J. Curry.)

Mr. Coulson: I think that statement ought to be corrected to some extent. There were not five million dollars of debentures issued, and I think the record already shows what debentures were issued.

Mr. Wood: I am willing to have my statement corrected to the extent that the debentures were actually issued.

Mr. Coulson: Yes. Just so there cannot be any misapprehension, there were not five million dollars. A part of the advance of the A. C. James Company was, as I think the record shows, made under the terms of the debenture agreement, and part, the final part, something like half a million dollars, was made under the secured notes, secured by the General and Refunding Mortgage.

Mr. Swaine: No, I think you are mistaken. I think it was $200.

Mr. Coulson: No.

Mr. Swaine: Let us get the facts.

Mr. Wood: I think what took place was this, Mr. Coulson:

After the General and Refunding Mortgage was execu- [2129] ted, or at the time that was executed, all the outstanding debentures, some four million and a half dollars, were cancelled in order not to violate the covenant in the debenture agreement against placing a mortgage on the property of the railroad company. Then there were two subsequent take-downs of debentures. I believe that the procedure was the debentures were authenticated and de-

(Testimony of M. J. Curry.)

livered, stamped with a legend, and immediately exchanged for a note secured by the General and Refunding Mortgage bonds, and they were cancelled and re-delivered to the trustee.

Mr. Coulson: Your record as you are making it here shows that as a simultaneous transaction. I did not recollect, if I ever knew, about this technical issue of debentures for the last half million, so I would be glad if your record is complete as to that.

I dare say, Mr. Examiner, we will have a chance to complete this record if upon examining this lengthy mass of documents we see that there are omissions or lacuna of any sort in it.

Mr. Wood: On that point, Mr. Coulson, I am not putting in documentary evidence, I am merely stating what my understanding is of what took place. The files of the first mortgage trustee of course do not contain it.

Examiner Wilkinson: I do not understand. You say you [2130] are not putting in documentary evidence. What do you call this that has been going in?

Mr. Wood: I mean as to this statement of what happened on the debentures.

Mr. Coulson: But if that statement is to be taken as evidence by the Commission we ought to have it documented.

Mr. Swaine: I think it would be well if we had all the documents. I agree with Mr. Coulson that we want all the documents. I would be very happy to

(Testimony of M. J. Curry.)

have the debenture trustee produce all the documents.

Examiner Wilkinson. It is taken for granted that the Commission wants a complete record. That is what we want.

Mr. Coulson: It has been my impression, Mr. Examiner, and I think the record to this date shows it, that only a part of the moneys advanced for the Northern Extension by the A. C. James Company were advanced under this debenture agreement, and that so far as the balance of those amounts, which I understood were something like half a million dollars, were concerned, they were advanced under the secured notes.

If that is not the case let us have the full facts, and also the full facts as to the moneys advanced by the Reconstruction Finance Corporation for the Northern Extension, which were clearly advanced under the secured notes [2131] and secured by the General and Refunding Mortgage bonds.

Mr. Wood: Mr. Coulson, I believe the A. C. James Company took all of the debentures. Is that right?

Mr. Coulson: All that were issued; not the whole five million dollars, as I understood it, but that seems to be an issue here. Nobody else took any.

Mr. Wood: What I was getting at was this:

The Chase National Bank of course was trustee under the debenture agreement, but I was considering the propriety of their producing the files from

(Testimony of M. J. Curry.)

another trust. But since your client held all of the debentures, if you are willing, I think there is no objection to our putting all of that in. We have them here.

Mr. Coulson: Before we get through, if we are going to conduct this lengthy excursion into the question of whether the after-acquired property clause is ambiguous, I think the Chase Bank in its many capacities of trustees under all the situations ought not only to put in the documents which Mr. Swaine as counsel for the Institutional Bondholders' Committee thinks it ought to put in, to support the first mortgage bondholders' position, but I think it ought to be prepared to come in in its capacity as trustee in this emergency as a resigning but unresigned trustee of the General and Refunding Mortgage, and put in the documents that bear on the lien of that mortgage, and then [2132] go a step further, if we are still dealing with an ambiguity here, and put in the documents that bear on what part of the various moneys were advanced under this debenture agreement that has been tendered and what part under the subsequent secured notes, as to the Northern Extension.

Mr. Swaine: I think that is fine. I think the Reconstruction Finance Corporation and the Railroad Credit Corporation will join in it. Then the Chase will be relieved of any embarrassment and can put the entire documentary record in in all three capacities.

(Testimony of M. J. Curry.)

Mr. Clay: May I make one suggestion? The Chase in its capacities as trustee of the first mortgage and as trustee of the General and Refunding Mortgage ought to be represented by different counsel.

Mr. Swaine: I understand that all it is doing under that set-up would be to produce the documents.

Mr. Clay: There ought to be somebody represent the general mortgage bondholders, to see that the Chase does put in all the documents.

Mr. Swaine: You three that represent the general mortgage bondholders——

Mr. Wood: I should prefer not to put in any of those documents myself. Incidentally, we did not bring anything under the General and Refunding mortgage with us. We have the debenture files, and if Mr. Coulson wants to put them [2133] in, I am perfectly satisfied to let them go in.

Mr. Coulson: The point I make is this, and I do not want to be misunderstood:

We cannot relieve the Chase from the embarrassments which it gets from acting as trustee under these successive agreements. If there is embarrassment it exists. If at a later stage of the proceeding, I as representing a first mortgage bondholder might complain because the Chase did not have a supplemental indenture executed, I would have a right to complain. In my capacity as representing a junior creditor, if the Chase has been delinquent in any respect I might have a right to complain. But the im-

(Testimony of M. J. Curry.)

portant thing is here that the Chase in limiting its functions narrowly to presenting the documents which Mr. Swaine wishes in defense of an issue which has not yet been pressed by other parties in this proceeding, but is only aimed at sustaining his statement made not only in his plan but repeatedly in the record and in his whole theory of this proceeding, that the first mortgage bondholders are superior in all respects to all other creditors except possibly the equipment trust—I do not think he has put them behind the first mortgage,—but if this is going in, I think of course we ought to have these other records from the files of the Chase in its other capacities. [2134]

Mr. Swaine: We will be very happy to have them in.

Mr. Wood: Mr. Coulson, so far as the Chase is concerned, of course the General Refunding mortgage bondholders are entitled to call on it to introduce any of those documents to support whatever evidence you want to go in, and we will be glad to do it. We do not happen to have them here at this time; but I do not feel that the Chase as trustee or myself as counsel should take the initiative in presenting the evidence, since we have resigned and are taking an inconsistent position under the first mortgage.

Mr. Swaine: That does not apply to the debenture agreement. There you are functus officio. That is a transaction which is closed. As I understand

(Testimony of M. J. Curry.)

it, both Mr. Coulson and I are in agreement, for once, that we would like all the documents affecting the debentures put in the record.

Mr. Wood: We have those here, and we would be glad to put them in.

Mr. Swaine: Those are here?

Examiner *Wilkins*: As I understand this, Mr. Wood, this morning you withdrew your appearance as counsel for the General and Refunding Mortgage.

Mr. Wood: That is right.

Mr. Coulson: And those who hold the General and Refund- [2135] ing mortgage bonds as collateral are left without a trustee to speak for them in this proceeding at the present time.

Mr. Clay: And without access to any of the records.

Examiner Wilkinson: As far as the record shows, directly representing the trustee, that is correct.

Mr. Swaine: But all the holders are here represented by counsel.

Mr. Clay: I would like also to have the record show that the General mortgage bondholders have access to none of the records. They are at present in the possession of the Chase Bank.

Mr. Wood: You will have access to them in the sense that the Chase will produce them whenever it is called upon to do so. We did not anticipate they would be called for, and we did not bring them with us.

(Testimony of M. J. Curry.)

Mr. Clay: I would like to make the additional statement of an apparent fact, that the general mortgage bondholders are not represented at the present time by a mortgage trustee.

Mr. Wood: Of course, I suppose the trustee continues in office until its successor is appointed. You cannot just throw the trust out in the street.

Mr. Coulson: That is why we are embarrassed by your suggestion that you withdraw as counsel without any other [2136] counsel being appointed to represent the trustee, who is a resigning and not resigned trustee.

Mr. Swaine: Can we not go ahead with the first mortgage evidence and the debenture evidence? Those were contemporaneous transactions. If we can get that in, then we can decide what is going to happen about this subsequent mortgage that was executed in 1932, after all this had happened.

Examiner Wilkinson: The indenture dated July 1, 1930, the 5 per cent gold debentures, is received as Exhibit No. 50.

(Exhibit No. 50, Witness Curry, received in evidence.)

Examiner Wilkinson: We will take a recess for five minutes.

(Whereupon, a short recess was taken.)

Q. (By Mr. Wood) Mr. Curry, will you please produce the application of the railroad company to the Interstate Commerce Commission for authority to issue and sell five million dollars principal amount

(Testimony of M. J. Curry.)

of first mortgage bonds to be used for the construction of the Northern California Extension, dated about October 1, 1930?

A. Application dated September 9, 1930, in the matter of Western Pacific Railroad Company for authority to issue securities, five million dollars additional first mortgage 5 per cent bonds. [2137]

Q. That application states that they are to be used in connection with the Northern California Extension?

A. To use the proceeds therefrom in the payment and discharge of liabilities incurred by applicant for the reimbursement of its treasury for money expended by it with respect to the acquisition and/or construction by this company of its proposed so-called Northern California Extension, and so forth.

Q. That is one of the documents of which you have no copies at this time?

A. That is correct.

Q. And which we will offer as we are going to offer these other documents, at a later date?

Mr. Coulson: May I interrupt to ask this witness at this point, if you do not object, whether that application was in terms a reimbursement application or an ear-marking of the proceeds of these bonds for the Northern Extension?

Mr. Swaine: Just a minute.

The Witness: I cannot answer that without reading it.

(Testimony of M. J. Curry.)

Mr. Swaine: That calls for a conclusion. The document states itself, and for the information of Mr. Coulson, the trustee intends to prove that the bonds were deposited and were drawn down, and the papers in connection with their drawing down will be produced.

Mr. Coulson: I am only interested in getting for the [2138] Commission what seemed to me at the outset the only other pertinent item of information in this thing, and that is how the moneys were applied, in the form of a statement which will show to us how much money was realized on this five million dollars, how they were applied, and when they were applied.

If Mr. Swaine is going to put this in through the first mortgage trustee——

Mr. Swaine: The first mortgage trustee will put it in.

Mr. Coulson: ——I will be glad to wait, but I do think the Commission ought to have a statement showing how these moneys were applied, when they were received, how much they were, and how they were applied.

Mr. Wood: That will all appear in the applications for taking down first mortgage bonds, and the cash proceeds.

Mr. Coulson: I do not think any application except a reimbursement application can show on its face that the application was made. I think we need a statement from the company.

(Testimony of M. J. Curry.)

Mr. Swaine: If you will be a little more patient and allow this to unfold, you will get those facts.

Mr. Coulson: I will be very glad to be patient until they are unfolded.

Thank you, Mr. Wood.

Examiner Wilkinson: You withdraw your question? [2139]

Mr. Coulson: Yes.

Mr. Wood: I now offer in evidence certified copy of the order of the Commission and the report entered October 6, 1930, Finance Docket No. 8473, which is the order authorizing the issue of five million dollars of first mortgage bonds. Incidentally, this states:

"The applicant proposes to use the proceeds from the bonds in payment of liabilities incurred and/or reimbursement of its treasury for money expended by it with respect to this construction and acquisition."

That is the Northern California Extension.

Examiner Wilkinson: Is there any objection? (No response.)

The report and order of the Commission dated October 6, 1930, will be received as Exhibit 51.

(Exhibit No. 51, Witness Curry, received in evidence.)

Mr. Coulson: Are we going to be furnished copies of these Commission orders?

Examiner Wilkinson: Not only copies of the orders, but every one of these exhibits.

(Testimony of M. J. Curry.)

Mr. Coulson: We have to study them, Mr. Examiner.

(Discussion off the record.)

Q. (By Mr. Wood) At this point, in order to finish with Mr. Curry, I am going to digress from the order a little bit and ask for the application of the railroad company to [2140] the Commission, dated about February 10, 1932, for a certificate authorizing a loan from the Reconstruction Finance Corporation.

A. I have that. It is application dated February 5, 1932, addressed to the Interstate Commerce Commission.

Q. Mr. Curry, is there a supplemental application dated February 13, 1932, that relates to that?

Mr. Clay: There is a supplemental application of February 13.

The Witness: I have not such an application with me. There may have been. I would have to look through my records.

Q. (By Mr. Wood) Will you make a note of that, please, Mr. Curry, and if there is, will you include that in the list of documents to be produced?

The next is an application some time late in 1931 for authority to issue and pledge General and Refunding Mortgage bonds as collateral security for notes to be issued to A. C. James Company and the Railroad Credit Corporation.

A. Of date February 11, 1932?

Q. I do not know the date.

(Testimony of M. J. Curry.)

A. I have here an application of the Western Pacific Railroad Company for authority to issue and pledge 15 million dollars of its General and Refunding Mortgage gold bonds, [2141] Series A, and to issue five million dollars of its notes.

Mr. Wood: That is one of the documents we will have to offer later.

I now offer in evidence a report and order of the Interstate Commerce Commission entered February 29, 1933, Finance Docket No. 9151, Western Pacific Railroad Company Reconstruction Loan, authorizing a loan from the Reconstruction Finance Corporation.

Mr. Clay: That is offered just merely as evidence of approval of the loan, not as evidence of the lien of the general mortgage bond?

Mr. Wood: Well, it is part of the picture.

Mr. Clay: I know, but that is a legal question. You are offering this merely to show——

Mr. Wood: Whatever bearing it has as a question of fact on the legal question that is involved.

Examiner Wilkinson: Is there any objection to this document?

(No response.)

The order and certificate of the Commission dated February 29, 1932, in Finance Docket 9151, are received as Exhibit 52.

(Exhibit No. 52, Witness Curry, received in evidence.)

(Testimony of M. J. Curry.)

Mr. Wood: I offer in evidence a certified copy of the report and order of the Commission entered February 27, [2142] 1932, Finance Docket No. 9162, authorizing the issue of not exceeding 15 million dollars General and Refunding Mortgage bonds and notes for not exceeding five million dollars.

Examiner Wilkinson: The document just referred to will be received as Exhibit No. 53.

(Exhibit No. 53, Witness Curry, received in evidence.)

Mr. Wood: Mr. Curry, will you please produce the annual reports of the Western Pacific Railroad Company for 1930 to 1934, inclusive?

(Discussion off the record.)

The Witness: I have them, and submit them from 1930 to 1935, inclusive.

Mr. Wood: I will offer them in evidence. You have no objection to putting those in now, Mr. Curry?

Examiner Wilkinson: Is there any objection to the receipt of these documents?

Mr. Coulson: Aside from my running objection there is none.

Examiner Wilkinson: The annual report of the Debtor for the calendar year ended December 31, 1930, is received as Exhibit 54.

The 1931 annual report is received as Exhibit 55.

The 1932 annual report is received as Exhibit 56.

The 1933 annual report is received as Exhibit 57.

[2143]

The 1934 annual report is received as Exhibit 58.

The 1935 annual report is received as Exhibit 59.

(Testimony of M. J. Curry.)

(Exhibits 54 to 59, inclusive, Witness Curry, received in evidence.)

Q. (By Mr. Wood) Will you please produce the minutes of a meeting of the Executive Committee of the railroad company for February 11, 1931?

A. These are extracts from my permanent minute book. They are not copies.

Q. Does that volume contain all of these minutes? A. All of those that you asked for.

Q. I might mention then at this time I am calling for the minutes of the Executive Committee meeting on February 11, June 25, July 23, October 15, November 17, and December 21 of 1931, and January 29, 1932. A. Yes.

Mr. Nicodemus: Do you want the entire records for those dates, or only so far as they pertain to this financing?

Mr. Wood: Only so far as they pertain to the Northern California Extension.

Q. Do you have extra copies of those, Mr. Curry, so that we can offer them now?

A. I have not, no. These are the originals from the permanent book that I brought with me. I have no copies.

Mr. Wood: Mr. Examiner, I want to be clear as to what [2144] the procedure will be about offering these documents later in evidence. In case we do not have another session is it understood that when the copies are ready we can put a copy in evidence

(Testimony of M. J. Curry.)

merely by notifying the Commission and filing the document, and sending the copies around to the other parties?

Examiner Wilkinson: As I understand, the purpose so far has been to identify on the record the data and the documents which you asked to be produced, for the purpose of having them presented as evidence in this case. If there is any objection to the data, with which all counsel here are familiar, having heard it, I would like the record to show it.

Mr. Coulson: I made clear, I think, at the start, Mr. Examiner, that I thought all of this was irrelevant to the issues immediately before us and should be considered only either as explaining an ambiguity in the record, which is already before the Commission, or as sustaining Mr. Swaine's rather sweeping claim in the plan which was filed with the Commission at the last hearing, that the first mortgage bondholders had a first lien on everything.

I understand he does not assert that claim in its complete form anyway, and I think all this amplification of the record as to the Northern Extension is unnecessary, and in that sense irrelevant to the issues we are immediate- [2145] ly dealing with. But I understand that that objection, having been made, was overruled and the Commission allowed me a running objection to all this. I do not want to be deemed to have withdrawn that objection, but aside from that I have no objection to the procedure suggested here.

(Testimony of M. J. Curry.)

Examiner Wilkinson: Are there any other objections?

I understand, Mr. Nicodemus, you undertake to produce through Mr. Curry the documents and data that Mr. Wood requested?

Mr. Nicodemus: What I think we will do is, we will take the originals over to the Chase Bank and let them photostat them in as many copies as they want; and transmit them. They are their exhibits, they are not ours.

Mr. Swaine: Oh, not all of that. These resolutions are your own.

Mr. Nicodemus: Oh, no, we closed our case.

Mr. Swaine: Oh, if you mean it that way, yes. I thought you meant they were the property of the Chase Bank.

Mr. Nicodemus: No.

Examiner Wilkinson: My understanding is you will supply that?

Mr. Nicodemus: Yes, we will undertake to get the documents. [2146]

(Discussion off the record.)

Q. (By Mr. Wood) Mr. Curry, in connection with those minutes which you have produced, will you state who were present at those meetings? Do your records show? A. Yes, they do show.

At the meeting of February 11, 1931, there were present Messrs. Schumacher, Loasby and James, directors.

Mr. Coulson: May I interrupt for a moment?

(Testimony of M. J. Curry.)

It seems to me this is building up the record unnecessarily. If we put in these minutes which show who were present, and the witness says it shows it correctly, why should we read into the record the names of the directors present at the meeting?

Mr. Swaine: You are not putting in the minutes. It was agreed you would put in only the resolution affecting the Northern California.

Mr. Coulson: I did not understand that. If that is so, we certainly want an opportunity to examine these minutes and see if other material in the minutes ought to go in. I thought the working agreement was that we were putting in these documents that he presented.

Mr. Swaine: All that was presented was the excerpt affecting the minutes regarding the Northern Extension. That is all we asked for.

Mr. Coulson: I suggest the best evidence is the record [2147] itself.

Mr. Nicodemus: I was seeking to keep out of this record material which did not relate to this matter at all. There may have been other business at these meetings.

Mr. Wood: I am perfectly willing to have them confined to the minutes as they relate to the Northern California Extension, provided the record also shows what members of the committee were present. If you object to that, then I should ask for the entire minutes of each meeting.

(Testimony of M. J. Curry.)

Mr. Coulson: I do not object to it, Mr. Wood. It was only a desire to shorten this up and avoid duplication. But if you need a statement as to who were at the meeting, I have no objection to it.

Mr. Wood: That is all I wanted.

The Witness: I understand you want the complete attendance?

Mr. Taylor, of counsel.

Q. (By Mr. Wood) Just the members of the Executive Committee.

A. At the meeting June 25, 1931, present, Messrs. Schumacher, Aldrich, James, and Loasby.

At the meeting of July 23, 1931, there were present Messrs. Schumacher, James and Loasby.

At the meeting held October 15, 1931, present, Messrs. Schumacher, James and Loasby. [2148]

At the meeting held on November 17, 1931, Messrs. James, Schumacher, Loasby and Adams.

At the meeting held December 21, 1931, present, Messrs. Schumacher, James, Loasby and Shepard.

At the meeting held January 29, 1932, present Messrs. Schumacher, James and Shepard.

That completes the list.

Q. Mr. Curry, the Mr. James that is referred to in each case is Mr. A. C. James?

A. Mr. Arthur Curtiss James.

Mr. Coulson: And the Mr. Aldrich?

The Witness: Mr. Winthrop W. Aldrich.

Mr. Wood: I now offer in evidence a certificate of the Commission filed and entered June 23, 1932,

(Testimony of M. J. Curry.)

and report and order of the Commission filed and entered February 25, 1933, in Finance Docket No. 9448, Western Pacific Railroad Company Reconstruction Loan.

Mr. Nicodemus: Do you have those as one exhibit?

Examiner Wilkinson: The documents just referred to will be received as Exhibit No. 60.

(Exhibit No. 60, Witness Curry, received in evidence.)

Mr. Wood. That is all we have of Mr. Curry, unless any cross examination is desired, otherwise we will put on another witness.

Examiner Wilkinson: Are there any questions of Mr. Curry? [2149]

Mr. Willard: May we reserve the right until we have an opportunity to examine the documents that will be submitted through him——

Examiner Wilkinson: To recall Mr. Curry if necessary?

Mr. Willard: ——for cross examination, yes.

Mr. Coulson: I would like to make a similar reservation, Mr. Examiner.

Examiner Wilkinson: You are excused under those conditions.

Mr. Clay: We would like to make a similar reservation.

Mr. Swaine: Just a minute, Mr. Curry. Mr. Clay wants to clear up one point.

Mr. Clay: An order of the Commission has been introduced which was entered upon an application

(Testimony of M. J. Curry.)

by the railroad made to the Reconstruction Finance Corporation. If they are going to put the order in, it would seem logical to put the application upon which the order was made in also.

Mr. Swaine: We have no objection.

Mr. Wood: That is, application to the Reconstruction Finance Corporation and the I. C. C. dated May 23, 1932, as amended and supplemented by further applications dated June 7, 1932 and June 10, 1932.

You can produce those, Mr. Curry?

The Witness: Yes.

Mr. Wood: Along with these other documents of which [2150] you have a note.

If there is no further cross examination of Mr. Curry, I would like to put Mr. Buckley on the stand.

Examiner Wilkinson: You are excused, Mr. Curry.

(Witness excused.)

Mr. Wood: I would like to call Mr. Buckley as a witness.

CARL E. BUCKLEY

was sworn and testified as follows:

Direct Examination

Q. (By Mr. Wood) Mr. Buckley, you are an officer of the Chase National Bank? A. I am.

Q. What position do you hold?

A. Second vice president.

Q. You are connected with what department of the bank? A. Corporate Trust.

Q. How long have you been connected with the Corporate Trust Department as an officer?

A. As an officer, since 1929.

Q. You were an officer of the Corporate Trust Department during the period from February 11, 1931, to January 29, 1932? A. I was.

Q. As such an officer you are familiar with the records of the Corporate Trust Department relating to the administra- [2151] tion of corporate mortgages? A. Yes.

Q. During this period February 11, 1931 to January 29, 1932, Mr. Henry E. Cooper, individual trustee under the first mortgage, was a vice president of the Chase Bank? A. He was.

Q. The records of Mr. Cooper, individual trustee, were kept in the Corporate Trust Department of the Chase National Bank? A. They were.

Q. You are familiar with those records?

A. Yes.

Q. Are you familiar with the records of the in-

(Testimony of Carl E. Buckley.)

dividual trustee which were kept in the Corporate Trust Department relating to the authentication and delivery of five million dollars principal amount of the first mortgage bonds and the applications for withdrawal of the cash proceeds of those bonds in connection with the Northern California Extension?

A. I am.

Q. You are also familiar with the procedure that was followed in connection with those applications? A. Yes.

Q. Will you state briefly what procedure was followed in connection with taking down the bonds and taking down the [2152] cash, just to give the picture of what took place?

A. Mr. Henry E. Cooper was the individual trustee during this period. The Corporate Trust Department was organized to take care of transactions involving authentication and delivery of bonds, and the take-down of cash under corporate mortgages was handled in the Corporate Trust Department.

Pursuant to a running arrangement with Mr. Cooper, we handled these transactions referred to.

Q. In what form did the applications come in from the railroad company? Was there one set or were they in duplicate or in what form?

A. The applications came in in duplicate form. When they were approved by our counsel, pursuant to the instructions of the corporate trustee and the individual trustee we delivered one duplicate set to the corporate trustee and retained the other.

(Testimony of Carl E. Buckley.)

Q. The Corporate Trustee at this time was the Crocker First Federal?

A. Crocker First Federal of San Francisco.

Q. Did you act on behalf of the Crocker First Federal Trust Company, as well as Mr. Cooper, in delivering bonds and paying cash?

A. We did. We acted in pursuance to their instructions.

Q. Mr. Buckley, will you produce from the files of the [2153] individual trustee the files relating to the authentication and delivery of one million dollars principal amount of first mortgage bonds on February 11, 1931?

(The Witness complied with the request.)

Q. Will you describe the documents which are in there? Just identify them.

A. This is a copy of a contract dated January 28, 1931, signed by the Western Pacific Railroad Company and the Western Pacific Railroad Corporation.

Q. For what did that contract call?

A. The Corporation purchased from the Company; the Company sold to the Corporation.

Q. By the Corporation you mean——

A. Western Pacific Railroad Corporation.

Q. And "Company" is——

A. Western Pacific Railroad Company—purchased one million dollars principal amount of first mortgage 5 percent gold bonds of the Company at 97.5 percent of their face amount, together with the accrued interest.

(Testimony of Carl E. Buckley.)

Certified copy of resolutions adopted at a meeting of the Executive Committee of the Western Pacific Railroad Company held on February 11, 1931.

Q. What was the effect of those resolutions?

A. The Company resolved that it call upon the trustee under its first mortgage for the authentication pursuant to [2154] paragraph B of Section 2 of Article II of the first mortgage of one million dollars principal amount of first mortgage 5 percent bonds.

Certified copy of a resolution adopted at a meeting of the Board of Directors of the Western Pacific Railroad Corporation, at a meeting held on October 14, 1930. The effect of that was that five million dollars principal amount of first mortgage 5 percent bonds were to be issued by the Company under and secured by its first mortgage dated June 26, 1916, to First Federal Trust Company (Crocker First Federal Trust Company, Successor) and Henry E. Cooper—I do not know how voluminously you wish me to go into these things.

Q. I just want enough to identify them and characterize their contents.

A. The president or any vice president of this company is authorized and directed to execute in the name of the company said First Mortgage 5 Percent Bonds of the aggregate amount of five million dollars in such denominations as he may determine and to cause the corporate seal of the company to be affixed thereto and attested by the sec-

(Testimony of Carl E. Buckley.)

retary of the company, and deliver the bonds to the trustee under such first mortage.

"Further resolved, that in case any of the officers of this company who shall have signed or sealed any of [2155] the permanent bonds of said issues"——

Q. I do not think we need that, just enough to identify it.

A. Certified copy of an order of the Interstate Commerce Commission, Finance Docket 8473, ordering that "The Western Pacific Railroad Company be, and it is hereby, authorized to issue not exceeding five million dollars of First Mortgage 5 Percent bonds under and pursuant to, and to be secured by, the First Mortgage dated June 26, 1916, made by it to the First Federal Trust Company and Henry E. Cooper, trustees."

Said bonds to be sold to the highest bidder in conformity with the regulations prescribed in the Commission's order of October 6, 1919, as amended October 4, 1920, in Ex Parte 54, but at not less than 97.5 per cent of par and accrued interest.

As part of that certified copy is a report of the Commission, docket 8473, submitted October 1, 1930, decided October 6, 1930.

Q. I think that is enough on that order.

A. Letter of transmittal dated October 20, 1930, signed by F. M. Angellotti, general counsel of the Western Pacific Railroad Company.

Q. That was transmitting the application papers?

(Testimony of Carl E. Buckley.)

A. Transmitting certified copy of resolution of the Board [2156] of Directors of the railroad company and certified copy of resolutions adopted by the Board of Directors of the Western Pacific Railroad Corporation.

Letter dated December 4, 1930, from Crocker First Federal Trust Company, addressed to the Chase National Bank, and forwarding to them a million dollars face value of Western Pacific Railroad Company first mortgage Series A gold bonds, stating that they had been executed by the company and certified by the Crocker First Federal Trust Company as Corporate trustee, and requesting the Chase National Bank, when it had received all papers required by the first mortgage for the certification of the bonds, approved in writing by Messrs. Murray, Aldrich and Webb, to certify the bonds as individual trustee, and thereafter the bonds are to be held by us as agent for them as trustee, subject to the receipt of the purchase price for account of the trustee and an order for delivery from the railroad company approved in writing by Messrs. Murray, Aldrich and Webb, and that they be notified upon receipt of such order.

The papers should be obtained in duplicate, and copies sent to the Crocker First Federal Trust Company.

Q. You have some similar letters relating to the additional batches of first mortgage bonds?

A. I have four letters of similar nature, aggre-

(Testimony of Carl E. Buckley.)

gating [2157] four million dollars principal amount of bonds.

Q. I do not think it is necessary to read all those.

Mr. Nicodemus: Is it necessary to introduce all of them? Are they seven identical sets of papers?

Mr. Wood: I want to get the picture of the procedure that took place here after the first set. I think we can shorten it by indicating that the procedure was similar on each of the others, and consequently putting the papers in.

Mr. Nicodemus: I am trying to keep them out on the theory that they are similar.

The Witness: The dates of those are December 3, 1930, December 4, 1930, December 5, 1930, and December 6, 1930.

Telegram addressed to the Chase National Bank of the City of New York by Crocker First Federal Trust Company, dated February 10, 1931, requesting the Chase Bank to deliver a million dollars Western Pacific Company first mortgage 5 per cent bonds upon payment for account of trustees under first mortgage Western Pacific Railroad Company of 97.5 per cent of face value, and on submission of papers approved by Murray, Aldrich and Webb; also requesting the Chase Bank to honor requisition 244 of Western Pacific Railroad Company calling for payment of cash deposited with trustees amounting to $975,000, on submission of papers approved by Murray, Aldrich and Webb. [2158]

The telegram also stated that they will affix docu-

(Testimony of Carl E. Buckley.)

mentary tax stamp to the mortgage; on February 11, 1931.

Letter dated February 14, 1931, addressed to the Crocker First Federal Trust Company and Henry E. Cooper as trustees under the first mortgage of the Western Pacific Railroad Company, dated June 26, 1916.

Q. (By Mr. Wood) That was merely the opinion of counsel that was given?

A. Signed by Murray, Aldrich and Webb, and that is the opinion of counsel given on the transaction involving the authentication and delivery of one million dollars principal amount of first mortgage bonds.

Q. I think that is sufficient to identify that.

A. Letter dated February 14, 1931, addressed to the Chase National Bank by Messrs. Murray, Aldrich and Webb, enclosing their opinion in duplicate, addressed to the Crocker First Federal, and Henry E. Cooper as trustees.

Letter dated February 17, 1931, addressed to Crocker First Federal Trust Company by the Chase National Bank, advising them that on February 11, 1931, they delivered to the Western Pacific Railroad Company a million dollars principal amount of first mortgage Series A 5 per cent gold bonds, and that in connection with the delivery it had received from Murray, Aldrich and Webb their opinion letter dated February 14, 1931, which is enclosed with [2159] the various documents outlined in their

(Testimony of Carl E. Buckley.)

letter. There is also enclosed a receipt of the railroad company for the delivery of the bonds.

Letter dated February 24, 1931, from Crocker First Federal Trust Company, San Francisco, addressed to the Chase National Bank, acknowledging its letter of February 17, 1931, confirming that $500 face amount of documentary United States Internal Revenue stamps have been affixed to the original counterpart of the mortgage and have been cancelled.

Receipt dated February 11, 1931, signed by the Western Pacific Railroad Company, addressed to the Chase National Bank of the City of New York as agent for the trustees under the Western Pacific Railroad Company first mortgage for a million dollars principal amount of Western Pacific Railroad Company first mortgage bonds.

Mr. Wood: Could I see that file just a moment, Mr. Buckley?

I will read the first paragraph in this letter from the Chase National Bank to the Crocker First Federal Trust Company, which copy is here:

"We advise that on February 11, 1931, we delivered to the Western Pacific Railroad Company one million dollars principal amount of first mortgage Series A 5 per cent gold bonds of the Western Pacific Railroad Company, num- [2160] bered"—and the numbers are given—"against payment to us of $975,000 for account of the trustees under the first mortgage."

(Testimony of Carl E. Buckley.)

Does that indicate to you, Mr. Buckley, that that cash was deposited to you? A. It does.

Mr. Wood: I want to offer this file in evidence. We have photostatic copies, but we have not had time to make a sufficient number for distribution. We would like to substitute one photostatic copy with the Commission, with the understanding that we will furnish additional copies for the various parties, and that same understanding I should like to have with respect to all of these first mortgage files.

Examiner Wilkinson: Is there any objection to the receipt?

Mr. Coulson: I would like it understood that I am making the same objection to these documents put in through this witness as I made to the documents put in through Mr. Curry. I think we are dragging in a lot of material that is irrelevant, and I am unpersuaded that it is not irrelevant to this moment.

Examiner Wilkinson: The documents just referred to by this witness, which I understand are known as the first mortgage file——

Mr. Wood: It is a file taken from the files of the [2161] individual trustee under the first mortgage. These applications were submitted in duplicate. They came first as a rule to the individual trustee, and one set was sent to the Crocker First Federal, the corporate trustee, and one set was kept in the files of the Chase National Bank on behalf of the individual trustee.

(Testimony of Carl E. Buckley.)

Examiner Wilkinson: —will be received as Exhibit 61.

(Exhibit No. 61, Witness Buckley, received in evidence.)

Examiner Wilkinson: We will recess now until 1:30 o'clock p. m.

(Whereupon, at 12:40 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

[2162]

After Recess

1:30 o'clock p. m.

CARL E. BUCKLEY

testified further as follows:

Direct Examination

Mr. Wood: Mr. Examiner, apropos of the discussion this morning regarding the production of records from the General and Refunding Mortgage, I want to say on behalf of Mr. Buckley and the Chase National Bank that the bank is ready to produce all of the records of the General and Refunding files at the request of the bondholders. They can get the files down here tonight and have them ready to be put in in the morning.

As counsel I feel that I ought not to take any part in the introduction of those documents. Counsel are here and they can examine the documents before the hearing and put in anything they want. Mr. Buckley will go on the stand and identify them, and

(Testimony of Carl E. Buckley.)

assist counsel in any way possible. A telephone call to New York will get the documents down here to-night or first thing in the morning.

Mr. Swaine: In order to clarify that particular point, there were only three issues of refunding bonds taken down.

Mr. Wood: I think it was three, possibly four.

Mr. Swaine: The documents will not be very voluminous, [2163] will they?

The Witness: On that bond alone?

Mr. Wood: Yes.

Mr. Clay: We think the mortgage trustee should have a counsel. We know nothing about what your file contains. You are still the mortgage trustee.

Mr. Wood: Unfortunately, in this situation there has been no time to make substitution.

Mr. Clay: There is no time for us to familiarize ourselves with the documents.

Mr. Wood: The documents are not very voluminous. You could examine them, I think, in half an hour easily. Mr. Buckley will have them here and can explain what is in them.

Mr. Clay: The responsibility is not the bondholders', it is the mortgage trustee's. Why have a mortgage trustee at all?

Mr. Wood: Unfortunately, we have this conflict where the trustee has resigned and no new trustee has been substituted.

Mr. Clay: You are still the acting trustee.

Mr. Wood: We are, and we are ready to produce the records.

(Testimony of Carl E. Buckley.)

Mr. Swaine: So far as those records are concerned, there is no conflict of interest. All we want is to identify [2164] what documents were delivered to the trustee to take down the bonds. If the documents are produced, why can they not be put in with the consent of all parties in interest? Those are the documents which the trustee received against which the bonds were deposited.

Mr. Clay: Personally, I do not feel I am justified in taking the responsibility of what should go in and what should not, because I do not know what the documents are and I would not want to do it on half an hour's casually going through the files.

Mr. Wood: Anything we have to put in would be on the part of the first mortgage trustee's case, and I think it would be an imposition for me to do that.

Mr. Clay: You mean you are counsel for Mr. Armstrong?

Mr. Wood: Exactly.

Mr. Clay: Of course, our trustee is the Chase Bank, which still is the trustee of the General and Refunding mortgage.

Mr. Wood: Exactly.

Mr. Clay: So you are down here not representing the Chase Bank or Mr. Armstrong?

Mr. Wood: I do not feel I should represent two or three conflicting interests.

Mr. Swaine: I am perfectly willing to resolve that difficulty. As part of the case of the Institutional [2165] Bondholders' Committee I would like

(Testimony of Carl E. Buckley.)

to know what the facts are with respect to the creation of the General and Refunding mortgage. I do not care whom the facts hit. I would like to know what the facts are.

I would like to request that the Chase as trustee under the General and Refunding mortgage produce those documents here tomorrow morning, and I will assume the burden of putting them in if nobody else will. They are perfectly relevant to our case.

Examiner Wilkinson: As far as the Examiner is concerned, he is not making any suggestions to counsel as to how they should try their case. The only thing the Commission is concerned with is to get the facts in the record. If Mr. Wood will see that they are produced here, we will get them in the record.

Mr. Swaine: I would like to make the request, then, on behalf of the Institutional Bondholders' Committee, that the files of the trustee under the General and Refunding Mortgage with reference to the authentication of bonds under that mortgage be produced tomorrow morning.

Examiner Wilkinson: Do you have any objection to that, Mr. Clay?

Mr. Clay: No.

Mr. Willard: No.

Mr. Wood: We undertake to produce the documents. [2166]

(Testimony of Carl E. Buckley.)

Mr. Buckley, if a short recess is taken now, could you telephone to New York and get those documents down here tonight?

(Discussion off the record.)

Mr. Coulson: The difficulty with this course of procedure, trying to sit continuously until we get these documents in, is that it may well be that when all the trustees put in these various documents questions will be suggested to one party in interest or another as to a matter that needs to be supplemented, and we may have to have another hearing anyway. I have no objection to continuous sessions if it serves a useful purpose, but I am afraid we are going by this dumping in of bushels of documents for later examination only to aggravate the time element instead of solving it.

Mr. Swaine: These are just a few documents. They relate to three transactions, and if counsel are going to want to take an adjournment after they see them, let them see them and take an adjournment tomorrow after seeing them, instead of taking an adjournment after two weeks from tomorrow or some later date.

Examiner Wilkinson: I think the sooner they are produced, in as much as they are going to be put in the record, the better it is.

Mr. Nicodemus: They can be produced tomorrow, except [2167] the originals. We have to go back again and photostat them.

Mr. Swaine: That is true of a lot of it.

(Testimony of Carl E. Buckley.)

Mr. Nicodemus: I would much rather come back a week from today with everything in shape.

Examiner Wilkinson: I will be guided by the desires of the parties here.

Mr. Swaine: I think we ought to get these here and produce them and have them identified, then the photostats can be distributed. If there is any need for further hearing, we can have it.

Examiner Wilkinson: If there is no real objection to it on the part of the parties, and if Mr. Buckley wants to be excused here to telephone, we can excuse him temporarily to do that.

We will take a short recess.

(Whereupon a short recess was taken.)

Mr. Clay: Mr. Examiner, while we are waiting, there is a matter I would like to clear up:

The interest due on the notes of the Western Pacific Railroad held by the Reconstruction Finance Corporation to and including June 30, 1936, was $454,689.30. The interest which will be due on said notes to and including December 31, 1936, will be $544,309.90.

Mr. Nicodemus: Is the amount correctly stated in—— [2168]

Mr. Clay: Those figures are taken from the books of the treasurer of the Reconstruction Finance Corporation.

Mr. Nicodemus: Is the amount correctly stated in the Debtor's plan as of January 1, 1936?

Mr. Clay: I do not know.

(Testimony of M. J. Curry.)

Mr. Swaine: Those figures vary quite a bit, $80,000, from the figures stated in the Institutional Bondholders' Committee plan. The figures stated in the plan were obtained from the Debtor; therefore, the Debtor and the Reconstruction Finance Corporation apparently are some $80,000 apart on the amount of interest which will be accrued up to January 1, 1937. I do not care what it is, but I would like to have the facts correct. I wish the Debtor and the Reconstruction Finance Corporation would get together and find out what the difference is, and why it is.

Mr. Clay: The figures which I have just given are the figures of interest which the Reconstruction Finance Corporation claims, and they are taken from the books of the treasurer of the Reconstruction Finance Corporation.

Mr. Curry: I think the reason for that is, Mr. Clay——

Mr. Clay: I do not care about the reason. I just want it stated of record what our claim is.

Mr. Curry: I think you are accruing on a 5 per cent basis. That is what I think. [2169]

Mr. Clay: That is what we are claiming.

Mr. Nicodemus: Can you give us the detail of the claim, its interest base, and the particular rate?

Mr. Clay: The interest specified in the notes is from the date that the interest went into default.

Mr. Swaine: In order that it may appear in juxtaposition to this statement, I think that should

(Testimony of M. J. Curry.)

the Commission approve the plan proposed by the Institutional Bondholders the plan ought to be modified to state the correct amount of principal plus interest accrued to January 1, whatever that may be.

Mr. Clay: I think it should.

Mr. Swaine: The plan as presented ought to be modified if the figure in the plan as presented is incorrect.

Examiner Wilkinson: Has the claim of the Reconstruction Finance Corporation been filed with the court?

Mr. Clay: The claim has been filed with the court.

Examiner Wilkinson: Will that claim correspond with the figures you have given?

Mr. Clay: It will correspond with the figures I have given.

Mr. Swaine: It is approximately $80,000 difference, as I get the figures.

Mr. Clay: No, it is about $120,000.

Q. (By Mr. Wood) Mr. Buckley, in Exhibit No. 61, which [2170] you identified before the adjournment, reference was made to cash requisition No. 244. Will you please produce that? Will you identify and describe the documents, briefly, that are contained in that file?

A. There is a certificate signed by the president and treasurer of the Western Pacific Railroad Company, dated February 11, 1931, attached to which is Exhibit A.

(Testimony of M. J. Curry.)

Q. Exhibit A is what, briefly?

A. Exhibit A is a certified copy of the minutes of a meeting of the stockholders of the company at a meeting called and held on September 22, 1930, which says that——

Q. I would not read the contents; just identify it.

A. Exhibit B is a certified copy of the extracts from the minutes of the meeting of the stockholders of the Western Pacific Railroad Corporation at a meeting held on October 15, 1930.

Q. That is stockholders or directors?

A. Stockholders.

A certified copy of the resolution adopted at a meeting of the Executive Committee of the Western Pacific Railroad Company at a meeting held on February 11, 1931.

An opinion letter dated February 11, 1931, addressed to the Crocker First Federal Trust Company and Henry E. Cooper, trustees under the first mortgage of the Western Pacific Railroad Company, signed by F. M. Angellotti, [2171] general counsel of the Western Pacific Railroad Company.

Letter dated February 14, 1931, addressed to Crocker First Federal Trust Company and Henry E. Cooper as trustees under first mortgage of Western Pacific Railroad Company, signed by Murray, Aldrich and Webb, transmitting certain papers submitted in connection with requisition No. 244.

Copy of letter dated February 14, 1931, addressed

(Testimony of M. J. Curry.)

to Crocker First Federal Trust Company by Chase National Bank, advising it that on February 11, 1931, it paid to the Western Pacific Railroad Company, $975,000, representing the proceeds of sale of one million dollars principal amount of first mortgage bonds of Western Pacific Railroad Company, at 97.5, and stating that the payment was made against the expenditures by the railroad company covered by their requisition 244.

It also transmitted a receipt of the railroad company for the payment, and includes an opinion letter of Murray, Aldrich and Webb, dated February 14, 1931, with various documents mentioned in their letter.

A letter dated February 24, 1931, addressed to the Chase National Bank by Crocker First Federal Trust Company, acknowledging receipt of their letter of February 17, 1931, relative to the payment of $975,000 on requisition 244. [2172]

Duplicate receipts signed by M. J. Curry, assistant treasurer of the Western Pacific Railroad Company, addressed to the Chase National Bank, for $975,000, payment made on requisition 244.

Mr. Wood: I offer that in evidence and we will substitute the photostatic copies as in the other case.

Examiner Wilkinson: The documents just referred to by the witness will be received as Exhibit No. 62.

(Exhibit No. 62, Witness Buckley, received in evidence.)

(Testimony of M. J. Curry.)

Mr. Nicodemus: Can you not stipulate that these documents are substantially identical to exhibit 61, except as to amounts and dates?

Mr. Wood: This is a different one.

Mr. Nicodemus: They all follow the same point. This is just a draw-down of the funds.

Mr. Wood: Let me explain what took place in each of the cases. I think it will make the record a little clearer:

In each case the railroad company first applied for authentication and delivered bonds upon the deposit of the cash proceeds of their sale, which in every case was 97.5 of the face amount. Then simultaneously they made application on these requisitions for the withdrawal of the cash proceeds so deposited against the certification of expenditures on the Northern California Extension. This [2173] second file is the take-down of the cash proceeds of the one million dollars of bonds that were referred to in the first file.

Mr. Nicodemus: I see. In each case we will have a series of take-downs of bonds followed by take-downs of cash simultaneously. The point is that one exhibit is typical of any other series that you produce here to absorb the five million dollars.

Mr. Wood: Exactly.

Mr. Nicodemus: We are cluttering up the record with all this identification of documents that are voluminous and have to be reproduced at great expense.

(Testimony of M. J. Curry.)

Mr. Swaine: The dates are very important here.

Mr. Nicodemus: Cannot the witness supply the dates? Is there any objection to the dates being supplied by the witness?

Examiner Wilkinson: Of course, the exhibit will be in the record and will speak for itself. As I understand, this is purely a question of identification, is it not? The witness' testimony is purely identifying the exhibits?

Mr. Nicodemus: They propose a series, as I understand, of about 14 exhibits.

Examiner Wilkinson: If an exhibit can be offered, and a statement sufficiently descriptive for identifying it can be made, that is all that is necessary, so far as I [2174] see it.

Mr. Nicodemus: You could make a statement on the record, could you not, Mr. Wood?

Mr. Coulson: That is open to the objection, Mr. Nicodemus, that if this point is going to be labored over, the other creditors ought to have an opportunity to examine these documents. It would be a considerable convenience to have copies of them for that purpose. So long as we have let so much of this go in, I do not see why these should not be put in, and give us an opportunity to see them.

Mr. Wood: These documents do vary also in the description of expenditures made. In other words, the expenditures are for different purposes in connection with the construction of the line, so that I think it would be well to have them all in.

(Testimony of M. J. Curry.)

Mr. Nicodemus: If counsel insists on it; my suggestion was only in the interest of holding down the record, which is getting beyond all reasonable proportions.

Mr. Wood: In connection with this first one, I would like to read portions of these as typical of the cash requisitions.

The minutes of the meeting of stockholders of the Western Pacific Railroad Corporation, which is the holding company of the railroad company, begins as follows: [2175]

"The Chairman stated that a further purpose of the meeting was the consideration of a proposal to consent to the authentication and delivery of $5,000,000 principal amount of the First Mortgage bonds of the Western Pacific Railroad Company, to bear interest at the rate of 5 per cent per annum and to be issued under the first mortgage of said company, dated June 26, 1916, and/or the payment of the proceeds of such bonds held in the form of deposited cash by the trustees on this said first mortgage with respect to the constructing, purchasing and/or otherwise acquiring by the Western Pacific Railroad Company of its proposed so-called 'Northern California Extension', consent of stockholders of this corporation being required under said mortgage, because of the fact that the total expenditure made or to be made in connection with such project would exceed $1,000,000."

Then follows a recital of the provisions of the mortgage, and then a resolution:

(Testimony of M. J. Curry.)

"Now, therefore, be it resolved, that the consent of the stockholders of this corporation be and it is hereby given to the authentication and delivery of $5,000,000 principal amount of the first mortgage bonds of the Western Pacific Railroad Company to bear interest at the rate of five per cent per annum, and to be issued under the first mortgage of said company, dated June 26, [2176] 1916, and/or the payment of the proceeds of such bonds held in the form of deposited cash by the trustees under said first mortgage with respect to the constructing, purchasing, and/or otherwise acquiring by the Western Pacific Railroad Company of its proposed so-called 'Northern California Extension' to begin at a point on the existing main line of said company in the vicinity of Keddie, Plumas County, California, and to connect at a point at or near Bieber, Lassen County, California, with a line built or to be built by Great Northern Railway Company from Klamath Falls southerly to said point at or near Bieber, California, being a total distance of approximately 112 miles; and also including a joint terminal to be jointly owned by said company and said Great Northern Railway Company at or near said Bieber; and also including a line of railroad to be jointly acquired and/or constructed and owned by the Western Pacific Railroad Company and Great Northern Railroad Company, extending from a point on the proposed line of said Great Northern Railway Company in the vicinity of Lookout, Mo-

(Testimony of M. J. Curry.)

doc County, California, westerly to a connection with the McCloud River Railroad at or near Hambone, Siskiyou County, California, being a line approximately 36 miles in length."

Mr. Homire: Is this part of the exhibit that is to be put in that you are reading? [2177]

Mr. Wood: This is part of the exhibit.

Mr. Homire: It means it is going in the record twice. Is that necessary?

Mr. Wood: I am not going to read the entire document.

Examiner Wilkinson: The exhibit, of course, will speak for itself. As I understand, this is purely descriptive of the exhibit.

Mr. Wood: Exactly. I am merely calling attention to certain pertinent parts of these exhibits.

Then we have the certificate of the president and treasurer certifying that.

"Expenditures to the amount of $999,998.98 have been actually made by the Western Pacific Railroad Company after June 30, 1916, to-wit, between February 1, 1929 and November 30, 1930, both inclusive, for the construction of a new line of railroad, known as this company's 'Northern California Extension,'"

and then follows the description of the line in language similar to what I just read.

Then it goes on:

"Said expenditures consist of the following items:

(Testimony of M. J. Curry.)

"Engineering	$244,777.82
Land for Transportation Purposes	121,377.67
Grading	589,393.37
Tunnels and Subways	$ 44,450.12

[2178]

And then the total.

"Reimbursement is sought from cash deposited under Section 2 of Article Second of said first mortgage, the amount of reimbursement being $975,000, in accordance with the provisions of said first mortgage."

Then is a description of the line. I will not read all of this.

Mr. Coulson: If the Examiner please, I hesitate to interrupt Mr. Wood, but it seems to me that all of this laboring with factual data offered to the Commission might better be reserved to the brief. It would be interminable here if we have running argument with every exhibit that is put in.

Mr. Wood: I am not going to do it. This is all descriptive.

Examiner Wilkinson: Counsel says that it is descriptive of his exhibit, and the Examiner does not like to cut him off. He expects him to use his discretion, though, of course, to make it as short as possible.

Mr. Wood: I assure you I will do that, Mr. Examiner.

(Testimony of M. J. Curry.)

The certificate then states:

"That so far as known or believed by us the property so constructed or acquired as aforesaid, is not subject to any lien or charge except (a) necessarily undetermined [2179] liens or charges ordinarily incident to construction and (b) the lien of said first mortgage."

The resolutions of the Executive Committee contain the following language:

"All portions of said extension which have been constructed and/or acquired being subject to the lien of said first mortgage and now in the possession of this company."

In the opinion of F. M. Angellotti, general counsel to the railroad company, appears this:

"In my opinion title to all those portions of this company's new line of railroad known as its 'Northern California Extension' and to all of the property which is mentioned in the certificate of H. M. Adams, president, and E. C. Bates, treasurer, of the Western Pacific Railroad Company, dated February 11, 1931, which accompanies this opinion * * * has vested in the Western Pacific Railroad Company, subject only to liens or charges certified in said certificate and to liens or charges of the character not required to be certified under the terms of paragraph 'Second' of sub-section D of section 2 of Article Second of the Western Pacific Railroad Company's first mortgage dated June 26, 1916, and all deeds, conveyances, or other instru-

(Testimony of M. J. Curry.)

ments necessary to vest the title to said property in said company have been executed and delivered [2180] to it, and all said portions of said extension and said property are subject to the lien of this company's first mortgage, and no supplemental indenture or instruments of further assurance are necessary to subject said property or any part thereof, to the lien of said first mortgage, subject only to the liens and charges aforesaid."

That answers a question that was raised earlier in the proceeding.

Mr. Coulson: May I here add, then, to my objection to the receipt of these documents that if the idea of presenting them is to put before the Commission as having probative force opinions of counsel on which the trustee proceeded in refraining from taking a supplemental indenture putting the Northern Extension under the first mortgage, I think it is a quite improper type of evidence. I do not think it is under any theory of law orderly procedure and evidence. It might be important in any action against the trustees on the part of the first mortgage bondholders for negligence, but putting it in this record here seems to be quite improper.

Mr. Wood: These are merely introduced as part of the files which the trustees received, the application papers which the trustees received in connection with the take-down of cash.

(Testimony of M. J. Curry.)

Mr. Coulson: My additional objection is prompted by the [2181] emphasis you give to Angellotti's opinion.

Examiner Wilkinson: I think that if counsel hereafter in introducing these exhibits will be a little briefer the Examiner would appreciate it. These exhibits are being received in line with the ruling made at the beginning of this testimony. It is understood that all of the evidence will be subject to a motion to strike after the other parties have received copies of them.

Mr. Wood: Mr. Examiner, I merely wanted to use the first two as typical of the others.

Mr. Nicodemus: You were reading from Exhibit 62? I want to make that clear.

Mr. Wood: 62, yes, with those which follow.

If it is agreeable, I am going to ask Mr. Buckley merely to identify the files without even identifying the individual documents, with the understanding that the documents contained are similar to those which have just been introduced.

Mr. Homire: It is understood that the Reconstruction Finance Corporation will reserve the right to strike this evidence out if on examination of it we find it objectionable.

Examiner Wilkinson: The parties to the proceeding will have the right to move to strike them from the record after they have seen them. [2182]

Mr. Wood: Mr. Buckley, will you please produce the file relating to the authentication of one

(Testimony of M. J. Curry.)

million dollars of bonds on June 25, 1931, against the deposit of $975,000 in cash, and with that requisition No. 246 relating to the payment on the same date of that $975,000 in cash?

(Discussion off the record.)

Mr. Wood: First let us have the bond takedown. I do not think you want me to do any more than offer it in evidence, Mr. Examiner.

Examiner Wilkinson: The documents referred to will be received as Exhibit No. 63.

(Exhibit No. 63, Witness Buckley, received in evidence.)

Mr. Wood: Then the requisition No. 246 calling for $975,000 of cash.

Examiner Wilkinson: The document will be received as exhibit No. 64.

(Exhibit No. 64, Witness Buckley, received in evidence.)

Mr. Wood: Then on July 23, 1931, authentication and delivery of $900,000 of bonds in deposit of $877,500 in cash.

Examiner Wilkinson: The document will be received as Exhibit 65.

(Exhibit No. 65, Witness Buckley, received in evidence.)

Mr. Wood: On the same date, requisition No. 247 for $812,571.03 in cash. [2183]

Examiner Wilkinson: The documents will be received as Exhibit 66.

(Exhibit No. 66, Witness Buckley, received in evidence.)

(Testimony of M. J. Curry.)

Mr. Wood: October 24, 1931, requisition No. 248 for $64,928.97 in cash.

Examiner Wilkinson: These documents will be received as Exhibit 67.

(Exhibit No. 67, Witness Buckley, received in evidence.)

Mr. Wood: On November 25, 1931, authentication and delivery of $750,000 of bonds against deposit of $731,250 in cash.

Examiner Wilkinson: These documents will be received as Exhibit No. 68.

(Exhibit No. 68, Witness Buckley, received in evidence.)

Mr. Wood: On the same date, requisition No. 250 calling for $731,250 in cash.

Examiner Wilkinson: These documents will be received as Exhibit No. 69.

(Exhibit No. 69, Witness Buckley, received in evidence.)

Mr. Wood: On January 8, 1932, application for $350,000 of bonds against deposit of $341,250 in cash.

Examiner Wilkinson: These documents will be received in evidence as Exhibit No. 70.

(Exhibit No. 70, Witness Buckley, received in evidence.)

Mr. Wood: On the same date, requisition No. 251, call- [2184] ing for $241,250 in cash.

Examiner Wilkinson: These documents will be received as Exhibit No. 71.

(Testimony of M. J. Curry.)

(Exhibit No. 71, Witness Buckley, received in evidence.)

Mr. Wood. On January 29, 1932, application for one million dollars of bonds against deposit of $975,000 in cash.

Examiner Wilkinson: These documents will be received as Exhibit No. 72.

(Exhibit No. 72, Witness Buckley, received in evidence.)

Mr. Wood: On the same date, requisition No. 252, calling for $975,000 in cash.

Examiner Wilkinson: These documents will be received as Exhibit 73.

(Exhibit No. 73, Witness Buckley, received in evidence.)

Q. (By Mr. Wood) Mr. Buckley, I show you a telegram and ask you if that was received by the Chase National Bank. A. It was.

Mr. Wood: This telegram is a telegram from the Crocker First National Bank, the corporate trustee, stating what its records show as to the recordation of the first mortgage in Plumas and Lassen Counties, which are the counties in which the Keddie-Bieber Line is situated. I realize it is not the best evidence, but I would like to offer it, if there is no objection. If you desire the original docu- [2185] ments we can get them from San Francisco at a later date, but it may save time if we proceed on this telegram. You realize, of course, that we do not have time to get the original documents here for this hearing.

(Testimony of M. J. Curry.)

Examiner Wilkinson: Is there any objection to the form of this telegram?

Mr. Coulson: No.

Examiner Wilkinson: It will be received as Exhibit 74.

(Exhibit No. 74, Witness Buckley, received in evidence.)

Mr. Wood: I would like to substitute a copy, and we will supply additional copies.

Mr. Nicodemus: Dated what day? October 21, 1936.

Mr. Wood: Now, Mr. Buckley, will you get those debentures files?

Mr. Nicodemus: Have you finished with the first mortgage?

Mr. Wood: I have finished with the first mortgage.

Mr. Nicodemus: Does that cover the entire five million dollars?

Mr. Wood: That covers the five million dollars.

Mr. Nicodemus: What are these resolutions in 1931 and 1932?

Mr. Wood: You mean that Mr. Curry identified?

Mr. Nicodemus: Yes.

Mr. Wood: I think those are the minutes of the meet- [2186] ings at which the resolutions in those files were adopted.

Mr. Nicodemus: Was your last draw-down the 17th of November?

Mr. Wood: No, January 29, 1932 was the last one.

(Testimony of M. J. Curry.)

Mr. Nicodemus: Have you covered that drawdown?

Mr. Wood: Yes.

Mr. Nicodemus: All right.

Mr. Wood: That was Exhibits 72 and 73.

Q. Mr. Buckley, will you please produce the file relating to the authentication and delivery on February 27, 1931, of one million dollars of debentures under the indenture of July 1, 1930, under which the Chase National Bank was trustee?

Unless counsel for the general mortgage bondholders wish to identify these further, I am going to offer them in the same way that I have offered these first mortgage files, without reading them or doing any more than marking them as exhibits. But I wish to say this, Mr. Examiner, that we have not had photostatic copies of these made and I would like to have them subject to the same understanding as those Mr. Curry produced, that we will identify them and then offer them in evidence with photostatic copies as soon as we can have them made.

Examiner Wilkinson: As I understand it, you are not proposing now to offer physically any of these exhibits? [2187]

Mr. Wood: I do not want to put these original bank files into the record without being able to withdraw them. We have not been able to make photostatic copies.

Examiner Wilkinson: When is it proposed to supply copies of these?

(Testimony of M. J. Curry.)

Mr. Wood: As soon as we can have photostats made, and that will be as soon as we get back to New York. It will take only a few days to make them.

(Discussion off the record.)

Mr. Wood: The next is an application for $600,000 of debentures, authenticated on March 26, 1931.

Mr. Nicodemus: Did you put in the one for February 27?

Mr. Wood: That is the one that I just mentioned.

The Witness: A million dollars.

Mr. Wood: The next one is application for $530,000 of debentures, authenticated on May 25, 1931.

The next is application for $995,000 of debentures, authenticated on June 20, 1931.

The next is an application for $309,000 of debentures, authenticated on August 25, 1931.

The next is an application for $600,000 of debentures, authenticated on October 20, 1931.

The next is an application for $120,000 of debentures, authenticated on November 25, 1931.

The next is an application for $350,000 of debentures, [2188] authenticated on January 29, 1932.

The next is an application for $347,000 of debentures, authenticated on March 28, 1932.

The next is an application for $149,000 of debentures, authenticated on May 31, 1932.

Q. Mr. Buckley, on March 1, 1932, do your files show cancellation of debentures? A. Yes.

(Testimony of M. J. Curry.)

Q. Will you state what took place on that date with respect to that cancellation?

A. On March 1, 1932, the Chase Bank received $4,504,000 principal amount of Western Pacific Railroad Company 5 per cent gold debentures.

Q. How many were outstanding on that date according to your records?

A. That was the principal amount outstanding also.

Q. In other words, these were all of the debentures then outstanding?

A. All of the debentures authenticated and delivered, outstanding, for cancellation.

Q. Is there a letter in that file, Mr. Buckley, from Mr. W. W. Carman, vice president of the A. C. James Company relative to that cancellation?

A. Yes.

Q. Will you state briefly what the contents of the letter [2189] are?

A. This is addressed to the Chase National Bank and it says in connection with the delivery and surrender to the Chase National Bank as trustee of $4,504,000 principal amount of 5 per cent gold debentures of the Western Pacific Railroad Company which were issued and are registered in the name of A. C. James Co., I desire to advise you that I have been authorized by each of the directors of A. C. James Co. to deliver and surrender the said debentures in exchange for the note of the Western

(Testimony of M. J. Curry.)

Pacific Railroad Company in the principal sum of $4,504,000, with interest at the rate of 5 per cent per annum, secured by $5,630,000 principal amount of the railroad company's general and refunding mortgage gold bonds, Series A.

It goes on to say that a certified copy of the resolution when adopted confirming this action will be furnished to you.

Q. Do you have a copy of that resolution that is referred to?

As to that, Mr. Examiner, I should like to offer this, and it is subject to the same understanding as these preceding files, that we will submit copies and offer the photostats in evidence.

Examiner Wilkinson: Mr. Wood, to get this straight on the record, I do not understand that you are offering [2190] these.

Mr. Wood: We are calling on Mr. Buckley to produce them.

Examiner Wilkinson: As I understand it, this is data which Mr. Swaine has requested you to produce.

Mr. Wood: Right.

Examiner Wilkinson: We have a witness here with the originals, and you undertake to furnish to Mr. Swaine the data which you are here describing?

Mr. Wood: That is right.

(Discussion off the record.)

(Testimony of M. J. Curry.)

Q. (By Mr. Wood) Mr. Buckley, in connection with the last two applications for debentures, the one on March 28, 1932 and the one on May 31, 1932, do those files show anything with respect to the cancellation of the debentures that were authenticated and delivered? There was a peculiar procedure there. Will you describe from the papers what took place in connection with that authentication and delivery?

A. In connection with the $347,000 authentication and delivery, there is a certified copy of a resolution adopted at a meeting of the Board of Directors of A. C. James Company held on March 5, 1932, which resolves that the acts of the officers of the company in exchanging $4,504,000 principal amount of the Western Pacific Railroad Company's 5 per cent debentures for a three-year [2191] note of the Western Pacific Railroad Company secured by the deposit of $5,630,000 principal amount General and Refunding Mortgage gold bonds of the railroad company be and is hereby ratified and approved and adopted as the act of the company.

Be it further resolved that the officers of the company are authorized and directed to advance to the Western Pacific Railroad Company the sum of $347,000, to be represented by a collateral note of the Western Pacific Railroad Company bearing 5 per cent interest payable quarterly, maturing three years from the date thereof, secured by $443,750 principal amount of the general mortgage gold bonds of the Western Pacific Railroad Company.

(Testimony of M. J. Curry.)

It goes on:

Resolved, that in the event that the Western Pacific Railroad Company is advised by its counsel that the advance to be made by A. C. James Company as authorized by the Board must pursuant to the authority of the Interstate Commerce Commission be consummated by an initial issue of the debentures of the railroad company and their immediate exchange for collateral notes, the officials of this company are hereby authorized and directed to consummate the transaction authorized by this Board in that manner, and to do any further acts and execute any further instruments necessary to carry out the purposes of this resolution. [2192]

Q. Do your files show that the debentures authenticated and delivered were immediately exchanged for a note and turned in to the trustee for cancellation?

A. The files show that the $347,000 principal amount of debentures were surrendered on the same date, March 28, 1932, by Western Pacific Railroad Company, for cancellation.

Q. With respect to the final application, do the files show that a similar transaction took place?

A. That is correct, with respect to $149,000 principal amount of debentures, on May 31, 1932.

Mr. Wood: Yes.

We are through with our case, Mr. Examiner.

Examiner Wilkinson: As I understand it, Mr. Wood, these last data that the witness has been tes-

(Testimony of M. J. Curry.)

tifying concerning are to be furnished in the shape of an exhibit for the record?

Mr. Wood: All of those files will be photostated and the file will be offered. Each file will be offered in evidence, with the request that a photostated copy be substituted for it and copies supplied to the various parties.

Mr. Homire: If they have finished, there are one or two things I would like to have the record show on behalf of the Reconstruction Finance Corporation:

We would like to have in the record the Commission's [2193] valuation reports on the Western Pacific, the report which is reported in 29 Valuation Reports, pages 239 to 279, and any supplements if there are any, up to date. I am not sure whether there are or not.

Mr. Nicodemus: Can that be introduced by reference to the published report?

Mr. Homire: I assume not, on the same theory that was advanced earlier in the proceeding.

Mr. Swaine: Can it be stipulated that the Commission's valuation was a certain amount as of a certain day, and that the additions since that day have been so much, so that by bringing it down to date the total valuation as of the last date that you have would be so much? We will stipulate that.

Mr. Nicodemus: I think it should be done that way, in the interest of brevity.

Mr. Swaine: You are not interested in the detail of that value, are you?

(Testimony of M. J. Curry.)

Mr. Homire: The same question came up as came up before. I have not examined carefully enough to know how much. I take it for granted all that we will want to put in is the final valuation as of the final date on which the Commission has placed a value on it. If there is anything in the report that we would like in, we would like to be at liberty to put it in. [2194]

Mr. Nicodemus: Those valuation reports are interminably long. They are referred to in the plan, and I do not think they have ever been put in the record, so far as I know.

Mr. Swaine: Before we leave that, can we not stipulate there as to the total valuation? You do not care about the detail, how much of it is in one thing and how much in another, do you?

Mr. Homire: It might be important as to some of these properties as to which the liens are in dispute.

Examiner Wilkinson: As a matter of fact, as far as the Western Pacific is concerned, unless this testimony is changed today, I do not understand that there were any separate mortgage divisions or anything of that type, that the value of the property would be applicable to the entire property as a unit, and so all you would be concerned with would be purely the final value. I think the suggestion of counsel that you could stipulate it would be better than trying to incorporate it by reference, because I will state now that I do not think we will be able to

(Testimony of M. J. Curry.)

allow anything in here by reference. If there is any difficulty by reason of anything today, it has to do solely with the Northern California Extension, and there would be no objection to stipulating the value of the Northern California Extension, certainly.

[2195]

Mr. Homire: We do not know to what extent there will be dispute.

Examiner Wilkinson: As a matter of fact, Mr. Nicodemus on some of the Debtor's exhibits or the plan shows these data to which Mr. Homire is referring.

Mr. Nicodemus: I think there is some evidence of the valuation.

Examiner Wilkinson: It seems to me that it is stated in the plan.

Mr. Homire: They have it stated, yes.

Mr. Nicodemus: I think in the record somewhere there is a statement to the effect that the valuation is so many dollars, as of a particular date, but I would have to check it to know.

(Discussion off the record.)

Mr. Coulson: I thought we agreed this morning that the Commission was going to consider the question of whether or not this after-acquired property clause was a self-executing clause. From that point of view I think we must have this valuation report in. But I think also it is a document of considerable importance in connection with this particular property, because property valuation is very

(Testimony of M. J. Curry.)

important in any of these properties where there have been lines constructed during the depression. I think that the Commission will need to consider this property [2196] report here. I would be in favor of its going in, much more than any of these documents we have put in this morning.

Mr. Swaine: We do not object if the parties want it.

Mr. Coulson: I would like it in.

Mr. Nicodemus: You are making the record, Mr. Examiner.

Examiner Wilkinson: Mr. Homire, if you want that document in, I should think that you could get copies very easily and offer them physically. The Examiner would prefer that you do that.

Mr. Homire: I meant to make clear that we would procure copies and offer them. We do not have them here today. Then if any part of it is deemed irrelevant—and probably a good deal will be—we will be perfectly willing to have that taken out.

I want to ask further that the record show some facts with regard to the common stock of the Denver & Rio Grande Western Railroad Company. Certificates representing 150,000 shares of that stock were pledged to the Reconstruction Finance Corporation by the Denver & Rio Grande Western Company directly. That company is now in bankruptcy.

Mr. Nicodemus: The pledge was made by the railroad company.

(Testimony of M. J. Curry.)

Mr. Homire: The pledge was made by the holding company. [2197]

Mr. Nicodemus: No, the pledge was made by the company, I think.

Mr. Homire: I have the pledge right here. It was made by the holding company. I am ready to offer this pledge in evidence. The holding company pledged these certificates. Is that what you question?

Mr. Nicodemus: No. I am just trying to ascertain what was done. My impression was that the holding company loaned the collateral to the railroad company and that the railroad company pledged it, but it may have been done directly.

Mr. Homire: I will offer in evidence a photostatic copy of the resolution of the Western Pacific Railroad Corporation authorizing the pledge of these certificates, together with a photostatic copy of the assignment by that corporation to the Reconstruction Finance Corporation. I have copies of it here.

Mr. Nicodemus: That is all right.

Mr. Homire: I think if the record does not show it we would like to have it stipulated that that stock represents one-half of the voting stock of the Denver & Rio Grande Western.

Examiner Wilkinson: You want to introduce it into the record?

Mr. Homire: Yes. [2198]

Mr. Swaine: No objection. I want this statement corrected.

Mr. Nicodemus: He has not finished it.

Mr. Homire: The total outstanding stock of the Denver & Rio Grande Western common stock, which is the voting stock, is 300 shares, and what is pledged with the Reconstruction Finance Corporation is one-half the total outstanding stock.

Mr. Nicodemus: A further correction:

The voting stock certificates are pledged, and not the stock. Is not that correct?

Mr. Homire: What you say is correct. This assignment shows exactly what is pledged. They are called stock trust certificates.

Examiner Wilkinson: The document which was just referred to is received as Exhibit 75.

(Exhibit No. 75, Witness Buckley, received in evidence.)

Mr. Homire: I also would like the record to show that the voting trust agreement under which that stock is held expired by its terms on the 31st of December, 1934, and that the District Court has held that the efforts to renew it were ineffectual, and that an appeal is now pending from that decree and that appeal is undetermined.

Mr. Nicodemus: And the case is in the United States Circuit Court of Appeals for the Eighth Circuit. [2199]

Mr. Homire: I also would like to have the same privilege that the Commission has allowed us as to the valuation of the Western Pacific applied to the valuation of the Denver & Rio Grande Western, 26

(Testimony of M. J. Curry.)

Valuation Report 733. We will obtain copies of that and produce it.

Mr. Nicodemus: I am somewhat alarmed by these valuation reports.

Examiner Wilkinson: Do you want to put in the valuation of the Denver & Rio Grande Western in this case?

Mr. Swaine: Oh, it has no relevancy at all.

Examiner Wilkinson: What is your basis for that, Mr. Homire?

Mr. Homire: It is part of the Reconstruction Finance Corporation's collateral.

Mr. Swaine: We do not purport to disturb the Reconstruction Finance Corporation's collateral except as an added claim against the Western Pacific.

Mr. Nicodemus: Mr. Homire's position is that there is a substantial equity in the stock of the Denver & Rio Grand Western. He wants to prove that by the valuation records.

Mr. Homire: I think Mr. Nicodemus is going a little far in stating what our position it, but we would like to have this valuation in to show whatever we think is relevant as to the value of the Denver & Rio Grande Western [2200] stock.

Mr. Swaine: I object to that.

Examiner Wilkinson: I right offhand fail to see where the rate-making value of the Denver & Rio Grande Western has anything to do with the Western Pacific, and particularly with this reorganization. And it is quite a bulky document.

(Testimony of M. J. Curry.)

Mr. Nicodemus: I think in each case if the valuation is put in it should be the figures and not the Valuation Reports.

Examiner Wilkinson: I think unless there are certain facts in these Valuation Reports outside of the final value figure or certain ultimate value figures it would be better if you could stipulate and agree as to what those figures are, rather than put the report itself in.

As far as putting in the Valuation of the Denver & Rio Grande Western, the Examiner is going to deny that request.

Mr. Homire: We will ask, then, that we be permitted to put in the final valuation figures on the property.

Examiner Wilkinson: Of the Denver & Rio Grande Western?

Mr. Homire: Yes, in lieu of the Valuation Reports.

Examiner Wilkinson: Is there any objection to this final figure?

Mr. Swaine: I object to its as.irrelevant and immateri- [2201] al. The plan does not purport to do anything to the Reconstruction Finance Corporation's interest in the Denver, it only purports to adjust its interest in the Western Pacific. This Denver stock is not owned by the Debtor, never came into the possession of the Debtor and has nothing at all to do with the interest of the Reconstruction Finance Corporation in the Western Pa-

(Testimony of M. J. Curry.)

cific, except it is a separate thing for them to adjust in the reorganization proceeding.

Examiner Wilkinson: The Examiner is going to deny the request that the Denver & Rio Grande Western final value figure be put in this record.

Mr. Homire: We will note an exception, please.

I wanted to check just one or two of these docket numbers with Mr. Wood that he was talking about this morning, but if there is to be another hearing I can check up on those docket numbers and report at the next hearing if there is any correction to be made.

Examiner Wilkinson: Are there any questions of Mr. Buckley?

Mr. Coulson: I would like to reserve a right to cross examine the witness after an examination of the voluminous data presented through him, if such need of cross examination should develop, but I would like in a preliminary way at this time to ask him just one or two questions just to [2202] complete the record.

Examiner Wilkinson: Very well.

Mr. Coulson: Mr. Buckley, was the Chase National Bank of the City of New York trustee from and after January 1, 1932, of the General and Refunding Mortgage executed by the Western Pacific Railroad Company to the Chase National Bank of the City of New York as of the date January 1, 1932?

Mr. Swaine: Would it not be well there to begin by giving the date of delivery of the mortgage?

(Testimony of M. J. Curry.)

The Witness: You have so many dates there that I am not sure I follow that.

Mr. Coulson: I can give the date of execution. I do not know that I can give the date of delivery, but the mortgage apparently is executed as of the 29th day of February, 1932, executed on that day, and presumably delivered about that date.

Mr. Wood: That is not necessarily the date on which it was delivered.

Mr. Coulson: No, but I just wanted to have the record show whether the Chase is trustee under that mortgage and has been since its execution and delivery. That is my question.

The Witness: Yes, we were trustee under the General and Refunding Mortgage of the Western Pacific Railroad Company, [2203] but I have not in my mind the dates involved.

Mr. Coulson: Let me ask you also, Mr. Buckley, whether the Chase was from and after execution and delivery of the indenture dated as of July 1, 1930, between the Western Pacific Railroad Company and the Chase National Bank of the City of New York as trustee, the trustee under that indenture, that being the indenture which secures the 5 per cent gold debentures as to which you testified this morning.

Mr. Swaine: Oh, I object to the form of that question because it shows on its face that they were not secured. You should state the one under which they were issued.

(Testimony of M. J. Curry.)

Mr. Coulson: Under that indenture. I will always accept Mr. Swaine's corrections as to the form of my questions, and I accept that correction.

The Witness: We were trustee under that indenture.

Mr. Coulson: Are you not still trustee under that indenture?

The Witness: My recollection is that all of the bonds authenticated and delivered under that indenture, which in the aggregate were the amount authorized, five million dollars, were cancelled of record on the trustee's records.

Mr. Wood: That will show in those files which we have just had Mr. Buckley identify.

Mr. Coulson: Will you be prepared to make sure that the [2204] record shows wherein your responsibility ceased? Am I correct in understanding that the Chase National Bank of the City of New York is still acting as trustee under the General and Refunding mortgage dated as of January 1, 1932, but is in the process of withdrawing as trustee?

The Witness: I have no direct knowledge of that. I have been busy on other things. I have heard that this morning, but of my own knowledge I do not know. I can ascertain, of course.

Mr. Coulson: Can you tell us whether in the handling of these various trust matters in your department there is any administrative distinction or distinction as to the administative handling of matters arising under this first mortgage in which Mr. Cooper, a vice president of the Chase, was act-

(Testimony of M. J. Curry.)

ing as individual trustee, and these other documents under which the Chase was directly and as a corporation acting as corporate trustee?

Mr. Wood: Mr. Coulson, I think that question is a little bit ambiguous. Just what do you mean by "distinction"?

Mr. Coulson: I will ask him whether there was any distinction in the handling of these various trust matters in his department as between these three indentures as to which he has given testimony this morning.

The Witness: As to the first mortgage trust we were [2205] acting as agent under instructions from the trustees, the corporate trustee and the individual trustee. Of course, under the other two which you mentioned, the Refunding and General and the indenture of July 1, we were acting directly as trustee.

Mr. Coulson: Did that technical difference as between the acting directly and acting as agent for the California corporate trustee and the individual trustee make any difference in the method of handling the matters in your Corporate Trust Department, that is all I want to bring out. The records are kept in the same department of the Chase, are they?

The Witness: That is true, yes, sir.

Mr. Coulson: That is all I want to know.

I would like to reserve, however, the right to cross examine the witness as to some of these exhibits put in this morning if it should be deemed

(Testimony of M. J. Curry.)

necessary to supplement them by other documents in the possession of the trustee in its various capacities, or if it should be necessary to examine the witness further as a further basis for a motion to strike out any of these data.

Examiner Wilkinson: Are there any further questions at this time of Mr. Buckley?

Mr. Homire: We would like to make the same reservation as to further cross examination of the witness. [2206]

Examiner Wilkinson: You are excused subject to being recalled, Mr. Buckley.

(Witness temporarily excused.)

Mr. Wood, that completes your presentation this afternoon?

Mr. Wood: That completes our presentation this afternoon.

Examiner Wilkinson: Mr. Swaine, do you have anything further?

Mr. Swaine: Nothing further.

Examiner Wilkinson: Mr. Homire?

Mr. Homire: Nothing.

Examiner Wilkinson: Mr. Nicodemus?

Mr. Nicodemus: Nothing further.

Examiner Wilkinson: Mr. Coulson, do you have anything?

Mr. Coulson: If the Commission please, at the last hearing I asked for an adjournment to consider the

question as to whether a further plan would be submitted to the Commission on behalf of A. C. James Company, a secured creditor. I think perhaps I ought to say briefly on the record the factors that have led us to prepare and to submit today such a plan, in order that there may be no misconceptions or misapprehensions drawn from our submission of such a plan.

In the first place, the A. C. James Company is a [2207] secured creditor, classified as a separate class by the California court; in other words, holding 100 per cent of one class, so far as that tentative classification continues. If the court in California should modify its tentative classification and group all the secured creditors, the so-called junior creditors, in one class, the A. C. James Company would still have in excess of 10 per cent of that class, and of course it has in excess of 5 per cent of the total debt, so would be a creditor of the type who might originally have filed a petition under Section 77 if it had so desired.

There are already two plans before the Commission. There I think I ought to state briefly the justification for adding to the problems of the Commission by filing a third plan.

The first plan was filed as the plan of the Debtor company. There seems to be some doubt as to its paternity. Mr. Nicodemus has told us that it was prepared by Mr. Swaine's Committee of Institutional Bondholders, and presented by the company, while Mr. Swaine said he had merely remote control at best as to that plan.

When it was introduced, on behalf of A. C. James Company I expressed our approval of the general principle of the plan, which was in the case of this railroad company to maintain debt as debt, to protect the property [2208] from future difficulties in the case of a recurring depression of the type we have just been through, of transferring to contingent interest all of the fixed charges necessary, and to protect the property from similar embarrassments in the future.

That I think is a proper principle in the case of the Western Pacific if it is anywhere, because, as has been pointed out to the Commission, the property valuation here is something like $145,000,000 and the total debt is, roughly, $63,000,000, or less than 45 per cent of the property valuation.

I did object at the time we intervened as a creditor to certain phases of the company's plan which, while incidental, seemed to me quite important. It was at that time my intention to rely on pointing out to the Commission these incidental features of the company plan which seemed to me inconsistent with the public interest and with the interest of the property in the various creditors and security holders of the property, relying on the Commission's exercising its function of modifying the plan to the extent that might be necessary.

Since that time a second plan has been put in, on behalf of the Institutional Bondholders' Committee, which carries forward the features of the Debtor company plan to which I expressed objection on our

petition of inter- [2209] vention. Those objections I will not repeat here, if your Honor please, I think it had better be taken care of by brief, anyway.

But it also has what seems to us a further objection, of abandoning the principle on which the original plan of the Debtor company was framed and filed.

In view of the decision of the Commission to accept this plan that was presented to it by the Institutional Bondholders' Committee, I feel forced to present a plan and propose to present a plan today. I am the more willing to do that because it seems to me that in addition to the objections I have already expressed in our petition of intervention to the original Debtor company plan, both of these plans are open to a basic objection, or I might say to several basic objections, but one that I did not mention in the petition of intervention that they are not realistic in the sense of recognizing the problem that we all face in these railroad reorganizations under the Federal Revenue Act of 1936.

While we have in our tax laws a provision which puts an almost prohibitive tax on undistributed corporate surpluses and while that tax is applicable to railroad properties, I do not think any of us can soundly rely on financing future capital needs through a compulsory segregation of current income. The tax cost is far too high for the good of the [2210] property.

So in the plan which I propose to submit, I have, I may say, provided mechanics as best I could for

future senior and junior financing of capital needs.

That involves, of course, the creation of a new first mortgage in which the present mortgage bondholders do not participate as a channel of future senior financing. I have also made provision in another respect for a matter not covered by our petition of intervention; that is, I have endeavored in framing this plan to set up a reorganization committee or to provide machinery for setting up a reorganization committee which will be representative of all the security holders and creditors of the property rather than of the Institutional Bondholders only, because I think I have expressed here the view previously that I doubt whether the insurance company bondholders are representative of all the first mortgage bondholders, and that no plan of reorganization should be adopted—and I may say the two prior plans both contemplate that—under which the committee which is acting and has acted for the Institutional Bondholders should act as a reorganization committee for the property.

I do not intend any of this by way of argument, but I want to make two definite further qualifications in the light of which I am presenting the proposed plan. [2211]

In this plan I have placed the so-called junior creditors, namely, the Railroad Credit Corporation, the Reconstruction Finance Corporation, and the A. C. James Company, all of which creditors hold notes of the railroad company secured by General and Refunding Mortgage bonds, in a category

whereby I propose to give them obligations which are inferior to the obligations given the first mortgage bondholders as to the entire system. I do not want that taken, however, as a concession that Mr. Swaine is correct in the recitals to his plan submitted at the last session, that the first mortgage bondholders have a superior lien on all elements of property of the system, because I do not think it is accurate. I am afraid that my suggestion to Mr. Swaine that we could not at least accept his sweeping claims has been responsible for some of this testimony this morning. On the other hand, I do think it proper and just, and have so included it in the plan, that these first mortgage bondholders, who have an undoubted first lien as to the property conveyed to the trustee when that mortgage was executed, who make certain concessions as to interest, both the interest rate and unearned and undistributed interest, should have their sacrifice recognized by the other secured creditors taking an inferior position, and I have so provided. But I do not intend it as a concession that that is their pres- [2212] ent position, and reserve the right to contend that it is not.

I might here interject and say that of course this plan is submitted wholly on behalf of the A. C. James Company. It is not joint in any respect, nor is it the result of suggestions made by either the Reconstruction Finance Corporation or the Railroad Credit Corporation.

I want to make one further statement, and that is that the plan which I propose to tender, while it is tendered by the A. C. James Company, which is designated as a junior creditor—accepting the characterization we have used in these proceedings, but with the qualifications that we have been laboring over today—while I am presenting it as a junior creditor, I do not want the Commission to understand or the parties to understand that it is framed solely with the desire to protect the position of the A. C. James Company as a so-called junior creditor. It is intended to represent what I feel is a realistic approach to this problem today, in the interest of all the creditors and all the security holders, taking into account the factual situation which we face now and recognizing some of these problems which arise out of the tax laws and other features.

And I want to say that because I do represent clients who hold upwards of $6,500,000 of first mortgage [2213] bonds on the Western Pacific Railroad Company property, in part owned outright, but for the most part as collateral to debts, which debts, however, are in all cases in default, and where the face of the debts is far in excess of the value of the collateral, so for our present purposes they are in the same position as if they were owned outright.

I say that as to those first mortgage bonds, not only is this plan not tendered in derogation of their rights, but as to those creditors they would be quite willing to accept this plan as first mortgage bondholders.

I present this proposed plan of reorganization on behalf of A. C. James Company under date of October 26, 1936.

Examiner Wilkinson: This plan of reorganization for the Western Pacific Railroad Company, proposed by A. C. James Company, will be received as Exhibit 76.

(Exhibit No. 76, by counsel, received in evidence.)

[Printer's Note: Exhibit 76 is here omitted as same is identical with "Plan of Reorganization for the Western Pacific Railroad Company proposed by A. C. James Co., a junior creditor" set out at page 101 of this printed record.]

Mr. Coulson: I think the Examiner made some suggestion in connection with the other plan that it also be filed in the office of the Commission. Is that correct?

Examiner Wilkinson: I believe so. We ought to follow the same procedure.

Mr. Swaine: May I ask Mr. Coulson a question or two? I assume he is presenting the plan. [2214]

Mr. Coulson: Yes. I have no witnesses.

Mr. Swaine: Mr. Coulson, Mr. A. C. James bears what relation to the A. C. James Company?

Mr. Coulson: He is the principal stockholder and is president of the A. C. James Company.

Mr. Swaine: What proportion of the stock of the Western Pacific Corporation is owned either by Mr. A. C. James or by corporations in which Mr. A. C. James is interested?

Mr. Coulson: I think that is already of record in this proceeding, but I will be glad to furnish the details precisely. You mean as to the holding company?

Mr. Swaine: No. What proportion of the holding company stock is owned either by Mr. James as an individual or by corporations in which Mr. A. C. James is the controlling stockholder?

Mr. Coulson: I will be glad to furnish the details in a statement which can be put on the record, as to those stocks. I think it is already in the record.

Mr. Swaine: It is a very substantial amount, is it not?

Mr. Coulson: Very substantial.

Mr. Swaine: Is it control of the Western Pacific Corporation?

Mr. Coulson: I do not know how you would define control in that situation. [2215]

Mr. Swaine: Is it a majority of the stock?

Mr. Coulson: No.

Mr. Nicodemus: There is nothing in the record about it at the present time.

Mr. Coulson: I think that in proving our claim for this junior creditor in the California court we stated that fact in our proof of claim. If we did not, I will see that it is put in the record here. There is no secret about it. It has all been of record a number of times.

Mr. Nicodemus: But it is not in the Interstate Commerce Commission record.

Mr. Coulson: I will be glad to furnish it.

Mr. Swaine: This plan, as Mr. Coulson has indicated, varies from the other two plans as to the posi-

tion of the new money. The Debtor's plan has the ten million dollars of new money provided alongside of 15 million dollars additional bonds under the same mortgage given to the existing first mortgage bondholders. The Institutional Bondholders' Committee plan provided for ten million dollars of bonds for new money alongside of ten million dollars of bonds to go to the existing first mortgage bondholders.

Mr. Coulson's plan, however, provides new money upon ten million dollars of bonds which are the sole issue under the new first mortgage.

I would like to ask Mr. Coulson if he proposes to [2216] introduce any testimony or make any statement as to the necessity for giving those bonds that lien in order to raise the money, and I call the Examiner's attention to the fact that I made the statement that the Institutional Bondholders that I represent are prepared in the present market to take those bonds of the character contemplated by the Institutional Bondholders' Committee. I believe that if the market conditions remain at all as they are at the present time those bonds can be sold, can be underwritten commercially. But I wonder if Mr. Coulson is to produce any evidence to show that a better bond is necessary in order to raise the money.

Mr. Coulson: I think I can answer Mr. Swaine's question without producing a witness, because I do not think any witness can testify usefully as to the matter.

I tried to point out in presenting this plan that I thought we all, if we were going to approach this reorganization question realistically now and in the light of the existent situation must provide a plan which will, and the Commission before it certifies a plan as being in the public interest must, take into account the fact that any railroad property may and probably will have future capital needs, and that they must be provided for. I do not think that any statement of Mr. Swaine's on the record or any statement of any witness who is familiar with [2217] the movements in the money market would remove the practical situation we face, that you must provide in any plan of reorganization just as soundly as you can a vehicle for senior financing, which, in the light of changes in the money market, adverse changes, will constitute the most marketable security you can have.

Any dilution of that by existing debt which is frozen in the property seems to me quite inconsistent with this new problem we face of providing for all future capital needs by the issue of securities rather than by the aggregation of current income.

I hold the hope as a lawyer that the Commission may throw its weight in Congress in favor of removing the railroads from the application of the undistributed corporate surplus tax. I have no hope that the principle of the undistributed corporate surplus tax is coming out of our law as to other corporations.

Have I answered your question, Mr. Swaine?

Mr. Swaine: Yes. As I understand it, you base that provision not on any idea that it is necessary in respect to the present situation of the new money, but solely upon the idea that it is necessary to make your first mortgage adequate as a vehicle for future financing, if I understand your position. I only asked you whether you were going to introduce evidence, in order to determine [2218] whether that was your position. I will answer it in the brief.

Mr. Coulson: I am not going to introduce evidence, aside from your translation of my long statement. I am not going to introduce evidence on it, I think.

Examiner Wilkinson: As I understand, Mr. Coulson, you stand upon this record here as giving evidence which will justify and support the plan you propose?

Mr. Coulson: Yes. That is subject to the qualification that it is pretty hard to stand on the record, because none of us knows what is in it at the present date. But I stand upon it, subject to a review of the splendid information that has been poured out.

Examiner Wilkinson: Are there any further questions of Mr. Coulson?

Mr. Nicodemus: Not on behalf of the Debtor.

Mr. Homire: None for the Reconstruction Finance Corporation.

(Discussion off the record.)

Examiner Wilkinson: In view of the discussion off the record, the Chase National Bank will not have to produce tomorrow the documents which they promised to produce tomorrow, but will produce them on or before November 5.

This hearing is adjourned to November 5.

Mr. Wood: That also applies to the documents which the [2219] railroad company was to produce?

Examiner Wilkinson: Yes.

Mr. Nicodemus: As soon as copies are available they will be distributed, if in advance of November 5.

Examiner Wilkinson: Exactly.

We have put in the record here today exhibits beginning with Exhibit 45 and going to Exhibit 75. Of those exhibits there is only one copy, and that has gone into the record. The Examiner must have at least two copies of each one of those exhibits, and counsel are also entitled to a copy of those exhibits. The parties who are to furnish these exhibits will supply counsel with copies accordingly.

Mr. Swaine: Mr. Examiner, there is one other question:

At the last hearing when the matter of briefs was under discussion it was stated by Mr. Boyden—I do not remember whether it was on the record or afterwards—that only one brief would be permitted to each party. It seems to me that if that rule is to be adhered to the Examiner ought today to notify the only two interests that have not yet filed plans, namely, the Reconstruction Finance Corporation and the Railroad Credit Corporation, that they should at the hearing to be held next Thursday state what modifications they desire to be made in any or all of these plans, or put in their own plan. [2220]

I make that statement for this reason:

If suggestions of modifications as to the plan of the Institutional Bondholders Committee are made by the Reconstruction Finance Corporation and appear for the first time in the Reconstruction Finance Corporation's brief which is filed at the same time that the Committee's brief is filed, we will have absolutely no opportunity to answer those modifications. The presentation of those modifications will be entirely ex parte, and the briefs of the two parties in interest might go sliding right by each other without coming head-on.

Therefore, it seems to me that one of two things should be done, and I do not care which, the only purpose being to have both sides of all arguments presented:

Either all suggested modifications should be made at next Thursday's hearing and the Commission adhere to its rule that there is only one brief, or all parties should have opportunity to file a reply brief at some short interval after all the main briefs are exchanged. Thus both sides of any question that is first raised in the direct brief can be elucidated to the Commission.

Mr. Coulson: There is another suggestion that might be possible, Mr. Swaine, that is perhaps not practicable under Commission procedure. I suggest it only subject to that possible impracticability.

[2221]

Mr. Swaine's suggestion would meet the suggestions of modification that would originate with the various parties to the proceeding, but I have always read Section 77 as imposing a considerable duty of

initiative on the Commission; and Mr. Swaine will have no chance under this procedure to meet the modifications that the Commission might initiate.

If it were feasible for the Commission in making its findings and suggested plan of modification to let the parties consider the tentative findings and modifications—as is done many times under many judicial and administrative forum procedures—and then brief them if necessary, that would be far better than Mr. Swaine's suggestion.

Mr. Swaine: I understand that the Commission is receiving briefs to determine what plan it will suggest, and my purpose is that the Commission before it makes up its mind as to what plan it will suggest shall have the benefit of all the views of the parties on all possible suggestions, and not have them merely ex parte.

Examiner Wilkinson: The Examiner might say here that under the Commission's practice in Finance cases or in a docket such as this all briefs are filed at one and the same time, and the practice does not provide for reply briefs. [2222]

However, as to the Examiner's suggesting that the Reconstruction Finance Corporation or the Railroad Credit Corporation file plans or suggestions of a plan, the Examiner does not feel as if that is any of his business. Of course, the Commission would be very glad to receive and hopes that all the parties to this proceeding will give it all the assistance they can. If they have any statements to make, the Commission would be very glad to receive them.

Mr. Swaine: Mr. Examiner, my point is this, and it is perhaps a little technical under the Act:

The Act states that any party can suggest a modification at a hearing.

Examiner Wilkinson: Absolutely.

Mr. Swaine: If a modification is suggested at a hearing, namely, the next hearing, all the parties can brief that modification.

Examiner Wilkinson: Certainly.

Mr. Swaine: If, however, the first suggestion of the modification of any one of these plans is made in Mr. Willard's brief, in the first place, that is not a modification at a hearing suggested at a hearing, and in the second place, under the Commission's rules nobody else will have an opportunity to discuss that modification, so the Commission would not have the benefit of any discussion by the other parties. [2223]

All I suggest is that the Commission should do one of two things: Either be technical about the Act and require the modifications to be proposed at a hearing, as the Act says, which I shall not urge on it at all, or else not be technical about its own rules and permit any modifications which are suggested in the main briefs to be discussed in briefs to be filed, let us say ten days or two weeks after the date the main briefs are required.

Mr. Coulson: It seems to me Mr. Swaine is being unduly legalistic about this thing. I do not see why any of us cannot appeal to the wisdom of the Commission to make changes in any plans if the Com-

mission should adopt some other plan. Why can we not say in a brief that we think that if the Commission does not adopt this plan we favor, or if it adopts the other plan, it should be done with modifications? I will say frankly that if the Commission made the modifications in the Debtor company plan which I think should be made in the interest of the public and in the interest of a present-day application of rules of logic, I would be quite content with the company plan. Why can I not say that?

Mr. Swaine: I want you to say it. That is just the point I am arguing, that you shall be allowed to do it. But when you have suggested your modifications, I want a chance to answer them if they are modifications that I [2224] hear for the first time in respect to the committee plan, or if they are modifications that I hear for the first time in respect of the company plan. Because, I point out, unless that is done the party who proposes the plan will have no opportunity at all to discuss modifications which are suggested, and certainly the Commission wants the benefit of comment on modifications. A modification may be just as vital as an original plan, and it ought to be briefed just as thoroughly as the original plan.

Mr. Coulson: It seems to me Section 77 had that in mind when it put in the provision for coming back to the Commission after the Commission released the plan, with a motion for reconsideration and rehearing.

Mr. Nicodemus: It allows 60 days for that purpose.

Mr. Coulson: Yes, it allows 60 days for that purpose. I think we are being a little too technical in this proceeding, myself.

Mr. Swaine: I would like to state now that if any modification is proposed to any of the plans in any of the main briefs which have not been suggested up to date, I would like leave to file a short brief discussing the modification so that the Commission will have the benefit of the Institutional Bondholders' Committee's views on any modifications that are suggested up to that time.

Examiner Wilkinson: Of course, the Examiner cannot very [2225] well rule specifically on a request such as that.

Mr. Swaine: I understand you cannot.

Examiner Wilkinson: I can repeat that if there are any parties to this proceeding who from a study of the evidence and the record desire to suggest modifications of any one of the three plans, before the record is closed is the time to suggest them. That is all the Examiner can say.

Mr. Willard: That does not mean that we would be foreclosed from suggesting them in a brief?

Examiner Wilkinson: I am not attempting to pass at all upon what is going to happen hereafter. I am merely talking about this record here.

Mr. Willard: I do not think you can regiment the briefs of opposing counsel.

Mr. Swaine: I do not want to regiment the briefs, I merely want a right to answer new material that has not been brought up before.

Examiner Wilkinson: Mr. Swaine's request will be presented to the Division or the Commission in the event briefs are filed subsequently which do propose modification of the plans. That is all the Examiner can say.

Mr. Swaine: That is all I can ask. I think it would be helpful if the other parties could suggest their modifications now. Then we would get to grips with the problem [2226] instead of dealing in a lot of generalities.

Examiner Wilkinson: The hearing is adjourned until November 5.

(Whereupon, at 3:30 o'clock p.m., an adjournment was taken until 10 o'clock a.m., Thursday, November 5, 1936.) [2227]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

WESTERN PACIFIC RAILROAD)
COMPANY REORGANIZATION.)

Ante Room A, I. C. C. Building,
Thursday, November 19, 1936.

Hearing in the foregoing matter was resumed at 10 o'clock, a.m., pursuant to adjournment.

Before:

Examiner Harvey H. Wilkinson.

Appearances:

The same as heretofore noted.

Additional Appearances:

H. C. McCollom, and Orrin G. Judd, 1 Wall Street, New York, N. Y., appearing for Irving Trust Company, as Successor Trustee under General Refunding Mortgage of Western Pacific Railroad Company. [2229]

PROCEEDINGS

Examiner Wilkinson: Are you ready to proceed, gentlemen?

Mr. Nicodemus: Mr. Examiner, since the last hearing the Irving Trust Company has been substituted in the place of the Chase National Bank of the City of New York as Trustee under the Western Pacific Railroad Company General and Refund-

ing Mortgage dated as of January 1, 1932.

I should like to offer in evidence the instrument of appointment executed by the railroad company pursuant to the terms of the General and Refunding Mortgage, and the instrument executed by the Irving Trust Company accepting the trust. These documents have been circulated among counsel, with possibly one or two exceptions which we can take care of now.

I offer the copies of the originals.

Examiner Wilkinson: Are there two separate documents?

Mr. Nicodemus: There are two separate documents, which may go in as one exhibit or two exhibits, according to the desire of the Examiner.

Examiner Wilkinson: As long as they pertain to the same thing, one exhibit number, I think, will be sufficient.

Mr. Nicodemus: All right. [223]

Examiner Wilkinson: They will be received as Exhibit No. 77.

(Exhibit No. 77, By Counsel, received in evidence).

Mr. Nicodemus: I understand that counsel representing the Irving Trust Company are present, and perhaps they would like at this juncture to enter an appearance.

Examiner Wilkinson: They should.

Mr. McCollom: H. C. McCollom and Orrin G. Judd, appearing for Irving Trust Company, as

Trustee under the General and Refunding Mortgage.

I shall like to present at this time the petition of Irving Trust Company as Trustee for intervention.

Examiner Wilkinson: This is a petition for general intervention?

Mr. McCollom: Yes.

Examiner Wilkinson: Do any of the parties have anything to say in regard to this petition?

Mr. Nicodemus: The Debtor interposes no objection to the intervention.

Mr. Swaine: The Institutional First Mortgage Bondholders Committee has no objection to the intervention.

Examiner Wilkinson: The petition will be granted.

Mr. McCollom: Copies are being distributed among counsel here, and the proper number will be filed with the Commission. [2232]

(The petition of the Irving Trust Company for leave to intervene was received and granted.)

(Discussion off the record.)

Mr. McCollom: The Examiner will note that the appointment contains as a last page the acknowledgment of the receipt thereof by the Irving, and that the acceptance of the appointment by Irving contains as a last page acknowledgment of the receipt thereof by the railroad company, just completing the substitution. In other words, the appointment has to be delivered to the railroad company under the terms of the mortgage.

Mr. Nicodemus: At the last hearing it was understood that from time to time during the pendency of this proceeding we would furnish operating results by months. Since the last hearing we have received the accounts for the month of September. Two copies have been furnished to the Commission, and copies have been circulated among counsel. I would like to offer that statement in evidence.

Examiner Wilkinson: That will be received as Exhibit 78.

(Exhibit No. 78, by Counsel, received in evidence.)

Mr. Nicodemus: Examiner Boyden requested the debtor to prepare and file as an exhibit a corporate history of the debtor. Such a history is now in the course of [2233] preparation, but due to the precedence required by this large order of Exhibits, we have been unable to complete that. We expect to have it available for filing within two weeks. If the hearing is adjourned before that date I ask leave to file it as a supplementary exhibit.

Examiner Wilkinson: There will be no objection to that, I assume.

Mr. Nicodemus: I am going to say for the information of counsel that it is a statement somewhat similar to the corporate history, and its preface is the valuation report. It simply states the origin of the company and its subsidiaries, and traces them through to date.

It is something designed to be helpful to everybody.

The Debtor's case was closed at the last hearing. We close it again.

Examiner Wilkinson: You have nothing further at this time.

Mr. Wood: Mr. Examiner, at the last hearing with Mr. Curry and Mr. Buckley on the stand, a number of exhibits were produced which were not offered in evidence at that time because no copies were available. We expect to offer those exhibits in evidence this morning.

There were also a number of exhibits that were actually offered in evidence, but as to which the number of copies required was not available. We now have copies here [2234] for the Commission, and I think the parties have received all but a few.

I will call Mr. Curry.

Examiner Wilkinson: Have copies of the exhibits which were received at the last hearing been circulated to counsel?

Mr. Wood: With the exception of the few orders of the Interstate Commerce Commission, I think all have been circulated, and I have copies here to supply those which have not been.

Examiner Wilkinson: Suppose we take up during the recess the distribution of the copies which have already been received in evidence, rather than distributing them at the present time, if it is your purpose right now to distribute those.

Mr. Nicodemus: There are only four or five.

Mr. Wood: I was particularly making a preliminary statement as to what I planned to do, and I was going to call Mr. Curry for the purpose of offering in evidence a number of documents which he produced at the last hearing, but which were not formally tendered.

Examiner Wilkinson: In connection with this line of testimony, the Examiner might admit that he was taken more or less by surprise at the last hearing that the question of this issue was going to be raised. He would [2235] like to have on the record now the position of the Trustee under the First Mortgage as to the relevancy of their claim in connection with this line of testimony. Would you mind making a statement, Mr. Wood?

Mr. Wood: Mr. Examiner, the first mortgage Trustee was informed that claims were being asserted or would be asserted by the General and Refunding Mortgage Bondholders. The exact nature of those claims was not known to us, except that we were told that a claim would be made to a lien, either prior to or pari passu with the first mortgage on the Northern California extension and the first mortgage Trustee's claim that the First Mortgage is a first lien on the entire northern California extension.

I believe that at the last hearing a question was raised as to the priority of the first mortgage on certain pledged securities, and I believe that testimony was offered as to what securities were pledged with the First Mortgage Trustees and what securi-

ties were pledged with the general and refunding mortgage Trustees.

Of course, we claim a first lien on all securities actually pledged under the First Mortgage.

Mr. Nicodemus: You mean actually deposited under the First Mortgage, or pledged?

Mr. Wood: Delivered and held by the Trustees under the [2236] First Mortgage.

Mr. Swaine: May I add something on behalf of the Institutional Committee?

The plan proposed by the Institutional Committee made the statement that all other classes of securities of the railroad company other than equipment obligations are entirely junior in lien to the first mortgage.

That plan is predicated upon that thesis, that the First Mortgage is a first lien upon everything. I made an oral statement that I found in respect to certain negligible stocks of subsidiaries that was in error and the record shows what those stocks are and also shows the value of those stocks.

The state of the record otherwise is this, that as to the granting clauses of the First Mortgage, as I understand they do not expressly describe the northern California extension. The granting clauses of the general and refunding mortgage do expressly describe the northern California extension. There is no supplemental indenture to the First Mortgage expressly describing the northern California extension. Therefore, this testimony is relevant to show how the northern California extension became sub-

ject to the lien of the First Mortgage. Our thesis is that the Interstate Commerce Commission must know the liens of the respective securities upon the [2237] property of the debtor before it can possibly determine whether a plan is fair or not.

Examiner Wilkinson: But in that connection, only as to whether a plan is fair and equitable, as to whether the different classes participate equitably in the plan, and not for the purpose, of course, of having the Commission as a matter of law adjudicate the rights between these mortgages.

Mr. Swaine: That is right. Section 77 requires that the plan shall, of course, be fair and equitable, "affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding participations of the various classes of creditors and stockholders."

In order to determine that question the Commission has to know whether a given mortgage is a first mortgage or a third mortgage.

Examiner Wilkinson: In these proceedings we are all more or less at a disadvantage. We do not have any pleadings and do not draw any particular issues or join any issues. But it occurred to the Examiner subsequent to the last hearing that so far as the record is concerned there is really nothing in the record to show [2238] that any other parties to this proceeding controvert the position that the First Mortgage is a prior lien on all the property,

other than by inference. I think Mr. Coulson stated that he did not agree with that. But so far as the record is concerned, he does not take any position here of contending that the bondholders under the first mortgage are not entitled to preferential treatment. I would think that if the other parties to the proceeding are contesting preferential treatment, they should so state here on the record.

Mr. Willard: The Railroad Credit Corporation has contested the position of the Institutional Bondholders as set out in their plan, to effect that, as urged here by Mr. Swaine, a first lien was claimed on all the property of the Western Pacific. We believe and we had reason to believe that there was some property that was subject to a first lien of the Refunding and General, and that if the First Mortgage had any claim at all on that property it was junior to the Refunding and General.

Mr. Swaine: What is that property, to be specific?

Mr. Willard: There are those stocks that you mentioned the other day. Now, we do not know. We have relied on the trustee of the general mortgage to develop that point. We have tried to be of some assistance, but there has been a shift of trustees recently without [2239] notice to us until after it was accomplished, and we have not been able to develop that point fully. It has not seemed to us that we had any obligation to point out specifically at this time what property was subject to the general mortgage as a first lien and on what

property that mortgage had merely a second lien.

Examiner Wilkinson: But it is the position of the Railroad Credit Corporation that the bondholders under the first mortgage are not entitled to preferential treatment in this plan, using the word "preferential" as we all understand?

Mr. Willard: As to all property.

Examiner Wilkinson: As to all property.

Mr. Willard: Of course, that goes to the point of determining the value of securities held under pledge by the Railroad Credit Corporation to secure its claim against the Western Pacific. That is all that is important; also, as Mr. Swaine has pointed out, in order to determine what our position is and should be under any plan of reorganization.

Examiner Wilkinson: Do you care to state here now that of the three plans which have been put in the record, all three, as I recall it, give preference to the First Mortgage bondholders—the Railroad Credit Corporation objects to that treatment?

[2240]

Mr. Willard: Yes, sir, certainly to the first two plans. Our objections are not so strong as to the plan submitted by Mr. Coulson at the last hearing. We think that plan is fairer, more practical than the other two, having that in mind.

Examiner Wilkinson: The Examiner is laboring here trying to get a reasonable basis for going along with this line of testimony, inasmuch as the Commission cannot adjudicate these rights. But as the Examiner sees it under the Act, if there is a contro-

versy and a question here as to the priority of these mortgages which does have a bearing on whether a plan is fair and equitable, inasmuch as the plans which have been submitted do give preference to the First Mortgage Bondholders, if the other parties to the proceeding object to that, then the Examiner sees that this evidence is relevant and material.

Mr. Willard: I think it will be necessary to develop the facts before we can tell precisely what claim should be made. We are not alone. We are not the only holders of general and refunding bonds. We are a minor holder; the mortgage trustee is represented by counsel.

Examiner Wilkinson: Perhaps counsel for the General and Refunding Mortgage would care to make a statement here as to the position of the Trustee under that mortgage. [2241]

Mr. McCollom: We take the position that it is perfectly plain that the first mortgage is not the prior lien on all property. I think, to make the situation a little clearer, the whole sentence should be read which Mr. Swaine started to read.

Since all other classes of securities of the railroad company other than the equipment obligations are entirely junior in lien to the first mortgage, obviously any stock so allotted to the present First Mortgage Bondholders, whether for principal or for accrued interest, should have rights as to both assets and income prior to those of the stock allotted to such other creditors and stockholders of the railroad company.

In other words, while I suppose no one would dispute that on the main, original line of the railroad, which is described in the mortgage, the First Mortgage has the prior lien, nevertheless there may well be other substantial items of property as to which the general mortgage is the prior lien. A plan which proposes that as to all securities proposed to be issued the first mortgage shall have priority is naturally objectionable, because it is based upon a premise which is plainly wrong.

As to the extent to which the general mortgage is prior, I do not think there is anyone at the present moment who can definie the property as to which the general mortgage [2242] is prior. That is the reason why at the conclusion of the hearing I am going to ask the Examiner for an adjournment of the hearing in order that we may consider the situation in respect of other property. It just so happens that at the present moment there have been pointed out two items of property in respect of which the General Mortgage is claimed to be prior.

I should hope that it might work out—although I am speaking entirely out of turn; I am a stranger here—that the plans might be adjusted, perhaps, as between reasonable people, without the necessity of encumbering this record later with a long batch of testimony with reference to comparative priority of mortgage liens.

Examiner Wilkinson: That is what the Examiner is trying to do at the present time, of course.

Mr. McCollom: It might well be that during the

adjournment which I am going to request that perhaps will come about, but in the meantime with a plan standing before this Commission based upon the assumption that the first mortgage is the prior lien upon all property, we can do nothing but dispute that to the best of our ability.

Mr. Swaine: May I state that we have conceded that with respect to stocks which were identified by Mr. Curry and as to which the record is clear, as to the earnings [2243] and companies concerned and the book values, the First Mortgage is not a first lien on those few stocks. We say that our statement in the Plan is substantially true anyway, that those things are of negligible importance.

The only item as to which there is any substance in dispute is the northern California extension, and that dispute arises by reason of the fact that the granting clauses of the First Mortgage did not specifically describe it because it was not in existence. Therefore, then, it seems to me that this testimony is relevant and really should have been introduced by the Debtor. In all of these proceedings that I have had anything to do with up to date the Debtor came and made proof of the liens of the various securities as the basis upon which its plan was founded and upon which the Commission should determine any plan. It seems to me that it was part of the Debtor's proof here to establish that notwithstanding the granting clauses did not describe this, nevertheless the Debtor had drawn down bonds for the purpose of building a line, and there-

fore the northern California line did pass under the first mortgage by reason of the specific provisions of the mortgage. The Debtor having failed to do that, the First Mortgage Bondholders Committee called on the Trustee to do it, and all we are trying to do is to establish that prima facie fact. [2244]

Examiner Wilkinson: As the Examiner sees it, the other parties to the proceeding have the right at any time during the proceedings to controvert any of the allegations in any of the plans; still, the institutional bondholders plan and the Debtor's plan have been in this record for many months, and it was not until recently that any question has been raised along this line. However, since the parties have stated that they do contest this, the Examiner will let the type of proof here go ahead. You may proceed.

Mr. McCollom: I should just like to say this, Mr. Examiner, that it is hardly appropriate for Mr. Swaine, representing the First Mortgage Bondholders, to say that the only question—perhaps he did not say that; perhaps he said that the only question that has been raised up to date is the question of the lien on the stock pledged with the General Mortgage trustee and the lien of the northern California extension. But I do not know at the moment, having been in this case only a few days, whether there may not be other very substantial items of property.

Examiner Wilkinson: That will be taken for granted. The statement of Mr. Swaine will not bind the general mortgage trustees.

Mr. Wood: Mr. Curry, will you please take the stand? [2245]

(Discussion off the record.)

M. J. CURRY

testified further as follows:

Direct Examination

Q. (By Mr. Wood) Mr. Curry, at the last hearing on page 343 of the record you were asked to produce an application to the Interstate Commerce Commission for authority to construct the northern California extension. That was dated February 8, 1929.

Do you have those documents in sufficient number so that we can distribute copies?

A. Application to the Reconstruction Finance Corporation for a loan?

Q. No, application to the Interstate Commerce Commission dated February 8, 1929. It is Finance Docket No. 7440.

A. Yes, I have such a document here.

Q. This is in Finance Docket No. 7440, in the matter of the application of the Western Pacific Railroad Company under paragraphs (18) to (21), inclusive, of Section 1 of the Interstate Commerce Act for a certificate of public convenience and

(Testimony of M. J. Curry.)

necessity for the construction and/or acquisition of a new line of railroad in the counties of Plumas, Lassen, and Modoc, California." A. Correct.

Mr. Wood: I will offer that in evidence, and ask [2246] leave to substitute a copy for the origina..

Do you have the necessary copies for the Commission, and you have already distributed copies to counsel, I understand.

The Witness: That is right, I have. I have the necessary copies for the Commission, and counsel have already been furnished with copies.

Examiner Wilkinson: The document referred to will be marked Exhibit No. 79.

(Exhibit No. 79, Witness Curry, received in evidence.)

Q. (By Mr. Wood) You were asked to produce a return to the questionnaire of the Interstate Commerce Commission, dated September 11, 1929, page 344 of the record.

Mr. Nicodemus: I want to object to the return to the questionnaire. I do not see how this bears on the lien of the mortgages. It is a large, voluminous document. It is not going to be helpful to anybody in the case.

Mr. Wood: It is part of the record showing the facts on which the claim to a lien rests.

Mr. Nicodemus: If you pick out the facts, winnow the wheat from the chaff, it will be all right. I do not think there is anything in there that you would want to offer as an independent fact. I object

(Testimony of M. J. Curry.)

on the ground it is irrelevant and immaterial, and voluminous.

Mr. Swaine: The part that we consider relevant is the [2247] statement as to how they intend to finance the building of the California extension.

Mr. Nicodemus: Do you mind having the witness read that into the record, and withdraw the exhibit?

Mr. Swayne: I have no objection to identifying the pages.

Mr. Nicodemus: This is like proving a word in the dictionary by offering the whole dictionary.

Mr. Swaine: It is question 29. It begins on page 22.

The Witness: "Question 29.

"The manner in which it is proposed to finance construction and equipment, and the kind and amount of securities to be issued, and the approximate terms of their sale; to what extent funds for financing are available, and which, if any, of such securities will be underwritten by industries to be served by the proposed line."

Mr. McCollom: Mr. Examiner, I must say that I join in the objection, for this reason, that this is a statement of what the railroad company proposes to do. It does not seem to me that it is of any materiality. It is a question of what happened rather than what was proposed to be done, it seems to me.

Examiner Wilkinson: It is true to a certain

(Testimony of M. J. Curry.)

extent, but you have to remember that this is not a court and we are not going to attempt to adjudicate this matter. This [2248] matter goes to the question of the fairness and equitableness of the plan. The Examiner sees that certain statements by the Debtor in these applications, while perhaps not competent or relevant or material in court, would be here. So you may proceed.

Likewise, if you can cut it short, we would appreciate that.

Mr. Coulson: Mr. Examiner, have you not stated the root of this thing, though, when you say that all you are interested in is the issue of whether the proposed plans are fair and equitable? I take it that the Commission is not going to try to decide in these 77 proceedings all the minute and detailed issues as to the relation of various lienors to spur lines and additions and equipment that might necessarily be decided by the court in a foreclosure proceeding. It is quite impossible.

I was as much surprised at the last hearing as the Examiner was to see an enormous mass of material brought before the Commission, solely because some of the creditors who were concededly junior creditors as to the main property of the road protested and said they would not accept the extreme claim that appeared in a plan filed with the Commission at the hearing immediately prior to the last hearing, that the first mortgage represented

(Testimony of M. J. Curry.)

a first lien on everything from the pencils on the [2249] president's desk down.

Mr. Swaine: Are you prepared to concede that it is a first lien on the northern California extension? If you are, ——

Mr. Coulson: May I finish, Mr. Swaine?

We said we would not concede that. It is absurd that it should be conceded, and I think there is a certain absurdity in a representative of a group of first mortgage bonds trying to prove that a first mortgage is a first lien on everything the railroad has, because it cannot be done and we all know it.

We raised the question, yes, and I think it was a proper question to raise, to say that we would not concede that extreme claim. But here we are piling an enormous mass of documents into a record which is necessarily a large record, when all you need to know is that there is some doubt about whether all the property of the Western Pacific is under the First Mortgage. Everybody admits it is a prior lien on the main line. If we are going to attempt to prove its relationship to every spur and every bit of equipment we will be here for two years.

As to Mr. Swaine's offering this testimony admitting that the after-acquired property clause of the First Mortgage comes into a question as to the northern [2250] California extension, I think if you inspected that, —— I think the record already shows it—as to the amount of First Mortgage

(Testimony of M. J. Curry.)

money that was spent on the northern California extension, and the amount of junior creditor money that was spent on the northern California extension, you have everything the Commission needs to decide whether the plans are fair and equitable.")

[2251]

I think this enormous mass of documents cluttering up the record is all wrong.

Mr. Swaine: I am rather surprised to hear Mr. Coulsen refer to the Northern California extension as a mere spur.

Mr. Coulsen: I am not referring to it that way.

Mr. Swaine: The testimony is, it is a very important piece of line. I will concede at once that if the first mortgage is not a lien upon the California extension, then the junior creditors are entitled to better treatment than any of these plans have given them, and I would expect some one of them to insist upon better treatment; and the Commission still has the power to bring down a plan.

So it seems to me that the Commission cannot properly function under Section 77 unless it has testimony showing how serious the dispute is.

It is our position that the dispute is purely frivolous. It is built up merely to create an assumed air of uncertainty, and we want to lay the ghost.

Exam. Wilkinson: As long as any parties to the proceeding take the position that the first mortgage bondholders are not entitled to preferential treatment along the lines as proposed in the plans,

(Testimony of M. J. Curry.)

I cannot see how we can fail to go ahead with this line of testimony, because the Northern California extension is a very important part of the Western Pacific property. [2252]

Q (By Mr. Wood). Mr. Curry, will you proceed with your reading of that?

A. "Answer 29."

Examiner Wilkinson: Just a moment. As I understand, now, what you are proposing to do is read a certain extract from this document which has been identified, rather than offer the document itself?

Mr. Wood: Exactly.

Mr. Nicodemus: Correct.

Examiner Wilkinson: Is there any objection to that?

(No response.)

Proceed.

The Witness: "Answer 29:

"It is proposed to finance the proposed construction as follows:

"(a) To the extent of fifty per cent of the cost of construction, but not exceeding $5,000,000, by the issuance and sale at par and accured interest of applicant's debenture bonds or notes maturing January 1, 1950, and bearing interest at the rate of 5 per cent per annum, payable semi-annually, redeemable in whole or in part at par at option of applicant upon any interest date on thirty days' notice. It is proposed to

(Testimony of M. J. Curry.)

sell said bonds or notes under the provisions of the Clayton Act. [2253]

"(b) As to the remainder of the cost of construction:

"It is proposed to finance the same from applicant's cash assets insofar as the same may be available for such use at the time of construction; and to the extent that funds in the treasury of applicant are not available therefor, by the issuance and sale of applicant's bonds under its first mortgage of date June 26, 1916, with a maturity date of March 1, 1946, in substantially the form of the existing bonds outstanding under said first mortgage.

"(c) As to financing the acquisition of necessary equipment:

"Insofar as additional equipment of applicant will be necessary by reason of the operation of the proposed line, it is proposed to finance the cost by the use of treasury funds to the extent such funds are available for that purpose at the time of the acquisition of the same, and to supplement the amount of funds so available insofar as may be necessary by equipment trust certificates and/or the issuance and sale of applicants' first mortgage 5 per cent bonds. It is not possible at this time to state the amount of securities so to be issued or [2254] the approximate terms of their sale.

"No securities to be issued will be underwrit-

(Testimony of M. J. Curry.)

sten by any industry or industries to be served by the proposed line."

Mr. Wood: At page 345 of the record and again at page 356, Mr. Curry, you were asked to produce a letter from A. C. James Company to the Western Pacific Railway Company dated May 14, 1929, and that was introduced as exhibit 45. Do you have the copies available for the Commission?

(Discussion off the record.)

Mr. Wood: Perhaps, Mr. Examiner, we could proceed and Mr. Curry can find those during the recess.

The Witness: Yes; I shall endeavor to find it. It must be here. I do not seem to be able to pick it up right away.

Mr. Wood: And No. 4 on my list, Mr. Curry, is the amended application to the Commission for authority to construct the Northern California extension, dated August 8, 1929. That is referred to on page 356 of the record.

For the purpose of shortening the record on this exhibit, Mr. Examiner, I will ask Mr. Curry what change this application made in the proposed line, as distinguished from the one which was introduced as exhibit 79.

That shows on the map which is annexed to the exhibit. [2255]

The Witness: This is a joint application by the Great Northern, in the matter of application by the Great Northern and the Western Pacific——

(Testimony of M. J. Curry.)

Mr. Swaine: Can it not be stipulated by all counsel that the only relevant change made by this application from the application that is already in evidence is that the point of connection of the new line will be changed from Lookout to Bieber, and there was added to the line a line from Hambone to Siskiyou.

Mr. Nicodemus: We will make that stipulation if you will leave out the word "relevant."

Mr. Swaine: All right. In other words, it slightly changed the line. That is our only purpose in wanting it.

Examiner Wilkinson: Are the other parties willing to agree to that?

Mr. McCollom: I am in no position to agree to anything of that nature because I have not studied these documents, but I should think that Mr. Curry perhaps would know that to be the fact; or if Mr. Nicodemus knows it to be the fact, I am satisfied.

Mr. Nicodemus: I believe it to be the fact.

The Witness: I believe it to be the fact, so stated in this document here.

Mr. Wood: I originally had planned to bring it out by [2256] Mr. Curry's testimony, but I am perfectly willing to stipulate it.

Mr. Nicodemus: That is the correct way to develop the record, in my judgment; bring it out by the witnesses and not by the documents themselves.

Examiner Wilkinson: As the Examiner takes it, then, the parties are in agreement as to that statement?

(Testimony of M. J. Curry.)

Mr. Swaine: That is the fact, is it not, Mr. Curry?

The Witness: To the best of my belief, yes.

Mr. Swaine: You have a basis for that belief in having read the document?

The Witness: Yes. I am reading it now. Yes, I think that is a true statement.

Mr. Swaine: All right.

Mr. Wilkinson: Proceed.

Q. (By Mr. Wood). Mr. Curry, do you have exhibit No. 46? That is the letter from A. C. James Company, dated June 19, 1929. It is No. 5 on by list, referred to at page 358 and 360 of the record.

That is already in evidence. Will you supply the Commission with the necessary copies?

A. Very well.

(Producing copies.)

Q. Will you please produce the application to the Interstate Commerce Commission for authority to issue $5,000,000 [2257] principal amount of debentures? It was dated October 28, 1930, and was referred to on page 360 of the record. It is Finance Docket 8548.

A. I have this document in my hand. This is application of the Western Pacific Railroad Company for authority to issue securities, $5,000,000 of 5 per cent gold debentures, Finance Docket No. 8548, dated October 28, 1930.

Mr. Nicodemus: Can you select from this the part that you think is relevant? I call attention to

(Testimony of M. J. Curry.)

the fact that it has a number of exhibits which are already in the record in other connections.

Examiner Wilkinson: This exhibit is not in the record.

Mr. Nicodemus: I say, it has exhibits, for instance, the debenture mortgage, annexed to it. It is going in as an independent exhibit.

Mr. Wood: I am willing to eliminate that part of it.

Mr. Nicodemus: I want to see if we cannot eliminate 99 per cent.

Mr. Swaine: Cannot all the exhibits be eliminated? Is not the debenture indenture already in?

Mr. Wood: That is attached to it. The other exhibits consist of the balance sheet and exhibit VIII, which is the resolution of the executive committee, which I think are important.

Mr. Nicodemus: They are not in. I think you put in a [2258] series of executive committee resolutions.

Mr. Swaine: I think the only thing that can be omitted from this is exhibit VI and the balance sheet.

Mr. Wood: I offer this in evidence, with the exception of the two exhibits which Mr. Swaine has mentioned.

Examiner Wilkinson: The document will be received as exhibit No. 80.

(Exhibit 80, Witness Curry, received in evidence.)

(Testimony of M. J. Curry.)

Q (By Mr. Wood). Mr. Curry, will you please produce your affidavit dated March 2, 1931, and the documents which accompany it, relating to bids for the $5,000,000 principal amount of debentures? That is exhibit 48, so we will skip that for the moment. What I want is the application to the Interstate Commerce Commission for authority to issue $5,000,000 principal amount of first mortgage bonds, dated September 9, 1930, referred to at page 377 of the printed record.

A. This is the application, "In the Matter of the Application of the Western Pacific Railroad Company for authority to issue securities ($5,000,000 additional first mortgage 5 per cent bonds). (Northern California Extension.)"

It is Finance Docket 8473.

Mr. Swaine: For the purpose of shortening the record, we suggest that the balance sheet constituting the last six pages be omitted from the record.

[2259]

Mr. Wood: Exhibit 5 is the balance sheet.

I offer this in evidence. We will take out the balance sheet, which appears as exhibit 5 of this document.

Examiner Wilkinson: Is there any objection by any of the parties to the deletion of the balance sheet?

The document will be received as exhibit 81.

(Exhibit 81, Witness Curry, received in evidence.)

Mr. McCollom: Mr. Examiner, it is my under-

(Testimony of M. J. Curry.)

standing that on the record at the present time there is an understanding that these various documents which have been offered, insofar as they might contain opinions of counsel or of the railroad company, for example, as to priority of the first mortgage, are not to be taken as binding any party; that these documents are put in merely for factual purposes.

Just having come into the case, I should like to be understood that any of these documents, so far as they express opinions or conclusions, are not to be taken as binding upon us in any way in that respect.

Examiner Wilkinson: The Examiner has stated that the Commission will not attempt to adjudicate this question. In the first place, if they did, it would not be binding upon the other parties. We all know that.

Mr. Swaine: We want to show only the fact of the opinion and what we shall argue from it, that it was an [2260] opinion that was caused to be given to the first mortgage trustee by a company under the influence of Mr. A. C. James, who bought the other securities, and therefore it also operates as an estoppel against Mr. A. C. James, who participated in causing this opinion to be given.

We want just the fact of the opinion in evidence.

Examiner Wilkinson: Pardon me just a moment. There are other parties besides A. C. James.

(Testimony of M. J. Curry.)

Mr. Swaine: We concede that if there is anyone here who takes anything free of any equity against Mr. A. C. James, who has rights higher than Mr. A. C. James, on the ordinary law of negotiable instruments they of course would not be bound by the estoppel. We want to found the estoppel as against him.

Mr. Wood: I take it that all we are doing is offering the facts for the Commission, and nothing else.

Mr. CcCollom: I had so understood.

Examiner Wilkinson: As bearing upon the fairness and equitableness of the plan. That is what this testimony goes for.

Q. (By Mr. Wood). Mr. Curry, will you produce the application to the Reconstruction Finance Corporation for a loan of $799,000, that is dated February 5, 1932?

Mr. Nicodemus: Mr. Examiner, before that is offered, I [2261] should like to ask counsel for the institutional bondholders whether he will segregate the relevant from the irrelevant matter in this document.

Mr. Wood: We have not come to that yet, Mr. Nicodemus.

The Witness: This is a different one.

Mr. Groome: This apparently is part of the application, but there is something that preceded it.

Mr. Nicodemus: This is apparently worse than I thought it was. There are going to be two instead of one.

(Testimony of M. J. Curry.)

Mr. Wood: We thought that this was the document until we discovered that Mr. Curry had something that preceded it.

(Discussion off the record.)

The Witness: I have here a copy of application and letters correcting inaccuracies therein, dated February 5, 1932, to the Reconstruction Finance Corporation, for a loan, to the Interstate Commerce Commission for approval thereof.

Q. (By Mr. Wood). Are those two related and should they go as one exhibit?

A. It is my understanding they should, because when the application was filed we were asked to make formal application in accordance with Circular 2 of the Reconstruction Finance Corporation, and this is the answer to Circular 2. [2262]

Mr. Swaine: Let me say that we are satisfied with Schedules F, L and P, plus the statement that those were part of the application dated so-and-so to the Reconstruction Finance Corporation for a loan.

If the Reconstruction Finance Corporation does not want the whole application, we are content to omit everything except schedules F, L and P.

Mr. Wood: Mr. Examiner, we have here the application which Mr. Curry has just described, a different and separate document which is really a part of it, but which contains answers to various requirements of the Reconstruction Finance Corporation, and as to which Mr. Swaine has stated

(Testimony of M. J. Curry.)

that he wishes to offer only schedules F, L and P.

Mr. Swaine: Understand, that is only for the first mortgage bondholders committee. If the trustee has any different view, that is your responsibility.

Mr. Wood: That is agreeable to us. I will offer that as one exhibit, the application and those schedules in the *accompany* document.

Examiner Wilkinson: Is there any objection to just part of this document being introduced?

Mr. Coulson: Do I understand, Mr. Examiner, that this offering of parts of documents which all the parties have not had an opportunity to examine thoroughly is subject to [2263] the right of the other parties to ask to reintroduce parts?

Mr. Swaine: That is not so, now. The parties have had these documents for a long time.

Mr. Coulson: How long a time, Mr. Swaine?

Mr. Swaine: They have had ample opportunity to look at them.

Mr. Coulson: How long a time? I have had mine for 24 hours in my office.

Mr. Swaine: These documents have been in our office for a considerably longer time.

Mr. Coulson: You have a great advantage over the other contestants in this proceeding from the start.

Mr. Homire: These documents reached the Reconstruction Finance Corporation some time in the last two days.

(Testimony of M. J. Curry.)

Mr. Nicodemus: I think that an agreement to produce the balance would be satisfactory to everybody.

Mr. Swaine: These were sent to everybody on November 14th. I have the letter of transmittal. They were sent to you at the same time they were sent to me.

The Witness: They were delivered personally, if you will pardon me, to the New York parties on Monday. They were delivered on Monday.

Mr. Swaine: At Mr. Coulson's office.

The Witness: That is this Monday.

Mr. Coulson: I do not know whether this particular docu- [2264] ment—some of them got in yesterday after I left the office—got to me Monday, Tuesday or Wednesday, but I know I have not been over it.

Examiner Wilkinson: As the Examiner ruled at the last hearing by reason of the fact that the copies of the exhibits could not be given to the parties in the proceeding, we received them but permitted the other sides to move to strike them out after they had had an opportunity to examine them.

If they have not received copies of these documents—

Mr. Swaine: They received them on Monday, Mr. Examiner.

Examiner Wilkinson: That is your statement, Mr. Swaine. Mr. Coulson said he received his yesterday afternoon.

(Testimony of M. J. Curry.)

Mr. Swaine: It is Mr. Curry's statement that they were delivered at Mr. Coulson's office on Monday.

Examiner Wilkinson: It is a rather embarrassing proposition here for the Examiner to try to pass upon when these documents were received, and he naturally is going to give counsel an opportunity to examine them. That is all he can do.

Mr. Swaine: Quite right.

Examiner Wilkinson: I understand there is no objection to the offer of this exhibit with the understanding that only portions of it are to be received as evidence?

Mr. Nicodemus: I object to it on the ground that it is [2265] irrelevant.

Examiner Wilkinson: You mean you object to the whole exhibit?

Mr. Nicodemus: I object to the whole thing, but I am reconciled to its going in if it is limited to one or two exhibits.

(Discussion off the record.)

Examiner Wilkinson: The whole document will be received as exhibit 82.

(Exhibit 82, Witness Curry, received in evidence.)

Mr. Swaine: That is why we brought down the whole exhibit. We were afraid we would then be met by the technical objection we had only half a document.

Mr. Coulson: Nobody has made a technical

(Testimony of M. J. Curry.)

objection. All we want to do is have an opportunity to complete this record.

Examiner Wilkinson: You have an opportunity to study this record, and then you can move to strike it out.

Mr. Nicodemus: I think the Examiner misunderstood my position. I objected to even the three exhibits that he culled out of the great mass of documents there as irrelevant. I am not objecting to the process of surgery. I think that ought to be applied very definitely. I do not like to see that huge application to the Reconstruction Finance Corporation go in. You see what it contains, maps, [2266] forecasts—

Mr. Swaine: Well, we have omitted all the maps and forecasts.

Examiner Wilkinson: The Examiner is certainly not going to read this exhibit over and pass on it now. He is receiving it subject to a motion to strike.

Mr. Coulson: I understood that all these exhibits along this line bearing on the equity and fairness of Mr. Swaine's plan were received subject to a motion to strike. Was not that agreed at the last hearing?

Examiner Wilkinson: That is correct, because you did not have copies of the exhibits at that time, and naturally you could not object or you could not approve it.

Mr. Coulson: Do I understand, Mr. Examiner, that in this ruling of yours the Commission is re-

(Testimony of M. J. Curry.)

ceiving these documents, subject to a motion to strike out, for the lmited purpose of proving the fairness and the equity of the plan, and that you limit the word "plan" there to Mr. Swaine's plan, since neither the debtor's plan nor the A. C. James plan has asked for such proof as to fairness and equity?

Examiner Wilkinson: It does not mean Mr. Swaine's plan nor the institutional bondholders' plan alone. It means all the plans.

Mr. Swaine: Including any plan the Commission might hand down. [2267]

Examiner Wilkinson: Including any plan that is presented here.

Q. (By Mr. Wood) Mr. Curry, will you please produce the amended and supplemental application to the Reconstruction Finance Corporation for a loan, dated February 13, 1932, referred to on page 381 of the record?

A. Here it is (producing document). That is the amended supplemental application referred to.

Mr. Nicodemus: That seems to be relatively inoffensive. It is only a few pages.

Mr. Wood: I offer this in evidence.

Examiner Wilkinson: The document will be received as exhibit 83.

(Exhibit 83, Witness Curry, received in evidence.)

Mr. Wood: Now, the application to the Interstate Commerce Commission for the approval of the Reconstruction Finance Corporation loan dated

(Testimony of M. J. Curry.)

February 13, 1932, is also referred to on page 381 of the record, and I offer that in evidence.

Examiner Wilkinson: It will be received as exhibit 84.

(Exhibit 84, Witness Curry, received in evidence.)

Mr. Wood: And the application to the Interstate Commerce Commission dated February 11, 1932, for authority to issue $15,000,000 of general and refunding mortgage bonds and $5,000,000 principal amount of notes, referred to at page [2268] 381 of the record.

The Witness: This is the application referred to (producing document).

Mr. Wood: I offer that in evidence, with the exception of the printed copy of the mortgage, which is an exhibit to it.

Examiner Wilkinson: Is there any objection to deleting the copy of the mortgage?

Mr. Wood: The copy of the mortgage is already in evidence.

Examiner Wilkinson: It will be received as exhibit 85.

(Exhibit 85, Witness Curry, received in evidence.)

Mr. Nicodemus: Is it understood that we have a reservation of a general objection to all of this testimony as irrelevant? I do not want to be repeating it.

(Testimony of M. J. Curry.)

Examiner Wilkinson: I understand that Mr. Coulson made that objection at the beginning, and the Examiner ruled that he would have a general objection along that line. I do not know that you made the objection. The record will show it. But if you want to object to all of this testimony at the present time, you may state it on the record.

Mr. Nicodemus: I think it would be safer to make an objection each time that it is offered. I will try to do it briefly, then follow it up at the end with a motion to strike out most of the exhibits. I think about three or [2269] four of these exhibits are relevant. I think the drawdown under the first mortgage is relevant. I doubt the relevancy of the rest of it.

Q. (By Mr. Wood) Mr. Curry, will you produce the minutes of the executive committee meetings on February 11th, June 25th, July 23rd, October 15th, November 17th, and December 21st, 1931, and January 29, 1932? Those were referred to on page 384 of the record.

A. These are the minutes referred to (producing documents.)

Mr. Wood: I offer them in evidence.

Examiner Wilkinson: They will be received as exhibit 86.

(Exhibit 86, Witness Curry, received in evidence.)

Mr. Nicodemus: Record my objection to it, please, Mr. Reporter.

(Testimony of M. J. Curry.)

Q. (By Mr. Wood) Mr. Curry, will you produce the application to the Reconstruction Finance Corporation dated May 23, 1932, for a loan of $759,000?

A. That is it. I have the application referred to here. (Producing document.)

Mr. Nicodemus: It has a number of exhibits that are already in.

Mr. Wood: It may be that by going over this we can eliminate some of it.

Examiner Wilkinson: We will take a recess here for 5 [2270] minutes.

(A short recess was taken.)

Mr. Wood: Mr. Curry, you have that application to the Reconstruction Finance Corporation dated May 23, 1932, for a loan of $759,000, referred to on page 390 of the record.

I will offer in evidence the application itself, and schedules E, L and P, also exhibit C, which are annexed to that document.

Examiner Wilkinson: The exhibit will be received as exhibit 87.

Mr. Nicodemus: Under the general objection that it is irrelevant.

(Exhibit 87. Witness Curry, received in evidence.)

Q. (By Mr. Wood) Next, Mr. Curry, the application to the Reconstruction Finance Corporation, dated June 6, 1932.

A. "Amended and supplemental application" to

(Testimony of M. J. Curry.)

the Reconstruction Finance Corporation (producing document.)

Mr. Wood: I offer that in evidence.

Examiner Wilkinson: It is received as exhibit 88.

(Exhibit 88, Witness Curry, received in evidence.)

Mr. Wood: Then the application dated June 10, 1932. I offer that in evidence.

The Witness: This is an amendment and supplement to its application filed June 2, 1932 for loans aggregating $759,000, and its amended supplemental application dated [2271] June 7th for further loans aggregating $1,505,554.

Examiner Wilkinson: It will be received as exhibit 89.

(Exhibit 89, Witness Curry, received in evidence.)

Mr. Wood: Next is the application to the Commission dated August 1, 1932, for authority to issue $5,000,000 of general and refunding mortgage bonds, referred to on page 390 of the record.

I offer that in evidence.

Examiner Wilkinson: Received as exhibit No. 90.

(Exhibit 90, Witness Curry, received in evidence.)

Mr. Wood: And the supplemental application to the Commission dated January 12, 1932, relating to the same issue of bonds. I offer that in evidence.

(Testimony of M. J. Curry.)

Examiner Wilkinson: The document will be received as exhibit 91.

(Exhibit 91, Witness Curry, received in evidence.)

Mr. Nicodemus: Subject to the general objection.

Mr. Wood: I now offer in evidence a certified copy of report and order of the Interstate Commerce Commission filed December 9, 1932, and report and order of the Commission filed February 25, 1932, in Finance Docket No. 9572, which relates to the issue of $4,000,000 of general and refunding mortgage bonds.

Examiner Wilkinson: These statements will be received as exhibit 92. [2272]

Mr. Nicodemus: Subject to our general objection.

(Exhibit 92, Witness Curry, received in evidence.)

Mr. Nicodemus: What is the object of this, to prove $4,000,000 of bonds were issued?

Mr. Wood: Yes. These were part of the picture showing the issue of the general and refunding bonds.

Mr. Nicodemus: The only object of this is the ultimate fact that $4,000,000 of these bonds were issued?

Mr. Swaine: No, that is not so, Mr. Nicodemus.

Mr. Nicodemus: Excuse me. Counsel for the trustee said otherwise. Beg his pardon, not mine.

Mr. Swaine: To show that the general and re-

(Testimony of M. J. Curry.)

funding mortgage was not intended to be a purchase-money lien on any property at any time.

Mr. Nicodemus: I object on the further ground that the refunding mortgage speaks for itself, and it is already in evidence.

Q. (By Mr. Wood) Mr. Curry, will you please produce the notice, specification and bid relative to an issue of $1,000,000 of first mortgage bonds which were authenticated and delivered on February 11, 1931?

A. I have here copies of notice, specifications, agreement and bid, covering purchase of $1,000,000 principal amount first mortgage 5 per cent bonds referred to. (Producing document.) [2273]

Mr. Wood: I offer that in evidence.

Mr. Nicodemus: Objected to, subject to the general objection.

Examiner Wilkinson: It will be received as exhibit No. 93.

(Exhibit 93, Witness Curry, received in evidence.)

Q. (By Mr. Wood) Mr. Curry, do you have a similar notice, specifications and bids, relating to the subsequent issues, of first mortgage bonds, namely, the $1,000,000 principal amount authenticated and delivered on June 25, 1931; $900,000 authenticated and delivered on July 23, 1931; $750,000 principal amount authenticated and delivered on November 25, 1931; $350,000 principal amount authenticated and delivered on January 8, 1932; and $1,000,000 principal amount authenticated and delivered on January 29, 1932?

(Testimony of M. J. Curry.)

A. We have similar papers in our records, yes.

Q. Are the documents relating to those subsequent issues of bonds substantially identical with the ones which have been introduced in evidence as exhibit 93?

A. To the best of my knowledge and belief, they are.

Mr. Wood: Mr. Examiner, for the purpose of shortening the record, I will not offer the subsequent notices, specifications and bids, but will let the record stand on Mr. Curry's statement that they are substantially identical. [2274]

Mr. Coulson: May I ask a question at this point?

Mr. Curry, do these subsequent applications contain the same statement which appears on the second paragraph of exhibit 93 to the effect that the first mortgage is a first lien on the main line aggregating 1050 miles?

Mr. Swain: Read the rest of it, please, if you are going to read part of it.

Mr. Coulson: Is the whole second paragraph included in the subsequent applications?

The Witness: In the specifications that you are reading from?

Mr. Coulson: Yes.

The Witness: The second paragraph?

Mr. Coulson: The second paragraph of the specifications, No. 2943, your exhibit 93.

The Witness: It is my recollection that on the

(Testimony of M. J. Curry.)

balance of the draw-downs the specifications were the same.

Mr. Coulson: They contain the same terms.

The Witness: Yes, sir. It is my recollection that they do.

Mr. Swaine: Mr. Examiner, it goes on to say that it will also be a first lien on the Northern California extension when completed.

Mr. Coulson: I beg your pardon, Mr. Examiner. It ought not to be misstated. The document speaks for itself, [2275] and it does not say the first mortgage will be a first lien. That is the point of it.

Examiner Wilkinson: As I understand it, exhibit 93 is in the record, and the subsequent documents referred to by Mr. Curry contain the same statements or similar statements as in 93. Is that correct?

The Witness: That is correct. That is the understanding, to the best of my knowledge.

Examiner Wilkinson: It will speak for itself, then.

Mr. Wood: The purpose of this, Mr. Examiner, is to show the notice, specifications and bids on the first block of the $5,000,000 of first mortgage bonds which went into the Northern California extension, and to show by Mr. Curry's statement that in the case of the rest of the $5,000,000, the same documents were used.

Mr. Nicodemus: Does the record now show the dates that the subsequent bonds were issued?

(Testimony of M. J. Curry.)

The Witness: Yes. He read them off.

Mr. Wood: I gave the dates of the authentication and delivery of each of the blocks of the first mortgage bonds.

Mr. Nicodemus: That is all right, then. That is quite satisfactory.

Mr. Wood: That is all with Mr. Curry, unless someone wishes to cross examine.

Examiner Wilkinson: Are there any questions of Mr. Curry? [2276]

Do the parties wish to reserve the right to recall Mr. Curry?

You are excused, Mr. Curry.

Mr. Coulson: Just a moment. Mr. Examiner, is not the right to recall inherent in the right you have given us to put in additional parts of these documents if we should need to?

Examiner Wilkinson: The Examiner just wanted to be safe here and have that on the record.

Mr. Nicodemus: It includes that reservation.

Mr. Coulson: I see. Thank you.

Mr. McCollom: Yes. We, of course, would like to have that. I did not know whether you were excusing him without reservation or not.

(Witness excused.)

Mr. Wood: I will call Mr. Buckley.

CARL E. BUCKLEY

testified further as follows:

Direct examination

Mr. Wood: Mr. Examiner, at the last hearing we introduced as exhibit 74 a telegram from Crocker First National Bank of San Francisco to the Chase National Bank relative to the recording of the first mortgage.

I substituted a typewritten copy of the original. I wish to withdraw the typewritten copy and substitute a [2277] photostatic copy, because I think the photostatic copy is more accurate, and we have three photostatic copies here to give the Commission.

Examiner Wilkinson: Mr. Woods, we cannot withdraw it very well. Just introduce that with your statement. It is a copy of it, and we will leave the other one in as well.

Mr. Wood: The original telegram, of course, was offered in evidence.

Examiner Wilkinson: We will leave the record state that this supersedes the other.

Mr. Wood: This supersedes the typewritten copy.

Examiner Wilkinson: It will be received as exhibit No. 94. Exhibit 94 will supersede exhibit 74.

(Exhibit 94, Witness Buckley, received in evidence.)

Q. (By Mr. Wood) Mr. Buckley, will you produce the file relating to the authentication and de-

(Testimony of Carl E. Buckley.)

livery of $1,000,000 of debentures on February 27, 1931? That is referred to on page 427 of the record.

A. I have it here (producing document).

Mr. Wood: I offer that in evidence.

Examiner Wilkinson: It will be received as exhibit No. 95.

(Exhibit 95, Witness Buckley, received in evidence.)

Mr. Wood: I wish to substitute photostatic copy for the [2278] original.

Examiner Wilkinson: Mr. Wood, the original is not in the record and the original has not been offered. As I understand, there was no objection by the parties here to introducing copies rather than the originals; so if you just offer the copies, it will be sufficient.

Mr. Wood: I see. I misunderstood the procedure. I thought we had to offer the original and then withdraw it and substitute the copies.

Examiner Wilkinson: As long as there is no objection by the other parties to copies other than the originals, there is no objection on the part of the Commission.

Mr. Nicodemus: That is the way the record reads.

Mr. Wood: They were merely produced at the last hearing. The originals are here.

Mr. Nicodemus: We object to all of these exhibits relating to debentures, which the record shows were paid off prior to the creation of the refunding mortgage.

(Testimony of Carl E. Buckley.)

Examiner Wilkinson: The objection is overruled. It will be received as exhibit 95.

(Exhibit 95, Witness Buckley, received in evidence.)

Mr. Wood: For the purpose of shortening the record again on these subsequent papers relating to a take-down of debentures, I am merely going to ask Mr. Buckley whether the papers are substantially identical with the ones con- [2279] tained in the exhibit just offered, with the exception, I think, of the last two, in which there were some additional documents.

Q. Mr. Buckley, there were subsequent applications for authentication and delivery of debentures as follows:

$600,000 principal amount authenticated and delivered on March 26, 1931?

A. That is correct.

Mr. Wood: I think perhaps you had better give the amount of the expenditures in the certificate of that application, and the dates on which the expenditures were made.

In each of these cases, Mr. Examiner, the application papers followed forms described in the debenture agreement, and they merely certified that expenditures of certain amounts were made between certain dates on the Northern California extension.

I am going to have Mr. Buckley read into the record the amounts of the expenditures and the dates of the expenditures in each case, so as to complete the factual material.

(Testimony of Carl E. Buckley.)

Examiner Wilkinson: Is there any objection to Mr. Buckley's reading these extracts rather than putting the document in?

Mr. Coulson: I understand he is going to read the dates, [2280] the amounts, and the application of the funds?

Mr. Wood: Mr. Coulson, the papers do not state the application of the funds any more than in the language of the indenture, which says that liabilities shall have been incurred or expenditures made for the construction of a line which is described in the language of the indenture.

Mr. Coulson: Am I wrong, Mr. Wood, in understanding that as a part of exhibit No. 95 there is a document which is the certificate of the president and treasurer of the Western Pacific Railroad Company, paragraph 1 of which begins,

> "That liabilities to the amount of $317,701.82 have been, and or within sixty (60) days next succeeding February 1, 1931, the date of this certificate, will be, incurred by the Western Pacific Railroad Company for the purpose of constructing, purchasing and/or otherwise acquiring the company's 'Northern California Extension' referred to and more particularly described,"

and so on?

Mr. Wood: That is what I refer to, yes.

Mr. Coulson: Do all the others contain that same phrase, the same application of funds? [2281]

(Testimony of Carl E. Buckley.)

Mr. Wood: Yes. That is taken from the indenture, and there is no specification of particular purposes in the way of work on the line or acquisition of particular items of property. I merely want to give the amounts of the liabilities and the expenditures and the dates involved, the amount of the debentures and the dates of authentication.

Mr. Coulson: With the statement in the record that the expenditures were all for the Northern California Extension?

Mr. Wood: Yes. In other words, these papers, with the exception of those which I mentioned, are substantially identical with the one which has just been introduced and contains the description of the line.

Mr. Nicodemus: Mr. Examiner, in view of this statement as to the contents of this document—I was not aware of that fact—I would like to withdraw my objection to exhibit 95. I think that is relevant.

Examiner Wilkinson: All right. Proceed, Mr. Buckley.

The Witness: $600,000 principal amount of debentures, authenticated and delivered March 26, 1931.

Certificate of the president and treasurer dated March 16, 1931, states that liabilities to the amount of $1,049,280.86 have been and/or within 60 days next succeeding March 16, 1931, the date of this certificate, will [2282] be incurred by the Western Pa-

(Testimony of Carl E. Buckley.)

cific Railroad Company, and expenditures to the amount of $150,719.14 have been actually made by the Western Pacific Railroad Company prior to March 16, 1931, for the same purpose.

Q. (By Mr. Wood) The application for $530,000 of debentures which were authenticated and delivered May 25, 1931: Will you please look at the certificate and give the dates and amounts of the liabilities and expenditures referred to?

A. Liabilities to the amount of $588,642.60 have been or within 60 days next succeeding May 15 1931; expenditures to the amount of $471,357.40 have been actually made by the Western Pacific Railroad Company prior to March 16, 1931.

Mr. Wood: Mr. Examiner, in that file there is a correction to be made. The certificate has a variance of dates. This is the file that relates to the $530,000 of debentures authenticated and delivered May 25, 1931. The certificate states that the liabilities have been made within 60 days next succeeding May 15, 1931, and that the expenditures were made prior to March 16, 1931. Those two dates should coincide.

If there is no objection, I should like to state the contents of a letter which occurs in that file, dated June 8, 1931, addressed to the Chase National Bank as [2283] trustee under the indenture, by M. J. Curry, vice president of the railroad company, in which he states that "We have just been advised by our legal department at San Francisco that a typo-

(Testimony of Carl E. Buckley.)

graphical error has been noted," and states that the date given as March 16, 1931 should read May 15, 1931.

In other words, that corrects the discrepancy in the certificate.

Q. Application for $995,000 of debentures, authenticated and delivered June 20, 1931. Will you also give the amount and dates of the liabilities and the amount and dates of the expenditures?

A. Liabilities to the amount of $1,968,732.23 have been or within 60 days next succeeding June 17, 1931, the date of the certificate, will be incurred; and expenditures to the amount of $21,267.77 have actually been made by the Western Pacific Railroad Company prior to June 17, 1931.

Q. The next is application for $309,000 of debentures, authenticated and delivered on August 25, 1931.

A. Liabilities to the amount of $618,000 have been or within 60 days next succeeding August 15, 1931, the date of this certificate, will be incurred by the Western Pacific Railroad Company.

Q. There are no expenditures described in that certificate, only liabilities? and no expenditures?

[2284]

A. Only liabilities; no expenditures.

Q. Next is the application for $600,000 of debentures, authenticated and delivered October 20, 1931.

A. Liabilities to the amount of $821,291.28 have been and/or within 60 days next succeeding October 5, 1931, the date of this certificate, will be incurred

(Testimony of Carl E. Buckley.)

by the Western Pacific Railroad Company; and expenditures to the amount of $378,608.72 have been actually made by the Western Pacific Railroad Company prior to October 5, 1931.

Q. The next is the application for $120,000 principal amount of debentures, authenticated and delivered November 25, 1931.

A. Liabilities to the amount of $12,854.54 have been and/or within 60 days next succeeding November 11, 1931, the date of this certificate, will be incurred by the Western Pacific Railroad Company; and expenditures to the amount of $227,145.46 have been actually made by the Western Pacific Railroad Company prior to October 5, 1931.

Mr. Wood: There is another date wrong there. In that file, Mr. Examiner, the date October 5, 1931, which is given in connection with the expenditures, should read November 11, 1931. There appears in this file a letter dated November 24, 1931, addressed to Mr. Buckley by Mr. Curry, in which he says,

[2285]

"Referring to your conversation with Mr. Bruen yesterday relative to typographical error appearing in next to the last line of paragraph 1 of certificate of President Adams and Treasurer Bates, debenture order No. 7, I am enclosing herewith a copy of a telegram dated November 23, in response to mine of same date, from which you will note that Treasurer Bates of this company has authorized me to instruct you as Trustee to change the words 'October 5, 1931' to 'November 11, 1931'."

(Testimony of Carl E. Buckley.)

The telegram referred to is in the file also.

Q. Next is the application for the authentication and delivery of $350,000 of debentures, authenticated and delivered January 29, 1932.

A. Expenditures to the amount of $700,00 have been actually made by the Western Pacific Railroad Company prior to January 31, 1932, the date of this certificate.

Q. There are no liabilities referred to in the certificate as having been incurred?

A. No liabilities referred to.

Mr. Wood: With respect to the applications for authentication and delivery of $347,000 of debentures on March 28, 1932 and $149,000 of debentures on May 31, 1932, I should like to offer the file, because they contain some additional matter relating to the cancellation of the debentures and the transactions which took place in connec- [2286] tion with the issue of General and Refunding Mortgage Bonds and notes.

Will you produce the application for $347,000 of debentures, authenticated March 28, 1932?

(The witness did so.)

Examiner Wilkinson: Received as Exhibit No. 96.

(Exhibit No. 96, Witness Buckley, received in evidence.)

Mr. Coulson: May I ask a question for the sake of continuity in the record at this point?

Examiner Wilkinson: Yes.

(Testimony of Carl E. Buckley.)

Mr. Coulson: Mr. Buckley, was this application which has just been marked Exhibit 96 received after the General and Refunding Mortgage of the Western Pacific Railroad Company had been filed and recorded and had become a lien upon the property of the Western Pacific Railroad Company?

Mr. Swaine: I object to the form of that question because unless the bonds had been executed and delivered under the mortgage it could not be technically a lien.

Mr. Coulson: May I ask Mr. Buckley whether any bonds had been issued under the General and Refunding Mortgage of January 1, 1932 at the time of this application which has just been admitted into the record as Exhibit No. 96?

The Witness: As to whether or not there were any bonds [2287] authenticated and delivered?

Mr. Coulson: Authenticated and delivered.

The witness: That is a matter of record which I could ascertain only by refreshing my recollection.

Mr. Coulson: Do you know that the mortgage had been recorded at that time?

The Witness: I do not know that. I would have to ascertain.

Mr. Coulson: Am I right that the record shows both those facts, Mr. Nicodemus?

Mr. Nicodemus: I cannot answer that.

Mr. Wood: I think, however, Mr Coulson, that this much appeared at the last hearing in a state-

(Testimony of Carl E. Buckley.)

ment of counsel, that at the time of the execution and delivery of the general and refunding mortgage, which I think was March 1, 1932, the bonds were simultaneously authenticated and delivered. I do not believe that anything appears as to the recording of the mortgage or the dates of the recording.

Mr. Coulson: The point, Mr. Examiner, is that we have of record the application of these funds to the construction of the northern extension. I think we have the dates of application, part of them, prior to the recording of the general and refunding mortgage, which in terms gave to the Trustee of the General and Refunding [2288] Mortgage a lien on the northern California extension.

I think this recording which is being put in here should show the extent to which any take downs of these debentures which were immediately converted into notes secured by General and Refunding Mortgage Bonds were after the date of the recordation of the general and refunding mortgage. That is the only point in which I am interested, in this connection. I think perhaps the record is clear at this point, but we will have a chance to clear it up later, if it is not.

Mr. Nicodemus: So far as the debtor is concerned, it has introduced no evidence as to the date of recording of either the First Mortgage or the General and Refunding Mortgage. I am not sure that the date of the recording of the Refunding

(Testimony of Carl E. Buckley.)

Mortgage is material, in conection with this controversy. It may be a good lien as between the parties regardless of the recording. The recording might be material if there were a third party claiming as a bona fide purchaser.

Mr. Wood: There is evidence on behalf of the First Mortgage Trustees as to the recording of a first mortgage in the two counties in which the northern extension is situated.

Mr. Nicodemus: There is a telegram here that said it was recorded. [2289]

Mr. Coulson: I think that is important. I think the record should also say what property has been added to the property of the Western Pacific since the recordation of the First Mortgage, and the basis on which the bonds have been taken down since that date.

Mr. Nicodemus: I think the Debtor would like to request the Trustee of the Refunding Mortgage to produce the date of the recording of that Mortgage, as shown by the originals on file.

Mr. McCollom: We have something else which we think will do for that purpose; when I come to put all my proof in—there is not much of it—I intend to put that in among the other proof.

Mr. Nicodemus: That is quite satisfactory.

Mr. Wood: Will you produce the application for $149,000 principal amount of debentures, authenticated and delivered May 31, 1932?

(Testimony of Carl E. Buckley.)

(The witness did so.)

Mr Wood: I offer that in evidence.

Examiner Wilkinson: It will be received as Exhibit No. 97.

(Exhibit No. 97, Witness Buckley, received in evidence.)

Mr. Wood: Next, will you produce the files relating to the cancellation of $4,504,000 principal amount of [2290] debentures on March 1, 1932? That is referred to in the record at pages 429 and 430. I offer that in evidence.

Examiner Wilkinson: It will be received as Exhibit 98.

Q. (Exhibit No. 98, Witness Buckley, received in evidence.)

Q. (By Mr. Wood) Mr. Buckley, with respect to these files relating to the authentication and delivery of debentures, that were not actually put in evidence, but from which you read various dates and amounts, with the exceptions which were noted as corrections of certain errors, and in some cases where the certificates certified liabilities only or expenditures only in place of certifying both liabilities and expenditures, they are substantially identical with the file which was introduced in evidence as Exhibit 95? That was the application for $5,000,000 of debentures, which were authenticated on February 27, 1931?

A. I think they are, yes.

Q. Substantially identical.

(Testimony of Carl E. Buckley.)

A. Substantially identical.

Mr. Wood: That is all.

Examiner Wilkinson: Are there any questions of Mr. Buckley?

Mr. Nicodemus: I would like to straighten out this question of the exhibits that were offered in connection [2291] with the authentication of the first mortgage bonds. I understood that Mr. Swaine earlier in the session agreed that everything should be eliminated except the certificate of expenditures and the subseqtuent draw-downs.

Mr. Swaine: So far as we are concerned, if there is the same character of testimony as was just made regarding the debenture take-downs, namely, that all the documents are like the typical one—

Mr. Nicodemus: That is what I want to do.

Mr. Swaine: —with the exception of the certificate of expenditures, then we are quite content to have only the certificate of expenditures.

Mr. Nicodemus: By this motion I want to make we can eliminate 14 exhibits.

Mr. Swaine: No, you do not eliminate fourteen exhibits, you cut down fourteen exhibits, in lieu of the whole exhibit.

Mr. Nicodemus: Each exhibit consisted of about nine documents.

Mr. Swaine: In lieu of the whole document you have a stipulation plus the part of each document which varies from the other documents.

(Testimony of Carl E. Buckley.)

Mr. Nicodemus: I move to strike out Exhibits 63 to 73, inclusive, excepting in each case the certificate of expenditures. Mr. Buckley testified that with the ex- [2292] ception of the certificate of expenditures and the date of the certification of the bonds they are substantially identical.

Examiner Wilkinson: Is there any objection to that?

Mr. Coulson: We want to leave of record the dates of certification, because they have some importance, but aside from that, I think to eliminate these 112 documents which are part of these exhibits is very useful.

Examiner Wilkinson: As I understand it, these exhibits have already been received physically in the record?

Mr. Nicodemus: They were. That is correct.

Mr. Coulson: It means eliminating all the documents in them except one, and the date; show the date and one document.

Examiner Wilkinson: And there is agreement of all parties that this may be done?

Mr. Swaine: He is not striking the exhibit, he is simply cutting the exhibit down in the same manner.

Examiner Wilkinson: You had better have it on your record here so that there will be no question about it, because we cannot take them out of the record physically. They wil stay in there, but if you want the record to show that only certain parts of them—

(Testimony of Carl E. Buckley.)

Mr. Nicodemus: They will not stay in there physically in the sense that you will be required to certify them to [2293] the Court or to the full Commission in the case of a hearing. That is what I am protecting.

(Discussion off the record.)

Mr. Wood: It occurs to me, since these documents are already in, that they might be left as they are, and when it comes to taking the record up to the Court the parties can stipulate to omit from the printing of the record the facts that are not essential. Would not that serve the purpose that Mr. Nicodemus has in mind?

Mr. Swaine: Why is not that a happy suggestion? That is the usual practice in the trial of cases before courts, that a document goes in with the idea that the parties will try to shorten the record on appeal.

Examiner Wilkinson: The only thing is that the Examiner understands we have to certify to the Court the transcript of the proceedings before this Commission. If these exhibits have been before the Commission and have been considered by the Commission, I think we would have to certify them up. So if you want to do anything like that, you had better make an agreement here on the record now that they are not to be considered by the Commission.

Mr. Coulson: It is my impression that under Section 77 the Commission has to send up anything

(Testimony of Carl E. Buckley.)

before it. It is unlike litigation, where the parties can agree to eliminate certain things that were considered by the [2294] inferior tribunal.

Examiner Wilkinson: That is right, so you will have to make the agreement here on the record at the present time.

Mr. Nicodemus: The debtor will be very pleased to make such an agreement now.

Mr. Swaine: And so are we willing to agree that there shall be excluded from the record everything in each of those thirteen draw-downs except the date and the certificate showing the expenditures, it being stipulated by all of the parties that all of the other parts of the certificate are substantially identical with the first of the series.

Mr. Nicodemus: That is right.

Mr. Wood: Of course, you have two kinds of papers.

Mr. Nicodemus: I protected you on that. I gave you two exhibits, 61 and 62.

Mr. Wood: Yes. I just want to get the thing straight on the record.

First of all, you have an application for taking down bonds against the deposit of cash. There are no certificates in connection with those applications. I think the record already shows the dates and amounts of the authentication and delivery. Then you have the cash requisitions on which the deposited cash, the proceeds of the [2295] sale of the

(Testimony of Carl E. Buckley.)

bonds, was taken down against the certification of the expenditures. In those appear the certificates of the officers as to the dates and amounts of the expenditures and the purposes for which they were made. As I understand it, we leave in the first two typical papers, which will be the application——

Mr. Nicodemus: They will be 61 and 62.

Mr. Wood: Exhibit 61, which is an application for a million dollars of bonds, and Exhibit 62, which is the first cash requisition. Then we leave in the record the dates and the amounts on which the bonds were taken down, and the dates and amounts of the cash requisitions and all of the certificates of expenditures on which those requisitions were based. Is that correct?

Mr. Swaine: That is right.

Mr. Nicodemus: That is quite right.

Examiner Wilkinson: As to the rest of the exhibit, the motion is here that it shall not be considered by the Commission?

Mr. Swaine: Instead of doing it that way, why do we not just stipulate it shall not be considered? I do not think that this is open to a motion to strike. I think if we insist on it it is relevant evidence.

Examiner Wilkinson: It is purely a stipulation here.

Mr. Swaine: Instead of a motion to strike, I suggest [2296] that the trustee and we withdraw that part.

(Testimony of Carl E. Buckley.)

Mr. Nicodemus: The excluded parts are withdrawn?

Mr. Wood: Yes. Certain correspondence between the Crocker First Federal and the Chase will vary in the documents. I do not think that they are material, except that they simply show the transaction.

(Discussion off the record.)

Mr. Wood: I make a formal request that the Commission consider with respect to Exhibits 63 to 73, both inclusive, only the portions to which I have just referred. Would the Examiner prefer that in order to get the thing concisely in the record we give again the dates and amounts of the bonds and the cash taken down, or leave that to the record as it now stands? I think it is all in there in the course of the testimony at the last hearing.

Examiner Wilkinson: It was all put in there.

Mr. Wood: The question is whether you would like to have it given concisely as Mr. Buckley gave it with the debentures.

Examiner Wilkinson: I do not think it is necessary, unless the other parties want it.

Mr. Wood: I am satisfied on the record as it stands.

Examiner Wilkinson: The request that has been made is agreed to by all parties? There are no objections?

(No response.) [2297]

The request is granted, then.

(Testimony of Carl E. Buckley.)

Examiner Wood: I have no further questions, Mr. Examiner.

Examiner Wilkinson: Are there any questions of Mr. Buckley? You may be excused, Mr. Buckley.

(Witness excused.)

Mr. McCollom: I would call the Examiner's attention with reference to the general and refunding mortgage to the fact that the mortgage was introduced as Exhibit 6 at page 25 of the minutes. I have never heard of a dispute as to the validity of the mortgage. While I have here various documents such as authorizations of stockholders, authorization of Directors, and so forth, as at present advised I see no necessity of offering any of those papers.

At page 25 of the minutes there is testimony by Witness Elsey that there have been authenticated under the mortgage bonds amounting to $18,99,500, and that they are pledged as collateral under the notes of the A. C. James Company, Reconstruction Finance Corporation, and the Railroad Credit Corporation.

That testimony was not objected to or questioned, therefore I feel no necessity of duplicating the substance of that testimony here by further testimony, as at present advised. [2298]

Also, at page 26, there was introduced Exhibit 9, which is stated to be a complete and detailed statement of the short term obligations of the carrier,

with three issues of notes, to which the witness has referred, and the schedules of collateral therefore.

I assume that that exhibit, although I have not studied it, states what it purports to state, and is adequate for the purpose for which it was introduced.

Also, Exhibit 10 supplements Exhibit 9, to a certain extent, so I merely refer to those exhibits 9 and 10 in passing.

I will call Mr. Buckley.

CARL E. BUCKLEY

testified further as follows:

Direct Examination

Q. (By Mr. McCollom) Mr. Buckley, have you produced from the files of the trustee under the General and Refunding Mortgage, which I will for shortness term the General Mortgage, a letter to the Chase from H. P. Tyler, attorney for the Western Pacific Railroad Company, dated August 17, 1932, showing the dates and places of recording of the General Mortgage?

A. I produced that letter, yes.

Q. Have you produced also photostatic copies of that letter? [2299] A. Yes, sir.

Mr. McCollom: I offer in evidence a photostatic copy of that letter.

Examiner Wilkinson: Have the other parties had copies of this document?

(Testimony of Carl E. Buckley.)

Mr. McCollom: I believe they have not been distributed up until the present moment.

Mr. Swaine: We are quite willing to examine these as they come up and not make any objection on the ground we have not seen them for two days. We have no objection.

Examiner Wilkinson: It will be received as No. 99.

(Exhibit No. 99, Witness Buckley, received in evidence.)

Mr. McCollom: Have you produced from the records of the Chase their transcript of certification and delivery of the General and Refunding Mortgage bonds, together with a photostatic copy?

The Witness: I have not produced the original of that. I did not know that that was necessary.

Q. Have you produced a correct photostatic copy of that transcript? A. Yes.

Mr. Swaine: We have no objection to this, except that I suggest that Mr. Buckley testify as to the meaning of the word "date". Some of those things are rather cryptic. [2300]

Q. (By Mr. McCollom) This transcript which you have produced is in two sheets, is it not, the first relating to bonds designated as General and Refunding Mortgage Gold Bonds, Series A, 5 per cent, due January 1, 1957, and the second relating to the General and Refunding Mortgage Gold Bonds, Series B, 5 per cent, due January 1, 1957?

A. That is correct.

(Testimony of Carl E. Buckley.)

Q. The top sheet shows, does it not, in the first column the date of delivery out by the Chase of the bonds that are referred to on the transcript?

A. The date on the left-hand column is the date on which the transaction occurred which appears opposite that date.

The first block of the form shows the date on which bonds were received from the company.

The next block shows the dates and details relative to the authentication and delivery of bonds.

The next block is a cancellation of bonds, and the next block, the total bonds outstanding.

The last block on the sheet would be the bonds held unissued; if any.

The date on the left would correspond to any of those transactions that appear opposite it.

Q. The column under the heading "outstanding" shows a final balance outstanding, according to the records of [2301] the Chase, in the principal amount of $14,999,500, is that correct?

A. That is correct, under Series A.

Q. Referring to the sheet which relates to the Series B Bonds, that has only one item on it, has it not? A. That is correct.

Q. That relates to $4,000,000 in principal amount of the bonds and shows the date of delivery out and the authority under which delivered, and the balance of Series B bonds outstanding, in the amount of $4,000,000. A. That is correct.

(Testimony of Carl E. Buckley.)

Mr. McCollom: I offer the transcript in evidence.

Mr. Swaine: I have no objection, but I would like to ask just one question on the form.

In the first line, in the first column appears 1932, March 2 as of 1.

In the fourth column appears the figure $14,380,000. In the seventh column appears the figure $5,630,000, and under that also a figure $8,750,000, with nothing carrying over to the first column. Am I to understand as to that figure that it is still under March 2 as of March 1?

A. The figures in the seventh column of $5,630,000 principal amount of series A bonds, and $8,750,000 principal amount of series A bonds are indicated on this record as having been authenticated and delivered on March 1, 1932 [2302]

Mr. Swaine: No. Are you right about that? Is it not March 2nd? The Witness: No.

Mr. Swaine: It says March 2 as of 1. When did you actually do it?

The Witness: March 1, but for some reason—I do not know the reason—the authorizing ticket reflecting the transaction on this record was not posted as of the date of the transaction, and it is just our practice not to put it in as of March 1, the date, but post it as of a subsequent date as of a prior date—to post it as of a subsequent date as of the date on which the transaction took place.

Mr. Swaine: The physical act, then, was on March 1st? The Witness: Correct.

(Testimony of Carl E. Buckley:)

Mr. Swaine: In the seventh column nothing appears opposite the figure $5,030,000, to which you have just made reference, but opposite the figure $8,750,000 appear the words, "Pursuant to Article 2, Section 4—delivered to company."

The Witness: That is correct.

Mr. Swaine: What is the reason for there being no explanation as to the $5,630,000?

The Witness: This "Remarks" column to which you have just referred is a memorandum column, and it refers to [2303] those bonds which were delivered on that day in the aggregate. In other words, it refers not only to the $8,750,000 principal amount which on this sheet is opposite those "Remarks," but also refers to the $5,630,000.

Mr. Swaine: That is just what I was trying to get at. In other words, the fact that it is only against the $8,000,000 was not intended to exclude its applicability to the $5,630,000?

The Witness: That is correct.

Mr. Swaine: That is all I want. I have no objection to it.

(Discussion off the record.)

Examiner Wilkinson: These transcripts, consisting of two sheets, will be received as Exhibit 100, and you will furnish copies.

(Exhibit No. 100, Witness Buckley)

Q. (By Mr. McCollom) The series A and series B, as shown by the last exhibit as outstanding,

(Testimony of Carl E. Buckley.)

according to the records of the Chase, aggregate how much?

A. $18,999,500 principal amount of bonds.

Q. Your records indicate also that all of those bonds were delivered to the company, do they not? A. They do.

Mr. McCollom: May I ask the railroad company to supply for the next hearing, unless it is already in the [2304] record, a statement of the dates of delivery by the railroad company of those bonds?

Mr. Nicodemus: We will do that. Their delivery to the trustee for authentication, or their delivery to pledgees?

Mr. McCollom: The delivery of the authenticated bonds out from the railroad company.

Mr. Nicodemus: To the pledgees?

Mr. McCollom: Yes.

Mr. Nicodemus: Is it not in Exhibit 9?

Mr. Swaine: I do not think the date of the actual delivery is shown, just the date of the note for which the obligations were pledged.

Mr. McCollom: I think it is a very simple matter to state the date of the initial delivery out by the railroad company of the authenticated bonds. You do not know now, I suppose?

Mr. Swaine: We will be glad to stipulate that that can be filed by Mr. Nicodemus, and we will accept it as part of the record as of today, without any opportunity to examine it.

Mr. Nicodemus: All right, that is fine.

(Testimony of Carl E. Buckley.)

Q. (By Mr. McCollom) Have you produced a photostatic copy of the records of the case with reference to the monies held by the Chase as Trustee under the General [2305] Mortgage as proceeds of collateral? A. I have.

Mr. Swaine: We have no objection.

Mr. McCollom: I offer in evidence this transcript.

Examiner Wilkinson: It will be received as Exhibit 101.

(Exhibit No. 101, Witness Buckley, received in evidence.)

Q. (By Mr. McCollom) Have you produced a photostatic copy of the records of the Chase as Trustee under the general mortgage showing the income received on collateral held by it as Trustee under that mortgage? A. I have.

Mr. Swaine: No objection.

Examiner Wilkinson: It will be received as Exhibit No. 102.

(Exhibit No. 102, Witness Buckley, received in evidence.)

Q. (By Mr. McCollom) Have you produced a correct list of securities held by the Chase as Trustee under the General Mortgage as of the close of business October 21, 1936? A. Yes.

(Discussion off the record.)

Mr. McCollom: I offer in evidence the list produced by the witness. [2306]

Examiner Wilkinson: Any objection?

(Testimony of Carl E. Buckley.)

Mr. Coulson: None.

Mr. Wood: No objection.

Examiner Wilkinson: It is received as Exhibit No. 103.

(Exhibit No. 103, Witness Buckley, received in evidence.)

Q. (By Mr. McCollom) Mr. Buckley, you have seen from time to time, have you not, statements of collateral as physically held by the Trustees under the first mortgage of the Western Pacific?

A. I recall one certificate in there from the Trustee.

Q. You know, for example, that that list shows certain securities of the Sacramento Northern Railroad Company?

A. I will have to verify my recollection as to specific details.

Q. I am not asking, Mr. Buckley, as to any specific amount. I am simply asking whether you have seen lists showing the Trustee of the first mortgage to hold certain securities?

A. I recall a list that is in our file.

Q. Of the Sacramento Northern Railroad. Has the Chase ever made any investigation as to the right of the Trustees under the First Mortgage to hold the collateral or securities which that Trustee holds? A. I do not know. [2307]

Mr. Nicodemus: I do not know whether his answer is responsive. Do you know there was no such investigation?

(Testimony of Carl E. Buckley.)

The Witness: I have no knowledge on it now, because I have not looked into the question. If there was any, it is a matter of record. It is the first time I have heard about it, and I have not examined our records to ascertain whether there was or not.

Q. (By Mr. McCollom) You do not know whether the Chase has had any occasion to study that question?

A. No, I do not, Mr. McCollom.

Q. Would the same answer be true as to any other collateral held by the Trustee under the First Mortgage?

A. Except this—the only knowledge I have as to the collateral—that a short time ago I believe Mr. Homire requested Milbank, Tweed, Hope & Webb, our counsel, to furnish him with a memorandum list of collateral handled by us as trustee under the first and refunding mortgage bond indenture.

I had a man make up such a list, and furnished it, I believe, to Mr. Wood of our counsel, and I assume he sent it along in response to your request.

Mr. Wood: It was sent to Mr. Homire.

The Witness: A copy of that list that was furnished to Mr. Homire is in our files. A copy of that list is produced here today by you. That is the copy (indicating). [2308] That is a copy which purports to show the correct amount of collateral held by us as Trustee under the Refunding and General.

(Testimony of Carl E. Buckley.)

But the primary record is still in our office, and while I believe that that is a correct list, and while I believe that there is a certificate from the Crocker First Federal as Trustee under the First Mortgage in our files, has indicated on that list—and I believe that there is a security of the Sacramento Northern as shown on that list—I cannot swear to the correctness of that without getting the primary record, you see.

Q. I do not think you understand my question, Mr. Buckley. My question was whether the Chase so far as you knew had ever made any investigation as to the right of the Trustees under the first mortgage to hold any collateral which they held as trustees under that mortgage.

A. As to that question I do not know, I have no knowledge.

Q. So far as you know, has the Chase as Trustee under the General Mortgage made any investigation as to the property which the railroad company acquired after the date of the first mortgage, and as to whether or not such property is covered by the lien of the first mortgage?

A. I have no knowledge of that, either, sir.

Q. Do you think you would have a present knowledge of it if it had been done? [2309]

A. It is quite likely that I would not. In a matter that has been extending over these years, having it flashed on me out of a clear sky, I might not. If I recollected it, it would just be chance.

(Testimony of Carl E. Buckley.)

Mr. McCollom: That is all we have to offer now, Mr. Examiner.

Examiner Wilkinson: Do you care for Mr. Buckley again?

Mr. McCollom: Mr. Buckley is in New York and I assume that we could always recall him.

Examiner Wilkinson: Any questions of Mr. Buckley?

You are excused, Mr. Buckley.

(Witness excused.)

Examiner Wilkinson: Is there anything further?

Mr. Nicodemus: None on the part of the Debtor.

Mr. Swaine: I understand the Debtor has closed its case. We have closed our case. I suggest that the Examiner fix a date for filing briefs.

Mr. McCollom: That of course would not be entirely satisfactory to us. I think Your Honor must appreciate that the Irving was not substituted as Trustee under this mortgage until last Friday. Since that time I have read several hundred pounds of papers, and there are still several hundred pounds of papers that have to be read. While it is quite true that all of those papers will not [2310] necessarily have any bearing on any question that remains open, still, the moment that you suggest the question of priority as between mortgages, you raise a very serious question. We should

not wish to have the record closed so far as we are concerned until after we had what under all the circumstances will be considered reasonable opportunity to study the facts, with the purpose of finding whether there is further evidence to be introduced in support of the claim of the general mortgage as against the First Mortgage.

I have consulted with the holders of the bonds issued under the general and refunding mortgage, and they feel that there should be a month's adjournment.

Mr. Swaine: Mr. Examiner, the General and Refunding Bonds are not as in the ordinary case held by large numbers of scattered bondholders who must be represented by a trustee or not be represented at all. All of the bonds are held by three institutions, the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company.

The negotiation of this plan was under consideration for many, many months before a plan was filed at all. All three of those bondholders had ample opportunity to examine as to their rights, because the question of what their rights were was naturally an important item in the [2311] negotiation of the plan.

I have forgotten the exact date on which the plan was filed. The first hearing, as I remember it, in this proceeding, was some time in March. Counsel for all three holders of the General and Refunding Bonds appeared at the first hearing. They

have been here at all the hearings down to date. They have had ample opportunity to have investigated the question to which Mr. McCollom refers.

I have no desire to cut Mr. McCollom short; if he at this last minute or last second finds something more to muddy the record with, all right. He is entitled to that opportunity.

But my practical suggestion is that the Examiner fix a date for briefs, and fix a date which need not be a month, say, let it be two weeks from now, and if Mr. McCollom has any more to offer on that date two weeks from now we can all come down and attend the taking of that testimony. Otherwise, let the record be considered closed as of today, and fix a date for filing of briefs which may give counsel opportunity to take into account any such testimony that may be introduced two weeks from today.

To make it concrete, I would suggest that briefs be filed by December 20th by all the parties.

Examiner Wilkinson: Mr. Swaine, we cannot fix a date for filing briefs until the case is closed, under the Com- [2312] mission's rules.

I appreciate what you have said, and certainly it is the desire of the Examiner and the Commission to close these cases up if possible.

I would like to ask now, if you do not mind, diverting just a moment from Mr. McCollom, as Mr. McCollom's position is clear, does the Railroad Credit Corporation have anything to produce at this hearing?

Mr. Willard: Probably not, Mr. Examiner, but we do not have all the facts before us. I gather Mr. Swaine's suggestion is that we shall prepare our briefs before we know whether there is anything more to go in.

Examiner Wilkinson: That has been disposed of.

Mr. Willard: We would like to know all the facts before we are called upon to prepare a brief and we state our position finally. We have relied on counsel for the Trustee to make the case. We have not made the effort to do it ourselves, as to priority. I think perhaps it is a little bit of a wrong picture to say that a plan has been negotiated for many months, implying that we had had part in it. We did not. We were not consulted when the plan was being prepared, and we came into the picture after the picture was all drawn.

We think that the Trustee for the General Mortgage should have an opportunity to make an examination of the [2313] records and to put in the record in this case whatever seems to be necessary to establish our rights as bondholders.

Examiner Wilkinson: As far as the Railroad Credit Corporation is concerned, at least at the present time, you have nothing ready, and so far as you know you do not intend to put any testimony in, yourself?

Mr. Willard: That is our present intention.

Examiner Wilkinson: Does the Reconstruction Finance Corporation have any evidence it wants to offer at this hearing?

Mr. Homire: No further evidence to offer at this hearing, except that at the last hearing it was understood that we would obtain copies of the Commission's valuation report on the Western Pacific, and I have those here now. I do not believe these have been assigned an exhibit number.

Examiner Wilkinson: At the same time some of the parties made a suggestion that it might be possible to get together and to stipulate certain facts rather than put in the whole report. Has there been any effort along that line?

Mr. Homire: I understood that they would be produced here.

Examiner Wilkinson: All right, if you want to do it. [2314] I just want to know if there is any possibility, rather than put in the entire report—

Mr. Homire: It has not been done.

Examiner Wilkinson: To stipulate as to the facts in there that you want in the record.

Mr. Nicodemus: I would like to undertake to stipulate.

Mr. Homire: That has not yet been done, but I should suppose that we could make the same reservation that is already in as to other evidence, at least as I understand it, that if they want to eliminate it from the record we could stipulate that later.

(Discussion off the record.)

Mr. Homire: We offer the report.

Examiner Wilkinson: The report of the Interstate Commerce Commission in Valuation

Docket No. 126, Western Pacific Railway Company, is received as Exhibit No. 104.

(Exhibit No. 104, by Counsel, received in evidence.)

Examiner Wilkinson: Do you have anything further, Mr. Homire?

Mr. Homire: No, not now.

Mr. Nicodemus: I have one thing further, I would like to have a little time in which to formulate a motion to strike out a great many exhibits that I think can be eliminated. I am quite serious about that.

Examiner Wilkinson: In view of the fact that there [2315] has been a general substitution of the General and Refunding Mortgage Trustee, and that a new one has been appointed only within the last day or two, much as the Examiner would like to close the record, he cannot do so. We will adjourn until December 9th.

Mr. Coulson: Mr. Examiner, I suggest for the convenience of the Commission and to avoid relegating a matter of computation to the briefs, that there be prepared for the various plans before the Commission statements similar to those that the Commission has required in other hearings, showing the effect on the tax expenses of the property of the distribution of income required by the various plans. I have special reference, of course, to the application of the undistributed corporate surplus tax law to plans which require a continuous segregation of income either by way

of providing for capital expenditures or for sinking funds or for other non-distributable purposes.

Examiner Wilkinson: Do you want to put in a statement like that?

Mr. Coulson: It does not apply to the plan I filed, but applies to the other two plans. I think Mr. Nicodemus and Mr. Swaine ought to charge themselves with responsibility for presenting exhibits at the next meeting for their two plans.

[2316]

Mr. Nicodemus: I think Colonel Coulson is an outstanding authority on taxes, and he should prepare that statement.

Mr. Coulson: That would be making it a matter of stipulation.

Mr. Swaine: It requires a great deal of stipulation.

Mr. Coulson: I would rather have Mr. Swaine's office do it as to his plan.

Mr. Swaine: So far as our plan is concerned —and that is true as to the Debtor's plan—that is entirely permissive. If the Board of Directors feels that the tax burden would be less if they did not want to apply income to capital expenditures, they do not have to under our plan. The state of the tax law as it was at the time the problem arose would be the thing that the Directors took into account. You would have to make all sorts of hypotheses. I do not believe it will help very much to make that.

Mr. Coulson: I did not so understand Mr. Swaine's plan, but I will reexamine it from that point of view. If his plan does involve any compulsory segregation of income, then I would respectfully request that the Commission have in this proceeding as in other similar proceedings a statement showing the effect of the additional tax burden. [2317]

Mr. Nicodemus: I would like to give a warning that in the next hearing if he suggests two weeks for filing briefs, that will be wholly satisfactory to us. That is not an adequate time for the preparation of briefs. I do not think he was serious.

Mr. Swaine: I suggested 30 days today, with the hearing in two weeks.

Examiner Wilkinson: In answer to Mr. Coulson, the Commission will be very glad to receive the data.

We will adjourn now until December 9, 1936.

(Whereupon, at 1:55 o'clock, pm., an adjournment was taken until December 9, 1936, at 10 o'clock, a. m.) [2318]

Before the
Interstate Commerce Commission
Finance Docket No. 10913

WESTERN PACIFIC RAILROAD
COMPANY REORGANIZATION.

Ante Room A,
Interstate Commerce Building,
Washington, D. C.
Wednesday, December 9th, 1936.

The above-entitled matter came on for further hearing at ten o'clock a. m., pursuant to notice.

Before:

Examiners Harvey H. Wilkinson, and R. T. Boyden.

Appearances:

Same as heretofore noted.

Additional Appearances:

Ernest S. Ballard, 120 S. La Salle Street, Chicago, Illinois, and Mr. Philip A. Walker, Munsey Building, Washington, D. C., appearing for Missouri Pacific Railroad Company, intervening petitioner.

H. Brua Campbell, 35 Wall Street, New York, N. Y., appearing for Debtor. [2320]

PROCEEDINGS

Examiner Wilkinson: Are you ready to proceed, gentlemen?

Mr. Campbell: Mr. Examiner, my name is H. Brua Campbell. I am appearing here in the place

of my partner, Mr. Nicodemus, who is ill at St. Luke's Hospital, who asked me to appear here, and I would like to enter my appearance for the Debtor, if I may.

Examiner Wilkinson: Yes, sir.

Mr. Campbell: The debtor desires to produce the corporate history of the debtor.

This was prepared in San Francisco and is introduced at the request of Examiner Boyden. We have tried to make it as complete as possible and give information which will be useful. If it contains any statement as to the respective liens of the first mortgage and the general and refunding mortgage, or any other mortgage, which is a legal conclusion, we understand that no one is bound thereby, not even the debtor. It is offered solely for the factual data which it contains, and we ask that it be received as Exhibit No. 105.

Mr. McCollom: May it please the Examiners, may I ask whether I am correct in understanding that in the preparation of this statement the company did not [2322] intend to make any statement with reference to the relative liens as between mortgages?

Mr. Campbell: This is off the record, for the time being.

Mr. McCollom: We do not object to the statement as long as it is understood that nothing contained in the statement is to be taken as stating the railroad's position with reference to liens of mortgages, or that nothing contained in the state-

ment is to be taken as being important with reference to the question of relative liens of the mortgages from the point of view of law.

We stand on the provisions of the general and refunding mortgage, which of course, cannot be modified by a statement of this nature.

Mr. Swaine: Of course the statements of the debtor cannot bind anyone affected by them, we believe. On the other hand they are admissions by the debtor, so far as the debtor is concerned, and I think the document must stand on its face for what it is worth.

Mr. McCollom: The language of the general and refunding mortgage on page 23, after describing the property covered by the mortgage, states as follows:

> "Subject, however, insofar, but only insofar as in law the same respectively may attach to [2323] any part or parts of the trust estate to existing liens and charges of record * * * including the first mortgage."

I should object to the introduction of the statement, if Mr. Swaine proposes that it be in the record, even for the limited purpose for which he states that he finds it should be in the record.

Examiner Wilkinson: Mr. McCollom, I do not see how you can represent the debtor, and this is a statement presented by the debtor in response to a request of the Examiner for a corporate history of the Western Pacific. The Examiner, of course,

has not read it, but naturally it does not bind other parties.

We take it that this is a statement by the debtor as to its corporate history, and it will be received as Exhibit No. 105.

Mr. Coulson: Before you rule that this be received, may I enter a formal objection to this document? I have been handed this document of 35 pages and it contains extended exhibits and tabulations, having received it just at this moment. I have no knowledge what facts are in it, but its probative value, if any, as to factual basis must arise solely from the fact that it is presented by counsel for the debtor.

Creditors appearing in this proceeding—and I [2324] represent one of the Junior Creditors—should have an opportunity to examine this as to the facts presented and as to the necessity of cross examination with reference to any of the facts.

I object to the admission of the exhibit on the basis that no foundation has been laid for it as to relevancy and competency, and if it is accepted by the Examiner, I ask that it be accepted subject to a motion to strike out or to a request on the part of any interested creditor for the right to cross examine insofar as factual data in this statement is concerned.

I have never seen it before.

Mr. Clay: The R. F. C. objects on the same ground.

Examiner Wilkinson: In view of the objection of Mr. Coulson that he has not had time to examine it, we will strike out the receipt of this document and will reserve ruling on it until the close of the hearing.

(Informal discussion off the record.)

Examiner Wilkinson: We will proceed.

Mr. Ware: Mr. Examiner, may I interrupt a moment before you proceed?

I have an intervening petition to offer here, and if this is the proper time, I should like to offer it.

Mr. Campbell: We have another exhibit which we [2325] would like to offer.

Examiner Wilkinson: While we are on the record here, let us finish with that. Let us see the petition.

Mr. Ware: This is a petition filed on behalf of the Missouri Pacific Railroad Company, Guy A. Thompson, Trustee, and this is the original petition. I have sufficient copies to go around.

Mr. Swaine: The Institutional Bondholders' Committee objects to the introduction of the Missouri Pacific petition.

Mr. Campbell: The debtor objects to the intervention of the Missouri Pacific Railroad Company, or its Trustee, on the ground it is not a party within the meaning of Section 77, and that its admission will unduly delay the proceedings.

Mr Ballard: If your Honors please, my name is Ernest S. Ballard and I have a matter relating to which I think something should be presented now.

I am the attorney for the Missouri Pacific Railroad Company, Debtor, as distinguished from the Trustee and I have a petition of intervention here —I do not mean debtor in these proceedings but in another proceeding—and I have a petition of intervention on the behalf of the Missouri Pacific Railroad Company, which I ask leave to file, and at the proper time I am [2326] prepared to be heard on it. I have copies for counsel.

Mr. McCollom: The Trustee under the General and Refunding Mortgage has not seen the petition, and we believe we should withhold statement of our position until we have seen and examined it.

Mr. Swaine: The objection of the Institutional Bondholders' Committee goes to the attempted intervention of the Trustee and the attempted intervention of the Missouri Pacific itself.

Mr. Campbell: The objection of the debtor likewise goes to both the attempted intervention of the Trustee and the attempted intervention of the Missouri Pacific itself.

Examiner Wilkinson: It is necessary, before the Examiner can rule upon this question, to have time to look at these petitions.

Mr. Coulson: Mr. Examiner, I would like to enter an objection to both petitions of intervention; and I would like to be heard as to the grounds of my objection at an appropriate time.

Examiner Wilkinson: At an appropriate time the question will be raised.

Do you have anything further, Mr. Campbell?

Mr. Campbell: Yes, Mr. Examiner. The Debtor desires to introduce a statement prepared by Mr. M. J. Curry, [2327] showing the delivering dates to pledgees of $18,999,500 principal amount of General and Refunding bonds. This was requested both by Mr. Swaine and Mr. McCollom. We ask that it be received as Exhibit No. 106, and with the introduction of that, the Debtor has finished its case in chief.

We understand, however, that other counsel will wish to introduce evidence.

Examiner Wilkinson: Is there any objection to this document by counsel?

Mr. Caulson: May we have an opportunity to examine it?

Examiner Wilkinson: The document will be marked for identification as Exhibit No. 106 and not received at this time but just marked.

(Exhibits Numbers 105 and 106, by Counsel, were marked for identification.)

Examiner Wilkinson: Do you have anything further, Mr. Campbell?

Mr. Campbell: Not at this point.

Examiner Wilkinson: Mr. McCollom, do you have anything at the present time?

Mr. McCollom: The present situation in this case, Mr. Examiner, arises from the fact that the Institutional Committee of First Mortgage Bondholders has [2328] proposed a plan based upon the assumption that the first mortgage is a prior lien upon all property of the Railroad Company and,

therefore, that they must receive for all indebtedness due to them securities which shall out-rank all other securities to be issued. No plan can possibly be based upon such an assumption. There might be more basis for such an assumption if the law were that a first mortgage and the after acquired property clauses presumably cover all property of the Railroad Company. The fact is that the law is exactly to the contrary.

In Mortgage Foreclosure cases presenting a plan of reorganization, the First Mortgagee asserts the coverage of his mortgage upon all property and must prove it. That is an accepted practice. There is nothing whatever in Section 77 to indicate that any other rule applies in 77 proceedings.

Therefore, after the last hearing, and after analyzing the situation, we wrote a letter to Mr. Swaine, dated December 4th, 1936, and sent copies to the Examiner and to the parties. I think it might be appropriate if that letter were either marked in evidence or copied into the record. I have a copy of it here with me.

Examiner Wilkinson: Do you have sufficient copies [2329] for the parties?

Mr. McCollom: They have already gone to the parties. I have two extra copies with me.

Examiner Wilkinson: This letter of December 4, 1936, will be received as Exhibit No. 107.

(Exhibit No. 107, by Counsel, was received in evidence.)

Mr. McCollom: Although the burden is upon the first mortgage, we think that the Commission and the First Mortgage Bondholders are entitled to an indication, so far as we can presently give it, of the classes of property as to which it is asserted either that the property is not subject to the first mortgage or that it is subject to that mortgage, only to the limit of extent that first mortgage monies were expended upon the property.

This we have tried to do by the letter of December 4th, which has just been offered.

Since the last hearing my partner, Mr. Judd, has spent practically all of his time, and I have spent a great amount of my time, in investigating the facts, but it will be understood, I am sure, that in the limited time which we have had, it has not been possible to study all of this property and the facts surrounding all of this property, and to be certain [2330] that there may not be items not mentioned in our letter which are free from the first mortgage.

Of course, the question of whether a mortgage covers property is very largely a question of fact, and also a question of very detailed fact in many cases.

The classes of property which are mentioned in our letter are all of them classes of property which have been held to be free from First or underlying mortgages.

We have some evidence to introduce today which we believe may aid the Commission, but in intro-

ducing this evidence it should be understood that we are not departing to any extent whatever from our position that it is not our burden to disprove the case of the first mortgage bondholders.

Inasmuch as my partner, Mr. Judd, is more familiar with the details of the evidence than I, I think it would save time if Mr. Judd were to introduce the evidence which we have to offer.

Examiner Wilkinson: Your appearance is entered, Mr. Judd?

Mr. Judd: Yes, sir, at the last hearing.

Mr. Curry, will you take the stand? [2331]

M. J. CURRY

testified further as follows:

Direct Examination

Q. (By Mr. Judd) Mr Curry, at the time that Western Pacific Railroad Company was organized in 1916, did its certificate of incorporation include any reference to the Northern California Extension?

A. To the best of my knowledge, it did not.

Q. You have examined the certificate and you know that that is a fact? A. That is a fact.

Q. Can you tell me when the reference to the Northern California Extension was included in the certificate of incorporation approximately?

A. Approximately the year 1927, I think it was —no, pardon me. 1929, I think it was.

(Testimony of M. J. Curry.)

Q. Have you any documents from which you can refresh your recollection?

A. (Examining papers) April 8th, 1929, is correct.

Q. Can you tell me what the total amount of expenditure on account of land for transportation purposes was in connection with the Northern California Extension?

A. Have you a statement there?

Q. I have a copy of one of your statements (handing [2332] paper to witness).

A. The total charges to June 30th, 1932, in connection with the Northern California Extension under Account 2-Land for transportation purposes, amounted to $376,662.17.

Mr. Judd: Mr. Wood, just to be sure of the record, I would like to be assured by you that Exhibits Nos. 62 to 73, as they were cut down at the last hearing, still include the certificates by detailed accounts against which the first mortgage money was requisitioned?

Mr. Wood: That is my recollection, that these certificates went in in toto.

Mr. Judd: If they are physically a part of the record, I think we can assume they are before the Commission.

Mr. Wood: That is subject to correction by looking at the record, but that is what I recall.

Mr. Judd: I would like to ask, Mr. Examiner, that in the event that the portion of those exhibits

(Testimony of M. J. Curry.)

which include the description of the accounts on which expenditures were made, and as a basis for which First Mortgage money was requisitioned, may be considered by the Commission, if they are not in the parts of those exhibits which have been introduced. [2333]

Examiner Wilkinson: That will be done, if you will identify it on the record with sufficient definiteness so that we know just what it is.

(Informal discussion off the record.)

Q. (By Mr. Judd) Mr. Curry, have you produced a copy of the Equipment Trust Agreement dated March 1, 1923, covering certain equipment of the Western Pacific Railroad?

A. I have, yes sir.

Mr. Judd: I offer that in evidence. We have copies to distribute, Mr. Examiner.

The Witness: That is the 1923 one.

Examiner Wilkinson: Is there objection?

(No response.)

Examiner Wilkinson: It will be received as Exhibit No. 108.

(Exhibit No. 108, Witness Curry, was received in evidence.)

Q. (By Mr. Judd) Have you prepared also, Mr. Curry, a copy of the Equipment Trust Agreement dated March 15, 1924, covering such equipment?

A. I have such an agreement in hand.

(Testimony of M. J. Curry.)

Q. Will you read me from page 2 of that agreement the equipment which it covers and the estimated cost?

A. "(a) 5 heavy Mikado Locomotives lettered W.P. and [2334] numbered 322 to 326 both inclusive;

"(b) 5 Mallet Locomotives, lettered W.P. and numbered 206 to 210 both inclusive;

"(c) 775 steel underframe refrigerator cars, lettered P.F.E. and numbered 52001 to 52775, both inclusive;

"(d) 100 logging cars lettered W.P. and numbered 2701 to 2800 both inclusive;

"(e) 200 steel underframe automobile cars lettered W.P. and numbered 14101 to 14300 both inclusive;

"(f) 1 Jordan spreader, equipped with composite ditching and spreading wings, lettered W.P. and numbered 9.

"Together with such additional railroad equipment as shall be required for said trust and subjected to this lease as hereinafter provided.

"The estimated cost of the railroad equipment above specifically described, when completed, has been certified to the trustee to be approximately $3,881,250."

Q. What is the amount of the Equipment Trust Certificates issued under this agreement?

(Testimony of M. J. Curry.)

A. Total issue 5½ per cent Equipment Trust Certificates Series C, $3,105,000. [2335]

Q. Can you find on pages 4 and 5, I believe it is, the number and amount of installments payable on those certificates?

A. "The principal of the Trust Certificates when and as the same shall become payable, whether by declaration or upon the respective dates of maturity thereof, towit:

"December 1, 1924—$207,000."

Q. How many installments of $207,000 are listed?

A. 15 installments of $207,000, maturing December 1st, each year, from December 1, 1924 to December 1, 1938 inclusive.

Q. Now, Mr. Curry, apart from the units described, the dates and the amounts referred to therein, can you state that this Equipment Trust Agreement is substantially similar to the agreement already marked in evidence as Exhibit No. 108?

A. I think I can safely make that statement, yes.

Examiner Wilkinson: Are you offering this Equipment Trust of 1924?

Mr. Judd: I have offered the 1923 Equipment Trust, and I have attempted to show that the Equipment Trust of 1924 is substantially the same in terms, although it covers additional equipment. I do not see that there is any necessity for putting those terms into [2336] the record a second time.

(Testimony of M. J. Curry.)

Q. (By Mr. Judd) Have you produced, Mr. Curry, a third Equipment Trust Agreement covering Series D Certificates and dated May 1, 1929?

A. I have such an agreement in hand, yes, sir.

Q. Can you read to me from page 2 of that agreement the items of equipment which it covers?

A. The listing is as follows:

(a) 5 Heavy Mikado locomotives, lettered W. P. and numbered 332 to 336 both inclusive;

(b) 50 Steel Tank Cars lettered W. P. and numbered 1,201 to 1,250 both inclusive.

(c) 50 50 foot flat cars, lettered W. P. and numbered 2,301 to 2,350, both inclusive;

(d) 150 automobile cars with steel ends, lettered W. P. and numbered 12001 to 12150 both inclusive;

(e) 100 automobile cars with end doors one end and steel end other, and lettered W. P. and numbered 13001 to 13100, both inclusive.

Together with such additional railroad equipment as shall be acquired for said Trust and subjected to this lease as hereinafter provided.

The estimated cost of the above railroad equipment described, when completed, has been certified to [2337] the trustee to be approximattely $1,369,827.30.

Q. What was the total amount of the certificates of Series D issued under that equipment trust agreement?

A. The 5 Per Cent Agreement Trust Certificates Series D, total issue, $1,095,000.

(Testimony of M. J. Curry.)

Q. Can you tell me the number and the amount of the installments payable on those equipment trust certificates, and when they were payable?

A. The principal of the trust certificates, when and as the same shall become payable, whether by declaration or upon the respective dates of maturity thereof, towit, beginning November 1, 1929 to and including November 1, 1943, $73,000 per annum.

Is that sufficient?

Q. That is sufficient. Except with respect to the units covered, the dates and the amounts which you have already referred to is this agreement substantially the same in form as the equipment trust agreement which has been marked Exhibit No. 108, and the equipment trust agreement dated March 15th, 1924? A. I believe it is, yes, sir.

Q. Who is the trustee under these equipment trust agreements at the present time?

A. The Chase National Bank of the City of New York, as successor to the Equitable Trust Company of New [2338] York.

Q. Under all three? A. Under all three.

Q. Will you produce, Mr. Curry, a lease from the Baldwin Locomotive Works to the Western Pacific Railroad Company, dated June 5th, 1931?

A. I have such a lease of locomotives, dated June 5, 1931, by the Baldwin Locomotive Works to the Western Pacific Railroad Company.

Mr. Judd: I offer that in evidence.

(Testimony of M. J. Curry.)

Examiner Wilkinson: Is there any objection?

(No response.)

Examiner Wilkinson: It will be received as Exhibit No. 109.

(Exhibit No. 109, Witness Curry, was received in evidence.)

Q. (By Mr. Judd) This lease refers, Mr. Curry, to payments to be made semi-annually, dating from the average weighted delivery date of all six locomotives hereunder, reading from Page 2. Is there a letter which fixes that average weighted delivery date?

A. Yes, there is such a letter, dated July 31, 1931.

(Producing document.)

Mr. Judd: I offer that letter in evidence.

Examiner Wilkinson: Any objection? [2339]

(No response.)

Examiner Wilkinson: It will be received as Exhibit No. 110.

(Exhibit No. 110, Witness Curry, was received in evidence.)

Mr. Judd: Are you familiar, Mr. Curry, in general, with the provisions of Article V, of Section 16, of the General Mortgage, General and Refunding Mortgage, requiring the Western Pacific Railroad Company for furnish annually to the Trustee under that mortgage a list of the equipment covered by it?

The Witness: I am familiar with such provision in the mortgage.

(Testimony of M. J. Curry.)

Q. (By Mr. Judd) Have you produced a list furnished to the Trustee of the General and Refunding Mortgage, under date of February 12th, 1936?

A. We have such a document here.

(Producing document.)

Mr. Judd: I offer that in evidence.

The Witness: It is a photostatic copy.

Examiner Wilkinson: Is there any objection?

(No response.)

Examiner Wilkinson: The document just referred to and consisting of 6 sheets, will be received as Exhibit No. 111. [2340]

(Exhibit No. 111, Witness Curry, was received in evidence.)

Q. (By Mr. Judd) The numbers describing the equipment listed on this statement, Mr. Curry, correspond do they not, to the numbers opposite specific types of equipment, on Exhibit No. 15, already in evidence? A. They do, yes, sir.

Q. The numbers listed in the statement as descriptive of equipment covered under the Equipment Trust Agreements would include reference to any equipment which has been renumbered or any equipment placed under those agreements pursuant to the requirements to replace worn out or destroyed equipment? A. Yes.

Q. Are you familiar in a general way with the manner of making the initial payment on account of this equipment, and the payments of installments coming due subsequently? A. I am, yes, sir.

(Testimony of M. J. Curry.)

Q. Can you tell me whether those payments were made out of proceeds of First Mortgage bonds or out of free funds of the company?

A. I cannot—you mean the 20 per cent payment?

Q. The 20 per cent payment and later payments.

A. My recollection is that that payment was made out [2341] of free funds.

Q. You do not know of any payments which were made out of First Mortgage Bonds on account of these items of equipment? A. I do not.

Mr. Groom: When you say "items of equipment", you mean just those under the equipment trust?

Mr. Judd: Yes, sir.

Mr. Swaine: You are not referring to this list, which is all the equipment the company owns?

Mr. Judd: No, I am referring to the three equipment trusts and the Baldwin Locomotive Lease, the only ones under which there was any initial payment.

Mr. Swaine: You appreciate that the statement introduced was a list of all the equipment the company owns. The First Mortgage Bondholders do not question that all that equipment is subject to the General and Refunding Mortgage, but subject also to the first mortgage.

Mr. McCollom: All of what equipment?

Mr. Swaine: All of the equipment embraced in this list, which is all the equipment which the company owns. This list which was introduced is not confined to the equipment trust agreement.

(Testimony of M. J. Curry.)

Mr. Judd: It includes all the equipment under the [2342] equipment trust agreement.

Mr. Swaine: It includes all the equipment which the company owns.

Mr. McCollom: Mr. Swaine, have you any question that the equipment under the three equipment trusts and the Baldwin Locomotive Lease is free from the first mortgage?

Mr. Swaine: I have a distinct question, and I will ask Mr. Curry, when you get through with him a question which will establish that it is under the first mortgage.

Q. (By Mr. Judd) Have you produced a copy of the listing application submitted to the New York Stock Exchange in connection with the listing of the last series of bonds issued under the first mortgage at $645,000, authorized by the Interstate Commerce Commission on October 17th, 1931?

A. I have produced such listing application.

Mr. Judd: I offer that listing application in evidence. I am sorry I have not copies of that at the present time, but I will say that one of the purposes for which it is introduced is to show the statement on page 4 thereof in the description of property, on which the mortgage constitutes a first lien, that:

> "The foregoing equipment does not include [2343] additional unmortgaged equipment covered by Equipment Trust Agreements, Series 'B' and Series 'C' and Series 'D', as follows:"

(Testimony of M. J. Curry.)

Do you want to look at it before it goes in?

Mr. Swaine: No.

Examiner Wilkinson: Any objections?

Mr. Swaine: None at all.

Examiner Wilkinson: It will be received as Exhibit No. 112.

(Exhibit No. 112, Witness Curry, was received in evidence.)

Examiner Wilkinson: You will furnish the necessary copies?

Mr. Judd: I will do that as promptly as possible.

Q. (By Mr. Judd) Can you tell me, Mr. Curry, what the mileage operated by the Western Pacific Railroad Company was on or about June 14th, 1916?

A. The first annual report for the calendar ended December 31, 1916 shows the railroad company's operations from July 14th, the date of the reorganization, to December 31st, average mileage operated as 942.98.

Q. Are you familiar in a general way, Mr. Curry, with the branches and extensions described in the General and Refunding Mortgage of the Company dated January 1, 1932? [2344]

A. In a general way, yes, sir.

Q. Have any of those branches of extensions been abandoned since the execution of that mortgage? A. Not to my knowledge.

Q. Mr. Curry, in the balance sheet of the Railroad Company as of December 31, 1935, there is an

(Testimony of M. J. Curry.)

item of Miscellaneous Physical Property listed of $3,856,127.99. Is that the same item which appears in somewhat greater detail in Item 212 of the Company's Annual Report to the Interstate Commerce Commission for December 31, 1935?

A. It is, yes, sir.

Q. Does that embrace substantially the same property which is listed in considerably greater detail in the same item of the company's annual report to the Interstate Commerce Commission for December 31, 1934? A. It is, yes, sir.

Q. That is for the years ended December 31, 1935 and December 31, 1934? A. That is right.

Mr. Judd: I offer in evidence copies of items 212, as it appears in the 1935 and 1934 reports to the Interstate Commerce Commission listing miscellaneous Physical Property.

Mr. Groom: May we see it? [2345]

Examiner Wilkinson: Any objection?

Mr. Swaine: May we see it first?

(Discussion off the record.)

Mr. Swaine: We have no objection to this document.

Examiner Wilkinson: Schedule No. 212, Miscellaneous Physical Property for the year ending December 31, 1934 of the Western Pacific Railroad Company, as shown on four sheets, will be received as Exhibit No. 113.

(Exhibit No. 113, Witness Curry, was received in evidence.)

(Testimony of M. J. Curry.)

Examiner Wilkinson: Schedule No. 212, Miscellaneous Physical Property for the year ending December 31, 1935 of the Western Pacific Railroad will be received as exhibit No. 114.

(Exhibit No. 114, Witness Curry, was received in evidence.)

Examiner Wilkinson: Will you furnish copies of the last statement, Mr. Judd?

Mr. Judd: Yes, sir, I will furnish copies.

Examiner Wilkinson: At the same time please furnish an extra copy of No. 113.

Mr. Judd: Here is an extra copy.

(Producing document.)

Examiner Wilkinson: Thank you.

Q. (By Mr. Judd) Have you produced, Mr. Curry, a copy [2346] of the Reorganization Plan of the Western Pacific Railway Company, dated June 15th, 1915, at the time of the first reorganization of the property? A. I have.

Q. Will you read me from page 8 of that plan the statement which it makes with reference to the First Mortgage Gold Bonds proposed to be issued, pursuant thereto?

Mr. Swaine: I would like to object to that, because the fact that it may have been proposed in some other proceeding to create a different kind of mortgage than was created has no bearing upon the meaning of the document which was ultimately created. The mortgage speaks for itself irrespective of any prior claim about it.

(Testimony of M. J. Curry.)

Mr. Judd: If your Honor please, the first mortgage with which we are concerned in this proceeding was issued as a part of a reorganization of the Western Pacific Railway Company, which began in 1915, and was effectuated in 1916.

The Exhibit which has just been introduced in evidence listing miscellaneous physical property introduced certain items of non-carrier property, some of which we believe, although our information on it is still incomplete, was owned before the organization of the present railroad company. [2347]

We feel——

Examiner Wilkinson: Just a moment. We have been receiving a lot of evidence, and I do not think this makes much difference. So, go ahead.

Mr. Swaine: On the ground that the Commission regards it as irrelevant, I will withdraw my objection.

Mr. McCollom: It is not irrelevant, as a matter of fact, Mr. Swaine.

Mr. Swaine: We can argue that.

Examiner Wilkinson: The statement of counsel will speak for itself.

Q. (By Mr. Judd) Will you read the provisions to which I have referred?

A. Quoting from page 8 of the Western Pacific Railway Company's Plan and Agreement of Reorganization, dated December 15, 1915:

"First Mortgage Gold Bonds (New Bonds) authorized issue $50,000,000, to be secured by

(Testimony of M. J. Curry.)

first mortgage upon all existing Railway properties of the old company and all property hereafter acquired by the operating company integrally connected therewith, and all property acquired by means of the use of proceeds of the new bonds or against which new bonds will be issued."

Q. I call your attention, Mr. Curry, to items 372 and [2348] 374 in the annual report to the Interstate Commerce Commission for the year ended December 31, 1935, and ask you whether those two items include the rent received by the Railroad Company from the items of miscellaneous property listed in Exhibits Numbers 113 and 114?

A. Yes, it is my belief that they cover such items.

Q. How many pieces of property are referred to under Account No. 372?

A. In this report for the year ended December 31, 1935?

Q. Yes, sir.

A. Minor items 291 in number, each less than $5,000 per annum.

Q. How many are referred to in Account No. 374?

A. Minor items 106 in number, each less than $25,000.

Mr. Judd: I offer in evidence copies of those two items in the annual report to the Interstate Commerce Commission, dated December 31, 1935.

(Testimony of M. J. Curry.)

Examiner Wilkinson: Any objection.

(No response.)

The document relating to the income for lease of road for the year ended December 31, 1935 will be received as Exhibit No. 115.

(Exhibit No. 115, Witness Curry, was received in evidence.) [2349]

Examiner Wilkinson: The tabulation headed "Miscellaneous Non-Operating Property", will be received as Exhibit No. 116.

(Exhibit No. 116, Witness Curry, was received in evidence.)

Q. (By Mr. Judd) Can you tell me, Mr. Curry, the amount of cash of the Railroad Company on August 2, 1935, when the petition instituting this proceeding was approved?

A. As of July 31, 1935 the cash balance in all banks was $848,452.30.

Q. That is as of the close of business on July 31st?

A. Yes, sir. That is as of the close of business on July 31st, 1935.

Q. Have you any information as to a date nearer August 2nd, than July 31st?

A. Not with us.

Mr. Judd: I might say that we have tried to get that from San Francisco, but have not yet had a reply, Mr. Examiner.

Q. (By Mr. Judd) Can you tell me the amount of cash of the Railroad Company on November

(Testimony of M. J. Curry.)

13th, 1935, the date of the qualification of the Trustees in reorganization?

A. The cash balances per bank statements at close of [2350] business November 13th, 1935 in all banks amounted to $1,529,643.36.

Q. Mr. Curry, referring back to the exhibit from the 1934 report to the Interstate Commerce Commission, I note Item, Line 111, "Property for non-carrier purposes", listed at $1,579,689.57. Have you any idea as to any of the property included in that item?

A. I have not. I did not prepare this statement. That is a question, I think, for the General Auditor to answer.

Q. Do you know whether any of it includes the Islais Creek property of the Railroad?

A. I do not from this statement here.

Q. Can you state from reference to a telegram which I hand you, which we have received from San Francisco Counsel, whether any portion of it represents the Islais Creek property of the Railroad?

(Handing telegram to witness.)

A. This telegram I assume is in answer to an inquiry made by you upon your representatives in the west, who went to our offices and secured the information.

Q. Yes, sir.

A. And I assume it is correct. It is stated in here that "Miscellaneous Property, Transfer of all

(Testimony of M. J. Curry.)

Property acquired prior to July 14th, 1916, major item being [2351] Islais Creek Property San Francisco."

Q. Can you tell me in a general way what this Islais Creek Property consists of?

A. This is a vast tract of land on San Francisco Bay, which was under water mostly, and it was thought it would make a great industrial center, and subject to considerable development, and subsequently action was taken bringing about the use of this district in that way.

Mr. Judd: That is all that we have of Mr. Curry, Mr. Examiner.

Cross Examination

Q. (By Mr. Swaine) Mr. Curry, was the equipment which was embraced in the list delivered to the Trustee under the General and Refunding Mortgage, including the equipment covered by the three equipment trusts and by the Baldwin Lease, acquired by the Western Pacific for use in the operation of any lines of railroad, extensions or branches subject to the lien of the first mortgage?

Mr. Coulson: I object to the form of the question, asking for the conclusion of the witness and not for factual testimony.

Mr. Swaine: I asked if it was acquired for use in connection with that. [2352]

Mr. Coulson: If it is to be answered, it seems to me it should be in answer to a question as to what

(Testimony of M. J. Curry.)

lines it is used on, whether the main line or Northern California?

Mr. Swaine: We will try to make the question satisfactory to Mr. Coulson.

Q. (By Mr. Swaine) Was it acquired in connection for use in the operation of any of the lines of railroad which are described in the granting clauses of the First Mortgage of the Western Pacific Railroad Company, dated June 26th, 1916?

A. It was acquired for use on all lines, main line and branches.

Q. Including the lines specifically described in that agreement?

A. Including the lines specifically described in that agreement.

Q. That applies equally to the equipment embraced in the Equipment Trust Agreements, does it not? A. It does.

Q. And the Baldwin Lease?

A. To my knowledge, it does.

Q. Has it in fact been so used?

A. It has.

Q. Now with reference to this free cash and the other [2353] so-called free assets in 1934, Mr. Curry, did not the Western Pacific seek from the First Mortgage Bondholders an extension of interest? A. It did.

Q. Interest for what period?

A. Interest due March 1, 1934 and September 1, 1934 on the first mortgage 5 per cent bonds to

(Testimony of M. J. Curry.)

January 1, 1937, the extension of those interest payments.

Q. Do you know approximately what proportion of the First Mortgage Bonds was extended as to interest?

A. It is my recollection that approximately $43,000,000 principal amount of bonds, or 87 per cent of the outstanding bonds assented to the plan of deferment.

Q. In that connection, did the Western Pacific Railroad Company enter into certain agreements with the Reconstruction Finance Corporation, Railroad Credit Corporation, the A. C. James Company and the Western Pacific Corporation with regard to the lien of the extended interest of the First Mortgage Bonds? A. It did.

Mr. Judd: I object to the reference to an unidentified agreement which has not been received.

Mr. Swaine: I will proceed to identify them now.

Q. (By Mr. Swaine) I show you a photostatic copy of a letter on the letterhead of the Reconstruction [2354] Finance Corporation, dated June 23, 1934, and signed by Jesse H. Jones, Chairman, being addressed to the Western Pacific Railroad Company. Mr. Clay will remember it. I will ask you whether that is a photostatic copy of an agreement entered into between the Debtor and the Reconstruction Finance Corporation?

(Handing paper to witness.)

(Testimony of M. J. Curry.)

A. It is, yes, sir.

Mr. Swaine: I offer that in evidence as the next Exhibit number.

Mr. Judd: We want our objection noted, Mr. Examiner. We would like to have a chance to look at it before specifying all the grounds of objections.

Mr. Swaine: Next to that photostat—I thought they were separate—and constituting the third and fourth pages is a document on the letterhead of A. C. James Company, dated July 2, 1934, and signed by A. C. James Co., by E. Hayward Ferry, Vice President. Is that one of the agreements which was taken in connection with the extension of the First Mortgage Bond interest?

(Handing paper to witness.)

A. It is.

Q. Following that, constituting pages 5 and 6, is a document on the letterhead of the Railroad Credit [2355] Corporation, dated July 3, 1934, addressed to Western Pacific Railroad Company and signed by The Railroad Credit Corporation, by E. R. Woodson, Vice President.

Is that also an agreement which was made in connection with the extension of the First Mortgage Bond interest? A. It is.

Mr. Swaine: Now, I offer the document in its entirety.

Examiner Wilkinson: Is there any objection?

Mr. Coulson: I object on the ground that the document is incomplete, unless Mr. Swaine also

(Testimony of M. J. Curry.)

puts into the record the extensive agreement with the First Mortgage Bondholders Committee, so-called.

Mr. Clay: And the supplements to that agreement.

Examiner Wilkinson: Are you in a position to do that, Mr. Swaine?

Mr. Swaine: Yes, sir.

Examiner Wilkinson: Will you do that?

Mr. Swaine: Yes, sir.

Examiner Wilkinson: The document consisting of 6 sheets will be received as Exhibit No. 117.

(Exhibit No. 117, by Counsel, was received in evidence.) [2356]

Mr. Swaine: I show you a photostat of a printed document under date of May 9th, 1934, on the letterhead of the Western Pacific Railroad Company, addressed to the Holders of the Western Pacific Railroad Company First Mortgage 5 per cent Bonds, who have already executed agreements of extension dated as of March 1st, 1934 and ask you whether that is the document constituting the extension of the First Mortgage Bond interest, or is the extension agreement?

(Handing paper to witness.)

A. It is.

Mr. Coulson: May I ask a question about that? I have not seen it. I understood Mr. Swaine in presenting it said it referred to parties who had already executed an agreement of extension.

(Testimony of M. J. Curry.)

The Witness: That is the way it read.

Mr. Swaine: Off the record.

(Discussion off the record.)

Mr. Coulson: Are you going to introduce the Western Pacific Corporation Agreement to which you referred?

Mr. Swaine: Yes, sir, that is, I hope I am. I am going to offer it.

Examiner Wilkinson: The copy of the letter of May 29th, 1934, to the Western Pacific Bondholders [2357] will be received as Exhibit No. 118.

(Exhibit No. 118, by Counsel, was received in evidence.)

Mr. Clay: May I ask a question off the record?

(Discussion off the record.)

Q. (By Mr. Swaine) I show you a letter on the Western Pacific Railroad Corporation's letterhead under date of July 5th, 1934, addressed to the Western Pacific Railroad Company, signed the Western Pacific Railroad Corporation, by T. M. Schumacher, President, and ask you whether that is another one of the agreements taken in connection with the extension of first mortgage bondholders' interest?

(Handing paper to witness.)

A. It is.

Mr. Swaine: I offer that.

Examiner Wilkinson: Is there objection?

(No response.)

(Testimony of M. J. Curry.)

Examiner Wilkinson: This will be received as Exhibit No. 119.

(Exhibit No. 119, by Counsel, was received in evidence.)

Q. (By Mr. Swaine) I show you an agreement dated November 30th, 1934, between the Western Pacific Railroad Corporation and Frederick H. Ecker, John W. [2358] Stedman and Reeve Schley, as a Committee representing the First Mortgage Bondholders, and ask you whether that was an agreement entered into in connection with the extension of the first mortgage bond interest?

(Handing paper to witness.)

A. Yes, it is.

Mr. Swaine: I offer that as the next Exhibit.

Mr. McCollom: Mr. Examiner, with respect to these documents which are now going in, we have never seen them before, and it is absolutely impossible to read them and see whether we think there would be a proper objection.

We do not want to object unless we know there is some good ground of objection, but I think the right ought to be reserved to move to strike them out, whether in the brief or elsewhere.

Mr. Swaine: I may say that these are all agreements, a series of agreements, signed by all the holders of the bonds which Mr. McCollom represents. The First Mortgage Bondholders agreed to this extension, conditioned upon certain agreements by the R. F. C., the R. C. C., the A. C. James Com-

(Testimony of M. J. Curry.)

pany and the Western Pacific, and I am now introducing the agreements which were made by those companies who constitute all the holders represented by the bonds represented by Mr. [2359] McCollom.

Those parties are all represented here, and they participated with me in the actual drafting of the documents and know all about them.

Examiner Wilkinson: I hear no objection and the document will be received as Exhibit No. 120.

(Exhibit No. 120, by Counsel, was received in evidence.)

Mr. Clay: Off the record again.

(Discussion off the record.)

Q. (By Mr. Swaine) Mr. Curry, I show you a printed document on the letterhead of the Western Pacific Railroad Company dated July 25th, 1934, addressed "To all Holders of Western Pacific Railroad Company's First Mortgage 5 Per Cent Bonds (Whether or not they have previously executed any agreements of extension of interest)," signed the Western Pacific Railroad Company, C. M. Schumacher, Chairman of the Executive Committee and Charles Elsey, President, to which is annexed a copy of a letter dated July 23, 1934, from Jesse H. Jones, Chairman of the Reconstruction Finance Corporation, to the Western Pacific Railroad Company, on the letterhead of the Reconstruction Finance Corporation, and ask you whether that letter

(Testimony of M. J. Curry.)

was sent to the First Mortgage Bondholders in connec- [2360] tion with the extension to which we have been referring?

(Handing paper to witness.)

A. It was.

Mr. Swaine: I offer that in evidence and will furnish additional photostatic copies to such parties as do not have them. I think every party who has appeared here has got printed copies of those. Those are printed documents which were a part of the negotiations with these very parties.

Examiner Wilkinson: Is there any objection?

Mr. McCollom: We have not seen it, Mr. Examiner. I have no idea.

Mr. Swaine: Let him look at it then.

In order that we can get the whole story and it will tie in—any objection they might have will go to the next one—the last paragraph of that says:

> "There is enclosed herewith a form of Modified Extension Agreement (which includes a consent to such extension of time to September 30th, 1934), which The Railroad Company requests you to execute and return to The Chase National Bank of the City of New York, as Agent for the Railroad Company, whether or not you [2361] have executed any previous form of interest extension agreement."

Q. (By Mr. Swaine) I show you another document entitled "Modified Extension Agreement",

(Testimony of M. J. Curry.)

dated as of July 25th, 1934, and ask you whether that is the Modified Extension Agreement referred to in the second paragraph?

(Handing papers to witness.)

A. It is.

Mr. Swaine: I offer that in evidence.

Examiner Wilkinson: Is there any objection?

Mr. Coulson: Just a moment. May I look at them?

Mr. Swaine: I wanted to tie it up.

Q. (By Mr. Swaine) When you stated that 87 per cent of the bonds——

Examiner Wilkinson: Just a minute. Put that off a moment. You have offered them and I have asked if *there any* objections. Are there any objections?

Mr. Coulson: I object only on the ground that the record is still apparently incomplete, unless we have the agreements of extension of March 1, 1934, as to which Exhibit No. 119 is on its face a supplement. I understand there are still references to the agreement of March 1, 1934, and I think this series is incomplete without it. [2362]

Mr. Swaine: I am quite willing to complete it. These all supersede the earlier ones, and if there is any value in having them, we can get them.

Examiner Wilkinson: Then the document dated July 25th, 1934, consisting of three sheets will be received as Exhibit No. 121, and the Modified Ex-

(Testimony of M. J. Curry.)

tension Agreement dated July 25th, 1934, consisting of two sheets will be received as Exhibit No. 122.

(Exhibits Numbers 121, and 122, by Counsel, were received in evidence.)

Q. (By Mr. Swaine) When you said a little while ago, Mr. Curry, that 87 per cent of the bonds had extended their interest, you meant that 87 per cent of the bonds had signed these Modified Extension Agreements in the form which we have just introduced in evidence?

A. Yes, sir, I did.

Mr. Clay: In the form of Exhibit No. 122?

The Witness: Yes, sir, the July 25th, agreement.

Mr. Swaine: Mr. Examiner, we do not think it is any real part of the case, and it is only encumbering the record, but we have here the copies of the March 1st, agreement which was superseded by all the other agreements which have been introduced. If anybody wants the March 1st agreement for the purpose of completing the record, we have copies here and they [2363] are free to introduce them.

Examiner Wilkinson: I understand that Colonel Coulson asked that it be put in, and you agreed to put it in.

Mr. Swaine: I am quite willing to put it in.

Mr. Coulson: There are references to that agreement in a number of exhibits introduced, which show the situation in the other agreements of superseded clauses, and I am not sure there is a complete supersedence.

(Testimony of M. J. Curry.)

Q. (By Mr. Swaine) Mr. Curry, are these four sheets the letters sent by the Western Pacific Railroad Company to holders of First Mortgage Bonds, coupon and registered, and the forms of Extension Agreement sent therewith on or about February 26th, 1934?

(Handing papers to witness.)

A. Yes, sir, they are.

Mr. Swaine: I offer those four sheets in evidence to be given one number.

Examiner Wilkinson: The document consisting of four sheets will be received as Exhibit No. 123.

(Exhibit No. 123, by Counsel, was received in evidence.)

Q. (By Mr. Swaine) Mr. Curry, I do not know whether you know the answer to this or not: Was the branch [2364] from Glendale to Bradford Winery in Sacramento County, California, 1.6 miles in length, in existence in 1916?

A. I cannot answer that.

Mr. Clay: Mr. Examiner, may I ask a question at this point?

Examiner Wilkinson: Certainly.

Mr. Clay: Will you rule on these petitions of intervention at this hearing or will they be taken up later?

Examiner Wilkinson: Just as soon as convenient; we will pass on them, just as soon as we finish this.

Mr. Clay: The reason I asked the question is that I have had no advance notice of the presenta-

(Testimony of M. J. Curry.)

tion of these petitions and it may be that I would like to consult the R. F. C. as to what position they would want to take.

Examiner Wilkinson: Off the record.

(Discussion off the record.)

Mr. Swaine: I have no further questions of Mr. Curry.

Examiner Wilkinson: Is there any further questioning of Mr. Curry?

(No response.)

Examiner Wilkinson: You are excused, Mr. Curry.

(Witness excused.) [2365]

Examiner Wilkinson: We will take a five minute recess.

(Thereupon a short recess was taken.)

Examiner Wilkinson: Are you ready to proceed, Mr. Wood?

Mr. Wood: Yes, Mr. Examiner. I will ask Mr. Buckley to take the stand.

Examiner Wilkinson: Mr. Buckley has previously been sworn in this proceeding.

C. E. BUCKLEY

testified further as follows:

Direct Examination

Q. (By Mr. Wood) Mr. Buckley, do the files of the individual trustee under the First Mortgage, kept in the Chase National Bank, contain the cash requisitions under the first mortgage, showing the amounts of cash withdrawn representing first mortgage money in respect of various items of property from the beginning of the mortgage down to the last taking down? A. They do.

Q. You are familiar with those original files?

A. I am.

Q. Can you state from your knowledge of those files what requisitions were made with respect to the construction of the Niles-San Jose Branch, giving the [2366] dates of the requisitions and their numbers, the amounts of cash withdrawn, the expenditures made, and the purposes for which the expenditures were made?

A. There were several requisitions aggregating expenditures of $2,521,229.01 for the construction of the branch line connecting with the main line at Niles, Alameda County, California, and extending to San Jose, Santa Clara County, California.

These requisitions were as follows: —And I will give the requisition number, the date and the amount.

Q. By "amount" you mean the amount of cash withdrawn on the requisition?

A. That is correct.

(Testimony of C. E. Buckley.)

Req. No.	Date	Amount
67	December 18, 1920	$166,860.85
78	December 18, 1920	9,336.22
81	December 22, 1920	125,000.00
83	February 2, 1921	100,093.84
109	June 3, 1921	252,656.59
114	June 3, 1921	19,303.69
119	July 1, 1921	116,020.60
121	July 19, 1921	109,151.39
122	Aug. 9, 1921	359,936.08
123	Sept. 16, 1921	263,712.87

[2367]

125	October 14, 1921	$128,849.65
126	November 9, 1921	160,501.15
127	December 7, 1921	124,403.47
128	December 29, 1921	90,584.19
130½	June 6, 1922	60,747.81
139	March 2, 1922	69,585.88

Mr. McCollom: We have 99 cents.

The Witness: Pardon me?

Mr. McCollom: Is it 99 or 88?

The Witness: 88.

Req. No.	Date	Amount
141	April 3, 1922	$ 57,934.34
143	January 8, 1923	132,028.62
156	July 24, 1923	6,667.89

(Testimony of C. E. Buckley.)

175	May 4, 1925	1,653.33
190	February 12, 1926	128,522.05
212	June 22, 1927	25,955.19

Mr. Wood: I may state at this point, Mr. Examiner, that there are some additional items of expenditure connected with the Niles-San Jose Branch which are not in that list to which Mr. Buckley is now testifying, but which will appear later under a general heading of spurs and tracks and so forth.

Mr. Coulson: May I, for the sake of continuity of [2368] the record, suggest to Mr. Wood that he have his witness show in connection with these branches as to cash requisitions, the amount of money that was requisitioned for right of way and the total cost of the right of way in each case?

Mr. Wood: We can get that from the requisitions, but it will add tremendously to the length of this examination. If Mr. Coulson wishes to ask the question on cross-examination, I think he is entitled to bring it out.

Mr. Coulson: I am in doubt as to the probative force of this testimony, unless it is in some way connected with the total cost of the extension and the cost of land, as distinguished from structures. I do not want to offer any objection to any of this testimony which deals with this conflict of liens question, except on two grounds:

(Testimony of C. E. Buckley.)

One, that is too voluminous, and the other that it is not clear.

I am doubtful whether Mr. Buckley's testimony will be probative unless it is made complete.

Mr. Swaine: If the Examiners please, the First Mortgage permits property to be acquired free of the lien only on certain conditions, one of which is that no proceeds of the First Mortgage Bonds will be used [2369] in connection therewith.

Mr. McCollom: We do not read the mortgage that way.

Mr. Swaine: That is a matter for our briefs.

Mr. McCollom: Yes, sir.

Mr. Swaine: The purpose of this testimony is to show that proceeds from First Mortgage bonds were used in connection with these various properties, and that is all we want to prove. We will brief the legal question later on.

Examiner Wilkinson: Suppose you proceed, Mr. Wood.

Q. (By Mr. Wood) Mr. Buckley, with respect to the Terminous Branch, what do the Cash Requisitions show as to the cash taken down for that branch?

A. An expenditure aggregating $586,215.59 for construction of branch line connecting with the main line at a point east of Kingdon, San Joaquin County, California, and extending to the east bank of Little Potato Slough, San Joaquin County, California, consisting of 7.82 miles of main track and

(Testimony of C. E. Buckley.)

3.03 miles of spurs, sidings, etcetera, constituting the Terminous Branch.

The requisitions are as follows:

Req.No.	Date	Amount
224	April 26, 1929	$561,014.05
234	Sept. 24, 1930	10,546.15

Q. Now, will you please give the same information [2370] regarding the so-called Bidwell Spur?

A. The requisitions were as follows:

Req.No.	Date	Amount
79—		

Mr. Judd: I do not think that the requisitions which you gave on the Terminous Branch add up to the totals which you gave, unless I missed one. I got just two.

Mr. Wood: Mr. Judd, I think the discrepancy, or the so-called discrepancy, is explained this way:

The total figure is the amount of the expenditure. The amounts which Mr. Buckley gave in the individual requisitions represent the amount of cash withdrawn. Where the cash represents the proceeds of sale of bonds—and I may say that these cash requisitions in some cases represent proceeds of bonds and in some cases release money—but where they represent proceeds of bonds and bonds were sold at a discount, the Railroad Company was required to certify expenditures equal to the principal amount of the bonds represented by the cash withdrawal.

(Testimony of C. E. Buckley.)

In other words, if the bonds were sold at 97, expenditures of $100,000 would have to be certified to withdraw $97,000 of cash. So that that may account for the discrepancy which seems to appear here. [2371]

Mr. Judd: If it could be stated that it does account for it, it would be satisfactory.

Mr. Wood: These are the figures which show in the requisition as to the expenditures and as to the amounts of cash. That is the only thing which we are putting in, the actual figures which show there. I am giving the explanation to show that it is not necessarily true that the totals represent the same, because in a great many cases the bonds were sold at a discount.

Mr. Judd: Is the discrepancy in each case entirely accounted for by that discount?

Mr. Wood: I think that is true.

Mr. Judd: I think that should be stated so that we can tell whether it is accounted for by that, or in which instance it represents expenditures not made the subject of requisitions.

Mr. Wood: All we can do is to say that this is what the certificate certified were the expenditures and what the amount of cash withdrawn was. I think the facts will have to speak for themselves.

To check back and see what the discounts show, I think would be out of all proportion to the value of the facts which would be brought out.

Mr. McCollom: Off the record just a minute. [2372]

(Testimony of C. E. Buckley.)

(Informal discussion off the record.)

Mr. McCollom: Where do you get the total which you give in the beginning of the item?

Mr. Wood: It is the total expenditures on those requisitions. Off the record.

(Discussion off the record.)

Mr. McCollom: I do not understand it yet, and I would like to ask Mr. Buckley one or two questions.

Q. (By Mr. McCollom) In stating the totals at the beginning of each amount upon the particular branches, what are those totals? What are they the totals of?

A. They represent the expenditures stated in the Officer's Certificates of expenditures made.

Q. Then when you state individual items, are those statements of individual items of expenditure, or are they statements of cash drawn down?

A. Those items are the amounts of cash drawn down in connection with that particular branch as embraced in the requisition number so and so.

A. And that explains, does it not, why the total of your individual amounts does not always add up to the original of the complete total which you gave at the beginning of your statement with reference to each item? A. That is correct. [2373]

Q. (By Mr. Wood) I believe you had finished with the Terminous Branch and had started on the Bidwell Spur?

(Testimony of C. E. Buckley.)

A. The following requisitions:

Req.No.	Date	Amount
79	Dec. 18, 1920	$ 1,752.76

Q. What was the amount of cash withdrawn there? A. Cash withdrawn, $1,752.76.

Q. I think it might be clearer if in each case you will state the cash withdrawn or expenditures, as the case may be. A. Yes, sir.

Req.No.	Date	Amount
152	Jan. 27, 1923—	

Q. Pardon me, Mr. Buckley, what was the purpose of the expenditure on No. 79?

A. That was Betterments to the main line, consisting of a spur track extending from Bidwell Bar, California.

Req.No.	Date	Amount
152	Jan. 27—	

Mr. Judd: Is that a statement from somebody's requisition or your statement?

The Witness: That is a statement found in the requisition papers.

Mr. Judd: All right. [2374]

Mr. McCollom: Off the record a minute.

(Discussion off the record.)

(Testimony of C. E. Buckley.)

The Witness:

Req.No.	Date	Cash taken down
152	Jan. 27, 1923	$179,486.87
	Total expenditures (including Req. No. 79) $181,239.63.	
164	Feb. 20, 1924	33,760.37
	Total expenditures (including Req. Nos. 79 and 152) $215,000.00.	
176	May 19, 1925	4,608.78
	Total expenditures $5,023.84 for interest during construction of Bidwell Spur.	

Q. (By Mr. Wood) In that last item, the total expenditures of 5 thousand and some odd dollars, that is merely the total on the requisition in carrying forward the previous requisitions, is that true?

A. That is correct.

Q. With respect to the Calpine Branch, will you give the same data, Mr. Buckley?

A. Yes, sir.

Req.No.	Date	Cash taken down
140	March 29, 1922	$397,876.83
	Total expenditures of $412,876.83 for construction of branch line connecting [2375] with main line at Calpine Junction, Plumas County, California, and extending to Calpine, Sierra County, California. $15,000 of cash reserved against existing liens was withdrawn against supplemental requisition dat-	

(Testimony of C. E. Buckley.)

ed December 22, 1930, against discharge of liens, making total amount of cash withdrawn $412,876.83.

Q. May I add to the explanation there with respect to that $15,000.

Under the First Mortgage, where property was certified, which was subject to prior liens, the Railroad Company was not permitted to withdraw the total amount of the expenditures but was required to reserve or set aside out of the deposited cash an amount equivalent to the principal amount of the liens. Then when the liens were discharged, they were entitled to withdraw the cash which was reserved, and that is what happened here.

Now, with respect to the Reno Branch, will you please give the same data?

A. The following requisitions:

Req. No.	Date	Cash taken down
47	Oct. 4, 1919	$1,152,132.23

Expenditure of $1,152,132.23 [2376]

Purpose: Purchase and acquisition of additional line of railroad connecting with main line at Reno Junction, California, and extending to Reno, Nevada.

111	June 3, 1921	$240,421.76

Expenditures of $240,421.76

174	May 4, 1925	$19,515.33

Total expenditures of $21,272.84 for acquisition of real property for betterment of

(Testimony of C. E. Buckley.)

main line, including expenditure of $102.35 for legal expenses and cost of recording deed in connection with land purchased for betterment of Reno Branch (Purchase price of land certified in Requisition No. 137).

Q. Mr. Buckley, in connection with that last requistion No. 174, the total amount of cash on that requisition was $19,515.33, and the total expenditures were $21,272.84. Out of that total expenditure, 102.35 represented expenditures on the Reno Branch. The balance of the expenditures represented items in part on the Reno Branch. Is that true?

A. That is right.

Q. So that you have merely given a total from the requisition and then itemized the part which relates [2377] to the Reno Branch?

A. That is right.

Mr. Wood: In connection with this Branch, there are additional items, which will appear under a different heading, which are not set up at this time. They will all be brought out later.

Q. (By Mr. Wood) Now, with respect to the Loyalton Branch, will you give the same data?

A. The following requisitions:

Req.No.	Date	Amount
35	Feb. 25, 1919	$137,672.69

Expenditures of $137,672.69

Purpose: Betterments to main line consisting of construction of industry and spur

(Testimony of C. E. Buckley.)

tracks, including cost of spur track 2.6 miles long to serve Clover Valley Lumber Company to 2.20 miles south of Loyalton, California ($5,350.08).

Q. The last item which you just mentioned of $5,000 odd, is the only item out of the total of $137,000 odd which applies to the Loyalton Branch. Is that true? A. That is true.

The other requisitions are: [2378]

Req. No.	Date	Amount
74	Dec. 18, 1920	$54.70

Expenditure of $54.70.

Purpose: Betterments to main line consisting of construction of cattle guards on Loyalton Branch.

187	Nov. 9, 1925	$33,868.43

Expenditures of $36,918.55 for betterments to main line, including track betterments between Hawley and Loyalton $87.12 (being balance of total expenditure of $59,764.36 covered in part in Requisitions Nos. 170, 177 and 181).

216	May 16, 1928	$100.00

Expenditures of $109.00 for betterments, including track betterments between Hawley and Loyalton of $730.72 (being balance of total expenditure of $60,495.08 covered in part in Requisitions Nos. 170, 177, 181 and 187).

(Testimony of C. E. Buckley.)

Mr. Judd: Only the $87.00 was spent on the Loyalton Branch?

Mr. Wood: That is not true, Mr. Judd.

The Witness: No, not in this case.

Mr. Wood: There was a total expenditure of [2379] $36,918.55, which was the balance of expenditures certified in another requisition.

Mr. Judd: Did any of that other requisition include expenditures alleged to have been on the Loyalton Branch?

Mr. Wood: Yes, they did.

The Witness: The last requisition is No. 217, date May 16, 1928, amount $37,934.54.

> Expenditures of $37,934.54 for betterments to main line, including track betterments between Hawley and Loyalton ($6,528.43, being balance of total expenditure of $67,023.51 covered in part in Requisitions Nos. 170, 177, 181, 187 and 216).

Mr. Judd: It is not at all clear to me what was spent on the Loyalton Branch.

Mr. Wood: Here we have taken in each case a requisition which included other items and have given the total amount on the requisition and the total expenditures, and we have included the individual amounts which apply to the Loyalton Branch, and some of those are carried forward from previous requisitions, which will be referred to in other parts of this testimony.

(Testimony of C. E. Buckley.)

Examiner Wilkinson: Mr. Wood, would it help, since this witness has these figures in tabular form, they [2380] could be put in in the form of an exhibit rather than through oral testimony?

Mr. Wood: Some of them have been marked up in pencil, and I do not think they are now in shape to put in in that way. I wish we could do it but I do not believe it would be practical to do it.

Examiner Wilkinson: Proceed, then.

Q. (By Mr. Wood) Mr. Buckley, I think that the next heading is called Tooele County Branches.

A. There are a number of requisitions which relate to Branch Lines in Tooele County, Utah, and they give different termini, and we are not sure, without knowing the physical properties, to what extent they are part of one and the same branch, and to what extent they represent different branches, or possibly spurs off of a main branch, so that we have lumped or grouped them under one heading and given the requisitions and the description of the line in each requisition, which I think will be sufficient for the Commission's records.

Q. Will you proceed with what we call the Tooele County Branches, Mr. Buckley?

A. The requisitions are as follows:

Req. No.	Date	Amount
10	Dec. 28, 1917	$265,156.89

[2381]

Expenditure of $265,156.89

(Testimony of C. E. Buckley.)

The purpose was contraction of branch line from a point on the main line at or near Grants, Utah, extending to Tooele, Utah.

35 Feb. 25, 1919 ..... $137,672.69

Expenditures of $137,672.69

Purpose: Betterments consisting of construction of industry and spur tracks in connection with main line, including cost of construction of spur track to serve Ellerbecks quarries, Tooele County, Utah, $57,017.44, and cost of construction of Tooele Branch, $10,403.90 (balance of total expenditure of $275,560.79 being covered in Requistiion No. 10).

Q. Now, with reference to that requisition, Mr. Buckley, is this true: That the total amount of $137,672.69 is the amount certified in that requisition No. 35, covering various items only part of which related to these Tooele County Branches?

A. That is correct.

Q. And the $57,017.44 is one item which relates to the construction of a spur track to the quarries and the other item of $10,403.90 is an item in that requisition relating to the construction of the Tooele [2382] Branch, but that last item is a balance of a total expenditure on the Tooele Branch of $275,560.79, part of which is covered by Requisition No. 10? A. That is correct.

Q. Will you proceed.

(Testimony of C. E. Buckley.)

A. Requisitions are as follows:

Req. No.	Date	Amount
66	Dec. 29, 1920	$7,013.71

The purpose was interest during construction of branch line from Grants to Tooele.

Q. Do you have the amount of the expenditure on that?

A. I am quite certain that it is the same, coincidental, but I have not noted it here. That is, it is the same amount but I do not have it down.

Q. In any event, it would be at least that amount of cash? A. Yes, sir.

110	June 3, 1921	$17,064.54

Expenditures of $17,064.54 for construction of branch line connecting with main line at Ellerbeck, Tooele County, Utah, and extending to Flux and Dolomite, Tooele County, Utah.

133	Feb. 10, 1922	$4,905.53

Expenditures of $4,905.53.

Purpose: Construction of branch line connecting [2383] with main line at Burmester, Tooele County, Utah, and extending to Warner, Tooele County, Utah.

144	Jan. 8, 1923	$2,938.54

Expenditures of $2,938.54

145	Jan. 8, 1923	$574.29

Expenditures of $574.29.

(Testimony of C. E. Buckley.)

Q. (By Mr. Wood) Now, with respect to the so-called North Channel Spur in Stockton, California, will you give us the same data?

A. The requisitions are as follows:

159 July 24, 1923.....Cash $162,689.96

Expenditures of $172,414.69 for betterments to main line, consisting of spur track (North Channel Spur) extending from main line north of Stockton yards into the City of Stockton.

174 May 4, 1925.....Cash $19,515.33

Expenditures of $21,272.84 for acquisition of real property for betterment of main line, Reno Branch, and North Channel Spur, and improvement of terminal facilities in San Francisco, Stockton and Oroville, includes expenditure of $2,783.62 for land south of Mormon Channel, Stockton, and $2,186.25 for purchase of land near Stockton. [2384]

Q. Those last two items were the items which you have picked out of the total of the requisition as applying to the North Channel Spur?

A. That is correct.

Mr. McCollom: Can you tell that they do in fact apply to that spur?

The Witness: I could say that the records, these requisitions, indicate that they do apply to that.

Mr. Wood: I will say this off the record, Mr. McCollom.

(Discussion off the record.)

(Testimony of C. E. Buckley.)

Q. (By Mr. Wood) Next, Mr. Buckley, is the Tesla Branch. Will you give us the same date for that? A. That is as follows:

Req.No.	Date		Amount
1	December 18, 1920	Cash	$39,537.21

Purpose: Betterments to main line.

Includes expenditure of $58.42 for cattle guards on Tesla Branch.

Q. Next is the line for which we have for convenience called a branch line in San Francisco. I think the description of it, as Mr. Buckley will give it, will sufficiently identify it. There does not seem to be any common name for it.

Will you take that up? [2385]

A. Requisition is:

Req.No.	Date		Amount
154	July 17, 1923	Cash	$132,298.27

Expenditures of $132,298.27.

Purpose: Purchase and acquisition of additional line of railroad in City and County of San Francisco connecting with main line, purchased from Ocean Shore Railroad Company.

Q. Now, Mr. Buckley, will you—

Mr. McCollom: Just a minute. Under what heading is that in connection with the General Mortgage?

Mr. Wood: I could not say whether that is described in the General and Refunding Mortgage or not.

(Testimony of C. E. Buckley.)

Mr. Coulson: Off the record.

(Discussion off the record.)

Examiner Boyden: Mr. Wood, in the opinion of the Examiners it is fruitless to sit here and listen to the witness read off the rest of these papers, because we would be here all afternoon. Cannot you submit these papers to other counsel so that they can look them over during the recess and see if there is any matter there which they want to refer to, and set them up in Exhibit form and file them in the record, and save this reading into the record?

Mr. Wood: We can do that, Mr. Examiner. We have [2386] not extra copies to furnish.

Examiner Boyden: Can you furnish extra copies at a later time?

Mr. Wood: If we can have the copies made up, and where we have, as I say, in some cases made pencil corrections, we would have to rewrite the pages. If we will be permitted to file them in corrected form, and send copies to all the parties and the Commission, all right. What I want to do is to get everything in here today.

Examiner Boyden: You can file the copy he has. If they are good enough for him to read from, they are good enough to file in the record.

Mr. Wood: If the Commission will permit us, instead of putting that physically in the record today, to take it back and make the required copies and then file them as exhibits, without coming here,

(Testimony of C. E. Buckley.)

again for that purpose, I think it would be desirable.

Examiner Boyden: It is a matter to be determined by the other parties. Are they going to accept your exhibit without further examination of the witness after inspecting it today?

Mr. Wood: I am prepared to ask Mr. Buckley whether these are accurate summaries of the data contained in the various requisitions which are set [2387] forth here. I think I have already asked him that in substance in the beginning, but to tie it in, I will ask him again.

Q. Mr. Buckley, you have in your hand a memorandum setting forth certain data which respect to these requisitions which you have been looking at in giving your testimony. Are you prepared to state that that memorandum accurately sets forth the data with respect to the cash requisitions that are set forth in the memorandum as shown by the original documents in your files?

A. I am. They are correct.

Q. Can you also state whether your records show that the amounts of cash shown as withdrawn by those requisitions were paid to the Railroad Company? A. I am.

Q. That is a fact, that they were paid?

A. Our records indicate that they were paid to the Railroad Company.

Mr. Wood: Then, Mr. Examiner, I am prepared to offer this in evidence subject to the conditions which you have just mentioned.

(Testimony of C. E. Buckley.)

Examiner Boyden: You cannot offer it, Mr. Wood, until you can physically present it for the record, but if counsel, after looking at it will agree to [2388] permit you to file it as an Exhibit after the hearing closes, without further examination of the witness, that might be done.

Mr. Wood: That is what I had in mind.

Mr. Swaine: It is right here.

Mr. Coulson: Mr. Examiner, we might want to ask this witness a question now, but that question can be asked now or can be put of record and a check made, and we can proceed that way.

Examiner Boyden: Very well.

Mr. Swaine: The document is here and can be produced and filed today. The only difficulty is that there are some penciled corrections which would have to be made on other copies.

Examiner Boyden: I understood Mr. Wood to say that he needed to have it copied, to make copies of it.

Mr. Wood: We can do it right today with that as the master copy.

Mr. Coulson: Mr. Buckley can do it during the Missouri Pacific arguments this afternoon.

Examiner Boyden: Let us proceed that way, Mr. Wood.

Mr. Coulson: Has that been given an Exhibit Number?

Examiner Wilkinson: We cannot give it an Exhibit Number until it is ready to go into the record.

[2389]

(Testimony of C. E. Buckley.)

Mr. Coulson: I understand it is ready to go into the record at the moment, and during the recess they are going to get up another copy.

Mr. Wood: Pardon me, Mr. Examiner. In order to clear up a possible ambiguity here as to what these various memoranda are, I would like to ask Mr. Buckley a question.

The memoranda which you have in your hand, as to which I have just asked you these questions, those are memoranda relating to the Niles-San Jose Branch, the Terminous Branch, the Bidwell Spur, the Calpine Branch, the Reno Branch, the Loyalton Branch, the so-called Tooele County Branches, the North Channel Spur, the Tesla Branch, and what we, for convenience, have called the Branch Line in San Francisco, as to which you have given oral testimony, and also the following as to which you have not yet testified:

Acquisition of land consisting of four pages; then a memorandum consisting of nine pages relating to the acquisition of the Sacramento Northern Railroad Company and the Deep Creek Railroad Company; another memorandum consisting of four pages relating to spurs for industrial tracks. That is the heading of it, "Spurs for Industrial Tracks."

Those are the documents to which I am referring [2390] Mr. Buckley, and as to which you state that they are the accurate summaries of what the original requisitions show?

(Testimony of C. E. Buckley.)

The Witness: That is correct.

Mr. Swaine: Would it not be well to fasten all these together as one document?

Examiner Boyden: Just the ones which he has not read.

Mr. Wood: Would you prefer to put in only the ones to which he has not testified?

Examiner Wilkinson: I do not see any necessity to furnish those already in the record, putting them in any more.

Mr. Wood: That is satisfactory.

Then we will eliminate the documentary summary data on the branch lines and will start with Requisition of Land.

That is all we have, Mr. Examiner.

Examiner Wilkinson: Is there any objection to the receipt of this exhibit, No. 124?

Mr. McCollom: Mr. Examiner, may I make this suggestion: We have had no opportunity to see these documents at all. Could the admission of them be withheld until we have had opportunity to look at them during the recess hour?

Examiner Wilkinson: Yes, of course. [2391]

Are there any further questions of Mr. Buckley?

Mr. Coulson: I would like to ask him just two or three short questions, but I think we would rather withhold our questions until this afternoon.

Mr. Swaine: I have one small matter which will take only a few minutes, I think, to complete the record.

(Testimony of C. E. Buckley.)

At one of the previous hearings I requested that Mr. Coulson obtain and furnish for the record the holdings of Arthur Curtiss James, or the A. C. James Company, either directly or indirectly, in the stock of the Western Pacific Railroad Corporation. I believe Mr. Coulson has procured that information, and if he will read it into the record and state it, I will accept his statement.

Mr. Coulson: The request made by Mr. Swaine, as I understand it, was a request for a statement of the stock of the Western Pacific Railway Corporation held by Mr. Arthur Curtiss James or by the Corporation which he controls.

I have prepared a statement showing the stockholdings of Arthur Curtiss James, or there has been prepared by the proper accounting officers, a statement showing the stockholdings of Arthur Curtiss James in the Western Pacific Railroad Corporation, together with the holdings of the Curtiss Southwestern Corpora- [2392] tion and the Curtiss Southwestern Company, the first a New York Corporation and the second a Delaware Corporation, showing the stockholdings of those two corporations in the Western Pacific Railroad Corporation. In the case of each of the two corporations Mr. James owns 97½ per cent of the stock of the corporations in question.

The A. C. James Company owns no stock in the Western Pacific Railroad Corporation. I would be glad to offer this statement. I have given Mr.

(Testimony of C. E. Buckley.)

Swaine additional copies which are available here for the record.

Examiner Wilkinson: Have you read all of the information on that statement?

Mr. Coulson: No, I suggest that the statement go in.

Examiner Wilkinson: It will be received as Exhibit No. 125.

(Exhibit No. 125, by Counsel, was received in evidence.)

EXHIBIT NO. 125

Arthur Curtiss James
Curtiss Southwestern Corporation
Curtiss Southwestern Company

Holdings in Western Pacific Railroad Corporation Preferred and Common Stock as of November 1st, 1936.

Arthur Curtiss James

Western Pacific Railroad Corpn. Common Stock 1000 shs.

Western Pacific Railroad Corpn. Preferred Stock 1000 shs.

Curtiss Southwestern Corporation

A New York Corporation in which Arthur Curtiss James owns 97½% of the stock, holds:

Western Pacific Railroad Corpn. Common Stock, 310,690 shs.

Western Pacific Railroad Corpn. Preferred Stock 2000 shs.

(Testimony of C. E. Buckley.)

Curtiss Southwestern Company

A Delaware Corporation in which Arthur Curtiss James owns 97½% of the stock, holds:

Western Pacific Railroad Corpn. Common Stock 40,700 shs.

Western Pacific Railroad Corpn. Preferred Stock 30,400 shs.

[Endorsed]: Finance Docket 10913. Exhibit No. 125. By Counsel. Filed Dec. 9, 1936. Paul P. O'Brien, Clerk.

Examiner Wilkinson: We will recess until two o'clock.

(Thereupon at 12:25 o'clock p. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [2393]

Examiner Wilkinson: Mr. Swaine, are you speaking about briefs when this case is closed?

Mr. Swaine: Yes, sir. As I understand it, this case is closed, except for bringing in some papers which are being prepared, that is, the copy with pencil marks which was brought forward this morning, and that is in turn to be presented. When that is done all parties will be ready to close the case.

I would like to have as early a date as practicable, and I suggest thirty days as the date for filing briefs on the three plans.

Mr. Campbell: Mr. Examiner, Mr. Nicodemus asked me to read in his behalf a brief statement,

which will take just a minute, at the conclusion of this hearing. If I have your permission, I should like to read it.

Mr. Swaine asked that at the conclusion of the hearing other counsel be requested to advise of any changes that may be suggested in briefs respecting any of the three plans. We waive the question which naturally arises as to the procedure of one counsel out of so many insisting upon having the last word, and submit the following statement:

> "In view of Mr. Swaine's complete repudiation of the Debtor's plan, which the record shows to [2438] be a compromise plan proposed by Mr. Swaine's clients and accepted by the Debtor as the best plan that could then be negotiated, we think it proper to point out to the Commission the particulars in which the plan is burdensome to the Debtor.
>
> "If the Commission shall undertake to modify the plan in the interest of substantial justice and to comply with the spirit of Section 77, we suggest that it consider the following:
>
> "(a) A small sinking fund for the new 4 per cent bonds."

Examiner Wilkinson: You are referring now to the Debtor's plan?

Mr. Campbell: I am referring now to the Debtor's plan.

> "(b) A reduction of the interest rate on the Series A Income Bonds from 5½% per cent to 4 per cent.

"(c) A reduction in the interest rate on the Series B Income Bonds from 5½% to 4 per cent.

"(d) A reduction in the interest rate on the Junior Lien Income Bonds from 5½% per cent to 4 per cent. **[2439]**

"We also suggest that the Commission consider the elimination of the Voting Trust as an effort on the part of the minority to secure control of the Debtor."

These suggestions are not made as modifications of the Debtor's plan. We stand upon the plan as filed and merely submit the above suggestions to indicate to Mr. Swaine the line of argument that we feel free to submit in our brief.

We may, however, on further reflection, think of other suggestions, and, if so, we shall feel free to place them in our brief.

On the point as to the time for filing briefs Mr. Nicodemus asked me to suggest two months.

Examiner Wilkinson: Just before we come to the date for filing briefs, so that we will have the record clear, the Debtor is not now proposing amendments to its plan?

Mr. Campbell: Not as modifications. They are not proposed as modifications.

Examiner Wilkinson: They are here intimating that they might, if they see fit, make these proposals in their brief?

Mr. Campbell: He says, "We think it proper to point out to the Commission the particulars in which [2440] the plan is burdensome to the Debtor, and if the Commission shall undertake to modify the plan in the interest of substantial justice"—if the Commission shall undertake to modify the plan —"and comply with the spirit of Section 77, we suggest that it consider the following."

It is a mere suggestion.

Examiner Wilkinson: I wanted to make the record clear.

Mr. Campbell: Mr. Examiner, Mr. Nicodemus also asked me at the conclusion of the case to renew in form a motion which he made at one of the earlier hearings, to strike out certain evidence, certain exhibits, and with your permission, since it is just a brief motion, I should like to renew it, the purpose being to lay the ground work for a renewal of such motion upon hearing before Division IV or the Commission.

This is the motion, on which we do not ask any ruling——

Examiner Boyden: Wait a minute.

Mr. Campbell: I beg your pardon.

Examiner Boyden: Do I understand you to say that a motion to strike is going to be argued before Division IV? [2441]

Mr. Campbell: To lay the groundwork for a submission before Division IV. It is his understanding that it will be open for a renewal, because I think this was designed to eliminate burden-

some, extraneous exhibits which are not necessary for consideration and make the record exceedingly cumbersome.

I do not ask any ruling here, but it is to lay the groundwork for renewing it again.

The motion which he wishes me to make is, to strike out the following Exhibits:

That the Examiner strike out the following Exhibits on the ground that they are incompetent, immaterial and irrelevant.

All of the Exhibits numbered from 45 to 104, except the following Exhibits Numbers 51, 52, 53, 60, 61, to 74, 75, 76, 77, 78, 79, 80, 81, 82, 95, 96, 97, 98, 99, 100, 102 and 103.

In addition we move to strike out all parts of Exhibits Numbers 63 to 73, inclusive, except in each case the certificate of expenditures which is a separate detachable document.

Examiner Wilkinson: While you are on that subject, do you not want to include Exhibit Numbers 107 to 125?

Mr. Campbell: I should think that we should like [2442] to suggest the same treatment with respect to all of those where there is a detachable, separate exhibit of a certificate of expenditure, but that was not framed at the time when I discussed this with him.

Examiner Wilkinson: We have not yet quite completed the testimony along this line. We might as well dispose of that question now.

Mr. Coulson, have you an objection along this line? Do you still move to strike out those exhibits?

Mr. Coulson: I will not joint at this time in the motion, because I think, as the Examiner stated this morning, there is so much testimony in this record in bulk that any blanket motion to strike out arouses some concern in my mind that it might be something essential to Mr. Swaine in carrying his burden of proof under his first mortgage, and I have no desire to embarrass any party to this proceeding.

Mr. Swaine: I appreciate that.

Examiner Wilkinson: Do any of the other parties to this proceeding desire to move to strike out any of this evidence which has been received heretofore, subject to the motion to strike?

(No response.)

Examiner Wilkinson: The Debtor's motion is overruled. The Exhibits are received. [2443]

Now we might as well dispose of Exhibit No. 105, which is a corporate history of the debtor, which was marked for identification only this morning.

Have parties had a chance to read it over, and is there any objection to Exhibit No. 105?

Mr. Coulson: I would like to make a suggestion as to that. It seems to me that the corporate history which is produced for identification as Exhibit No. 105 purports to be no more than a summary of factual data already before the Commission.

I think we can allow it to go into the record here, if there is a distinct understanding that it is only such a summary, and subject to correction either as to direct statement of fact or implication, by reference to the testimony, the evidence, that has been put before this Commission by various witnesses subjected to cross examination.

I think, however, that in doing that there are a few verbal changes that might well be made by the parties here before it is accepted by the Commission, and accepted with those verbal changes, so as to avoid subsequent misunderstanding.

I call your attention to the bottom of page 19, the beginning of the next line to the bottom, beginning with the word, "constituting," and running through the [2444] word "mortgage" on the last line of the page.

I suggest that that phrase be stricken out as unnecessary, since the mortgages, plus the voluminous testimony which Mr. Swaine has introduced, speak for themselves, and this conclusion might be misunderstood if allowed to stand uncorrected.

Mr. Swaine: Before you leave that, if you will just look over on page 20, I think you will see that the statement is rather innocuous. It says:

"* * * then owned by the railroad company which was subject to the first mortgage."

Mr. Coulson: I grant it is innocuous, but I would like to render it unambiguous as well.

Examiner Wilkinson: This statement was prepared by the Debtor. Does the debtor agree to the

deletion of the words suggested by Colonel Coulson?

Mr. Campbell: I am disposed to agree with that. Mr. Nicodemus' statement was offered, subject to correction, and it is merely factual data, and no legal conclusions.

Examiner Wilkinson: The Exhibit is received subject to the deletion of the language suggested by Colonel Coulson.

Mr. Swaine: If you delete that, you must delete all the rest of the sentence. [2445]

Mr. Coulson: I will frame a sentence which will perhaps meet what Mr. Swaine has in mind. On the next page a similar conclusion is stated as to the general and refunding mortgage by the use of the words in the second line of that page,

"* * * and constituting a first lien."

I suggest that we strike out the words "and constituting a first lien" and substituting therefor "was expressly a first lien."

Mr. Swaine: I think if you strike out anything you should strike out everything except that there was created a first and refunding mortgage on the date, and let it speak for itself, and do not characterize it.

Examiner Wilkinson: I think it is better to receive this exhibit with the understanding that the statements in the exhibit by the Debtor are not binding upon the parties to this proceeding, other than the Debtor, and that these statements be subject, as Colonel Coulson stated, to verification and

check by the evidence which has already been put in in this case.

Mr. Coulson: With all deference to the Examiner, I think we want something more than not binding, we want something which is not confusing. This statement serves only the purpose of being a convenience [2446] to the Examiner, and is not binding.

Examiner Wilkinson: Just as background.

Mr. Coulson: I think it is quite unsound, despite the desire of all of us to dispose of this case. With petitions of intervention and what not before the Commission, it may be six months before the Commission writes a final decision, and I think if this statement is to serve its purpose it should be put in unambiguous and non-confusing phraseology at this time and I think there is so little in it which is non-confusing that we ought to be able to do it.

Examiner Wilkinson: Off the record.

(Discussion off the record.)

Mr. Coulson: As suggested by Mr. Swaine, strike out on page 19 of Exhibit No. 105 for identification the last two lines on page 19 and the first five and one-half lines on page 20.

On page 22, the next to the last line of the paragraph which finishes at the top of that page, the line which begins "bonds of the railroad company," insert after the word "company" the phrase, "as additional collateral for a debt of the railroad company."

On page 23 at the end of the paragraph which ends at the top of that page, insert the paragraph:

"The railroad company is still indebted to [2447] A. C. James Company to the full amount of its original advances of $4,999,800, and has not made any payment of interest thereon since February, 1934."

Examiner Wilkinson: It is agreed and stipulated by all the parties to the proceeding that the changes stated by Colonel Coulson may be made in Exhibit Number 105, is it?

Mr. Campbell: No objection.

Examiner Wilkinson: Exhibit No. 105 is received.

(Exhibit No. 105, by Counsel, was received in evidence.)

Examiner Wilkinson: Now, Exhibit No. 106 was received for identification.

Mr. Coulson: I would like to make a comment as to that, if I may, Mr. Examiner.

Examiner Wilkinson: Yes, sir.

Mr. Coulson: This is headed, I think, in a misleading way. It starts out, "Statement of Loans from Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James * * *."

It goes on with further data. It is of course not a statement of loans, but rather a statement of the dates when certain general and refunding bonds were issued and delivered. This is not only incomplete, but it is merely [2448] a summation of data that is already in its complete form in the record, and I think it is in this form misleading and will be misunderstood at a later time when our memory of these things is cold, if we allow it to go in.

I suggest that if there is any necessity for a convenient summation of this sort, that there be a mere statement of the dates when these various general and refunding mortgage bonds were issued, and to whom, and for what purpose.

Mr. Judd: That can easily be read into this statement.

Mr. Campbell: Colonel Coulson, in introducing that exhibit and statement prepared by Mr. M. J. Curry, showing the delivery dates to pledgees of $18,995,500 principal amount of general and refunding bonds, the information was given.

Mr. Coulson: But it completely lacks clarity under its present title, and I think is bound to confuse us later. We have already got the data in the Exhibit already put in as Number 105, I think, and in numerous other statements in this proceeding.

Mr. Swaine: No. 105 does not give the dates of delivery.

Mr. Clay: I would like to ask, Mr. Examiner, if [2449] this is to have the same status as Exhibit No. 105, and does not bind the collaterals. The collateral which the R. F. C. holds was delivered contemporaneously with the making of the loans. I do not know whether the dates shown in this Exhibit are dates which coincide with the making of the loans, but I do know that the collateral was delivered at the time of the making of our loans.

Mr. Coulson: I suggest that Mr. Curry might just read into the record the amounts and dates of the delivery, and not have this confusion in the record,

because there are other collaterals here and there are lots of questions which it raises.

Examiner Wilkinson: If it will only take a moment to do it, all right.

Mr. Coulson: It would only take a moment to read in the dates of delivery, I think, Mr. Examiner.

Mr. Curry: Dates of delivery of general and refunding mortgage bonds, 5 per cent, Series A and B as part collateral:

The Reconstruction Finance Corporation—

Mr. Coulson: Put in the dates first, Mr. Curry, so that we will be clear, because that is what we are interested in, the date of each delivery, to whom it went, and the amount. [2450].

Mr. Curry: $8,750,000 principal amount, delivered on March 1, 1932.

$2,000,000 principal amount, delivered March 25, 1933.

To the Railroad Credit Corporation, $2,000,000 delivered March 25, 1933; $2,000,000 principal amount, Series B, delivered March 25th, 1933 by A. C. James Company.

To A. C. James Company: $5,630,000 delivered March 1, 1932; $2,000,000 of such bonds repledged with the Railroad Credit Corporation, delivery of said $2,000,000—

Mr. Coulson: For a debt of the Debtor Company?

Mr. Curry: For a debt of the Railroad Company, delivery of said $2,000,000 being made on March 25, 1933 by A. C. James Company.

$433,500 delivered to A. C. James Company, March 28th, 1932.

$186,000 delivered to A. C. James Company, May 31st, 1932.

Mr. Willard: There again, Mr. Examiner, I assume that the evidence already in would control, in the event of any difference.

Examiner Wilkinson: That is correct.

Mr. Coulson: It is merely a convenient summary of [2451] the dates.

Examiner Wilkinson: In view of the fact that Mr. Curry has read the first parts of this exhibit, and in view of the objections, Exhibit No. 106 will not be received.

C. E. BUCKLEY

testified further as follows:

Direct Examination

(Continued)

Mr. Wood: Mr. Examiner, in offering this document as an Exhibit—I think the identification of it is already in the record—I want to make an explanation which will perhaps clarify the portions which are headed respectively "Acquisition of Sacramento Northern Railway and Spurs and Industrial Tracks."

The memorandum gives in each case the total amount of cash withdrawn on a particular requisition. In a great many cases the expenditures covered a great variety of items, and the amount of

(Testimony of C. E. Buckley.)

cash will be entirely disproportionate to the amount of expenditures that are set forth in the memorandum. The reason for that is this:

Say we had one million dollars of cash withdrawn for all sorts of Additions and Betterments, for [2452] the particular purpose which is set forth in the memorandum as construction of spur and other tracks.

We have picked out merely the amount of expenditures that relate to that particular class of property, namely, spurs and industrial tracks. We have not given the aggregate of expenditures in the whole requisition, although we have given the whole amount of cash. So that you will have one million dollars cash withdrawn and maybe $25,000 as the item of property expended.

With that explanation, I think the memorandum will be a little clearer.

I offer that as an Exhibit.

Examiner Wilkinson: As you will recall, Mr. Wood, it has already been put in the record as Exhibit No. 124.

Mr. Wood: I thought it was for identification only.

Examiner Wilkinson: Exhibit No. 124 will be received.

(Exhibit No. 124, Witness Buckley, was received in evidence.)

Mr. Wood: I will have this rewritten with the changes here in pencil on the document which is

(Testimony of C. E. Buckley.)

now going into the record, and I will distribute copies [2453] to the parties. The Commission would like to have two more, I understand.

Examiner Wilkinson: Very well.

Mr. Swaine: I would like to address to the Examiners a question of personal privilege. I have not had a holiday for two years.

Mr. Coulson: Just a moment. Do you anticipate the cross examination of Mr. Buckley?

Mr. Swaine: No. I thought you were through.

Mr. Judd: I have a couple of questions.

Cross Examination

Q. (By Mr. Judd) Mr. Buckley, with respect to the branches, spurs and other items covered by your testimony and this Exhibit No. 124, are we to understand that you have extracted and summarized everything on those subjects which is contained in requisitions for cash drawn down under the first mortgage?

A. I cannot say that we took every item in those requisitions that referred to the heading of the various loans, and inserted them here.

Q. You can say?

A. I cannot say that we extracted every one. All I can say is that the facts contained in the memoranda are contained in the appropriate requisitions on file with the individual trustee. [2454]

Q. With respect to the individual branches about which you have testified, have you any knowledge of

(Testimony of C. E. Buckley.)

the total amount of money that was spent by the railroad company for right of way on any particular branch? A. I have not.

Mr. Wood: That would appear in the requisitions but it would take a great deal of time to dig it out in each individual case.

Mr. Judd: Would that show, if I may ask you, Mr. Wood, the total amount spent by the railroad company or the total amount cited in the requisitions?

Mr. Wood: The requisitions are certifications of what they have expended, on the basis of which they are withdrawing cash.

Mr. Judd: Are they a certification that nothing will be expended beyond that?

Mr. Wood: No, they show expenditures between certain dates.

Mr. Judd: In connection with the branch from Hawley to Loyalton, may I see the memorandum from which you were testifying concerning the first item of expenditure?

Mr. Wood: At that point I may say this: That the position of the first mortgage trustee is that under the after acquired property clause of the first [2455] mortgage, we take the position that if any first mortgage money went into a branch or extension, that branch in its entirety is subject to the first mortgage.

Mr. McCollom: Of course, we do not agree with that view.

(Testimony of C. E. Buckley.)

Mr. Swaine: That is a matter for briefing.

Mr. Coulson: When they put in testimony as to minor expenditures on a branch this morning, that was brought up, but they show the right of way of a part of the branch of the California extension being shown acquired with mortgage money, and do not show with what money the rest of it was acquired,

Examiner Wilkinson: Proceed.

Q. (By Mr. Judd) Mr. Buckley, am I correct in understanding with respect to requisition No. 35, that the expenditures therein on what you call the Loyalton Branch were made simply for what is termed a spur track, running south from Loyalton?

A. All I can tell you, Mr. Judd, is this: That the papers in requisition 35 will indicate that these expenditures were for the betterment to the main line, consisting of the construction of a spur track, including the cost of the spur track 2.6 miles long, to serve this lumber company to 2.20 miles south of [2456] Loyalton, California.

There is evidence in the 35 papers that indicate that.

Q. And that is the only part of requisition No. 35 which went into what you term the Loyalton Branch?

A. I cannot say that there are not some others, without looking at it, but I know that this particular information did appear on No. 35.

Q. I simply want to bring out that there is nothing in this, as it stands on the record now, to

(Testimony of C. E. Buckley.)

contradict the statement in Exhibit No. 29 that the branch from Hawley to Loyalton was acquired with free funds, and that the treasury was reimbursed for that expenditure on scrapping a part of the branch.

A. I have no knowledge of that.

Mr. Wood: I do not think that that is quite correct, Mr. Judd, because this item does not stand alone here. You have on Number 35 an item of $5,350.08, for one particular purpose, cost of a spur.

Mr. Judd: Yes.

Mr. Wood: Yet the total requisition is 137 some odd thousand dollars.

Coming to that 137 some odd thousand dollars you have an expenditure in the balance of 59 thousand and some odd dollars for betterments to the main line, [2457] including track betterments between Hawley and Loyalton.

Mr. Judd: On that there is only $87.00 as I read this memorandum, which is on track betterments between Hawley and Loyalton.

Mr. Wood: That is the balance which was used under this requisition, but the reference is made to previous requisitions numbers 170, 177 and 181, and the balance is given as $59,764.36.

Mr. Judd: Would you say, Mr. Wood, that that $59,000 purports to represent expenditures on the Loyalton Branch?

Mr. Wood: Exactly, it does. In your next requisition No. 216, you have some more of the track betterments between Hawley and Loyalton.

(Testimony of C. E. Buckley.)

Mr. Judd: Let me see requisition No. 170. I am not going into all of them, but I would like to see if it goes to that amount.

Examiner Boyden: Are you talking about papers in the record or not in the record?

Mr. Judd: I think, as a matter of cross examination of Mr. Buckley, we are entitled to look, within reason, at the papers on which his testimony was based.

Examiner Boyden: Off the record. [2458]

(Informal discussion off the record.)

Mr. McCollom: Mr. Examiner, the requisitions are here, if the Commission feels that they ought to be used, but there were taken from these requisitions, and Mr. Buckley has testified that the data set forth is accurate. Mr. Judd of course, is entitled to ask any questions he wants about them.

Mr. Coulson: I am frank to say that I understood Mr. Buckley's testimony this morning as to the total item mentioned by Mr. Wood as being a total which included items for other purposes, and that the specific item applying to the extension here was the smaller figure here.

Mr. Wood: That is true in part.

Mr. Judd: It is my purpose to see that—

Mr. Coulson: The record showed it this morning.

Mr. Wood: I think that needs explanation. I have a large requisition which includes all sorts of items. In that you will find one item which says $87.12, the amount being shown on this particular requisi-

(Testimony of C. E. Buckley.)

tion, but then there will be a little parenthesis following that, that will say, "being the balance of total expenditures of so much," or it will say, "After deducting amounts covered by requisition No." then giving the number, and say "balance so much." [2459]

In other words, they are carry-overs from previous requisitions, with a total amount, deducting the previous requisitions, leaving a balance which is used on that particular requisition. They refer back, and the total is what is given here.

Mr. Judd: I should think I might look at the one requisition to which I referred, and so far as I am concerned, I have no objection, Mr. Buckley has them in his bag.

(Informal discussion off the record.)

Q. (By Mr. Judd) You do not know, do you, Mr. Buckley, as to whether or not your statement on the acquisition of land covers all the land which has been acquired by the Western Pacific Railroad Company since 1916? A. I do not, no.

Q. You do not know, for instance, with respect to the item of miscellaneous physical property, listed on Exhibit No. 115, I believe it is, warehouse building at Grass and Terminous, acquired in October, 1930 for $35,616, whether that was acquired out of first mortgage money or free funds?

A. I do not know. It may be possible to pick it up by the deductions, but I have no knowledge at the moment. [2460]

(Testimony of C. E. Buckley.)

Mr. Wood: Which item, Mr. Judd.

Mr. Judd: Line 46 on No. 212, being Exhibit No. 113.

Mr. Wood: How does it read?

Mr. Judd: It reads "warehouse building, pump house, pumps, etcetera, Grass and Terminous, California."

Mr. Wood: I do not know any way of tying those up except by comparing the deductions, the amounts, the dates, and taking the requisition, which would necessarily tie it up with that. You would have to go into the railroad company's own records, I suppose, to get the proper tie up.

Mr. Judd: Is the same true as to the spurs, that there has been no comparison made on the industrial spurs and other tracks built by the railroad since 1916 to see whether or not such construction was financed with first mortgage funds?

The Witness: I have made no such comparison.

Mr. Wood: All we have done is to take the requisitions and summaries, what appears in the papers. That is the extent of our examination of this data.

Mr. Judd: I see. If the expenditures listed as $31,000 capital account for construction of tracks to serve the industrial section in San Francisco are [2461] stated in Exhibit No. 31 as uncapitalized, there is nothing in this which in and of itself connects with that or contradicts it?

Mr. Wood: All I say is that we looked at nothing but the requisitions. If there is an obvious tie up

(Testimony of C. E. Buckley.)

between a requisition and that, it speaks for itself. There is no attempt to reconcile the requisition with any data or material.

Mr. Judd: That is for us to dig out later on in brief?

Mr. Wood: If you like.

Q. (By Mr. Judd) Have you made demands on the Chase Bank, Mr. Buckley, on behalf of the general mortgage for payment of interest or dividends upon the collateral held by the Chase Bank as trustee under the general mortgage?

A. Notes or bonds held by us as collateral?

Q. Yes.

A. We have served some notice on obligors, on notes held as collateral. Whether or not that is a demand for payment of interest or a notice that if any interest is paid, it is payable to us as trustee, I cannot recollect the facts.

Q. Do you remember approximately the date when that was done? [2462]

A. My best recollection is that it was shortly after the company went into 77, but I would have to verify that from the record. It is easy to ascertain all of this.

Mr. Judd: Mr. Examiner, I would like to have permission to read for the record a telegram which was just received this morning transmitting information from San Francisco with respect to the payments of interest on the note of Tidewater Southern Railway Company and pledged under the

(Testimony of C. E. Buckley.)

general mortgage, since the date when the general mortgage went into default, to wit, March 1, 1934.

Examiner Wilkinson: Who is the telegram from?

Mr. Judd: The telegram is from our San Francisco Counsel and it reads:

"Western Pacific Reports—meaning the San Francisco office of the Western Pacific and skipping some irrelevant matter—"The Western Pacific Railroad Company has been the only recipient of interest payments since March 1, 1934 on Tidewater Southern Notes for $508,000, pledged under General and Refunding Mortgage, such payments being as follows:

"Interest period September 1, 1933 to February 28th, 1934, $12,706.97. Date paid [2463] March 2, 1934 STOP Interest period March 1, 1934 to August 31, 1934, $12,706.97. Date Paid September 17, 1934 STOP Interest period September 1, 1934 to February 28, 1935, $12,706.97. Date Paid March 6, 1935 STOP Interest period March 1, 1935 to August 31, 1935 $12,706.97. Date Paid September 6, 1935 STOP Total $50,827.88.

(Signed) FELIX T. SMITH",

our San Francisco Counsel.

I would like to offer for the record a copy of the note of the Tidewater Southern Railway Company.

Can you identify that, Mr. Buckley, as a copy of a note in your possession, as trustee, under the General Mortgage?

(Handing papers to witness.)

(Testimony of C. E. Buckley.)

Examiner Boyden: Don't we have copies of all those noted in the record?

Mr. Judd: I believe some particulars of those are in, but in view of the fact that interest has been paid on this note without being paid to the trustee under the General Mortgage, I think it is desirable to have the full provision, the entire notes, in the record. [2464]

Mr. Swaine: So that there will be no misunderstanding, we do not concede that the general and refunding is a first lien on that note.

Examiner Wilkinson: Can you identify that?

The Witness: No, I cannot identify that. I would have to see the original note and see that that is a photostat. I do not carry the figures in my mind.

Mr. Coulson: Can it not be received subject to inspection?

The Witness: I would be glad to.

Mr. Judd: If, after the hearing, I submit to you the letter which you sent over and from which the photostats were made, will you be satisfied that this is a correct copy?

The Witness: I do not know whether this is a photostat of what was sent or not. I suppose it is, but I would have to see the original document.

Examiner Wilkinson: Suppose you offer it, Mr. Judd.

Mr. Judd: I will offer it in evidence, subject to correction.

Mr. Swaine: No objection.

(Testimony of C. E. Buckley.)

Examiner Wilkinson: It will be received as Exhibit No. 126. [2465]

(Exhibit No. 126, by Counsel, was received in evidence.)

Examiner Wilkinson: Have you got copies?

Mr. Judd: Yes, sir.

Examiner Wilkinson: That is all, Mr. Buckley.

Mr. Coulson: May I ask just one question?

The Witness: Yes, sir.

Q. (By Mr. Coulson) Mr. Buckley, I refer to the various branch lines as to which you testified today and the total items of real property itemized in Exhibit No. 124, which has been put in the record in connection with your testimony today, and ask you whether there has been executed and delivered by the debtor company to the first mortgage trustee any supplemental indentures which refer to these various branch lines and other properties?

A. I do not recall.

Q. But you would recall if one had been executed, if you had been connected with the carrier?

Mr. Wood: We will concede there were none. I think that is the fact.

Mr. Coulson: Thank you.

Mr. Clay: Does that mean that there has been no supplemental indentures since the date of the first mortgage in 1916? [2466]

Mr. Swaine: I am so advised by counsel for the trustee.

Mr. Wood: I have worked with the Western Pa-

(Testimony of C. E. Buckley.)

cific for years a great deal and I have never heard of a supplement, but I do not know.

Mr. Swaine: We are perfectly willing to have this case adjudicated on the assumption that there are not any.

Examiner Wilkinson: Any further questions of Mr. Buckley?

(No response.)

(Informal discussion off the record.)

Mr. Wood: Mr. Examiner, if we are through with the discussion about briefs—

Examiner Wilkinson: That was off the record. Do you have anything further of Mr. Buckley?

Mr. Judd: No, sir.

Examiner Wilkinson: Does any other party have any question of Mr. Buckley?

(No response.)

Examiner Wilkinson: You are excused.

(Witness excused.)

Mr. Wood: In connection with the statement Mr. Swaine made about there being no supplements, I think [2467] for the purpose of making the record clear—and this is not for the purpose of committing anybody to a legal conclusion—I think it ought to be pointed out that in the case of each one of these requisitions involving acquisition of property, purchases of land, or branch

lines, there was an opinion of the railroad company's counsel furnished to the trustees as part of the requisition, to the effect that no supplemental indenture was necessary to subject particular property to the lien of the first mortgage, subject to no prior liens, and that is provided in the opinion.

Mr. Clay: Mr. Examiner, that opinion of course, is merely an opinion, and it cannot bind the creditors in this proceeding. I should further like to point out that part of this property is in Utah, and part of the property is in Nevada and part of the property is in California, and it is possible that in one of those states no supplemental mortgage is required. It is quite possible that if the property were located in one or the other states, under the law of that state a supplemental mortgage would be required.

Mr. Wood: Mr. Examiner, I tried to make that clear in the preliminary statement which I made; that we are not putting this in for the purpose of a legal conclusion, but it is merely a statement of facts, to [2468] make the matter clear. I assume that when counsel gives an opinion he has considered the law of a particular state with which he is dealing.

Mr. Coulson: I do not think we can make that a matter of evidence.

Examiner Wilkinson: It is not evidence, and it is not to be relied upon in this proceeding. There is no use of encumbering the record by talking about it.

Mr. Swaine: Wait a minute. It does have an evidentiary value.

Examiner Wilkinson: Has the opinion been put in the record?

Mr. Swaine: No.

Examiner Wilkinson: Are you going to put it in?

Mr. Wood: That is the reason I am making reference to it. Not unless the Commission wants it put in.

Examiner Wilkinson: I am not telling you what to put in. As I said, it would be an admission on the part of the Debtor, but unless you have got it to put in, there is no use in talking about it.

Mr. Swaine: Let us meet it when it comes up. Mr. Coulson asked the question as to whether there was taken by the trustee a supplemental indenture. I concede, so far as my bonds are concerned, that no [2469] supplemental indenture was taken. At the same time I think it is fair to have pointed out that the debtor represented to the trustee on each one of these take-downs, by filing an opinion of counsel, that no supplemental indenture was necessary.

Now that is the fact, and Mr. Coulson knows that it is a fact, and Mr. Buckley can testify to it, or if it becomes relevant we can dig out of the take-down proceedings every opinion on every case. I quite agree with Mr. Clay that that does not bind Mr. Clay to it, but it does show what the intent as between the debtor and the first mortgage

bondholders was, and I think it is a relevant fact.

Examiner Wilkinson: The only thing which I am saying, Mr. Swaine, is that it may be—and I would admit it, if you have it—but I cannot consider as evidence some statement like that.

Mr. Coulson: Mr. Examiner, I would like to say quite clearly—it seems to me we are wasting time on something which is necessarily irrelevant—that the opinions of counsel, even if they were offered and identified as competent counsel, competent to give testimony as to the law of these various states, it [2470] cannot ever be considered evidence here, and as an admission it might have some embarrassment to the debtor, but this question of liens is something in which the debtor company has no personal interest. It is purely a question between the first mortgage bondholders, the junior creditors, and the general creditors of this property, and no one of them can be bound by any opinion that any counsel gave the trustee or the debtor company.

Examiner Wilkinson: I think we have had sufficient on the record in that regard. Proceed please.

Mr. Wood: Mr. Buckley can testify. Will you take the stand, Mr. Buckley?

Mr. Clay: May I suggest that so far as I am concerned, that I am willing to admit that such an opinion was given, but I do not see how the opinion can be binding upon the parties.

Mr. Swaine: I agree with that. It does not bind you.

Examiner Wilkinson: I believe that is sufficient on the record on that.

If you have something else, all right.

Mr. Wood: I would like to have Mr. Buckley testify to the fact that the opinion was given in each case. [2471]

Examiner Wilkinson: All right.

Mr. Wood: Mr. Buckley, in the case of each of these requisitions as to which you have testified, and which was mentioned in the memorandum which went into evidence as Exhibit No. 124, I think it was found from your examination of those requisitions that in each case there was an opinion of counsel as part of the requisition, to the effect that no supplemental indentures or other instrument was necessary to subject the property described in the requisition to the lien of the first mortgage as a first lien, with the exception of any prior lien specifically mentioned in the opinion.

I think in a few cases there were, or in the case of one there was $15,000 reserved, but unless specifically mentioned, there were no prior liens.

Mr. Coulson: I object to the form of the question, as he has not specified what property he has referred to.

Examiner Wilkinson: The objection is overruled. Will you answer the question if you can?

Mr. Buckley: We have received such an opinion.

Examiner Wilkinson: Is there anything further of Mr. Buckley?

(No response.) [2472]

Examiner Wilkinson: Have any parties anything further to offer in this case?

(No response.)

Examiner Wilkinson: The case will be closed, and briefs will be filed on January 11th, 1937, and of course the record speaks for itself with respect to the motions, or rather the petitions of intervention.

(Thereupon at 4:10 o'clock p. m., the hearing in the above entitled matter was closed.)

[Endorsed]: Filed Oct. 3, 1939. [2473]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

District Court of the United States, Northern District of California, Southern Division.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, Southern Division, do hereby certify that the foregoing pages, numbered from 1 to 2769, inclusive, contain a full, true and correct transcript of so much of the records and proceedings In the Matter of The Western Pacific Railroad Company, Debtor, No. 26591-S, as are included in the Designations of the portions of the record to be contained in the Record on Appeal in said proceeding, filed by the parties to said proceeding in said Court in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, and consisting of (a) "Designation

by Appellants, The Western Pacific Railroad Company, The Western Pacific Railroad Corporation, A. C. James Co., The Railroad Credit Corporation, and Irving Trust Company as Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company dated January 1, 1932, of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal," filed October 10, 1940 (supra pp. 1257 to 1265); (b) "Designation by Appellees, Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee for a Group of Institutional Holders of First Mortgage Bonds of the Western Pacific Railroad Company, and Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees [2770] under the First Mortgage Filed June 26, 1916, of The Western Pacific Railroad Company, of Additional Portions of the Record, Proceedings, and Evidence to be Included in the Record on Appeal", filed October 21, 1940, (supra pp. 1650 to 1654), and (c) "Designation by Appellee, Reconstruction Finance Corporation, of Additional Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal", filed October 19, 1940, (supra pp. 1746 to 1747), as the same now remains on file and of record in my office, except (1) the original Exhibits which in accordance with Rule 75(i) of said Rules of Civil Procedure for the District Courts of the United States and the order of said Court made, filed and entered November 27, 1940 (supra pp. 1754 to

1755), have been transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit and are a part of the transcript of record on appeal herein; and (2) the items designated as Numbered 39 and 40, respectively, in the above mentioned Designation of the Appellants filed herein Ocfober 10, 1940, and described in said Designation as "Summary of Issues Remaining for Decision by the Court Filed herein by the Western Pacific Railroad Company and A. C. James Co. on December 20, 1939", and "Summary of Issues as Stated by Counsel for Institutional Bondholders Committee Filed herein on December 20, 1939", respectively, and that the foregoing constitutes the transcript of record on the appeals heretofore taken by the above named Appellants from the order of the above named Court made, filed and entered on August 15, 1940, which approved a Plan of Reorganization of the above named Debtor.

I further certify that neither of said last mentioned items included in said Designation of the Appellants (i.e., Items Nos. 39 and 40) has been included in the foregoing transcript of record on [2771] appeal, for the reason that neither of the documents mentioned in said respective items has been filed in said Court, or is part of the files thereof.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $404.10, and that said amount has been paid to me by the attorneys for the Appellants herein.

In witness whereof, I hereunto set my hand and affix the seal of said District Court, this 30th day of December, 1940.

[Seal] WALTER B. MALING,
Clerk.

By J. P. WELSH,
Deputy Clerk.

[2772]

[Endorsed]: No. 9714. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of The Western Pacific Railroad Company, a corporation, Debtor. Western Pacific Railroad Corporation, a corporation, The Western Pacific Railroad Company, a corporation and Irving Trust Company, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. James Co., a corporation, The Railroad Credit Corporation, a corporation, Appellants, vs. Institutional Bondholders Committee and Reconstruction Finance Corporation, Appellees. Transcript of Record. (Excluding Certain Portions not Printed, in Accordance with Stipulation and Order.) Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed, December 31, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals.

No. 9714

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

STATEMENT OF POINTS UPON WHICH APPELLANTS WILL SEVERALLY RELY IN SUPPORT OF THEIR RESPECTIVE APPEALS AND DESIGNATIONS OF PARTS OF THE RECORD SAID APPELLANTS THINK NECESSARY FOR THE CONSIDERATION OF SAID POINTS.

The Western Pacific Railroad Company, debtor herein, The Western Pacific Railroad Corporation, A. C. James Co., The Railroad Credit Corporation, and Irving Trust Company as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, dated January 1, 1932, all of whom have, heretofore, severally appealed to the above entitled Court from the order of the District Court of the United States for the Northern District of California, Southern Division, made, filed and entered on August 15, 1940, by which the last mentioned Court approved a Plan of Reorganization of the debtor, do hereby, (in conformity with Rule 19(6) of the above entitled Court, jointly and severally,

(1) state that the points upon which said re-

spective appellants severally intend to rely in support of their respective [2773] appeals, are the points set forth in the statements of said respective appellants which were filed in said District Court pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States, and which are contained in the certified transcript of record on appeal herein at pages 1266 to 1291, thereof, and constitute a part of said record on appeal; said respective statements of points are, by reference, incorporated herein and made a part hereof; and

(2) designate as the parts of the record on appeal which said respective appellants think necessary for the consideration of their respective points, the entire record on appeal as made up by the Clerk of said District Court and certified by him, and lodged and filed herein December 31, 1940, and the original exhibits which (in conformity with Rule 75(i) of said Rules of Civil Procedure for the District Courts of the United States and pursuant to order of said District Court made, filed and entered November 27, 1940) were sent to the above entitled Court, in lieu of copies thereof, by the Clerk of said District Court, and constitute a part of the record on appeal on said appeals.

Dated: December 31, 1940.

PIERCE & GREER,
C. W. DOOLING,
Attorneys for Appellant,
The Western Pacific Railroad Company.

WHITMAN, RANSOM,
COULSON & GOETZ,
GARRET W. McENERNEY,
ANDREW F. BURKE,
Attorneys for Appellant,
A. C. James Co.

[2774]

M. C. SLOSS,
SLOSS & TURNER,
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The Western Pacific Railroad Corporation.

W. J. KANE,
EDWARD G. BUCKLAND,
Attorneys for Appellant,
The Railroad Credit Corporation.

DAVIES, AUERBACH,
CONNELL & HARDY,
PILLSBURY, MADISON &
SUTRO,
FELIX E. SMITH,
Attorneys for Appellant,
Irving Trust Company as
Trustee under the General
and Refunding Mortgage of
the Debtor.

[Endorsed]: Filed Dec. 31, 1940. Paul P. O'Brien, Clerk.

[2775]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE TRANSCRIPT OF RECORD ON APPEALS.

Good cause appearing therefor, it is hereby ordered that the time for filing the transcript of record on the appeals heretofore taken to this Court by The Western Pacific Railroad Company, A. C. James Co., The Western Pacific Railroad Corporation, The Railroad Credit Corporation and Irving Trust Company as Trustee under the General and Refunding Mortgage of the Debtor, from the order of the United States District Court for the Northern District of California, Southern Division, made, filed and entered August 15, 1940, approving the Plan of Reorganization of the above named Debtor, which said time (as fixed by Rule 73 of the Rules of Civil Procedure for the District Courts of the United States, and three orders of the District Court, dated October 25, 1940, November 27, 1940 and December 12, 1940, respectively), will expire December 19, 1940 (i.e., ninety days after the date upon which the Notices of Appeal on said appeals were filed in said District Court) be and the same is hereby extended to and including December 31, 1940.

Dated: December 18, 1940.

CURTIS D. WILBUR,
Senior U. S. Circuit Judge.

[2776]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE

State of California,
City and County of San Francisco—ss.

Timothy McCarthy, being first duly sworn, deposes as follows:

1. I am and at all times herein mentioned, I was a citizen of the United States, over the age of twenty-one years and not a party to nor interested in the above entitled proceeding:

2. On December 18, 1940, I served the "Order Extending Time within which to File Transcript of Record on Appeal" (hereinafter called "Order Extending Time", simply), the original of which was filed in the office of the Clerk of the above entitled Court on December 18, 1940, and a certified copy whereof was filed in the office of the Clerk of the District Court of the United States, for the Northern District of California, Southern Division, on the same [2777] day, upon each of the persons hereinafter named personally, by delivering a copy of said Order Extending Time to said respective persons at their respective offices as next stated, viz:

(a) Upon Morrison, Hohfeld, Foerster, Shuman & Clark, Attorneys for Institutional Bondholders Committee, at their office, Crocker Building, San Francisco, California;

(b) Upon Brobeck, Phleger & Harrison, Attorneys for Reconstruction Finance Corporation, at their office, Crocker Building, San Francisco, California;

(c) Upon Chickering & Gregory, Attorneys for Crocker First National Bank of San Francisco, California, and Samuel Armstrong, Trustees of the First Mortgage of The Western Pacific Railroad Company, at their office, 111 Sutter Street, San Francisco, California;

(d) Upon Felix T. Smith and Pillsbury, Madison & Sutro, Attorneys for The Chase National Bank of the City of New York, at their office, Standard Oil Building, San Francisco, California;

(e) Upon Thomas, Beedy & Paramore, Attorneys for Bankers Trust Company, at their office, 301 Montgomery Street, San Francisco, California;

(f) Upon C. W. Dooling, Attorney for Appellant The Western Pacific Railroad Company, at his office, 878 Mills Building, San Francisco, California;

(g) Upon Felix T. Smith and Pillsbury, Madison & Sutro, Attorneys for Appellant Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, at their office, Standard Oil Building, San Francisco, California;

(h) Upon M. C. Sloss and Sloss & Turner, Attorneys for Appellant The Western Pacific Railroad Corporation, at their office, 111 Sutter Street, San Francisco, California.

3. On December 18, 1940, I served said Order Extending Time upon the respective persons here-

inafter named by enclosing the same in securely sealed envelopes, with postage thereon fully prepaid, addressed to said respective persons at their respective offices hereinafter mentioned, and depositing said sealed envelopes, so addressed, in the United States Postoffice at San Francisco, California, viz:

[2778]

(a) Upon Cravath, de Gersdorff, Swaine & Wood, Attorneys for Institutional Bondholders Committee, 15 Broad Street, New York, New York;

(b) Upon C. M. Clay, Attorney for Reconstruction Finance Corporation, 1825 H Street, N. W., Washington, D. C.;

(c) Upon Milbank, Tweed & Hope, Attorneys for Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage of The Western Pacific Railroad Company, 15 Broad Street, New York, New York;

(d) Upon Milbank, Tweed & Hope, Attorneys for Chase National Bank of the City of New York, 15 Broad Street, New York, New York;

(e) Upon Pierce & Greer, Attorneys for Appellant The Western Pacific Railroad Company, 40 Wall Street, New York, New York;

(f) Upon Edward G. Buckland, and William J. Kane, Attorneys for Appellant The Railroad Credit Corporation, Maryland Trust Building, Baltimore, Maryland;

(g) Upon Davies, Auerbach, Connell & Hardy, Attorneys for Appellant Irving Trust Company as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, 1 Wall Street, New York, New York;

(h) Upon Whitman, Ransom, Coulson & Goetz, Attorneys for Appellant A. C. James Co., 40 Wall Street, New York, New York;

(i) Upon Leroy R. Goodrich, Attorney for The Western Realty Company, 1001 Bank of America Building, Oakland, California.

TIMOTHY McCARTHY

Subscribed and sworn to before me this 19th day of December, 1940.

(Seal) HENRY J. O'CONNOR,
Notary Public
In and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 31, 1940.
Paul P. O'Brien, Clerk. [2779]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE STIPULATION RE PORTIONS OF TRANSCRIPT OF RECORD TO BE PRINTED

Upon application of Mr. M. C. Sloss, counsel for appellant Western Pacific Railroad Corporation,

and good cause therefor appearing, IT IS ORDERED that the time of appellants within which to file stipulation designating portions of transcript of record which are to be printed be, and hereby is extended to and including January 23, 1941.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

Dated: San Francisco, Calif., January 8, 1941.

[Endorsed]: Filed Jan. 8, 1941.
Paul P. O'Brien, Clerk. [2780]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE

State of California,
City and County of San Francisco. ss.

Timothy McCarthy, being first duly sworn, deposes as follows:

1. I am and at all times herein mentioned, I was a citizen of the United States, over the age of twenty-one years and not a party to nor interested in the above entitled proceeding;

2. On January 9, 1941, I served the "Order Extending Time to File Stipulation re Portions of Transcript of Record to be Printed" (hereinafter called "Order Extending Time", simply), which was filed on January 8, 1941, with the Clerk of the above entitled Court upon each of the persons hereinafter named personally, by delivering a copy of said Order Extending Time to said respective persons at their respective offices as next stated, viz:

(a) Upon Morrison Hohfeld, Foerster, Shuman, & Clark, Attorneys for Institutional Bondholders Committee, at their office, Crocker Building, San Francisco; [2781]

(b) Upon Brobeck, Phleger & Harrison, Attorneys for Reconstruction Finance Corporation, at their office, Crocker Building, San Francisco, California;

(c) Upon Chickering & Gregory, Attorneys for Crocker First National Bank of San Francisco, California, and Samuel Armstrong, Trustees of the First Mortgage of The Western Pacific Railroad Company, at their office, 111 Sutter Street, San Francisco, California;

(d) Upon Felix T. Smith and Pillsbury, Madison & Sutro, Attorneys for The Chase National Bank of the City of New York, at their office, Standard Oil Building, San Francisco, California;

(e) Upon Thomas, Beedy & Paramore, Attorneys for Bankers Trust Company, at their office, 301 Montgomery Street, San Francisco, California;

(f) Upon C. W. Dooling, Attorney for Appellant The Western Pacific Railroad Company, at his office, 878 Mills Building, San Francisco, California;

(g) Upon Felix T. Smith and Pillsbury, Madison & Sutro, Attorneys for Appellant Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of

The Western Pacific Railroad Company, at their office, Standard Oil Building, San Francisco, California;

(h) Upon M. C. Sloss and Sloss & Turner, Attorneys for Appellant The Western Pacific Railroad Corporation, at their office, 111 Sutter Street, San Francisco, California.

3. On January 9, 1941, I served said Order Extending Time upon the respective persons hereinafter named by enclosing the same in securely sealed envelopes, with postage thereon fully prepaid, addressed to said respective persons at their respective offices hereinafter mentioned, and depositing said sealed envelopes, so addressed, in the United States Postoffice at San Francisco, California, viz:

(a) Upon Cravath, de Gersdorff, Swaine & Wood, Attorneys for Institutional Bondholders Committee, 15 Broad Street, New York, New York;

(b) Upon C. M. Clay, Attorney for Reconstruction Finance Corporation, 1825 H Street, N. W., Washington, D. C.;

(c) Upon Milbank, Tweed & Hope, Attorneys for Crocker First National Bank of San Francisco and Samuel Armstrong, Trustee of First Mortgage of The Western Pacific Railroad Company, 15 Broad Street, New York, New York; [2782]

(d) Upon Milbank, Tweed & Hope, Attorneys for Chase National Bank of the City of New York, 15 Broad Street, New York, New York;

(e) Upon Pierce & Greer, Attorneys for Appellant The Western Pacific Railroad Company, 40 Wall Street, New York, New York;

(f) Upon Edward G. Buckland and William J. Kane, Attorneys for Appellant The Railroad Credit Corporation, Maryland Trust Building, Baltimore, Maryland;

(g) Upon Davies, Auerbach, Connell & Hardy, Attorneys for Appellant Irving Trust Company as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, 1 Wall Street, New York, New York;

(h) Upon Whitman, Ransom, Coulson & Goetz, Attorneys for Appellant A. C. James Co., 40 Wall Street, New York, New York;

(i) Upon Leroy R. Goodrich, Attorney for The Western Realty Company, 1001 Bank of America Building, Oakland, California.

TIMOTHY McCARTHY,

Subscribed and sworn to before me this 10th day of January, 1941.

(Seal) HENRY J. O'CONNOR.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jan. 14, 1941.

Paul P. O'Brien, Clerk. [2783]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR ORDER DISPENSING WITH PRINTING OF CERTAIN PORTIONS OF RECORD ON APPEAL.

Whereas, certain portions of the record on appeal on the several appeals heretofore taken to the above entitled Court from the order made, filed and entered in the above proceeding by the District Court of the United States for the Northern District of California, Southern Division, on August 15, 1940, approving the Plan of Reorganization of the debtor, which are hereinafter described, are voluminous and of a character and size that would not readily lend themselves to reproduction in a printed record; and

Whereas, the substance of the essential parts or legal effect of certain other portions of such record, hereinafter described, are set forth in other portions of said record, and especially in the "Stipulation as to Facts not in Dispute", which appears at pages 960 to 1134, inclusive, in the record as certified to the above entitled Court by the Clerk of the District Court (hereinafter called the "certified record"); and [2783]

Whereas, the parties hereto are of the opinion that it would be impractical and unduly burdensome to require such certain portions of such record to be printed and that the inclusion of said respective portions of said record in the printed record on appeal is unnecessary.

Now, therefore, the parties hereto, in consideration of the premises, do (subject to the approval of the above entitled Court) hereby stipulate as follows:

1. The portions of said record on appeal which are next hereinafter described (and whenever possible are, further, identified by references to the pages in the certified record where they appear) need not be printed or included in the printed record on appeal, on the aforesaid appeals, viz:

(a) The petition for order respecting the filing of claims and division of creditors and stockholders into classes, filed August 20, 1935, being Item Number 3 in Appellants' Designation (pp. 13 to 18);

(b) Order of the District Court dividing claims into classes filed October 20, 1935, being Item Number 4 in Appellants' Designation (pp. 19 to 25);

(c) Petition for appointment of trustees and order respecting notice of hearing of said petition filed August 31, 1935, being Item Number 5, in Appellants' Designation (pp. 26 to 35); [2784]

(d) Claim of A. C. James Co., filed September 10, 1935, being Item Number 6 in Appellants' Designation (pp. 36 to 47);

(e) Claim of The Western Pacific Railroad Corporation filed September 12, 1935, being Item Number 7 in Appellants' Designation (pp. 38 to 49);

(f) Claim of Western Realty Company filed September 13, 1935, being Item Number 8 in Appellants' Designation (pp. 50 to 51);

(g) Claim of The Railroad Credit Corporation filed on or before September 15, 1935, being Item Number 9 in Appellants' Designation (pp. 52 to 107);

(h) Claim filed on behalf of holders or pledgees of General and Refunding Mortgage bonds on or before September 15, 1935, being Item Number 10 in Appellants' Designation (pp. 108 to 110);

(i) Order appointing trustees filed September 23, 1935, being Item Number 11 in Appellants' Designation (pp. 111 to 116);

(j) Order of September 30, 1935, modifying order appointing trustees, being Item Number 12 in Appellants' Designation (pp. 117 to 118);

(k) The exhibits included in, annexed to and/or which form a part of the transcript of the hearings before the Interstate Commerce Commission [2785] of the United States, hereinafter called the "Commission" simply (said transcript being Item Number 16 in Appellants' Designation, and being set forth in the certified record at pages 1755 to 2770, inclusive, thereof) other than the exhibits numbered 1, 22, 27, 29, 32, 33, 38, 42, 76, 125 and 127 to 148, inclusive. None of the original Exhibits included in, annexed to or which form

part of said transcript of the hearings before said Commission, except those numbered 1, 42, 76 and 127 to 148, (both numbers included), are included in the certified record, but all said original Exhibits, other than those last mentioned, have, heretofore in accordance with Rule 75(i) of the Rules of Civil Procedure for the District Courts of the United States and an order of the District Court made, filed and entered November 27, 1940, been transmitted to the above entitled Court as part of the record on appeal herein, in lieu of copies thereof;

(l) That part of the transcript of the hearings before the Commission (said transcript being Item Number 16 in the Appellants' Designation, and being set forth in the certified record at pages 1755 to 2770, inclusive, thereof) which reports the arguments of counsel relating to petitions of intervention filed on behalf of the Missouri Pacific Railroad Company and Guy A. Thompson, Trustee of the Missouri Pacific Railroad Company, being part of the proceedings had before the Commission at the afternoon hearing held on December 9, 1936, the part to [2786] be omitted from the printed record on appeal being pages 630 to 673, inclusive, of said transcript and being set forth in the certified record at pages 2394 to 2437, inclusive, thereof.

(m) That part of the transcript of the hearings before the Commission which reports the arguments of counsel before the Commission at the hearings held on November 17, 1937 and January 20, 1939, the part to be omitted from the printed record on appeal being pages 710 to 1003, inclusive, of said transcript and being set forth in the certified record at pages 2475 to 2769, inclusive thereof.

(n) Order dated December 30, 1938, of the Commission, granting a rehearing, being Item Number 19 in Appellants' Designation (pp. 305 to 306);

(o) Petition of A. C. James Co. for leave to intervene before the Commission, dated April 18, 1936, being Item Number 21 in Appellants' Designation (pp. 373 to 387);

(p) Petition of The Railroad Credit Corporation for leave to intervene before the Commission dated March 14, 1936, being Item Number 22 in Appellants' Designation (pp. 388 to 391);

(q) Petition of Irving Trust Company, as trustee under the General and Refunding Mortgage of the debtor, for leave to intervene before the Commission dated November 19, 1936, being Item Number 23 in Appellants' Designation (pp. 392 to 398); [2787]

(r) Order of the District Court made November 8, 1939, fixing the time within which

objections to the plan of reorganization and claims for equitable treatment might be filed and designating December 8, 1939, as the date for filing such objections and claims, being Item Number 28 in Appellants' Designation (pp. 797 to 802);

(s) Petition of A. C. James Co. for leave to file petition of intervention, and order granting such petition, both filed December 1, 1939, petition of A. C. James Co. for leave to intervene and order made and filed, December 4, 1939, fixing time and place for hearing such petition, notice of filing petition of intervention of A. C. James Co., order granting petition of intervention of A. C. James Co., made and filed December 4, 1939, and notice of making and entry of said order, being Item Number 29 in Appellants' Designation (pp. 803 to 817);

(t) Petition of The Western Pacific Railroad Corporation for leave to file petition of intervention and order granting such petition and fixing date of hearing upon petition of intervention, both filed December 7, 1939, petition of intervention of The Western Pacific Railroad Corporation and notice of filing same, both dated December 7, 1939, order granting petition of intervention, dated December 11, 1939, and notice of making and entry of said order, being Item Number 30 in Appellants' Designation (pp. 818 to 831); [2788]

(u) Petitions, orders and notices relating to intervention of Irving Trust Company as trustee under the General and Refunding Mortgage of the debtor, being Item Number 31 in Appellants' Designation (pp. 832 to 851);

(v) Notice from Clerk of the District Court respecting filing of notices of appeal, being Item Number 52 in Appellants' Designation (pp. 1245 to .....);

(w) Bonds for costs on appeal filed September 20, 1940, by respective appellants, being Item Number 53 in Appellants' Designation (pp. 1246 to 1256);

(x) Verified statement of Crocker First National Bank of San Francisco as Corporate Trustee under the Debtor's First Mortgage, filed in the District Court on September 4, 1935, showing the principal amount of First Mortgage Bonds outstanding under said First Mortgage, being Item Number 1 in the additional portion of the record, proceedings and evidence to be included in the record on appeal filed in said District Court on October 21, 1940 by appellees Frederick H. Ecker, John W. Stedman and Reeve Schley, as a Committee for a Group of Institutional Holders of First Mortgage Bonds of the Western Pacific Railroad Company, and Crocker First National Bank and Samuel Armstrong, as trustees under the First Mortgage dated June 26, 1916 of The

Western Pacific Railroad Company (said designation [2789] being hereinafter called "Institutional Bondholders and First Mortgage Trustees Designation"), (pp. 1292 to 1293);

(y) Opinion and Order of the District Court entered November 9, 1935, confirming appointment of Trustees of the Debtor, being Item Number 2 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1294 to 1299);

(z) Petition of the First Mortgage Trustees for order impounding income, for leave to intervene, and other relief, filed March 5, 1936, and Order to Show Cause, dated March 5, 1936, fixing time and place of hearing on said Petition, being Item Number 3 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1300 to 1482);

(aa) Order entered March 9, 1936, permitting First Mortgage Trustees to intervene and making provision as to rights of said trustees with respect to income of the debtor, being Item Number 4 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1483 to 1485);

(bb) Petition of the Institutional Bondholders' Committee for leave to intervene in proceedings before the Commission, dated June 25, 1936, and filed on or about June 26, 1936, being

Item Number 5 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1486 to 1599); [2790]

(cc) Order of Commission entered July 9, 1936, permitting intervention of Institutional Bondholders' Committee in proceedings before Commission, being Item Number 6 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1501 to .....);

(dd) Petition of the First Mortgage Trustees for leave to intervene before the Commission, dated October 23, 1936, and filed on October 26, 1936, being Item Number 7 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1502 to 1509);

(ee) Petition of the Institutional Bondholders' Committee for leave to file petition of intervention and order granting such petition, both filed November 22, 1939; petition of intervention, verified November 16, 1939, of the Institutional Bondholders' Committee and notice of filing of same dated November 22, 1939, both filed November 22, 1939; order granting Institutional Bondholders' Committee's petition of intervention entered November 27, 1939, and notice of making and entry of said order dated November 28, 1939, being Item Number 13 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1599 to 1623);

(ff) Petition of Reconstruction Finance Corporation for leave to file petition of intervention and order granting such petition and fixing date of hearing on petition of Intervention, both filed December 7, 1939; petition of intervention of Reconstruction Finance Corporation and notice of filing of same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, [2791] and notice of making and entry of said order, being Item Number 14 in Institutional Bondholders and First Mortgage Trustees' Designation (pp. 1624 to 1633);

(gg) Claim of Reconstruction Finance Corporation filed on or before September 12, 1935, being Item Number 3 in Reconstruction Finance Corporation Designation (pp. 1667 to 1680);

(hh) Petition of Reconstruction Finance Corporation for leave to intervene before the Commission, dated October 5, 1936, being Item Number 4 in Reconstruction Finance Corporation Designation (pp. 1681 to 1687);

(ii) Order of the Commission dated October 7, 1936, granting intervention to Reconstruction Finance Corporation, being Item Number 5 in Reconstruction Finance Corporation Designation (pp. 1688 to ....);

(jj) Petition of Reconstruction Finance Corporation for leave to file petition of intervention and order granting such petition and

fixing date of hearing on petition of intervention, both filed in District Court December 7, 1939, petition of intervention of Reconstruction Finance Corporation and notice of filing same, both dated December 7, 1939, and order granting petition of intervention dated December 11, 1939, and notice of making and entry of said order, being Item Number 9 in Reconstruction Finance Corporation Designation (pp. 1624 to 1633); [2792]

(kk) The original exhibits offered in evidence at the hearing in the District Court on January 22, 1940 of the objections to the Plan of Reorganization of the Debtor, certified to said Court by the Commission *except* (1) the "Stipulation as to Facts not in Dispute" (less Exhibits "G" and "H" thereto mentioned in the succeeding paragraph [ll] hereof) and the memorandum of corrections therein, identified by the witness, Charles Elsey, which said stipulation and memorandum are included in the certified record at pages 960 to 1133, inclusive, thereof; (2) the following exhibits introduced by Irving Trust Company, viz: Exhibits 1(a) to 1(i), inclusive; page 1 of Exhibit 2 and Exhibits 4 to 12, inclusive; (3) the exhibit introduced by The Western Pacific Railroad Corporation and marked its Exhibit 1, and (4) the exhibits introduced by Reconstruction Finance

Corporation and marked its Exhibits 1 and 2; none of said original exhibits, other than those mentioned in the subparagraph marked (1) hereof, are included in the certified record, but all of said original exhibits, other than those last mentioned, have heretofore, in accordance with Rule 75[i] of the aforesaid Rules of Civil Procedure and the aforesaid Order of the District Court made November 27, 1940, been transmitted to the Clerk of the above entitled Court, in lieu of copies thereof; [2793]

(11) Exhibits "G" and "H" to the aforesaid "Stipulation as to Facts not in Dispute" (pp. 1080 to 1112).

2. That, notwithstanding the provisions of Rules 19 and 21 of the Rules of the above entitled Court, the aforesaid portions of said record on appeal which shall not be printed or included in the printed record on appeal on said appeals, shall constitute and be considered and treated as part of the record on appeal on said appeals and a part of the record on any petition for certiorari to the Supreme Court of the United States that may be filed by any party in this cause, may be referred to by any party in brief or argument, and shall be given the same force and effect as though they were printed and included in the printed record on appeal on said appeals; and

3. That the above entitled Court (or the Senior Circuit Judge of said Court) may, without notice

to any of the parties hereto, make an order approving this stipulation, and, otherwise, providing in accordance therewith.

Dated: January 20, 1941.

C. W. DOOLING,
PIERCE & GREER,
Attorneys for Debtor.

MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
CRAVATH, DE GERSDORFF, SWAINE & WOOD,
Attorneys for Institutional Bondholders' Committee.

DAVIES, AUERBACH, CONNELL & HARDY,
PILLSBURY, MADISON & SUTRO,
Attorneys for Irving Trust Company, as Substituted Trustee under General and Refunding Mortgage. [2794]

ANDREW F. BURKE,
GARRET W. McENERNEY,
WHITMAN, RANSOM, COULSON & GOETZ,
Attorneys for A. C. James Co.

BROBECK, PHLEGER & HARRISON,
C. M. CLAY,
Attorneys for Reconstruction Finance Corporation.

E. G. BUCKLAND,
WM. J. KANE,
Attorneys for The Railroad Credit Corporation.

M. C. SLOSS,
SLOSS & TURNER,
Attorneys for The Western Pacific Railroad Corporation.
CHICKERING & GREGORY,
MILBANK, TWEED & HOPE,
Attorneys for Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees of First Mortgage.

[Title of Circuit of Appeals and Cause.]

Upon reading the foregoing Stipulation and good cause appearing therefor, IT IS HEREBY ORDERED

1. That the foregoing Stipulation be and the same is hereby approved;

2. That in accordance with said Stipulation the portions of the record on appeal on the appeals mentioned therein, which are particularly described in said Stipulation, need not be printed or included in the printed record on appeal on said appeals;

3. That, notwithstanding the provisions of Rules 19 and 21 of the Rules of this Court, the above mentioned portions of the record on appeal on said appeals, which shall not be printed or included in the printed record on appeal, as hereinabove provided, shall constitute and be considered and treated by this Court as parts of the record on appeal on the aforesaid appeals, and a part of the record on any petition for certiorari to the Supreme Court

of the United States that may be filed by any party in this cause, may be referred to by any party in brief or argument, and shall be given the same force and effect as though they were printed and included in the printed record on appeal on said appeals.

Dated: January 23, 1941.

CURTIS D. WILBUR,
Senior United States Circuit Judge.

[Endorsed]: Filed Jan. 24, 1941. Paul P. O'Brien, Clerk. [2796]

CLERK'S COPY.

Vol. VII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING ~~INTERNATIONAL~~ BONDHOLDERS COMMITTEE, PETITIONERS, *Institutional*

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 26, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1941. JANUARY 17, 1942. FEBRUARY 28, 1942. MARCH 30, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES, CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of the Western Pacific Railroad Company, a corporation,

Appellees.

Supplemental Transcriptof Record

(VOLUME VII)

Pages 2627 to 2648

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Order for correction of record on appeal for supplementing record, and certification of supplemental record 2627

Monthly income system statement showing the combined results of operation of the properties of the Debtor and its subsidiaries for the month of December 1938, and the period January 1 to December 31, 1938 in comparison with the combined operating results for the corresponding periods of the year 1937 2633

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of December 1939, and the period January 1 to December 31, 1939 in comparison with the combined operating results for the corresponding periods of the year 1938 2634

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of December 1940, and the period January 1 to December 31, 1940, in comparison with the combined operating results for the corresponding periods of the year 1939 2635

Index Page

Statement of the combined results of operations of the properties of the Debtor and its subsidiaries for the month of January 1941, in comparison with January 1940 2636

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of February 1941 and the period January 1 to February 29, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2637

Certificate of clerk to order for correction of records, etc. 2639

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of March 1941 and the period January 1 to March 31, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2641

Certificate of clerk to statement for the month March 1941, etc. 2643

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of April 1941 and the period January 1 to April 30, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2644

Index Page

Certificate of clerk to statement for the month of April 1941, etc. 2645

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of May 1941 and the period January 1 to May 31, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2646

Certificate of clerk to statement for the month of May 1941, etc. 2647

In the District Court of the United States, for the Northern District of California, Southern Division.

No. 26591-S

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

ORDER FOR CORRECTION OF RECORD ON APPEAL, FOR SUPPLEMENTING RECORD, AND CERTIFICATION OF SUPPLEMENTAL RECORD.

The motion of A. C. James Co., filed April 3, 1941, for an order correcting the record upon the appeals which are pending in the United States Circuit Court of Appeals for the Ninth Circuit from the order of this Court made August 15, 1940, which approved a plan of reorganization of the above mentioned debtor, by directing the Debtor's Trustees to file with the Clerk of this Court as a part of the record in the proceeding for the reorganization of the Debtor certain statements, particularly described and set forth in said motion, came on regularly this day for hearing. Messrs. Whitman, Ransom, Coulson & Goetz (by Horace E. Whiteside, Esq.) and Messrs. Garret W. McEnerney and Andrew F. Burke, appeared on behalf of the movant; Messrs. Cravath, de Gersdorff, Swaine & Wood and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark (by Herbert W. Clark, Esq.) appeared for

Institutional Bondholders Committee; C. M. Clay, Esq., and Messrs. Brobeck, Phleger & Harrison, (by Mr. James S. Moore, [1*] Jr.) appeared for Reconstruction Finance Corporation; Messrs. Sloss & Turner (by E. D. Turner, Esq.) appeared for The Western Pacific Railroad Corporation; Allan P. Mathew, Esq. (by John O. Moran, Esq.) appeared for T. M. Schumacher, Esq., and Sidney M. Ehrman, Esq., Trustees of the Debtor; Messrs. Chickering & Gregory and Messrs. Milbank, Tweed & Hope (by Mr. John Philip Coghlan, Jr.) appeared for Crocker First National Bank of San Francisco and Samuel Armstrong as Trustees under the First Mortgage of the Debtor; Messrs. Pillsbury, Madison & Sutro and Messrs. Davies, Auerbach, Cornell & Hardy (by Felix T. Smith, Esq.) appeared for Irving Trust Company, as Trustees under the General and Refunding Mortgage of the Debtor, and Messrs. Pillsbury, Madison & Sutro and Messrs. Milbank, Tweed & Hope (by Felix T. Smith, Esq.) appeared for Chase National Bank of the City of New York.

Evidence was adduced in support of said motion from which it appeared and the Court finds that service of said motion and of Points and Authorities in support thereof and of notice of the hearing thereof was duly made upon all parties to the proceeding, as provided by the Rules of this Court and that the incorporation of certain of the statements particularly described and set forth in said Motion has been agreed to by the parties, as next appears.

It was stipulated in open Court by and on behalf of the parties represented at said hearing, as aforesaid, that the motion of the movant to the extent hereinafter specified in this order might be granted and that this order might be made. To the extent specified in this order no objection was made to the granting of said motion or the awarding of the relief sought therein.

Counsel for the movant stated that Messrs. Pierce & Greer and Charles W. Dooling, Esq., counsel for the Debtor, and Edward G. [2] Buckland, Esq., and W. J. Kane, Esq., counsel for The Railroad Credit Corporation, consented to the granting of the motion in the form and to the extent that the Court might deem proper and that, except to the extent granted herein, said motion might be deemed withdrawn,

Now, Therefore, in consideration of the premises and good cause appearing therefor, It Is Hereby Ordered as follows:

1. That the Trustees of the Debtor shall (and they are hereby directed to) forthwith cause to be filed herein, the statements (copies of which are annexed hereto in "Exhibit A") showing the combined results of the operation of the properties of the Debtor and its subsidiaries, of the character and for the periods next specified:

(a) the monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries

for the month of December, 1938, and the period January 1 to December 31, 1938, in comparison with the combined operating results for the corresponding periods of the year 1937, as prepared by the Accounting Department under the supervision of the Debtor's Trustees;

(b) the monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of December, 1939, and the period January 1 to December 31, 1939, in comparison with the combined operating results for the corresponding periods of the year 1938, as prepared by the Accounting Department under the supervision of the Debtor's Trustee;

(c) the monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of December, 1940, and the period January 1, to December 31, 1940, in comparison with the combined operating results for the corresponding periods of the year 1939, as prepared by the Accounting Department under the supervision of the Debtor's Trustees;

(d) the statement of the combined results of operations of the properties of the Debtor and its subsidiaries for the month of January, 1941, in comparison with January, 1940, and prepared by the Accounting De- [3] partment under the supervision of the Debtor's Trustees.

2. That the above mentioned statements and this order shall constitute a supplemental record and a part of the record upon the pending appeals from said order of August 15, 1940, and that as soon as said statements shall have been filed herein, the Clerk of this Court do (and he is hereby directed to) transmit a copy of the statements so filed herein to the Clerk of the United States Circuit Court of Appeals, accompanied by a copy of this order and his Certificate that said copies of said statements and order are true copies of said respective documents, filed in his office, and that, in accordance with this order, the same are and shall constitute a supplemental record and part of the record upon said pending appeals.

3. That the Trustees of the Debtor shall (and they are hereby directed to) cause to be filed herein, promptly, correct copies of each and every monthly statement that shall be, hereafter, prepared and issued, up to and including the date of the argument of said pending appeals, in the United States Circuit Court of Appeals for the Ninth Circuit, (of sufficient number to permit the filing of one of such copies, the certification of another and the service by the Clerk upon each of the interested parties of another copy of each such statement filed with him), which shall show the combined results of operations of the properties of the Debtor and its subsidiaries (corresponding to the monthly statement for January, 1941, with comparisons to January, 1940, which is particularly described in par.

1[d] above); and that as soon as any such monthly statement shall have been so filed, the Clerk of this Court do (and he is hereby directed to) forward a copy of said statement to the Clerk of said United States Circuit Court of Appeals, accompanied by his Certificate that such monthly statement is a true copy of the document so filed [4] and that, in accordance with this order, the same is and shall constitute a supplemental record and part of the record upon the aforesaid appeals from said order of August 15, 1940.

4. That upon the filing of copies of any statement such as is mentioned in the preceding paragraph (3) hereof the Clerk of this Court shall cause one copy of said statement to be served upon counsel for each of the parties herein.

Done in open Court this 7th day of April, 1941.

A. F. ST. SURE,
Judge. [5]

THE WESTERN PACIFIC RAILROAD COMPANY

SACRAMENTO NORTHERN RAILWAY

TIDEWATER SOUTHERN RAILWAY COMPANY

DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1, to DECEMBER 31			
			Increase or Decrease				Increase or Decrease.	
	1938	1937	Amount	Per Cent	1938	1937	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,591.09	1,591.09	-	-	1,591.09	1,591.09	-	-
OPERATING REVENUES								
Freight	$ 1,271,042.39	$ 976,440.67	$ 294,601.72	30.17	$ 14,934,497.26	$ 16,588,843.30	$ 1,654,345.04	9.97
Passenger	45,741.11	51,815.46	6,074.35	11.72	680,381.96	814,632.04	134,250.09	16.48
Mail	3,972.50	5,083.18	1,110.68	21.85	45,450.40	52,141.42	6,686.02	12.82
Express	4,073.15	8,274.00	4,194.85	50.75	102,809.73	131,063.95	28,254.22	21.56
Dining Car, Hotel & Restaurant	3,309.81	3,793.10	483.29	12.74	70,557.96	82,945.68	12,388.42	14.94
Miscellaneous	18,686.59	22,518.73	3,832.14	17.17	223,749.11	248,858.14	25,109.03	10.09
Total Railway Operating Revenues	$ 1,346,807.55	$ 1,067,925.14	$ 278,882.41	26.11	$ 16,057,450.71	$ 17,918,484.53	$ 1,861,033.82	10.39
OPERATING EXPENSES								
M. of W. & S.-Ordinary and Budget	$ 171,093.54	$ 206,504.75	$ 35,411.21	17.15	$ 2,873,212.26	$ 2,942,098.08	$ 71,885.82	2.44
M. of W. & S.-Rehabilitation Program (W.P.RR.Co.)-Note "A"	54,397.44	10,803.55	85,200.99	-	1,137,110.75	1,106,504.75	31,606.00	2.86
Total M. of W. & S.	$ 116,696.10	$ 217,308.30	$ 100,612.20	46.30	$ 4,010,323.01	$ 4,050,602.83	$ 40,279.82	.99
M. of E.-Ordinary and Budget	$ 167,423.56	$ 251,522.08	$ 84,098.52	33.47	$ 2,562,477.61	$ 3,110,392.80	$ 547,915.19	17.62
M. of E.-Rehabilitation Program (W.P.RR.Co.)-Note "A"	2,894.92	17,348.46	14,453.54	83.31	198,388.75	731,990.40	536,601.65	73.31
Total M. of E.	$ 170,378.48	$ 268,870.54	$ 99,492.06	36.83	$ 2,757,866.36	$ 3,842,383.20	$ 1,084,516.84	28.23
Power	11,938.50	13,497.45	1,558.95	11.55	145,466.87	160,540.37	15,073.50	9.39
Traffic	60,574.01	59,800.85	773.16	1.29	744,560.36	745,439.78	1,121.08	.15
Transportation-Rail Line	561,532.94	570,449.85	8,916.91	1.60	6,790,807.97	7,380,471.72	589,663.75	7.62
Miscellaneous Operations	7,197.71	7,271.53	73.82	1.02	108,649.64	114,509.63	5,859.99	5.12
General	80,233.75	82,644.93	2,411.18	2.93	755,799.68	788,926.70	33,127.02	4.20
Transportation-for Investment-Credit	19,154.28	2,792.36	16,361.92	585.96	99,714.51	60,384.36	39,330.16	65.74
Total Railway Operating Expenses	$ 969,197.21	$ 1,197,061.09	$ 227,863.88	19.03	$ 15,214,589.88	$ 16,987,489.88	$ 1,772,900.00	10.44
NET REVENUE FROM RAILWAY OPERATIONS	$ 377,610.34	$ 129,135.95	$ 508,736.29	-	$ 842,890.83	$ 930,994.65	$ 88,103.82	9.46
Excise and Use Tax Accruals-Ordinary and Budget	$ 30,546.34	$ 29,020.74	$ 1,525.60	5.26	$ 469,051.72	$ 230,298.53	$ 238,753.19	103.67
Excise and Use Tax Accruals-Rehabilitation Program (W.P.RR.Co.)	90.43	3,128.84	3,029.41	96.82	44,120.96	41,982.33	2,138.62	5.09
Railway Tax Accruals-All Other	45,227.11	53,651.33	8,424.22	15.70	657,233.47	619,026.75	38,206.72	6.17
Railway Operating Income	$ 301,737.46	$ 214,926.96	$ 516,664.32	-	$ 927,515.31	$ 39,687.04	$ 887,202.35	-
Hire of Equipment-Net Debit	$ 90,130.46	$ 104,456.24	$ 14,325.78	13.71	$ 1,109,815.74	$ 1,216,321.95	$ 106,506.21	8.76
Joint Facility Rents-Net Credit	7,253.36	22,070.93	14,817.47	67.13	130,590.56	146,163.71	15,573.15	10.65
Net Railway Operating Income	$ 218,860.36	$ 297,312.27	$ 516,172.63	-	$ 1,906,740.49	$ 1,030,471.30	876,269.29	-
NON-OPERATING INCOME								
Rental of Property	$ 23,793.92	$ 33,777.35	$ 9,983.43	29.56	$ 310,970.68	$ 409,863.06	$ 98,892.38	24.13
Interest Accruals	6,545.50	2,208.06	4,337.44	196.25	20,573.75	38,778.34	18,204.59	47.34
Miscellaneous	1,211.25	238.23	973.02	408.44	1,626.57	455.23	1,171.34	257.31
Total Non-Operating Income	$ 31,590.67	$ 36,223.64	$ 4,632.97	12.79	$ 342,171.00	$ 446,096.63	$ 103,925.63	29.30
GROSS INCOME	$ 250,451.03	$ 261,044.63	$ 511,539.66	-	$ 954,509.49	$ 584,374.67	$ 380,134.82	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,591.66	$ 2,779.04	$ 187.38	6.77	$ 30,782.69	$ 30,964.51	$ 211.82	.69
Miscellaneous Tax Accruals	8,077.47	4,847.25	230.22	4.75	57,254.79	53,299.44	3,955.35	7.42
Amortization of Discount - Note "A"	12,236.27	15,040.41	2,805.14	18.65	138,452.62	179,318.67	39,865.47	22.36
Miscellaneous	18,412.10	19,495.38	983.28	5.04	52,886.32	56,154.57	3,268.25	5.82
Total Miscellaneous Deductions	$ 39,316.50	$ 41,161.08	$ 3,844.58	9.34	$ 279,346.62	$ 319,737.21	$ 39,390.59	12.36
AVAILABLE FOR INTEREST - Note "A"	$ 212,134.53	$ 302,249.71	$ 514,384.24	-	$ 1,247,916.11	$ 901,321.74	$ 340,804.33	-
Interest on Funded Debt	$ 240,018.59	$ 273,129.63	$ 33,111.04	12.12	$ 2,886,718.65	$ 3,254,451.69	$ 367,733.04	12.11
Interest on Unfunded Debt	71,894.68	17,853.49	54,041.19	311.92	734,860.20	215,090.84	519,777.36	241.65
Total Interest Deductions	$ 311,913.27	$ 290,983.12	$ 21,330.15	7.34	$ 3,621,578.85	$ 3,469,542.53	$ 122,044.32	3.49
NET INCOME	$ 99,778.71	$ 592,932.83	$ 493,054.09	-	$ 4,885,502.96	$ 4,401,654.31	$ 483,848.65	-

NOTE "A"		MONTH		PERIOD	
		1938	1937	1938	1937
For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for interest" shown above should be adjusted by the following increases:	Operating Expense - Rehabil. Program - M. of W. & S.	$ 54,397.44	$ 10,803.55	$ 1,137,110.75	$ 1,106,504.75
	- M. of E.	2,894.92	17,348.46	198,388.75	731,990.40
	Amortization of Discount on W.P.RR.Co.First Mortgage Bonds	11,283.44	17,283.44	135,401.28	135,401.28
	Available for Interest-Adjusted	171,915.45	202,874.28	223,964.67	1,069,764.65

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Accounting Department
San Francisco, California

February 10, 1938

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THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER		Increase or *Decrease*		PERIOD JANUARY 1 to DECEMBER 31		Increase or *Decrease*	
	1939	1938	Amount	Per Cent	1939	1938	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,545.09	1,591.09	*46.00*	*2.89*	1,571.92	1,591.09	*19.17*	*1.20*
OPERATING REVENUES								
Freight	$ 1,351,283.31	$ 1,271,042.39	$ 80,240.92	6.31	$16,819,156.81	$14,934,497.26	$ 1,884,659.55	12.62
Passenger	56,303.33	45,741.11	10,562.22	23.09	1,014,887.10	680,381.96	334,505.15	49.16
Mail	6,115.30	3,972.50	2,142.80	53.94	45,135.05	45,455.40	*320.35*	*.70*
Express	3,693.10	4,075.15	*382.05*	*9.37*	92,722.02	102,809.73	*10,087.71*	*9.81*
Dining Car, Hotel & Restaurant	5,076.44	3,309.81	1,766.63	53.38	97,561.41	70,557.26	27,004.15	38.27
Miscellaneous	18,238.35	18,666.59	*428.24*	*2.29*	238,059.06	223,749.11	14,309.95	6.40
Total Railway Operating Revenues	$ 1,440,709.83	$ 1,346,807.55	$ 93,902.28	6.97	$18,307,521.45	$16,057,450.71	$ 2,250,070.74	14.01
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 209,115.24	$ 116,696.10	$ 92,419.14	79.20	$ 2,809,949.28	$ 4,010,323.01	*1,200,373.73*	*29.93*
Maintenance of Equipment	262,768.04	170,378.48	92,389.56	54.23	3,097,290.12	2,757,866.36	339,423.76	12.31
Power	10,994.80	11,938.50	*943.70*	*7.90*	146,921.44	145,466.87	1,454.57	1.00
Traffic	64,192.52	60,574.01	3,618.51	5.97	785,026.73	744,560.86	40,465.87	5.43
Transportation-Rail Line	610,015.57	561,332.94	48,682.63	8.67	7,033,671.20	6,790,607.97	243,063.23	3.58
Miscellaneous Operations	8,934.10	7,197.71	1,736.39	24.12	146,974.66	108,649.64	38,325.02	35.27
General	59,379.19	60,233.75	*854.56*	*1.42*	768,142.50	755,799.68	12,342.82	1.63
Transportation for Investment-Credit	3,312.59	19,154.28	*15,841.69*	*82.71*	9,529.91	98,714.51	*89,184.60*	*90.35*
Total Railway Operating Expenses	$ 1,222,086.87	$ 969,197.21	$ 252,889.66	26.09	$14,778,446.02	$15,214,559.88	$ *436,113.86*	*2.87*
NET REVENUE FROM RAILWAY OPERATIONS	$ 218,622.96	$ 377,610.34	$ *158,987.38*	*42.10*	$ 3,529,075.43	$ 842,890.83	$ 2,686,184.60	318.69
Excise & Use Tax Accruals	$ 38,077.09	$ 30,645.77	$ 7,431.32	24.25	$ 498,429.69	$ 513,172.67	$ *14,742.98*	*2.87*
Railway Tax Accruals-All Other	47,365.16	45,227.11	2,138.05	4.73	633,816.62	657,233.47	*23,416.85*	*3.56*
Railway Operating Income	$ 133,180.71	$ 301,737.46	$ *168,556.75*	*55.86*	$ 2,396,829.12	$ *327,515.31*	$ 2,724,344.43	-
Hire of Equipment-Net Debit	$ 116,036.63	$ 90,130.46	$ 25,905.17	28.74	$ 1,179,970.54	$ 1,109,815.74	$ 70,154.80	6.32
Joint Facility Rents-Net Credit	12,778.18	7,253.36	5,524.82	76.17	126,926.42	130,590.56	*3,664.14*	*2.81*
Net Railway Operating Income	$ 29,923.26	$ 218,860.36	$ *188,937.10*	*86.33*	$ 1,343,785.00	$ *1,308,740.49*	$ 2,650,525.49	-
NON-OPERATING INCOME								
Rental of Property	$ 23,967.33	$ 23,793.92	$ 173.41	.73	$ 285,113.20	$ 310,970.68	$ *25,857.48*	*8.32*
Interest Accruals	2,313.91	6,585.50	*4,271.59*	*64.86*	23,825.23	29,573.75	*5,748.52*	*19.44*
Miscellaneous	2,954.42	1,211.25	1,743.17	143.91	4,669.80	1,626.57	3,043.23	187.09
Total Non-Operating Income	$ 29,235.66	$ 31,590.67	$ *2,355.01*	*7.45*	$ 313,608.23	$ 342,171.00	$ *28,563.77*	*8.35*
GROSS INCOME	$ 59,158.92	$ 250,451.03	$ *191,292.11*	*76.38*	$ 1,657,393.23	$ *964,569.49*	$ 2,621,962.72	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,579.16	$ 2,591.66	$ *12.50*	*.48*	$ 30,895.46	$ 30,752.69	$ 142.77	.46
Miscellaneous Tax Accruals	5,180.98	5,077.47	103.51	2.04	59,564.55	57,254.79	2,309.76	4.03
Amortization of Discount	12,251.27	12,235.27	16.00	.13	137,903.98	138,452.82	*548.84*	*.40*
Miscellaneous	9,460.61	18,412.10	*8,951.49*	*48.62*	44,514.71	52,886.32	*8,371.61*	*15.83*
Total Miscellaneous Deductions	$ 29,472.02	$ 38,316.50	$ *8,844.48*	*23.08*	$ 272,878.70	$ 279,346.62	$ *6,467.92*	*2.32*
AVAILABLE FOR INTEREST - Note "A"	$ 29,686.90	$ 212,134.53	$ *182,447.63*	*86.01*	$ 1,384,514.53	$ *1,243,216.11*	$ 2,628,430.64	-
Interest on Funded Debt	$ 238,930.65	$ 240,018.59	$ *1,087.94*	*.45*	$ 2,870,913.26	$ 2,886,718.65	*15,805.39*	*.55*
Interest on Unfunded Debt	71,098.82	71,894.68	*795.86*	*1.11*	839,515.62	734,868.20	104,647.42	14.24
Total Interest Deductions	$ 310,029.47	$ 311,913.27	$ *1,883.80*	*.60*	$ 3,710,428.88	$ 3,621,586.85	$ 88,842.03	2.45
NET INCOME	$ *280,342.57*	$ *99,778.74*	$ *180,563.83*	-	$ *2,325,914.35*	$ *4,865,502.96*	$ 2,539,588.61	-

NOTE "A"

For comparison with estimates filed as Exhibit 29 and also the record in similar form set forth by Exhibit 43 Finance Docket No. 10913, the amount "Available for Interest" shown above should be adjusted by the following increases:

	MONTH		PERIOD	
	1939	1938	1939	1938
Operating Expense - Rehabilitation Program - M. of W. & S.	$ -	$ *54,387.20*	$ -	$ 1,137,110.75
M. of E.	-	*8,178.60*	-	*200,501.57*
Amortization of Discount on W.P.R.R.Co. First Mortgage Bonds	11,283.44	11,283.44	135,401.28	135,401.28
Available for Interest - Adjusted	40,970.34	177,199.37	1,519,915.81	229,097.49

Note: *Italics denote red.*

Accounting Department
San Francisco, California
February 3, 1940

Exhibit A. (Con.)

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY (*)

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1 TO DECEMBER 31			
			Increase or *Decrease.*				Increase or *Decrease.*	
	1940	1939	Amount	Per Cent	1940	1939	Amount	Per Cent
AVERAGE MILEAGE OR ROAD OPERATED	1,536.19	1,545.09	*8.90*	*.58*	1,547.00	1,571.92	*24.92*	*1.59*
OPERATING REVENUES								
Freight	$ 1,718,568.29	$ 1,351,283.31	$ 367,284.98	27.18	$ 18,701,678.52	$ 16,819,156.81	$ 1,882,521.71	11.19
Passenger	73,747.22	56,303.33	17,443.89	30.98	860,046.90	1,014,887.10	*154,840.20*	*15.26*
Mail	4,893.72	6,115.30	*1,221.58*	*19.98*	41,830.53	45,135.06	*3,304.52*	*7.32*
Express	6,089.86	3,693.10	2,396.76	64.36	79,282.94	92,722.02	*13,439.08*	*14.49*
Dining Car, Hotel & Restaurant	8,049.54	5,076.44	2,973.10	58.57	82,231.30	97,561.41	*15,330.11*	*15.71*
Miscellaneous	19,025.26	18,238.35	786.91	4.31	233,271.90	238,059.06	*4,787.26*	*2.01*
Total Railway Operating Revenues	$ 1,830,353.89	$ 1,440,709.83	$ 389,644.06	27.05	$ 19,998,341.99	$ 18,307,521.46	$ 1,690,820.54	9.24
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 171,912.36	$ 209,115.24	$ *37,202.88*	*17.79*	$ 3,082,906.73	$ 2,809,949.28	$ 272,856.45	9.71
Maintenance of Equipment	246,235.01	262,768.04	*16,533.03*	*6.29*	2,820,508.72	3,097,290.12	*276,781.40*	*8.94*
Power	7,860.59	10,994.80	*3,134.21*	*28.51*	129,216.59	146,921.44	*17,704.85*	*12.05*
Traffic	64,792.76	64,192.52	600.24	.94	788,256.19	785,026.73	3,229.46	.41
Transportation - Rail Line	684,550.24	610,015.57	74,534.67	12.22	7,367,110.31	7,033,671.20	333,439.11	4.74
Miscellaneous Operations	10,985.96	8,934.10	2,051.86	22.97	127,300.68	146,974.66	*19,673.98*	*13.39*
General	64,039.87	59,379.19	4,660.68	7.85	935,849.22	768,142.50	167,706.72	21.83
Transportation for Investment - Credit	3,769.77	3,312.59	*457.18*	*13.80*	11,652.55	9,529.91	2,123.64	22.28
Total Railway Operating Expenses	$ 1,246,607.02	$ 1,222,086.87	$ 24,520.15	2.01	$ 15,239,393.89	$ 14,778,446.02	$ 460,947.87	3.12
NET REVENUE FROM RAILWAY OPERATIONS	$ 583,746.87	$ 218,622.96	$ 365,123.91	167.01	$ 4,758,948.10	$ 3,529,075.43	$ 1,229,872.67	34.85
Excise and Use Tax Accruals	$ 41,933.18	$ 38,077.09	$ 3,856.09	10.13	$ 534,791.71	$ 498,429.69	$ 36,362.02	7.30
Railway Tax Accruals - All Other	52,190.72	47,365.16	4,825.56	10.19	636,028.15	633,816.62	2,211.53	.35
Railway Operating Income	$ 489,622.97	$ 133,180.71	$ 356,442.26	267.64	$ 3,588,128.24	$ 2,396,829.12	$ 1,191,299.12	49.70
Hire of Equipment - Net Debit	$ 137,066.76	$ 116,035.63	$ 21,031.13	18.12	$ 1,338,079.09	$ 1,179,970.54	$ 158,108.55	13.40
Joint Facility Rents - Net Credit	19,404.61	12,778.18	6,626.43	51.86	139,141.08	126,926.42	12,214.66	9.62
Net Railway Operating Income	$ 371,960.82	$ 29,923.26	$ 342,037.56	-	$ 2,389,190.23	$ 1,343,785.00	$ 1,045,405.23	77.80
NON-OPERATING INCOME								
Rental of Property	$ 22,151.30	$ 23,967.33	$ *1,816.03*	*7.58*	$ 295,247.83	$ 285,113.20	$ 10,134.63	3.55
Interest Accruals	2,983.77	2,313.91	669.86	28.95	30,167.44	23,825.23	6,342.21	26.62
Miscellaneous	*11,235.63*	2,954.42	*14,190.05*	-	2,569.34	4,669.80	*2,100.46*	*44.98*
Total Non-Operating Income	$ 13,899.44	$ 29,235.66	$ *15,336.22*	*52.46*	$ 327,984.61	$ 313,608.23	$ 14,376.38	4.58
GROSS INCOME	$ 385,860.26	$ 59,158.92	$ 326,701.34	552.24	$ 2,717,174.84	$ 1,657,393.23	$ 1,059,781.61	63.94
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,579.16	$ 2,579.16	$ -	-	$ 31,038.93	$ 30,895.46	$ 143.47	.46
Miscellaneous Tax Accruals	5,459.03	5,180.98	278.05	5.37	59,655.47	59,564.55	90.92	.15
Amortization of Discount	11,352.25	12,251.27	*899.02*	*7.34*	136,706.42	137,903.98	*1,197.56*	*.87*
Miscellaneous	4,965.47	9,460.61	*4,495.14*	*47.51*	*23,316.52*	44,514.71	*67,831.23*	-
Total Miscellaneous Deductions	$ 24,355.91	$ 29,472.02	$ *5,116.11*	*17.36*	$ 204,084.30	$ 272,878.70	$ *68,794.40*	*25.21*
AVAILABLE FOR INTEREST	$ 361,504.35	$ 29,686.90	$ 331,817.45	-	$ 2,513,090.54	$ 1,384,514.53	$ 1,128,576.01	81.51
Interest on Funded Debt	$ 304,373.62	$ 238,930.65	$ 65,442.97	27.39	$ 3,653,106.90	$ 2,870,913.26	$ 782,193.64	27.25
Interest on Unfunded Debt	6,081.51	71,098.82	*65,017.31*	*91.45*	47,976.94	839,515.62	*791,538.68*	*94.29*
Total Interest Deductions	$ 310,455.13	$ 310,029.47	$ 425.66	.14	$ 3,701,083.84	$ 3,710,428.88	$ *9,345.04*	*.25*
NET INCOME	$ 51,049.22	$ *280,342.57*	$ 331,391.79	-	$ *1,187,993.30*	$ *2,325,914.35*	$ 1,137,921.05	-

NOTE: Italics denote red.

(*) - Deep Creek Railroad Company discontinued operations effective July 31, 1939

Accounting Department
San Francisco, California
February 3, 1941

EXHIBIT A. (cont)

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF JANUARY		Increase or Decrease.	
	1941	1940	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,549.10	12.91	.83
OPERATING REVENUES				
Freight	$ 1,401,689.59	$ 1,209,794.54	$ 191,795.05	15.85
Passenger	79,636.28	60,457.05	19,176.23	31.72
Mail	3,000.00	3,771.49	771.49	20.46
Express	2,556.14	3,444.19	888.05	25.78
Dining Car, Hotel & Restaurant	7,917.08	4,769.17	3,147.91	66.01
Miscellaneous	21,253.70	19,713.63	1,540.07	7.81
Total Railway Operating Revenues	$ 1,515,961.79	$ 1,301,950.07	$ 214,001.72	16.44
OPERATING EXPENSES				
Maintenance of Way & Structures	$ 168,103.29	$ 199,727.12	$ 31,623.83	15.83
Maintenance of Equipment	277,776.53	235,718.38	42,058.15	17.84
Power	7,163.38	11,765.32	4,601.94	39.05
Traffic	66,191.08	60,375.34	5,815.74	9.62
Transportation - Rail Line	620,265.49	566,515.28	53,770.21	9.49
Miscellaneous Operations	11,800.97	9,590.36	2,210.61	23.05
General	89,212.28	89,745.79	533.51	.76
Transportation for Investment - Credit	672.83	141.70	531.13	374.83
Total Railway Operating Expenses	$ 1,219,680.09	$ 1,153,315.89	$ 66,364.20	5.77
NET REVENUE FROM RAILWAY OPERATIONS	$ 296,071.70	$ 148,634.18	$ 147,437.52	99.19
Excise and Use Tax Accruals	$ 39,548.35	$ 42,797.66	$ 3,249.31	7.59
Railway Tax Accruals - All Other	64,183.66	55,739.54	8,444.12	15.15
Railway Operating Income	$ 192,339.69	$ 50,096.98	$ 142,242.71	283.93
Hire of Equipment - Net Debit	$ 106,501.77	$ 76,462.59	$ 30,039.18	39.29
Joint Facility Rents - Net Credit	6,823.26	27,744.39	34,567.65	-
Net Railway Operating Income	$ 92,661.18	$ 54,110.00	$ 146,771.18	-
NON-OPERATING INCOME				
Rental of Property	$ 32,694.28	$ 24,918.94	$ 7,775.34	31.20
Interest Accruals	2,934.06	2,145.72	788.34	36.74
Miscellaneous	14.00	76.26	62.26	81.64
Total Non-Operating Income	$ 35,642.34	$ 27,140.92	$ 8,501.42	31.32
GROSS INCOME	$ 128,303.52	$ 26,969.08	$ 155,272.60	-
MISCELLANEOUS DEDUCTIONS				
Miscellaneous Rents	$ 2,184.04	$ 2,413.82	$ 229.78	9.52
Miscellaneous Tax Accruals	5,014.85	4,807.67	207.18	4.31
Miscellaneous	3,603.82	4,732.18	1,128.36	23.84
Total Miscellaneous Deductions	$ 10,802.71	$ 11,953.67	$ 1,150.96	9.63
AVAILABLE FOR FIXED CHARGES	117,500.81	38,922.75	156,423.56	-
FIXED CHARGES				
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-
Interest on Funded Debt:				
First Mortgage Bonds (W.P.RR.Co.)	205,375.41	205,375.41	-	-
Equipment Obligations	5,560.00	7,440.72	1,880.72	25.41
Trustees' Certificates	33,269.44	33,033.33	63.63	.19
Other Obligations (*)	62,260.18	60,154.24	2,105.94	3.50
Interest on Unfunded Debt:				
Equipment Obligations (W.P.RR.Co.)	370.94	-	370.94	-
Other Obligations	341.43	2,815.94	2,474.51	87.88
Amortization of Discount on Funded Debt:				
First Mortgage Bonds (W.P.RR.Co.)	11,283.49	11,283.49	-	-
Equipment Obligations	36.24	135.87	99.63	73.33
Total Fixed Charges	$ 319,697.13	$ 320,889.00	$ 1,851.87	.58
NET INCOME	201,536.32	358,811.75	154,275.43	-

KEY - Italics denote red.

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		1941	1940
Notes payable	- Reconstruction Finance Corporation	$12,582.60	$12,582.60
	- A. C. James Co.	20,039.50	20,832.50
	- Railroad Credit Corporation	4,100.94	-
Advances	- The Western Pacific Railroad Corporation	22,804.65	22,804.65
	- The Western Realty Company	208.32	208.32
	- The Western Pacific Railroad Corporation to U. S. A.	3,636.17	3,636.17
	Total	$62,260.18	$60,154.24

9

Accounting Department
San Francisco, California
March 4, 1941

THE WESTERN PACIFIC RAILROAD CORPORATION
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS-COMBINED

(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF FEBRUARY		Increase or Decrease.		PERIOD JANUARY 1 TO FEBRUARY 29.		Increase or Decrease.	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,549.79	*13.60*	*.88*	1,536.19	1,549.19	*13.60*	*.88*
OPERATING REVENUES								
Freight	$ 1,310,949.38	$ 1,023,264.17	$ 287,685.19	28.12	$ 2,712,538.95	$ 2,233,048.71	$ 479,490.24	21.47
Passenger	41,848.81	37,276.51	4,572.30	12.27	121,484.09	97,733.56	23,750.53	24.30
Mail	3,000.00	3,639.58	*639.58*	*17.57*	6,000.00	7,411.07	*1,411.07*	*19.04*
Express	2,429.00	3,707.60	*1,278.60*	*34.51*	4,984.14	7,151.79	*2,167.65*	*30.31*
Light, Car, Hotel & Restaurant	7,261.45	5,217.27	2,044.18	39.18	15,178.53	9,986.44	5,192.09	51.99
Miscellaneous	15,203.26	17,613.37	*2,410.11*	*13.68*	36,456.96	37,327.00	*870.04*	*2.33*
Total Railway Operating Revenues	$ 1,380,690.88	$ 1,090,708.50	$ 289,982.38	26.59	$ 2,896,642.67	$ 2,392,658.57	$ 503,984.10	21.06
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 178,887.33	$ 174,035.48	$ 4,851.85	2.87	$ 446,790.52	$ 373,762.57	26,972.05	7.22
Maintenance of Equipment	264,033.50	232,709.75	31,323.75	13.46	541,810.03	468,428.13	73,381.90	15.67
Power	7,517.98	12,566.39	*5,048.41*	*40.17*	14,701.36	24,351.71	*9,650.35*	*39.63*
Traffic	63,838.12	62,131.32	*1,706.80*	*2.75*	130,029.20	122,506.66	7,522.54	6.14
Transportation-Rail Line	570,084.80	496,678.99	73,405.81	14.78	1,190,370.29	1,063,194.27	127,176.02	11.96
Miscellaneous Operations	11,157.66	9,191.08	1,966.58	21.40	22,958.63	18,781.44	4,177.19	22.24
General	57,967.42	61,010.12	*3,042.90*	*4.99*	127,179.50	130,755.91	*3,576.41*	*2.74*
Transportation for Investment - Credit	49.84	197.58	*147.74*	*74.94*	742.36	339.28	383.07	112.91
Total Railway Operating Expenses	$ 1,153,537.09	$ 1,048,125.52	$ 105,111.57	10.03	$ 2,373,117.18	$ 2,201,441.41	$ 171,675.77	7.80
NET REVENUE FROM RAILWAY OPERATIONS	$ 227,453.79	$ 42,582.98	$ 184,870.81	434.14	$ 523,525.49	$ 191,217.16	$ 332,308.33	173.79
Excise and Use Tax Accruals	$ 45,426.77	$ 38,652.80	$ 6,773.97	17.52	$ 84,974.12	$ 81,449.86	$ 3,524.26	4.33
Railway Tax Accruals - All Other	61,559.64	53,344.18	8,215.46	15.40	145,743.30	109,083.72	16,659.58	15.27
Railway Operating Income	$ 120,468.38	$ 49,413.40	$ 169,881.78	-	$ 312,808.07	$ 683.58	$ 312,124.49	-
Hire of Equipment - Net Debit	$ 62,124.75	$ 60,253.09	$ 6,871.66	11.40	$ 173,626.52	$ 136,715.68	$ 36,910.84	27.00
Joint Facility Rents - Net Credit	*20,699.22*	16,132.85	*36,832.07*	-	*13,875.98*	*11,611.54*	*2,264.42*	-
Net Railway Operating Income	$ 32,644.41	$ 93,533.64	$ 126,178.05	-	$ 125,305.59	$ 147,643.64	$ 274,949.23	
NON-OPERATING INCOME								
Rental of Property	$ 26,554.88	$ 21,719.58	$ 4,835.30	22.26	$ 59,249.16	$ 45,638.52	$ 13,610.64	27.04
Interest Accruals	3,083.45	2,239.35	844.10	37.69	6,017.51	4,385.07	1,632.44	37.23
Miscellaneous	3.00	19.00	*16.00*	*84.21*	17.00	95.26	*78.26*	*82.15*
Total Non-Operating Income	$ 29,641.33	$ 23,977.93	$ 5,663.40	23.62	$ 65,283.67	$ 51,118.85	$ 14,164.82	27.71
GROSS INCOME	$ 62,285.74	$ 69,555.71	$ 131,841.45	-	$ 190,589.26	$ 98,574.79	$ 287,114.05	-
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,621.15	$ 2,411.45	$ 109.70	4.55	$ 4,705.19	$ 4,925.27	$ 120.08	2.49
Miscellaneous Tax Accruals	5,004.99	4,813.53	191.46	3.98	10,019.34	9,621.20	398.64	4.14
Miscellaneous	5,356.16	5,547.92	*191.76*	*3.46*	8,959.98	10,280.10	*1,320.12*	*12.84*
Total Miscellaneous Deductions	$ 12,982.30	$ 12,772.90	$ 109.40	.86	$ 23,685.01	$ 24,726.57	$ *1,041.56*	*4.21*
AVAILABLE FOR FIXED CHARGES	$ 49,403.44	$ *82,926.61*	$ 131,732.05	-	$ 166,904.25	$ *121,251.56*	$ 288,155.61	-
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-	$ 600.00	$ 600.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.RR.Co.)	205,375.45	205,375.45	-	-	410,750.86	410,750.86	-	-
Equipment Obligations	5,162.50	6,710.06	*1,547.56*	*23.06*	10,712.50	14,150.78	*3,438.28*	*24.30*
Trustees' Certificates	33,227.78	33,333.34	*105.56*	*.32*	66,497.22	66,666.67	*169.45*	*.25*
Other Obligations (*)	60,488.85	59,088.64	1,398.21	2.37	122,747.03	119,242.38	3,504.15	2.94
Interest on Unfunded Debt:								
Equipment Obligations (A.P.RR.Co.)	541.12	-	541.12	-	1,112.06	-	1,112.06	-
Other Obligations	335.11	3,111.79	*2,776.68*	*89.23*	876.54	5,927.73	*5,251.19*	*88.59*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.RR.Co.)	11,283.49	11,283.49	-	-	22,566.98	22,566.98	-	-
Equipment Obligations	*80.78*	107.67	*26.91*	*24.99*	167.00	293.54	*126.54*	*43.11*
Total Fixed Charges	$ 316,793.06	$ 319,310.44	$ *2,517.38*	*.79*	$ 636,630.19	$ 640,199.44	$ *3,569.25*	*.56*
NET INCOME	$ *254,389.62*	$ *401,639.05*	$ 134,249.43	-	$ *468,925.94*	$ *761,450.80*	$ 292,524.86	-

NOTE - Italics denote red

Accounting Department
San Francisco, California
April 4, 1941

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month:		Period:	
		1941	1940	1941	1940
Notes Payable	- Reconstruction Finance Corporation	$11,384.94	$11,770.81	$23,947.54	$24,353.41
" "	- S. C. Lane Co.	20,833.50	20,833.50	41,665.00	41,666.00
" "	- Railroad Credit Corporation	1,900.14	-	4,008.09	-
Advances	- The Western Pacific Railroad Corporation	22,894.66	22,894.45	45,789.30	45,789.30
"	- The Western Realty Company	209.33	209.33	416.66	416.66
"	- The Western Pacific Railroad Corporation to S.N. Ry.	3,564.69	3,382.35	6,920.45	7,013.52
	Total	$60,486.35	$59,089.64	$122,747.03	$119,242.88

Filed Apr 17 1941

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

District Court of the United States, Northern District of California, Southern Division.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, Southern Division, do hereby certify that the foregoing pages, numbered from 1 to 10, inclusive, contain full, true and correct copies of (1) the "Order for Correction of Record on Appeal, for Supplementing Record, and Certification of Supplemental Record", made by said Court, on April 7, 1941, (hereinafter called the "Order" simply) and filed in my office on the same date; (2) of the statements particularly described in said Order, and copies whereof are appended thereto, and (3) statement of the combined results of operations of the properties of the debtor and its subsidiaries for the month of February, 1941, in comparison with the month of February, 1940, prepared by the accounting department of the debtor under the supervision of the debtor's Trustees, which said Order and said statements (in accordance with the terms of said Order) constitute and are supplement to and a part of, the record upon the appeals heretofore taken by the above named Appellants from the order of the above mentioned Court, made, filed and entered, August 15, 1940, which approved a Plan of [11] Reorganization of the above named debtor.

I further certify that the cost of preparing and certifying to the correctness of said Order and of

said statements, is the sum of $2.40, and that said amount has been paid to me by the attorneys for said Appellants.

In Witness Whereof, I hereunto set my hand and affix the seal of said District Court, this 21st day of April, 1941.

[Seal] WALTER B. MALING,
Clerk,

By E. H. NORMAN,
Deputy Clerk. [12]

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS-COMBINED

(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF MARCH				PERIOD JANUARY 1 to MARCH 31.			
			Increase or Decrease.				Increase or Decrease.	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,549.79	*13.60*	*.88*	1,536.19	1,549.79	*13.60*	*.88*
OPERATING REVENUES								
Freight	$ 1,629,201.46	$ 1,262,581.76	$ 366,619.70	29.04	$ 4,341,740.41	$ 3,495,630.47	$ 846,109.94	24.20
Passenger	61,359.43	56,090.16	5,269.27	9.39	182,843.52	153,823.72	29,019.80	18.87
Mail	3,012.29	3,623.67	*611.38*	*16.87*	9,012.29	11,034.74	*2,022.45*	*18.33*
Express	4,930.11	8,734.95	*3,804.84*	*43.56*	9,914.25	15,886.74	*5,972.49*	*37.59*
Dining Car, Hotel & Restaurant	6,375.61	4,169.66	2,203.95	52.86	21,552.14	14,156.10	7,396.04	52.25
Miscellaneous	16,422.18	16,992.50	1,429.68	8.41	54,879.14	54,319.50	559.64	1.03
Total Railway Operating Revenues	$ 1,723,299.08	$ 1,352,192.70	$ 371,106.38	27.44	$ 4,619,941.75	$ 3,744,851.27	$ 875,090.48	23.37
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 220,636.70	$ 284,901.54	$ *64,265.84*	*22.55*	$ 567,426.22	$ 658,664.11	$ *91,237.89*	*13.85*
Maintenance of Equipment	303,245.02	224,554.24	78,690.78	35.04	845,055.05	692,982.37	152,072.68	21.94
Power	7,591.45	11,313.54	*3,722.09*	*32.90*	22,292.81	35,665.25	*13,372.44*	*37.49*
Traffic	68,107.95	66,813.59	1,294.36	1.94	198,137.15	189,320.25	8,816.90	4.66
Transportation-Rail Line	632,322.94	561,847.48	71,475.46	12.72	1,823,692.23	1,625,041.75	198,651.48	12.22
Miscellaneous Operations	9,845.89	7,491.69	2,354.20	31.42	32,804.52	26,273.13	6,531.39	24.86
General	62,234.78	61,497.36	737.42	1.20	189,414.28	192,253.27	*2,838.99*	*1.48*
Transportation for Investment-Credit	633.28	175.44	457.84	260.97	1,355.63	514.72	840.91	163.37
Total Railway Operating Expenses	$ 1,304,350.45	$ 1,218,244.00	$ 86,106.45	7.07	$ 3,677,467.63	$ 3,419,686.41	$ 257,782.62	7.54
NET REVENUE FROM RAILWAY OPERATIONS	$ 418,948.63	$ 133,948.70	$ 284,999.93	212.77	$ 942,474.12	$ 325,165.86	$ 617,308.26	189.84
Excise and Use Tax Accruals	$ 45,682.69	$ 43,036.04	$ 2,646.65	6.15	$ 130,656.81	$ 124,485.90	$ 6,170.91	4.96
Railway Tax Accruals-All Other	68,833.13	53,055.76	15,777.37	29.74	194,576.43	162,139.48	32,436.95	20.01
Railway Operating Income	$ 304,432.81	$ 37,856.90	$ 266,575.91	704.17	$ 617,240.88	$ 38,540.48	$ 578,700.40	--
Hire of Equipment-Net Debit	$ 124,962.02	$ 84,651.26	$ 40,310.76	47.62	$ 298,388.54	$ 221,366.94	$ 77,221.60	34.88
Joint Facility Rents-Net Credit	15,844.28	12,179.58	3,664.70	30.09	1,968.32	568.04	1,400.28	246.51
Net Railway Operating Income	$ 195,315.07	$ *34,614.78*	$ 229,929.85	--	$ 320,820.66	$ *182,258.42*	$ 502,879.08	--
NON-OPERATING INCOME								
Rental of Property	$ 32,992.30	$ 24,780.93	$ 8,211.37	33.14	$ 92,241.46	$ 71,419.45	$ 20,822.01	29.15
Interest Accruals	3,351.20	2,161.09	1,190.11	55.07	9,368.71	6,546.16	2,822.55	43.12
Miscellaneous	690.40	17.00	673.40	--	707.40	112.26	595.14	530.14
Total Non-Operating Income	37,033.90	26,959.02	10,074.88	37.37	102,317.57	78,077.87	24,239.70	31.06
GROSS INCOME	$ 232,348.97	$ *7,655.76*	$ 240,004.73	--	$ 422,938.23	$ *104,180.55*	$ 527,118.78	--
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,269.16	$ 2,269.16	$ --	--	$ 6,974.35	$ 7,094.43	$ *120.08*	*1.69*
Miscellaneous Tax Accruals	4,993.70	4,792.73	200.97	4.19	15,013.54	14,413.93	599.61	4.16
Miscellaneous	12,234.63	9,256.45	2,978.18	32.17	21,194.61	19,536.55	1,658.06	8.49
Total Miscellaneous Deductions	$ 19,497.49	$ 16,318.34	$ 3,179.15	19.48	$ 43,182.50	$ 41,044.91	$ 2,137.59	5.21
AVAILABLE FOR FIXED CHARGES	$ 212,851.48	$ *23,974.10*	$ 236,825.58	--	$ 379,755.73	$ *145,225.46*	$ 524,981.19	--
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ --	--	$ 900.00	$ 900.00	$ --	--
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	205,375.41	205,375.41	--	--	616,126.27	616,126.27	--	--
Equipment Obligations	5,162.50	3,806.60	1,355.90	35.62	15,875.00	17,957.38	*2,082.38*	*11.60*
Trustees' Certificates	33,166.11	33,333.33	*167.22*	*.44*	99,683.33	100,000.00	*316.67*	*.32*
Other Obligations (*)	62,260.20	60,154.26	2,105.94	3.50	185,007.23	179,397.14	5,610.09	3.13
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	536.67	2,899.14	*2,362.47*	*81.49*	1,648.73	2,899.14	*1,250.41*	*43.13*
Other Obligations	342.56	3,040.63	*2,698.07*	*88.73*	1,019.10	8,968.36	*7,949.26*	*88.64*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	--	--	33,850.47	33,850.47	--	--
Equipment Obligations	80.76	107.67	*26.91*	*24.99*	247.76	401.21	*153.45*	*38.25*
Total Fixed Charges	$ 318,527.70	$ 320,300.53	$ *1,772.83*	*.55*	$ 954,357.09	$ 960,499.97	$ *6,142.88*	*.64*
NET INCOME	$ *105,676.22*	$ *344,274.63*	$ 238,598.41	--	$ *574,602.16*	$ *1,105,725.43*	$ 531,123.27	--

NOTE: - Italics Denote Red

Accounting Department

San Francisco, California

May 5th, 1941

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month:		Period:	
		1941	1940	1941	1940
Notes Payable	- Reconstruction Finance Corporation	$12,582.61	$12,582.61	$36,530.15	$36,936.92
" "	- A. C. James Company	20,832.50	20,832.50	62,497.50	62,497.50
" "	- Railroad Credit Corporation	2,105.94	---	6,114.02	---
Advances	- The Western Pacific Railroad Corp.,	22,894.65	22,894.65	68,683.96	68,683.96
"	- The Western Realty Company	208.33	208.33	824.98	824.98
"	- The Western Pacific Railroad Corporation to S. N. Ry.	3,636.17	3,636.17	10,556.63	10,854.69
	Total	$62,260.20	$60,154.26	$185,007.23	$179,397.14

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing one page, numbered from 1 to 2, inclusive, contain a full, true, and correct transcript of the supplemental records and proceedings in the matter of The Western Pacific Railroad Co., Debtor, No. 26591-S in Bankruptcy, and forwarded in accordance with order of Apr. 7, 1941, for Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of May, A. D. 1941.

[Seal] WALTER B. MALING
Clerk

E. H. NORMAN
Deputy Clerk [2]

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS-COMBINED

(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF APRIL				PERIOD JANUARY 1 to APRIL 30th			
			Increase or *Decrease.*				Increase or *Decrease.*	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,549.79	*13.60*	*.88*	1,536.19	1,549.79	*13.60*	*.88*
OPERATING EXPENSES								
Freight	$ 1,704,646.23	$ 1,405,048.78	$ 299,597.45	21.32	$ 6,046,386.64	$ 4,900,679.25	$ 1,145,707.39	23.38
Passenger	52,171.58	62,525.85	*10,354.27*	*16.56*	236,015.10	216,349.57	18,665.53	8.63
Mail	3,000.00	3,507.39	*507.39*	*14.47*	12,012.29	14,542.13	*2,529.84*	*17.40*	
Express	5,064.68	5,301.56	*236.88*	*4.47*	14,978.93	21,188.30	*6,209.37*	*29.31*
Dining Car, Hotel & Restaurant	7,543.35	4,447.67	3,095.68	69.60	29,095.49	18,603.77	10,491.72	56.40
Miscellaneous	19,111.27	16,290.21	2,821.76	17.32	73,991.11	70,609.71	3,381.40	4.79
Total Railway Operating Revenues	$ 1,791,537.81	$ 1,497,121.46	$ 294,416.35	19.67	$ 6,411,479.56	$ 5,241,972.73	$ 1,169,506.83	22.31
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 274,020.35	$ 322,161.91	$ *48,141.56*	*14.94*	$ 841,446.57	$ 980,826.02	$ *139,379.45*	*14.21*
Maintenance of Equipment	299,962.81	224,645.99	75,316.82	33.53	1,145,017.86	917,628.36	227,389.50	24.78
Power	7,570.10	11,677.89	*4,107.79*	*35.18*	29,862.91	47,343.14	*17,480.23*	*36.92*
Traffic	74,105.70	68,126.62	5,979.08	8.78	272,242.85	257,446.87	14,796.98	5.75
Transportation-Rail Line	643,698.59	595,421.00	48,277.59	8.11	2,467,391.82	2,220,462.75	246,929.07	11.12
Miscellaneous Operations	9,637.06	8,524.64	1,112.42	13.05	42,441.58	34,797.77	7,643.81	21.97
General	64,129.58	64,115.15	14.43	.02	253,543.86	256,368.42	*2,824.56*	*1.10*
Transportation for Investment-Credit	123.26	176.87	*53.61*	*30.31*	1,478.89	691.59	787.30	113.84
Total Railway Operating Expenses	$ 1,373,000.93	$ 1,294,496.33	$ 78,504.60	6.06	$ 5,050,468.56	$ 4,714,181.74	$ 336,286.82	7.13
NET REVENUE FROM RAILWAY OPERATIONS	$ 418,536.88	$ 202,625.13	$ 215,911.75	106.56	$ 1,361,011.00	$ 527,790.99	$ 833,220.01	157.87
Excise and Use Tax Accruals	$ 49,722.45	$ 44,979.22	$ 4,743.23	10.55	$ 180,379.26	$ 169,465.12	$ 10,914.14	6.44
Railway Tax Accruals-All Other	52,647.65	54,031.74	*1,384.09*	*2.56*	247,224.08	216,171.22	31,052.86	14.36
Railway Operating Income	$ 316,166.78	$ 103,614.17	$ 212,552.61	205.14	$ 933,407.66	$ 142,154.65	$ 791,253.01	556.61
Hire of Equipment - Net Debit	$ 119,502.03	$ 112,101.68	$ 7,400.35	6.60	$ 418,090.57	$ 333,468.62	$ 84,621.95	25.38
Joint Facility Rents - Net Credit	14,752.07	16,752.64	*2,000.57*	*11.94*	16,720.39	17,320.68	*600.29*	*3.47*
Net Railway Operating Income	$ 211,416.82	$ 8,265.13	$ 203,151.69	--	$ 532,037.48	$ *173,993.29*	$ 706,030.77	--
NON-OPERATING INCOME								
Rental of Property	$ 34,115.48	$ 22,891.83	$ 11,223.65	49.03	$ 126,356.94	$ 94,311.28	$ 32,045.66	33.98
Interest Accruals	3,455.07	2,211.50	1,243.57	56.23	12,823.78	8,757.66	4,066.12	46.43
Miscellaneous	20.00	6.00	14.00	233.33	727.40	118.26	609.14	515.09
Total Non-Operating Income	$ 37,590.55	$ 25,109.33	$ 12,481.22	49.71	$ 139,908.12	$ 103,187.20	$ 36,720.92	35.59
GROSS INCOME	$ 249,007.37	$ 33,374.46	$ 215,632.91	646.10	$ 671,945.60	$ *70,806.09*	$ 742,751.69	--
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,381.67	$ 2,269.17	$ 112.50	4.96	$ 9,356.02	$ 9,363.60	$ *7.58*	*.08*
Miscellaneous Tax Accruals	4,993.70	4,792.73	200.97	4.19	20,007.24	19,206.66	800.58	4.17
Miscellaneous	5,232.62	7,184.21	*1,951.59*	*27.16*	26,427.23	26,720.76	*293.53*	*1.10*
Total Miscellaneous Deductions	$ 12,607.99	$ 14,246.11	$ *1,638.12*	*11.50*	$ 55,790.49	$ 55,291.02	$ 499.47	.90
AVAILABLE FOR FIXED CHARGES	$ 236,399.38	$ 19,128.35	$ 217,271.03	--	$ 616,155.11	$ *126,097.11*	$ 742,252.22	--
FIXED CHARGES								
Rent for Leased Roads & Equipment	$ 300.00	$ 300.00	$ --	--	$ 1,200.00	$ 1,200.00	$ --	--
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R Co.)	205,375.41	205,375.41	--	--	821,501.68	821,501.68	--	--
Equipment Obligations "	5,162.50	5,854.20	*691.70*	*11.82*	21,037.50	23,811.58	*2,774.08*	*11.65*
Trustees' Certificates	33,144.44	33,333.33	*188.89*	*.57*	132,827.77	133,333.33	*505.56*	*.38*
Other Obligations (*)	61,669.08	59,611.52	2,057.56	3.45	246,676.31	239,008.66	7,667.65	3.21
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	532.21	847.25	*315.04*	*37.18*	2,180.94	3,746.39	*1,565.45*	*41.79*
Other Obligations	359.43	3,049.43	*2,690.00*	*88.21*	1,378.53	12,017.79	*10,639.26*	*88.53*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	--	--	45,133.96	45,133.96	--	--
Equipment Obligations "	80.76	107.67	*26.91*	*24.99*	328.53	508.88	*180.36*	*35.44*
Total Fixed Charges	$ 317,907.32	$ 319,762.30	$ *1,854.98*	*.58*	$ 1,272,265.21	$ 1,280,262.27	$ *7,997.06*	*.62*
NET INCOME	$ *81,507.94*	$ *300,633.95*	$ 219,126.01	--	$ *656,110.10*	$ *1,406,359.38*	$ 750,249.28	--

NOTE: - Italics Denote Red

Accounting Department

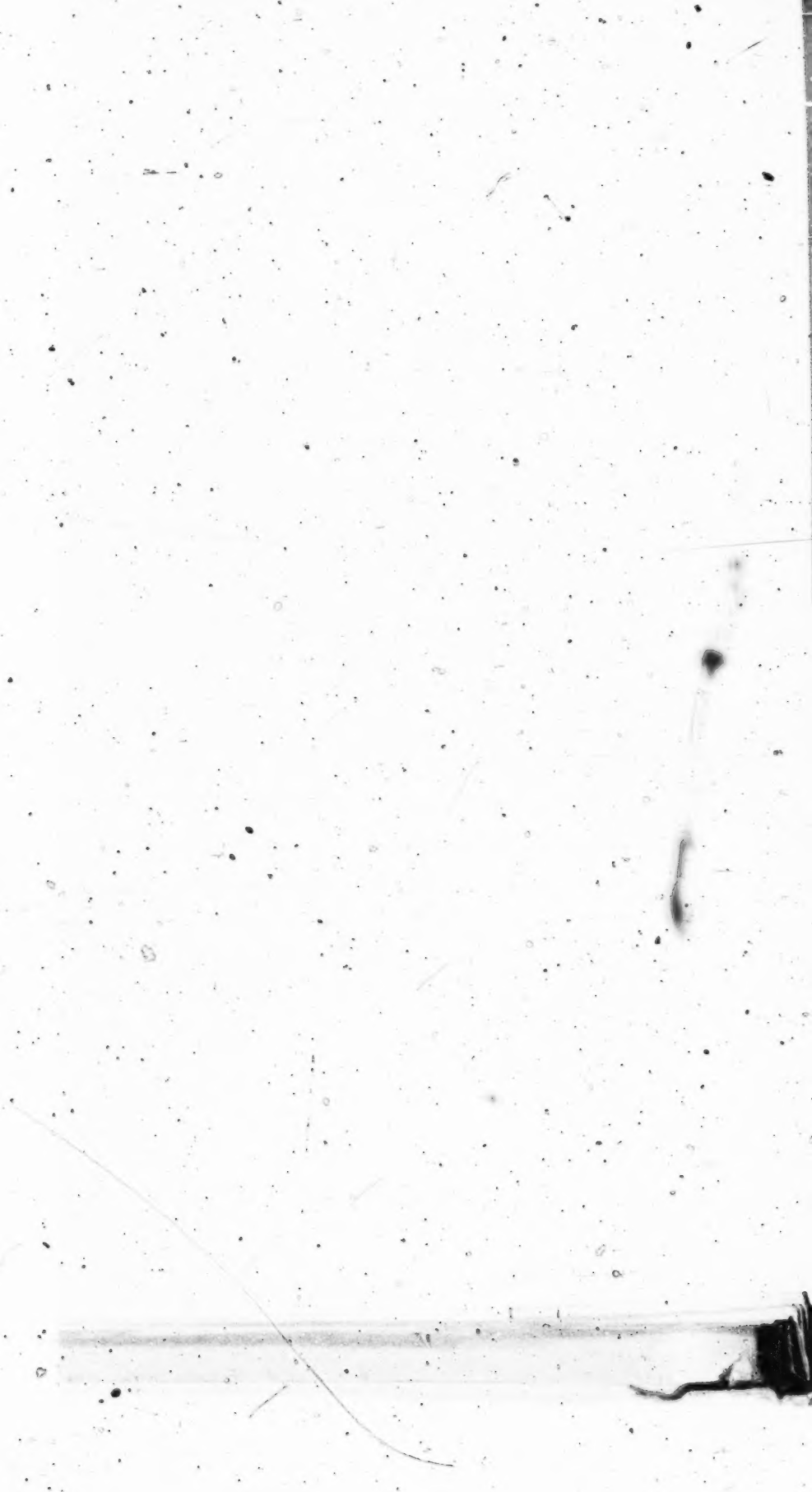
San Francisco, California

June 3rd, 1941

(Endorsed)
Filed
Jun 10, 1941

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month:		Period:	
		1941	1940	1941	1940
Notes Payable	- Reconstruction Finance Corporation	$12,176.70	$12,176.70	$48,706.86	$49,112.72
" "	- A. C. James Co.	20,832.50	20,832.50	83,330.00	83,330.00
" "	- Railroad Credit Corporation	2,038.01	---	8,152.03	---
Advances	- The Western Pacific Railroad Corp.,	22,894.65	22,894.65	91,578.60	91,578.60
"	- The Western Realty Company	209.34	208.34	833.32	833.32
"	- The Western Pacific Railroad Corporation to S. N. Ry.	3,518.88	3,499.33	14,075.51	14,154.02
	TOTAL	$61,669.08	$59,611.52	$246,676.31	$239,008.66



District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page, numbered 1, inclusive, is a full, true, and correct transcript of the supplemental records and proceedings in the matter of The Western Pacific Railroad Co., No. 26591 S in bankruptcy, and forwarded in accordance with order of Apr. 7, 1941, For Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 16th day of June, A. D. 1941.

[Seal] WALTER B. MALING
Clerk

E. H. NORMAN
Deputy Clerk [2]

[Endorsed]: Filed Jun. 16, 1941.

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
OPERATING RESULTS-CONCLUDED
(All Inter-Company Items Eliminated)

ITEM OF ACCOUNT	MONTH OF MAY				PERIOD JANUARY 1 to MAY 31st			
	1941	1940	Increase or Decrease. Amount	Per Cent	1941	1940	Increase or Decrease. Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,549.79	13.60	.88	1,536.19	1,549.79	13.60	.88
OPERATING REVENUES								
Freight	$ 1,752,427.31	$ 1,506,680.53	$ 245,746.78	16.31	$ 7,798,813.95	$ 6,407,359.79	$ 1,391,454.17	21.72
Passenger	60,096.78	50,818.33	10,728.55	17.63	285,111.81	277,167.90	7,943.98	2.87
Mail	3,000.00	3,392.94	392.94	11.58	18,012.29	17,935.07	2,922.78	16.30
Express	11,598.13	20,474.83	8,876.70	43.35	26,577.06	41,663.13	15,086.07	36.21
Dining Car, Hotel & Restaurant	7,853.15	5,172.67	2,680.73	51.83	36,948.64	23,776.19	13,172.45	55.40
Miscellaneous	82,308.96	16,948.95	5,360.01	31.62	96,300.07	87,558.66	8,741.41	9.98
Total Railway Operating Revenues	$ 1,847,284.33	$ 1,613,488.00	$ 233,796.33	14.49	$ 8,258,763.89	$ 6,855,460.73	$ 1,403,303.16	20.47
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 312,119.14	$ 336,121.55	$ 20,002.41	6.02	$ 1,153,565.71	$ 1,314,947.57	$ 139,381.86	12.14
Maintenance of Equipment	303,785.75	226,446.11	77,339.64	34.15	1,448,803.61	1,144,074.47	304,729.14	26.64
Power	7,437.87	10,946.29	3,508.42	32.05	37,300.78	58,289.43	20,988.65	36.01
Traffic	77,685.83	68,388.61	9,217.22	13.48	349,849.68	325,835.48	24,013.20	7.37
Transportation - Rail Line	667,826.53	598,610.34	69,016.19	11.53	3,135,018.35	2,819,073.09	315,945.26	11.21
Miscellaneous Operations	13,272.09	8,745.48	2,526.61	28.89	53,713.67	43,543.25	10,170.42	23.36
General	81,815.78	85,856.36	4,040.58	4.74	315,359.64	322,224.78	6,865.14	2.13
Transportation for Investment - Credit	351.59	98.44	253.15	257.16	1,830.48	790.03	1,040.45	131.70
Total Railway Operating Expenses	$ 1,441,311.40	$ 1,311,016.30	$ 130,295.10	9.94	$ 6,491,779.96	$ 6,025,198.04	$ 466,581.92	7.74
NET REVENUE FROM RAILWAY OPERATIONS	$ 405,972.93	$ 302,471.70	$ 103,501.23	34.22	$ 1,766,983.93	$ 830,262.69	$ 936,721.24	112.82
Excise and Use Tax Accruals	$ 50,331.20	$ 44,702.47	$ 5,628.73	12.59	$ 230,710.46	$ 214,167.59	$ 16,542.87	7.72
Railway Tax Accruals - All Other	51,547.14	52,887.11	1,339.97	2.53	298,771.22	269,058.33	29,712.89	11.04
Railway Operating Income	$ 304,094.59	$ 204,882.12	$ 99,212.47	48.42	$ 1,237,502.25	$ 347,036.77	$ 890,465.48	256.59
Hire of Equipment - Net Debit	$ 107,573.56	$ 120,033.64	$ 12,460.08	10.38	$ 525,664.13	$ 453,502.26	$ 72,161.87	15.91
Joint Facility Rents - Net Credit	14,659.71	13,741.56	1,081.85	6.87	31,380.10	83,062.24	1,682.14	3.09
Net Railway Operating Income	$ 211,130.74	$ 100,590.04	$ 110,590.70	109.94	$ 743,218.22	$ 73,403.25	$ 816,621.47	--
NON-OPERATING INCOME								
Rental of Property	$ 24,210.54	$ 24,227.76	$ 17.22	.07	$ 150,567.48	$ 118,539.04	$ 32,028.44	27.02
Interest Accruals	3,424.58	2,422.55	1,002.03	41.36	16,248.36	11,180.21	5,068.15	45.33
Miscellaneous	180.91	22.00	158.91	722.32	908.31	140.26	768.05	547.59
Total Non-Operating Income	$ 27,816.03	$ 26,672.31	$ 1,143.72	4.29	$ 167,724.15	$ 129,859.51	$ 37,864.64	29.16
GROSS INCOME	$ 238,998.77	$ 127,262.35	$ 111,734.42	87.80	$ 910,942.37	$ 56,456.26	$ 854,486.11	--
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,170.17	$ 2,190.17	$ 20.00	.91	$ 11,526.19	$ 11,533.77	$ 97.58	.24
Miscellaneous Tax Accruals	$ 4,992.67	$ 4,798.29	$ 194.38	4.05	$ 24,999.91	$ 24,904.95	994.96	4.14
Miscellaneous	4,817.63	3,715.49	1,102.14	29.66	31,244.86	30,436.25	808.61	2.66
Total Miscellaneous Deductions	$ 11,980.47	$ 10,703.95	$ 1,276.52	11.93	$ 67,770.96	$ 66,994.97	$ 1,775.99	2.69
AVAILABLE FOR FIXED CHARGES	$ 227,016.30	$ 116,558.40	$ 110,457.90	94.77	$ 843,171.41	$ 9,538.71	$ 852,710.12	--
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ --	--	$ 1,500.00	$ 1,500.00	$ --	--
Interest on Funded Debt:								
First Mortgage Bonds (W.P.RR Co.)	$ 205,375.41	$ 205,375.41	$ --	--	$ 1,026,877.09	$ 1,026,877.09	$ --	--
Equipment Obligations	5,162.50	5,854.16	691.66	11.81	26,200.00	29,665.74	3,465.74	11.68
Trustees' Certificates	33,102.78	33,333.34	230.56	.69	165,930.55	166,666.67	736.12	.44
Other Obligations (*)	62,260.19	60,144.32	2,115.87	3.52	308,936.50	299,152.98	9,783.52	3.27
Interest on Unfunded Debt:								
Equipment Obligations (W.P. RR Co.)	527.73	842.90	315.17	37.39	2,708.67	4,589.29	1,880.62	40.98
Other Obligations	363.68	3,030.01	2,666.33	88.00	1,742.21	15,047.80	13,305.59	88.42
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P. RR Co.)	11,283.49	11,283.49	--	--	56,417.45	56,417.45	--	--
Equipment Obligations	80.76	107.67	26.91	24.99	409.28	616.55	207.27	33.62
Total Fixed Charges	$ 318,456.54	$ 320,271.30	$ 1,814.76	.57	$ 1,590,721.75	$ 1,600,533.57	$ 9,811.82	.61
NET INCOME	$ 91,440.24	$ 203,712.90	$ 112,272.66	--	$ 747,550.34	$ 1,610,072.28	$ 862,521.94	--

NOTE: - Italics Denote Red

ENDORSED
FILED
JUL 15 1941
WALTER B. MALING

...unting Department
San Francisco, California

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	- Reconstruction Finance Corporation	$12,582.60	$12,582.60	$61,289.45	$61,695.32
" "	- A. C. James Co.	20,832.50	20,832.50	104,162.50	104,162.50
" "	- Railroad Credit Corporation	2,105.94	--	10,257.97	--
Advances	- The Western Pacific Railroad Corp.,	22,894.65	22,894.65	114,473.25	114,473.25
"	- The Western Realty Company	208.33	208.33	1,041.65	1,041.68
"	- The Western Pacific Railroad				

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page, numbered 1, inclusive, contains a full, true, and correct transcript of the supplemental records and proceedings in the matter of The Western Pacific Railroad Co., No. 26591 S in Bankruptcy and forwarded in accordance with order of Apr. 7, 1941, entitled Order for Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California this ..... day of July, A. D. 1941.

[Seal] WALTER B. MALING
Clerk

E. H. NORMAN
Deputy Clerk [2]

[Endorsed]: No. 9714. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of The Western Pacific Railroad Company, a corporation, Debtor. Western Pacific Railroad Corporation, a corporation, The Western Pacific Railroad Company, a corporation and Irving Trust Company, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. James Co., a corporation, The Railroad Credit Corporation, a corporation, Appellants, vs. Institutional Bondholders Committee and Reconstruction Finance Corporation, Crocker First National Bank of San Francisco and Samuel Armstrong, Trustees of the First Mortgage of the Western Pacific Railroad Company, a corporation, Appellees. Supplemental Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed Apr. 21, 1941.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

CLERK'S COPY.

Vol. VIII

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 7

FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING INTERNATIONAL BONDHOLDERS COMMITTEE, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., THE RAILROAD CREDIT CORPORATION, ET AL.

No. 8

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE, DATED JUNE 26, 1916, PETITIONERS,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, THE WESTERN PACIFIC RAILROAD COMPANY, IRVING TRUST COMPANY, ETC., ET AL.

No. 20

THE WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

FREDERICK H. ECKER, ET AL.

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, A. C. JAMES CO., ET AL.

No. 61

IRVING TRUST COMPANY, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF WESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, ET AL., ETC.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONS FOR CERTIORARI FILED { DECEMBER 30, 1941. JANUARY 17, 1942. FEBRUARY 28, 1942. MARCH 30, 1942.

CERTIORARI GRANTED APRIL 27, 1942.

No. 9714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,
Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of the Western Pacific Railroad Company, a corporation,
Appellees.

Transcript of Record

VOLUME VIII

Pages 2649 to 2676

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Monthly income system statement showing the combined results of operation of the properties of the Debtor and its subsidiaries for the month of June 1941, and the period January 1 to June 30, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2649

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of July 1941, and the period January 1 to July 31, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2652

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of August 1941, and the period January 1 to August 31, 1941, in comparison with the combined operating results for the corresponding periods of the year 1941 2654

Monthly income system statement showing the combined results of operations of the properties of the Debtor and its subsidiaries for the month of September 1941 and the period January 1 to September 30, 1941 in comparison with the combined operating results for the corresponding periods of the year 1940 2656

Page

Certificate of Clerk of District Court to monthly income statement for June 1941, etc. 2651

Certificate of Clerk of District Court to monthly income statement for July 1941, etc. 2653

Certificate of Clerk of District Court to monthly income statement for August 1941, etc. 2655

Certificate of Clerk of District Court to monthly income statement for September 1941, etc. 2657

Proceedings in the United States Circuit Court of Appeals:

Order directing argument, etc. 2661

Order of submission 2662

Order directing filing of opinion and filing and recording of decree 2663

Opinion 2663

Decree 2675

Certificate of Clerk of United States Circuit Court of Appeals 2677

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
OPERATING RESULTS—COMBINED
(All Inter-Company Items Eliminated)

Item or Account	Month of June				Period January 1 to June 30th			
			Increase or Decrease*				Increase or Decrease*	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
Average Mileage of Road Operated	1,536.19	1,549.79	13.60*	.88*	1,536.19	1,549.79	13.60*	.88*
Operating Revenues								
Freight	$ 1,699,924.52	$ 1,360,130.27	$339,794.25	24.98	$ 9,498,738.47	$ 7,767,490.05	$ 1,731,248.42	22.29
Passenger	98,875.60	88,581.43	10,294.17	11.62	383,987.48	365,749.33	18,238.15	4.99
Mail	3,000.00	3,408.95	408.95*	12.00*	18,012.29	21,344.02	3,331.73*	15.61*
Express	15,352.56	7,446.54	7,906.02	106.17	41,929.62	49,109.67	7,180.05*	14.62*
Dining Car, Hotel & Restaurant	11,749.85	9,085.78	2,664.07	29.32	48,698.49	32,861.97	15,836.52	48.19
Miscellaneous	23,333.86	19,507.85	3,826.01	19.61	119,633.93	107,066.51	12,567.42	11.74
Total Railway Operating Revenues	$ 1,852,236.39	$ 1,488,160.82	$364,075.57	24.46	$10,111,000.28	$ 8,343,621.55	$ 1,767,378.73	21.18
Operating Expenses								
Maintenance of Way & Structures	$ 291,853.74	$ 303,815.04	$ 11,961.30*	3.94*	$ 1,445,419.45	$ 1,616,762.61	$ 171,343.16*	10.60*
Maintenance of Equipment	340,050.32	230,366.00	109,684.32	47.61	1,788,853.93	1,374,440.47	414,413.46	30.15
Power	6,805.54	10,515.77	3,710.23*	35.28*	44,106.32	68,805.20	24,698.88*	35.90*
Traffic	78,814.82	69,772.51	9,042.31	12.96	428,663.50	395,607.99	33,055.51	8.36
Transportation—Rail Line	649,286.72	564,851.50	84,435.22	14.95	3,784,305.07	3,383,924.59	400,380.48	11.83
Miscellaneous Operations	13,907.42	13,233.76	673.66	5.09	67,621.09	56,777.01	10,844.08	19.10
General	66,565.24	59,981.26	6,583.98	10.98	381,924.88	382,206.04	281.16*	.07*
Transportation for Investment—Credit	1,048.41	412.03	636.38	154.45	2,878.89	1,202.06	1,676.83	139.50
Total Railway Operating Expenses	$ 1,446,235.39	$ 1,252,123.81	$194,111.58	15.50	$ 7,938,015.35	$ 7,277,321.85	$ 660,693.50	9.08
Net Revenue from Railway Operations	$ 406,001.00	$ 236,037.01	$169,963.99	72.01	$ 2,172,984.93	$ 1,066,299.70	$ 1,106,685.23	103.79
Excise and Use Tax Accruals	$ 49,937.19	$ 44,435.21	$ 5,501.98	12.38	$ 280,647.65	$ 258,602.80	$ 22,044.85	8.52
Railway Tax Accruals—All Other	51,540.82	52,798.81	1,257.99*	2.38*	350,312.04	321,857.14	28,454.90	8.84
Railway Operating Income	$ 304,522.99	$ 138,802.99	$165,720.00	119.39	$ 1,542,025.24	$ 485,839.76	$ 1,056,185.48	217.39
Hire of Equipment—Net Debit	$ 101,700.87*	$ 73,859.68	$ 27,841.19	37.69	$ 627,365.00	$ 527,361.94	$ 100,003.06	18.96
Joint Facility Rents—Net Credit	16,693.53	17,711.25	1,017.72*	5.75*	48,073.63	50,773.49	2,699.86*	5.32*
Net Railway Operating Income	$ 219,515.65	$ 82,654.56	$136,861.09	165.58	$ 962,733.87	$ 9,251.31	$ 953,482.56	—
Non-Operating Income								
Rental of Property	$ 32,289.42	$ 22,246.45	$ 10,042.97	45.14	$ 182,856.90	$ 140,785.49	$ 42,071.41	29.88
Interest Accruals	3,440.37	2,431.84	1,008.53	41.47	19,688.73	13,612.05	6,076.68	44.64
Miscellaneous	11.00	1,352.50	1,341.50*	99.19*	919.31	1,492.76	573.45*	38.42*
Total Non-Operating Income	$ 35,740.79	$ 26,030.79	$ 9,710.00	37.30	$ 203,464.94	$ 155,890.30	$ 47,574.64	30.52
Gross Income	$ 255,256.44	$ 108,685.35	$146,571.09	134.86	$ 1,166,198.81	$ 165,141.61	$ 1,001,057.20	606.18
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,189.16	$ 2,184.17	$ 4.99	.23	$ 13,715.35	$ 13,737.94	$ 22.59*	.16*

Railway Operating Income	$ 304,522.99	$ 138,802.99	$165,720.00	119.39	$ 1,542,025.24	$ 485,839.76	$ 1,056,185.48	217.39
Hire of Equipment—Net Debit	$ 101,700.87	$ 73,859.68	$ 27,841.19	37.69	$ 627,365.00	$ 527,361.94	$ 100,003.06	18.96
Joint Facility Rents—Net Credit	16,693.53	17,711.25	1,017.72•	5.75•	48,073.63	50,773.49	2,699.86•	5.32•
Net Railway Operating Income	$ 219,515.65	$ 82,654.56	$136,861.09	165.58	$ 962,733.87	$ 9,251.31	$ 953,482.56	—
Non-Operating Income								
Rental of Property	$ 32,289.42	$ 22,246.45	$ 10,042.97	45.14	$ 182,856.90	$ 140,785.49	$ 42,071.41	29.88
Interest Accruals	3,440.37	2,431.84	1,008.53	41.47	19,688.73	13,612.05	6,076.68	44.64
Miscellaneous	11.00	1,352.50	1,341.50•	99.19•	919.31	1,492.76	573.45•	38.42•
Total Non-Operating Income	$ 35,740.79	$ 26,030.79	$ 9,710.00	37.30	$ 203,464.94	$ 155,890.30	$ 47,574.64	30.52
Gross Income	$ 255,256.44	$ 108,685.35	$146,571.09	134.86	$ 1,166,198.81	$ 165,141.61	$ 1,001,057.20	606.18
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,189.16	$ 2,184.17	$ 4.99	.23	$ 13,715.35	$ 13,737.94	$ 22.59•	.16•
Miscellaneous Tax Accruals	4,946.91	4,797.28	149.63	3.12	29,946.82	28,802.23	1,144.59	3.97
Miscellaneous	7,764.45	5,392.87	2,371.58	43.98	39,009.31	35,829.12	3,180.19	8.88
Total Miscellaneous Deductions	$ 14,900.52	$ 12,374.32	$ 2,526.20	20.41	$ 82,671.48	$ 78,369.29	$ 4,302.19	5.49
Available for Fixed Charges	$ 240,355.92	$ 96,311.03	$144,044.89	149.56	$ 1,083,527.33	$ 86,772.32	$ 996,755.01	—
Fixed Charges								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ —	—	$ 1,800.00	$ 1,800.00	$ —	—
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	$ 205,375.41	$ 205,375.41	$ —	—	$ 1,232,252.50	$ 1,232,252.50	$ —	—
Equipment Obligations "	5,162.50	5,854.16	691.66•	11.81•	31,362.50	35,519.90	4,157.40•	11.70•
Trustees' Certificates "	33,061.11	33,333.33	272.22•	.82•	198,991.66	200,000.00	1,008.34•	.50•
Other Obligations†	62,008.74	59,621.62	2,387.12	4.00	370,945.24	358,774.60	12,170.64	3.39
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	523.25	838.55	315.30•	37.60•	3,231.92	5,427.84	2,195.92•	40.46•
Other Obligations	80.20	2,966.05	2,885.85•	97.30•	1,822.41	18,013.85	16,191.44•	89.88•
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	—	—	67,700.94	67,700.94	—	—
Equipment Obligations "	80.76	107.67	26.91•	24.99•	490.04	724.22	234.18•	32.34•
Total Fixed Charges	$ 317,875.46	$ 319,680.28	$ 1,804.82•	.56•	$ 1,908,597.21	$ 1,920,213.85	$ 11,616.64•	.60•
Net Income	$ 77,519.54•	$ 223,369.25•	$145,849.71	—	$ 825,069.88•	$ 1,833,441.53•	$ 1,008,371.65	—

•Denote Red

Accounting Department
San Francisco, California
August 5th, 1941

†Interest on Funded Debt—Other Obligations" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	—Reconstruction Finance Corporation	$12,176.71	$12,176.71	$ 73,466.16	$ 73,872.03
" "	—A. C. James Co.	20,832.50	20,832.50	124,995.00	124,995.00
" "	—Railroad Credit Corporation	2,038.01	—	12,295.98	—
Advances	—The Western Pacific Railroad Corp.	22,894.80	22,894.80	137,368.05	137,368.05
"	—The Western Realty Company	208.35	208.35	1,250.00	1,250.00
"	—The Western Pacific Railroad Corporation to S. N. Ry.	3,585.90	3,509.26	21,297.58	21,289.52
S. N. Ry. Bonds	—Other than Bonds held by The Western Pacific Railroad Company	272.47	—	272.47	—
	Total	$62,008.74	$59,621.62	$370,945.24	$358,774.60

[Endorsed]: Filed Aug 11, 1941. [1]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page numbered from 1, inclusive, contain a full, true, and correct transcript of the supplemental records and proceedings in the matter of The Western Pacific Railroad Co., No. 26591-S in Bankruptcy, and forwarded in accordance with Order of Apr. 7, 1941, "For Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of August A. D. 1941.

(Seal) WALTER B. MALING,
Clerk.
E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 9714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 11, 1941. Paul P. O'Brien, Clerk.

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
OPERATING RESULTS—COMBINED
(All Inter-Company Items Eliminated)

Item or Account	Month of July				Period January 1 to July 31			
			Increase or Decrease*				Increase or Decrease*	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
Average Mileage of Road Operated	1,536.19	1,549.79	13.60*	.88*	1,536.19	1,549.79	13.60*	.88*
Operating Revenues								
Freight	$ 1,932,800.89	$ 1,450,413.00	$482,387.89	33.26	$11,431,539.36	$ 9,217,903.05	$ 2,213,636.31	24.01
Passenger	83,383.31	127,202.53	43,819.22*	34.45*	467,370.79	492,951.86	25,581.07*	5.19*
Mail	3,000.00	3,165.78	165.78*	5.24*	21,012.29	24,509.80	3,497.51*	14.27*
Express	5,549.73	2,758.63	2,791.10	101.18	47,479.35	51,868.30	4,388.95*	8.46*
Dining Car, Hotel & Restaurant	14,185.47	9,502.75	4,682.72	49.28	62,883.96	42,364.72	20,519.24	48.43
Miscellaneous	33,386.98	20,186.01	13,200.97	65.40	153,020.91	127,232.52	25,768.39	20.25
Total Railway Operating Revenues	$ 2,072,306.38	$ 1,613,228.70	$459,077.68	28.46	$12,183,306.66	$ 9,956,850.25	$ 2,226,456.41	22.36
Operating Expenses								
Maintenance of Way Structures	$ 309,295.93	$ 308,177.07	$ 1,118.86	.36	$ 1,754,715.38	$ 1,924,939.68	$ 170,224.30*	8.84*
Maintenance of Equipment	351,905.80	228,120.60	123,785.20	54.26	2,140,759.73	1,602,561.07	538,198.66	33.58
Power	8,253.54	12,705.47	4,451.93*	35.04*	52,359.86	81,510.67	29,150.81*	35.76*
Traffic	74,537.77	70,741.49	3,796.28	5.37	503,201.27	466,349.48	36,851.79	7.90
Transportation—Rail Line	692,776.77	599,867.04	92,909.73	15.49	4,477,081.84	3,983,791.63	493,290.21	12.41
Miscellaneous Operations	15,489.03	12,381.37	3,107.66	25.10	83,110.12	69,158.38	13,951.74	20.17
General	61,560.69	62,028.15	467.46*	.75*	443,485.57	444,234.19	748.62*	.17*
Transportation for Investment—Credit	297.70	248.92	48.78	19.60	3,176.59	1,450.98	1,725.61	118.93
Total Railway Operating Expenses	$ 1,513,521.83	$ 1,293,772.27	$219,749.56	16.99	$ 9,451,537.18	$ 8,571,094.12	$ 880,443.06	10.27
Net Revenue from Railway Operations	$ 558,784.55	$ 319,456.43	$239,328.12	74.92	$ 2,731,769.48	$ 1,385,756.13	$ 1,346,013.35	97.13
Excise and Use Tax Accruals	$ 52,268.28	$ 46,601.92	$ 5,666.36	12.16	$ 332,915.93	$ 305,204.72	$ 27,711.21	9.08
Railway Tax Accruals—All Other	103,315.75	54,129.77	49,185.98	90.87	453,627.79	375,986.91	77,640.88	20.65
Railway Operating Income	$ 403,200.52	$ 218,724.74	$184,475.78	84.34	$ 1,945,225.76	$ 704,564.50	$ 1,240,661.26	176.09
Hire of Equipment—Net Debit	$ 125,262.56	$ 114,158.03	$ 11,104.53	9.73	$ 752,627.56	$ 641,519.97	$ 111,107.59	17.32
Joint Facility Rents—Net Credit	8,194.17	5,136.75	3,057.42	59.52	56,267.80	55,910.24	357.56	.64
Net Railway Operating Income	$ 286,132.13	$ 109,703.46	$176,428.67	160.82	$ 1,248,866.00	$ 118,954.77	$ 1,129,911.23	949.87
Non-Operating Income								
Rental of Property	$ 34,320.05	$ 24,239.81	$ 10,080.24	41.59	$ 217,176.95	$ 165,025.30	$ 52,151.65	31.60
Interest Accruals	3,458.53	2,424.18	1,034.35	42.67	23,147.26	16,036.23	7,111.03	44.34
Miscellaneous	45.00	449.85	404.85*	90.00*	964.31	1,942.61	978.30*	50.36*
Total Non-Operating Income	37,823.58	27,113.84	10,709.74	39.50	241,288.52	183,004.14	58,284.38	31.85
Gross Income	$ 323,955.71	$ 136,817.30	$187,138.41	136.78	$ 1,490,154.52	$ 301,958.91	$ 1,188,195.61	393.50

Net Railway Operating Income	$ 286,132.13	$ 109,703.46	$176,428.67	160.82	$ 1,248,866.00	$ 118,954.77	$ 1,129,911.23	949.87
Non-Operating Income								
Rental of Property	$ 34,320.05	$ 24,239.81	$ 10,080.24	41.59	$ 217,176.95	$ 165,025.30	$ 52,151.65	31.60
Interest Accruals	3,458.53	2,424.18	1,034.35	42.67	23,147.26	16,036.23	7,111.03	44.34
Miscellaneous	45.00	449.85	404.85*	90.00*	964.31	1,942.61	978.30*	50.36*
Total Non-Operating Income	37,823.58	27,113.84	10,709.74	39.50	241,288.52	183,004.14	58,284.38	31.85
Gross Income	$ 323,955.71	$ 136,817.30	$187,138.41	136.78	$ 1,490,154.52	$ 301,958.91	$ 1,188,195.61	393.50
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,174.17	$ 2,194.17	$ 20.00*	.91*	$ 15,889.52	$ 15,932.11	$ 42.59*	.27*
Miscellaneous Tax Accruals	5,075.25	5,005.29	69.96	1.40	35,022.07	33,807.52	1,214.55	3.59
Miscellaneous	5,111.67	5,163.72	52.05*	1.01*	44,120.98	40,992.84	3,128.14	7.63
Total Miscellaneous Deductions	$ 12,361.09	$ 12,363.18	$ 2.09*	.02*	$ 95,032.57	$ 90,732.47	$ 4,300.10	4.74
Available for Fixed Charges	$ 311,594.62	$ 124,454.12	$187,140.50	150.37	$ 1,395,121.95	$ 211,226.44	$ 1,183,895.51	560.49
Fixed Charges								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ —	—	$ 2,100.00	$ 2,100.00	$ —	—
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	205,375.41	205,375.41	—	—	1,437,627.91	1,437,627.91	—	—
Equipment Obligations "	5,162.50	5,854.18	691.68*	11.82*	36,525.00	41,374.08	4,849.08*	11.72*
Trustees' Certificates "	33,019.44	33,333.33	313.89*	.94*	232,011.10	233,333.33	1,322.23*	.57*
Other Obligations†	62,255.29	60,144.32	2,110.97	3.51	433,200.53	418,918.92	14,281.61	3.41
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	413.02	728.47	315.45*	43.30*	3,644.94	6,156.31	2,511.37*	40.79*
Other Obligations	356.86	3,039.73	2,682.87*	88.26*	2,179.27	21,053.58	18,874.31*	89.65*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	—	—	78,984.43	78,984.43	—	—
Equipment Obligations "	80.76	107.67	26.91*	24.99*	570.80	831.89	261.09*	31.39*
Total Fixed Charges	$ 318,246.77	$ 320,166.60	$ 1,919.83*	.60*	$ 2,226,843.98	$ 2,240,380.45	$ 13,536.47*	.60*
Net Income	$ 6,652.15*	$ 195,712.48*	$189,060.33	—	$ 831,722.03*	$ 2,029,154.01*	$ 1,197,431.88	—

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†"Interest on Funded Debt—Other Obligations" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	—Reconstruction Finance Corporation	$12,582.61	$12,582.61	$ 86,048.77	$ 86,454.64
" "	—A. C. James Co.	20,832.50	20,832.50	145,827.50	145,827.50
" "	—Railroad Credit Corporation	2,105.94	—	14,401.92	—
Advances	—The Western Pacific Railroad Corp.	22,894.65	22,894.65	160,262.70	160,262.70
"	—The Western Realty Company	208.32	208.32	1,458.32	1,458.32
"	—The Western Pacific Railroad Corporation to S. N. Ry.	3,585.90	3,626.24	24,883.48	24,915.76
S. N. Ry. Bonds	—Other than Bonds held by The Western Pacific Railroad Company	45.37	—	317.84	—
	Total	$62,255.29	$60,144.32	$433,200.53	$418,918.92

Accounting Department
San Francisco, California
September 4th, 1941

[Endorsed]: Original filed Sep. 13, 1941 with Clerk, U. S. Dist. Court, San Francisco. [1]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page, numbered 1, contain a full, true, and correct transcript of the supplemental records and proceedings in the matter of The Western Pacific Railroad Co., No. 26591-S in Bankruptcy, and forwarded in accordance with order of Apr. 7, 1941, for Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record, as the same now remain on [redacted] and of record in my office.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 13th day of September A. D. 1941.

(Seal) WALTER B. MALING,
Clerk.
By C. W. CALBREATH,
Deputy Clerk.

[Endorsed]: No. 9714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sept. 13, 1941. Paul P. O'Brien, Clerk.

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
OPERATING RESULTS—COMBINED
(All Inter-Company Items Eliminated)

Item or Account	Month of August				Period January 1 to August 31			
			Increase or Decrease*				Increase or Decrease*	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
Average Mileage of Road Operated	1,536.19	1,549.79	13.60*	.88*	1,536.19	1,549.79	13.60*	.88*
Operating Revenues								
Freight	$ 2,293,172.37	$ 1,620,854.23	$672,318.14	41.48	$13,724,711.73	$10,838,757.28	$ 2,885,954.45	26.63
Passenger	80,648.12	107,190.03	26,541.91*	24.76*	548,018.91	600,141.89	52,122.98*	8.69*
Mail	3,000.00	3,173.29	173.29*	5.46*	24,012.29	27,683.09	3,670.80*	13.26*
Express	3,689.39	6,629.41	2,940.02*	44.35*	51,168.74	58,497.71	7,328.97*	12.53*
Dining Car, Hotel & Restaurant	15,963.64	9,753.81	6,209.83	63.67	78,847.60	52,118.53	26,729.07	51.29
Miscellaneous	31,211.18	20,428.50	10,782.68	52.78	184,232.09	147,681.02	36,551.07	24.75
Total Railway Operating Revenues	$ 2,427,684.70	$ 1,768,029.27	$659,655.43	37.31	$14,610,991.36	$11,724,879.52	$ 2,886,111.84	24.62
Operating Expenses								
Maintenance of Way and Structures	$ 258,503.74	$ 301,239.21	$ 42,735.47*	14.19*	$ 2,013,219.12	$ 2,226,178.89	$ 212,959.77*	9.57*
Maintenance of Equipment	301,959.25	254,950.36	47,008.89	18.44	2,442,718.98	1,857,511.43	585,207.55	31.50
Power	6,574.21	11,387.77	4,813.56*	42.27*	58,934.07	92,898.44	33,964.37*	36.56*
Traffic	69,279.73	67,384.61	1,895.12	2.81	572,481.00	533,734.09	38,746.91	7.26
Transportation—Rail Line	778,690.12	630,960.30	147,729.82	23.41	5,255,771.96	4,614,751.93	641,020.03	13.89
Miscellaneous Operations	18,663.70	12,530.68	6,133.02	48.94	101,773.82	81,689.06	20,084.76	24.59
General	63,753.49	69,879.95	6,126.46*	8.77*	507,239.06	514,114.14	6,875.08*	1.34*
Transportation for Investment—Credit	237.04	1,534.73	1,297.69*	84.55*	3,413.63	2,985.71	427.92	14.33
Total Railway Operating Expenses	$ 1,497,187.20	$ 1,346,798.15	$150,389.05	11.17	$10,948,724.38	$ 9,917,892.27	$ 1,030,832.11	11.23
Net Revenue from Railway Operations	$ 930,497.50	$ 421,231.12	$509,266.38	120.90	$ 3,662,266.98	$ 1,806,987.25	$ 1,855,279.73	102.67
Excise and Use Tax Accruals	$ 54,349.44	$ 48,052.21	$ 6,297.23	13.10	$ 387,265.67	$ 353,256.93	$ 34,008.44	9.63
Railway Tax Accruals—All Other	102,122.06	53,132.30	48,989.76	92.20	555,749.85	429,119.21	126,630.64	29.51
Railway Operating Income	$ 774,026.00	$ 320,046.61	$453,979.39	141.85	$ 2,719,251.76	$ 1,024,611.11	$ 1,694,640.65	165.39
Hire of Equipment—Net Debit	$ 127,519.19	$ 105,528.72	$ 21,990.47	20.84	$ 880,146.75	$ 747,048.69	$ 133,098.06	17.82
Joint Facility Rents—Net, Credit	20,208.44	23,801.41	3,592.97*	15.10*	76,476.24	79,711.65	3,235.41*	4.06*
Net Railway Operating Income	$ 666,715.25	$ 238,319.30	$428,395.95	179.70	$ 1,915,581.25	$ 357,274.07	$ 1,558,307.18	436.16
Non-Operating Income								
Rental of Property	$ 36,130.09	$ 28,108.84	$ 8,021.25	28.54	$ 253,307.04	$ 193,134.14	$ 60,172.90	31.16
Interest Accruals	3,970.54	2,461.33	1,509.21	61.32	27,117.80	18,497.56	8,620.24	46.60
Miscellaneous	418.63	152.39	266.24	174.71	1,382.94	2,095.00	712.06*	33.99*
Total Non-Operating Income	$ 40,519.26	$ 30,722.56	$ 9,796.70	31.89	$ 281,807.78	$ 213,726.70	$ 68,081.08	31.85

Hire of Equipment—Net Debit	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Joint Facility Rents—Net Credit	20,208.44	23,801.41	3,592.97•	15.10•	76,476.24	79,711.65	3,235.41•	4.06•
Net Railway Operating Income	$ 666,715.25	$ 238,319.30	$428,395.95•	179.70	$ 1,915,581.25	$ 357,274.07	$ 1,558,307.18	436.16
Non-Operating Income								
Rental of Property	$ 36,130.09	$ 28,108.84	$ 8,021.25	28.54	$ 253,307.04	$ 193,134.14	$ 60,172.90	31.16
Interest Accruals	3,970.54	2,461.33	1,509.21	61.32	27,117.80	18,497.56	8,620.24	46.60
Miscellaneous	418.63	152.39	266.24	174.71	1,382.94	2,095.00	712.06•	33.99•
Total Non-Operating Income	$ 40,519.26	$ 30,722.56	$ 9,796.70	31.89	$ 281,807.78	$ 213,726.70	$ 68,081.08	31.85
Gross Income	$ 707,234.51	$ 269,041.86	$438,192.65	162.87	$ 2,197,389.03	$ 571,000.77	$ 1,626,388.26	284.83
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,205.17	$ 2,193.16	$ 12.01	.55	$ 18,094.69	$ 18,425.27	$ 30.58•	.17
Miscellaneous Tax Accruals	5,048.15	5,005.29	42.86	.86	40,070.22	33,814.81	1,257.41	3.24
Miscellaneous	1,726.82	1,463.39	263.43	18.00	45,847.80	42,456.23	3,391.57	7.99
Total Miscellaneous Deductions	$ 8,980.14	$ 8,661.84	$ 318.30	3.67	$ 104,012.71	$ 99,394.31	$ 4,618.40	4.65
Available for Fixed Charges	$ 698,254.37	$ 260,380.02	$437,874.35	168.17	$ 2,093,376.32	$ 471,606.46	$ 1,621,769.86	343.88
Fixed Charges								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ —	—	$ 2,400.00	$ 2,400.00	$ —	—
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	$ 205,375.45	$ 205,375.45	$ —	—	$ 1,643,003.36	$ 1,643,003.36	$ —	—
Equipment Obligations "	5,162.50	5,854.16	691.66•	11.81•	41,687.50	47,228.24	5,540.74•	11.73•
Trustees' Certificates "	32,977.78	33,333.34	355.56•	1.07•	264,988.88	266,666.67	1,667.79•	.63•
Other Obligations†	62,255.32	60,144.30	2,111.02	3.51	495,455.85	479,063.22	16,392.63	3.42
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	383.13	698.70	315.57•	45.17•	4,028.07	6,855.01	2,826.94•	41.24•
Other Obligations	351.46	3,067.04	2,715.58•	88.54•	2,530.73	24,120.62	21,589.89•	89.51•
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	—	—	90,267.92	90,267.92	—	—
Equipment Obligations "	80.76	107.67	26.91•	24.99•	651.56	939.56	288.00•	30.65•
Total Fixed Charges	$ 318,169.89	$ 320,164.15	$ 1,994.26•	.62•	$ 2,545,013.87	$ 2,560,544.60	$ 15,530.73•	.61•
Net Income	$ 380,084.48	$ 59,784.13•	$439,868.61	—	$ 451,637.55•	$ 2,088,938.14•	$ 1,637,300.59	—

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Accounting Department
San Francisco, California
October 1st, 1941

†"Interest on Funded Debt—Other Obligation" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	—Reconstruction Finance Corporation	$12,582.58	$12,582.58	$ 98,631.35	$ 99,037.22
" "	—A. C. James Co.	20,832.50	20,832.50	166,660.00	166,660.00
" "	—Railroad Credit Corporation	2,105.94	—	16,507.86	—
Advances	—The Western Pacific Railroad Corp.	22,894.65	22,894.65	183,157.35	183,157.35
"	—The Western Realty Company	208.33	208.33	1,666.65	1,666.65
"	—The Western Pacific Railroad Corporation to S. N. Ry.	3,585.90	3,626.24	28,469.38	28,542.00
S. N. Ry. Bonds	—Other than Bonds held by The Western Pacific Railroad Company	45.42	—	363.26	—
	Total	$62,255.32	$60,144.30	$495,455.85	$479,063.22

[Endorsed]: Filed Oct. 10, 1941, Walter B. Maling, Clerk. [1]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page numbered 1, contain a full, true, and correct transcript of the supplemental records and proceedings in the Western Pacific Railroad Co., No. 26591-S in Bankruptcy, and forwarded in accordance with Order of Apr. 7, 1941, For Correction of Record on Appeal, for Supplementing Record and Certification of Supplement Record, as the same now remain on file and of record in my office

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of October A. D. 1941.

(Seal) WALTER B. MALING,
Clerk.
E. H. NORMAN,
Deputy Clerk.

[Endorsed]: No. 9714. United States Circuit Court of Appeals for the Ninth Circuit. Filed Oct. 10, 1941. Paul P. O'Brien, Clerk.

The Western Pacific Railroad Company
Sacramento Northern Railway
Tidewater Southern Railway Company
OPERATING RESULTS—COMBINED
(All Inter-Company Items Eliminated)

Item or Account	Month of September		Increase or Decrease*		Period January 1 to September 30		Increase or Decrease*	
	1941	1940	Amount	Per Cent	1941	1940	Amount	Per Cent
Average Mileage of Road Operated	1,536.19	1,549.79	13.60*	.88*	1536.19	1,549.79	13.60*	.88*
Operating Revenues								
Freight	$ 2,612,273.76	$ 1,961,870.11	$650,403.65	33.15	$16,236,985.49	$12,800,627.39	$ 3,536,358.10	27.63
Passenger	64,282.93	83,610.93	19,328.00*	23.12*	612,301.84	683,752.82	71,450.98*	10.45*
Mail	3,000.00	3,177.63	177.63*	5.59*	27,012.29	30,860.72	3,848.43*	12.47*
Express	6,364.90	5,265.06	1,099.84	20.89	57,533.64	63,762.77	6,229.13*	9.77*
Dining Car, Hotel & Restaurant	12,128.33	9,641.37	2,481.96	25.74	90,970.93	61,759.90	29,211.03	47.30
Miscellaneous	32,269.21	21,368.73	10,900.48	51.01	216,501.30	169,049.75	47,451.55	28.08
Total Railway Operating Revenues	$ 2,730,314.13	$ 2,084,933.83	$645,380.30	30.95	$17,341,305.49	$13,809,813.35	$ 3,531,492.14	25.57
Operating Expenses								
Maintenance of Way & Structures	$ 257,398.01	$ 244,465.20	$ 12,932.81	5.29	$ 2,270,617.13	$ 2,470,644.09	$ 200,026.96*	8.10*
Maintenance of Equipment	316,230.41	247,639.49	68,590.92	27.70	2,758,949.39	2,105,150.92	653,798.47	31.06
Power	6,808.25	10,467.48	3,659.23*	34.96*	65,742.32	103,365.92	37,623.60*	36.40*
Traffic	70,076.61	62,432.42	7,644.19	12.24	642,557.61	596,166.51	46,391.10	7.78
Transportation—Rail Line	853,588.29	668,441.95	185,146.34	27.70	6,109,360.25	5,283,193.88	826,166.37	15.64
Miscellaneous Operations	15,320.46	13,569.76	1,750.70	12.90	117,094.28	95,258.82	21,835.46	22.92
General	63,916.86	229,528.29	165,611.43*	72.15*	571,155.92	743,642.43	172,486.51*	23.19*
Transportation for Investment—Credit	2,022.42	461.99	1,560.43	337.75	5,436.05	3,447.70	1,988.35	57.67
Total Railway Operating Expenses	$ 1,581,316.47	$ 1,476,082.60	$105,233.87	7.13	$12,530,040.85	$11,393,974.87	$ 1,136,065.98	9.97
Net Revenue from Railway Operations	$ 1,148,997.66	$ 608,851.23	$540,146.43	88.72	$ 4,811,264.64	$ 2,415,838.48	$ 2,395,426.16	99.16
Excise and Use Tax Accruals	$ 55,757.08	$ 45,475.98	$ 10,281.10	22.61	$ 443,022.45	$ 398,732.91	$ 44,289.54	11.11
Railway Tax Accruals—All Other	101,398.23	51,334.71	50,063.52	97.52	657,148.08	480,453.92	176,694.16	36.78
Railway Operating Income	991,842.35	512,040.54	479,801.81	93.70	3,711,094.11	1,536,651.65	2,174,442.46	141.51
Hire of Equipment—Net Debit	191,232.51	157,912.83	33,319.68	21.10	1,071,379.26	904,961.52	166,417.74	18.39
Joint Facility Rents—Net Credit	22,220.15	15,029.92	7,190.23	47.84	98,696.39	94,741.57	3,954.82	4.17
Net Railway Operating Income	$ 822,829.99	$ 369,157.63	$453,672.36	122.89	$ 2,738,411.24	$ 726,431.70	$ 2,011,979.54	276.97
Non-Operating Income								
Rental of Property	$ 26,456.36	$ 26,627.97	$ 171.61*	.64*	$ 279,763.40	$ 219,762.11	$ 60,001.29	27.30
Interest Accruals	4,405.39	2,765.21	1,640.18	59.31	31,523.19	21,262.77	10,260.42	48.26
Miscellaneous	22.00	37,614.27	37,592.27*	99.94*	1,404.94	39,709.27	38,304.33*	96.46*
Total Non-Operating Income	$ 30,883.75	$ 67,007.45	$ 36,123.70*	53.91*	$ 312,691.53	$ 280,734.15	$ 31,957.38	11.38
Gross Income	$ 853,713.74	$ 436,165.08	$417,548.66	95.73	$ 3,051,102.77	$ 1,007,165.85	$ 2,043,936.92	202.94
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,176.66	$ 2,476.66	$ 300.00*	12.11*	$ 20,271.35	$ 20,601.93	$ 330.58*	1.60*
Miscellaneous Tax Accruals	5,048.15	5,005.29	42.86	.86	45,118.37	43,818.10	1,300.27	2.97

Joint Facility Rents—Net Credit								
Net Railway Operating Income	$ 822,829.99	$ 369,157.63	$453,672.36	122.89	$ 2,738,411.24	$ 726,431.70	$ 2,011,979.54	276.97
Non-Operating Income								
Rental of Property	$ 26,456.36	$ 26,627.97	$ 171.61•	.64•	$ 279,763.40	$ 219,762.11	$ 60,001.29	27.30
Interest Accruals	4,405.39	2,765.21	1,640.18	59.31	31,523.19	21,262.77	10,260.42	48.26
Miscellaneous	22.00	37,614.27	37,592.27•	99.94•	1,404.94	39,709.27	38,304.33•	96.46•
Total Non-Operating Income	$ 30,883.75	$ 67,007.45	$ 36,123.70•	53.91•	$ 312,691.53	$ 280,734.15	$ 31,957.38	11.38
Gross Income	$ 853,713.74	$ 436,165.08	$417,548.66	95.73	$ 3,051,102.77	$ 1,007,165.85	$ 2,043,936.92	202.94
Miscellaneous Deductions								
Miscellaneous Rents	$ 2,176.66	$ 2,476.66	$ 300.00•	12.11•	$ 20,271.35	$ 20,601.93	$ 330.58•	1.60•
Miscellaneous Tax Accruals	5,048.15	5,005.29	42.86	.86	45,118.37	43,818.10	1,300.27	2.97
Miscellaneous	18,324.50•	33,263.62•	14,939.12	—	27,523.30	9,192.61	18,330.69	199.41
Total Miscellaneous Deductions	$ 11,099.69•	$ 25,781.67•	$ 14,681.98	—	$ 92,913.02	$ 73,612.64	$ 19,300.38	26.22
Available for Fixed Charges	$ 864,813.43	$ 461,946.75	$402,866.68	87.21	$ 2,958,189.75	$ 933,553.21	$ 2,024,636.54	216.87
Fixed Charges								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ —	—	$ 2,700.00	$ 2,700.00	$ —	—
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	$ 205,375.41	$ 205,375.41	$ —	—	$ 1,848,378.77	$ 1,848,378.77	$ —	—
Equipment Obligations "	5,162.50	5,854.16	691.66•	11.81•	46,850.00	53,082.40	6,232.40•	11.74•
Trustees' Certificates "	32,936.11	33,333.33	397.22•	1.19•	297,924.99	300,000.00	2,075.01•	.69•
Other Obligations†	61,781.51	59,621.45	2,160.06	3.62	557,237.36	538,684.67	18,552.69	3.44
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	378.62	694.32	315.70•	45.47•	4,406.69	7,549.33	3,142.64•	41.63•
Other Obligations	322.43	2,984.74	2,662.31•	89.20•	2,853.16	27,105.36	24,252.20•	89.47•
Amortizations of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	—	—	101,551.41	101,551.41	—	—
Equipment Obligations "	80.76	107.67	26.91•	24.99•	732.32	1,047.23	314.91•	30.07•
Total Fixed Charges	$ 317,620.83	$ 319,554.57	$ 1,933.74•	.61•	$ 2,862,634.70	$ 2,880,099.17	$ 17,464.47•	.61•
Net Income	$ 547,192.60	$ 142,392.18	$404,800.42	284.29	$ 95,555.05	$ 1,946,545.96•	$ 2,042,101.01	—

•Denote Red

Accounting Department
San Francisco, California
November 4th, 1941

[Endorsed]: Filed Nov. 12, 1941. [1]

†"Interest on Funded Debt—Other Obligations" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	—Reconstruction Finance Corporation	$12,176.71	$12,176.71	$110,808.06	$111,213.93
" "	—A. C. James Co.	20,832.50	20,832.50	187,492.50	187,492.50
" "	—Railroad Credit Corporation	2,038.00	—	18,545.86	—
Advances	—The Western Pacific Railroad Corp.	22,894.65	22,894.65	206,052.00	206,052.00
"	—The Western Realty Company	208.33	208.33	1,874.98	1,874.98
"	—The Western Pacific Railroad Corporation to S. N. Ry.	3,585.90	3,509.26	32,055.28	32,051.26
S. N. Ry. Bonds	—Other than Bonds held by The Western Pacific Railroad Company	45.42	—	408.68	—
	Total	$61,781.51	$59,621.45	$557,237.36	$538,684.67

District Court of the United States
Northern District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing page numbered 1, *inclusive,* contain a full, true, and correct transcript of the records and proceedings in the matter of The Western Pacific Railroad Co., No. 26591-S in Bankruptcy, and forwarded in accordance with the order of Apr. 7, 1941, "For Correction of Record on Appeal, for Supplementing Record and Certification of Supplemental Record" as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing supplemental transcript of record on appeal is the sum of Two (2) Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 14th day of November A. D. 1941.

(Seal) WALTER B. MALING,
Clerk.
E. H. NORMAN,
Deputy Clerk.

[Endorsed]: #9714, Filed Nov. 14, 1941. Paul P. O'Brien, Clerk.

No. 9714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,
Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of the Western Pacific Railroad Company, a corporation,
Appellees.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 28, 1941.

Before: Denman, Mathews and Stephens, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING ARGUMENT, etc.

Ordered appeals herein argued by Mr. Frank C. Nicodemus, Jr., counsel for appellant The Western Pacific Railroad Company; and by Mr. M. C. Sloss, counsel for appellant, The Western Pacific Railroad Corporation; by Robert E. Coulson, counsel for appellant, A. C. James Co., and by Mr. Edward G. Buckland, counsel for appellant The Railroad Credit Corporation; and by Mr. Robert T. Swaine, counsel for appellee The Institutional Bondholders Committee, and continued to tomorrow for further argument.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, July 29, 1941.

Before: Denman, Mathews and Stephens, Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeals in above causes further argued by Mr. Robert T. Swain, counsel for appellee Institutional Bondholders Committee; by Mr. C. M. Clay, Assistant General Counsel, Reconstruction Finance Corporation, counsel for appellee Reconstruction Finance Corporation; and by Mr. Orville W. Wood, counsel for appellees Crocker First National Bank of San Francisco, et al.; and by Mr. Orrin G. Judd, counsel for appellant Irving Trust Company, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, November 28, 1941.

Before: Denman, Mathews and Stephens, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeals from the District Court of the United States for the Northern District of California, Southern Division.

OPINION

Before Denman, Mathews and Stephens, Circuit Judges.

Mathews, Circuit Judge:

These appeals are from an order of the District Court[1] which, in a proceeding by The Western Pacific Railroad Company, a railroad corporation (hereafter called the debtor), under § 77 of the Bankruptcy Act, 11 U.S.C.A. § 205, approved a

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(1) 34 F. Supp. 493, 505-509.

plan of reorganization which had been approved and certified to the court by the Interstate Commerce Commission.[2] The debtor has outstanding:

1. Trustees' certificates issued pursuant to paragraph (3) of subsection (c) of § 77 in the principal sum of $10,000,000. These certificates are owned and held by Reconstruction Finance Corporation.[3]

2. First mortgage 5% bonds dated June 26, 1916, due March 1, 1946, in the principal sum of $49,290,100, with accrued and unpaid interest[4] thereon of $13,143,776—a total of $62,433,876—secured by a mortgage (hereafter called the first mortgage) of which Samuel Armstrong and Crocker First National Bank of San Francisco are trustees.

3. General and refunding mortgage 5% bonds (hereafter called refunding bonds) dated January 1, 1932, due January 1, 1957, in the principal sum of $18,999,500, secured by a mortgage (hereafter called the refunding mortgage) of which Irving Trust Company is trustee.[5] These bonds are pledged to secure payment of the notes hereafter mentioned. They have not been issued for any other purpose.

4. Notes in the principal sum of $2,963,000, with accrued and unpaid interest thereon of $899,870—a total of $3,862,870—secured by the pledge of re-

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(2) 233 I.C.C. 409, 441-455.

(3) 122 F.2d 807.

(4) As of January 1, 1939, the effective date of the plan.

(5) Irving Trust Company succeeded The Chase National Bank as trustee on November 13, 1936.

funding bonds in the principal sum of $10,750,000 and other collateral. These notes are owned and held by Reconstruction Finance Corporation.

5. Notes in the principal sum of $2,445,610, with accrued and unpaid interest thereon of $146,503[6]—a total of $2,592,113—secured by the pledge of refunding bonds in the principal sum of $4,000,000 and other collateral. These notes are owned and held by Railroad Credit Corporation.

6. Notes in the principal sum of $4,999,800, with accrued and unpaid interest thereon of $1,249,950—a total of $6,249,750—secured by the pledge of refunding bonds in the principal sum of $4,249,500 and other collateral. These notes are owned and held by A. C. James Company.

7. Unsecured indebtedness to The Western Realty Company in the principal sum of $50,000, with accrued and unpaid interest thereon of $11,667—a total of $61,667.

8. Unsecured indebtedness to The Western Pacific Railroad Corporation (hereafter called the holding company) in the principal sum of $5,768,791, with accrued and unpaid interest thereon of $1,980,429—a total of $7,749,220.

9. Six per cent preferred stock of the par value of $28,300,000 (283,000 shares of the par value of $100 each) owned and held by the holding company.

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(6) These are the Commission's figures (233 I.C.C. 452). They differ slightly from those mentioned in the court's opinion (34 F. Supp. 497).

10. Common stock of the par value of $47,500,000 (475,000 shares of the par value of $100 each) owned and held by the holding company.

The plan provides, in effect, that the above mentioned securities and obligations shall be canceled and that, in lieu thereof, the reorganized company[7] shall issue new first mortgage 4% bonds dated January 1, 1939, due January 1, 1974, in the principal sum of $10,000,000, secured by a new first mortgage; income mortgage 4½% bonds (hereafter called income bonds) dated January 1, 1939, due January 1, 2014, in the principal sum of $21,219,075, secured by a so-called income mortgage; new 5% preferred stock of the par value of $31,850,297 (318,502.97 shares of the par value of $100 each); and 319,441 shares of new common stock without par value. These securities are to be distributed as follows:

To Reconstruction Finance Corporation, $10,000,000 of the new first mortgage bonds,[8] $1,185,200 of income bonds, $1,777,800 of new preferred stock and 15,788 shares of new common stock;[9] to the

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(7) The reorganized company may be the debtor or a new corporation to which all assets of the debtor shall be transferred.

(8) Thus the $10,000,000 of receivers' certificates now held by Reconstruction Finance Corporation would be exchanged for new first mortgage bonds, dollar for dollar.

(9) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Reconstruction Finance Corporation would receive $306.82 of income bonds, $460.12 of new preferred stock and 4.087 shares of new common stock.

holders of first mortgage bonds now outstanding, $19,716,040 of income bonds, $29,574,060 of new preferred stock and 230,593 shares of new common stock;[10] to Railroad Credit Corporation, $154,111 of income bonds, $241,681 of new preferred stock and 35,425 shares of new common stock;[11] to A. C. James Company, $163,724 of income bonds, $256,756 of new preferred stock and 37,635 shares of new common stock.[12] The Western Realty Company and the holding company are excluded from participation in the reorganization.

Objections to the plan were filed by the debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation, A. C. James Company, The Western Realty Company and a bondholders' committee[13] representing holders of some of the first mortgage bonds now outstanding.

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(10) Thus, for each $1,000 of indebtedness evidenced by first mortgage bonds now outstanding, holders thereof would receive $315.79 of income bonds, $473.69 of new preferred stock and 3.693 shares of new common stock.

(11) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Railroad Credit Corporation would receive $59.45 of income bonds, $93.24 of new preferred stock and 13.666 shares of new common stock.

(12) Thus, for each $1,000 of indebtedness evidenced by notes now held by it, A. C. James Company would receive $26.20 of income bonds, $41.08 of new preferred stock and 6.021 shares of new common stock.

(13) The committee consists of Frederick H. Ecker, John W. Stedman and Reeve Schley.

The objections were overruled and the plan was approved. The debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation and A. C. James Company have appealed.

Neither the debtor nor the refunding mortgage trustee was adversely affected by the plan or by the order approving it. Hence neither of them was entitled to appeal. King v. Buttolph, 9 Cir., 30 F.2d 769; Loomis v. Gila County, 9 Cir., 101 F.2d 827; In re Western Pacific R. R. Co., 9 Cir., 122 F.2d 807. Their appeals are therefore dismissed.

The holding company objected to the plan on the ground that it is not fair and equitable,[14] but is unfair and inequitable, in that it excludes the holding company from participation in the reorganization. The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939. Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 517-525.

Railroad Credit Corporation objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Recon

(14) Bankruptcy Act, § 77(e)(1), 11 U.S.C.A. § 205(e)(1).

struction Finance Corporation and the holders of first mortgage bonds now outstanding.[15] A. C. James Company objected to the plan on the ground that it is unfair and inequitable in that it discriminates unfairly in favor of Reconstruction Finance Corporation, Railroad Credit Corporation and the holders of first mortgage bonds now outstanding.[16]

That Reconstruction Finance Corporation, Railroad Credit Corporation, A. C. James Company and the holders of first mortgage bonds now outstanding should participate in the reorganization is conceded. Fairness requires that their participation should be in proportion to the value of their respective claims. The question raised by the objections of Railroad Credit Corporation and A. C. James Company was whether the plan complies with that requirement. To determine this question, it was necessary to determine, as of the effective date of the plan, the value of (1) each of the claims of Reconstruction Finance Corporation,[17] (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075 of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new

(15) See footnotes 8-11.

(16) See footnotes 8-12.

(17) Reconstruction Finance Corporation has two claims—one as holder of trustees' certificates, one as holder of the debtor's notes.

common stock which the plan provides shall be distributed to said claimants.

To determine the value of the above mentioned claims, it was necessary to determine the value of (1) the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. Consolidated Rock Products Co. v. Du Bois, supra.

To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

Subsection (e) of § 77 provides: "If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value

and certify the same to the court in its report on the plan." In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

Lacking the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails. Consoli-

dated Rock Products Co. v. Du Bois, supra. See, also, National Surety Co. v. Coriell, 289 U.S. 426, 436; First National Bank v. Flershem, 290 U.S. 504, 525; Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action.[18]

The District Court's opinion states (34 F. Supp. 501): "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned." The statement indicates a possible misconception. Subsection (e) of § 77 provides:

> "Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time

(18) Subsection (e) of § 77 provides: "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action * * *"

within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by

the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge . . ."

In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not on the court.

Order reversed and proceeding remanded with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

[Endorsed]: Opinion. Filed Nov. 28, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 9714.

WESTERN PACIFIC RAILROAD CORPORATION, et al.,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE, et al.,

Appellees.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the appeals of the Western Pacific Railroad Company and Irving Trust Company, as trustee, be, and hereby are dismissed, and that the order of the said District Court in this cause approving a plan of reorganization be, and hereby is reversed, with costs in favor of the appellants, The Western Pacific Railroad Corporation, Railroad Credit Corporation and A. C. James Co., and against the

appellees, and that this cause be, and hereby is remanded to the said District Court with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellants, The Western Pacific Railroad Corporation, Railroad Credit Corporation, and A. C. James Co., recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered November 28, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two thousand six hundred and seventy-six (2,676) pages, numbered from and including 1 to and including 2676, to be a full, true and correct copy of the entire record, excluding certain original exhibits, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 17th day of December, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

NO. 9714

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, Debtor.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS COMMITTEE and RECONSTRUCTION FINANCE CORPORATION, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of the Western Pacific Railroad Company, a corporation,

Appellees.

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9714

In the Matter of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

THE WESTERN PACIFIC RAILROAD CORPORATION, a corporation, THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, and IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of the Western Pacific Railroad Company, A. C. JAMES CO., a corporation, THE RAILROAD CREDIT CORPORATION, a corporation,

Appellants,

vs.

INSTITUTIONAL BONDHOLDERS' COMMITTEE and RECONSTRUCTION FINANCE CORPORATION,

Appellees.

It is ordered that that portion of the decree entered herein November 28, 1941 dismissing the appeals of the Irving Trust Company, as Trustee, and Western Pacific Railroad Company is set aside. The petitions for rehearing of the Irving Trust

Company, as Trustee, and Western Pacific Railroad Company for other relief are denied.

WILLIAM DENMAN
United States Circuit Judge
CLIFTON MATHEWS
United States Circuit Judge
ALBERT LEE STEPHENS
United States Circuit Judge

[Endorsed]: Filed Feb. 12, 1942, as amended by order of February 16, 1942. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9714

A. C. JAMES CO., et al.,
Appellants,
vs.
INSTITUTIONAL BONDHOLDERS COMMITTEE, et al.,
Appellees.

DECREE

Appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Northern District of California, Southern Division, and was duly submitted;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court in this cause approving a plan of reorganization be and hereby is reversed, with costs in favor of the appellants and against the appellees and that this cause be, and hereby is remanded to the said District Court with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

It is further ordered, adjudged, and decreed by this Court, that the appellants recover against the appellees for their costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered November 28, 1941, as amended by amended order of February 12, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDED RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three (3) pages, numbered from and including 2681 to and including 2683, to be a full, true and correct copy of the order of February 12, 1942, as amended by order of February 16, 1942, on petitions for rehearing, and decree as amended by amended order of February 12, 1942, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellees Ecker, et al., and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of February, 1942.

(Seal) PAUL P. O'BRIEN,
Clerk.

[fol. 2685] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942.

No. 7

ORDER ALLOWING CERTIORARI—Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2686] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 8

ORDER ALLOWING CERTIORARI—Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2687] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 20

ORDER ALLOWING CERTIORARI—Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2688] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 33

ORDER ALLOWING CERTIORARI—Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2689] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 61

ORDER ALLOWING CERTIORARI—Filed April 27, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court of the United States

October Term, 1941

No. ~~819~~ 7

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

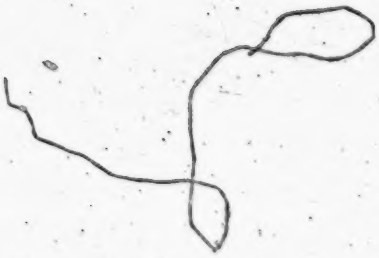
WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Petitioners.

HERBERT W. CLARK,
Of Counsel.

December 20, 1941.



INDEX

	PAGE
Opinions Below	3
Jurisdiction	3
Statement	4
1. Present Capitalization of the Debtor	5
2. New Capitalization under the Commission Plan	6
3. Distribution under the Commission Plan	6
4. Valuation Data before the Commission	8
5. Findings Made by the Commission	9
A. Findings as to capitalization	10
B. Findings as to classes excluded from participation	12
C. Findings as to allocation of new securities	13
6. Proceedings before the District Court	19
7. Action of the Circuit Court of Appeals	20
Questions Presented	23
Reasons Relied on for the Allowance of the Writ	26
Appendix	i

TABLE OF AUTHORITIES

Cases

PAGE

Akron, Canton & Youngstown Ry., 228 I. C. C. 645 (1938) 26, 27
In re Akron, Canton & Youngstown Ry. (N. D., Ohio, 1939) (not reported) 29, 30, 35, 38

Case v. Los Angeles Lumber Products Co., 308 U. S. 106 (1939) 28, 30, 31, 34, 35
Chicago & Eastern Illinois Ry., 230 I. C. C. 199 (1938), 230 I. C. C. 571 (1939) 26, 27
Chicago & North Western Ry., 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940) 26, 27
In re Chicago & North Western Ry., 35 F. Supp. 230 (N. D., Ill., 1940) 29, 30
In re Chicago & North Western Ry., 121 F. (2d) 791, (C. C. A. 7th, 1941) 44
Chicago Great Western R. R., 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939) 26, 27
Chicago, Milwaukee, St. Paul & Pacific R. R., 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940) 26, 27
In re Chicago, Milwaukee, St. Paul & Pacific R. R. (C. C. A. 7th, December 4, 1941, not yet reported) 4, 28
Chicago, Rock Island & Pacific Ry., 242 I. C. C. 298 (1940) 26, 27
Consolidated Rock Products Co. v. DuBois, 312 U. S. 510 (1941) 3, 22, 28, 30, 31, 32, 33, 35, 42
Continental Illinois National Bank & T. Co. v. Chicago, R. I. & P. Ry., 294 U. S. 648 (1935) 40

Denver & Rio Grande Western R. R., 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940) 26, 27
In re Denver & R. G. W. R. R., 38 F. Supp. 106 (D. Colo., 1940) 30, 35

PAGE

Erie R. R., 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940) 26
In re Erie R. R., 37 F. Supp. 237 (N. D. Ohio, 1940) 30, 35, 38

Gray v. Powell, 10 U. S. L. W. 4096 (U. S. S. C., December 15, 1941) 38

Jameson v. Guaranty Trust Co., 20 F. (2d) 808 (C. C. A. 7th, 1927) cert. den. 275 U. S. 569 (1927) 30

Kansas City Terminal Ry v. Central Union Trust Co., 271 U. S. 445 (1926) 31

Louisiana & North West R. R., 224 I. C. C. 58 (1937), 230 I. C. C. 171 (1938) 26
In re Louisiana & N. W. R. R., 36 F. Supp. 639 (S. D. N. Y., 1939) 35

Missouri Pacific R. R., 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940) 26, 27
In re Missouri Pacific R. R., 39 F. Supp. 436 (E. D. Mo., 1941) 29, 30, 35, 38
Mountain States Power Co., 5 S. E. C. 1 (1939) 27

Nashville, C. & St. L. Ry. v. Browning, 310 U. S. 362 (1940) 32
National Public Utilities Corp., 5 S. E. C. 601 (1939) 27
New York, New Haven & Hartford R. R., 239 I. C. C. 337 (1940) 26, 27
In re New York, N. H. & H. R. R. (D. Conn., Dec. 8, 1941, not yet reported) 30, 35, 38
Northern Pacific Ry. v. Boyd, 228 U. S. 482 (1913). 31

Palmer v. Massachusetts, 308 U. S. 79 (1939) 38, 39
Palmer v. Warren, 310 U. S. 132 (1940) 38, 39
Peoples Light and Power Co., 2 S. E. C. 829 (1937). 27

In re Radio-Keith-Orpheum Corp., 106 F. (2d) 22 (C. C. A. 2d, 1939) cert. den. 308 U. S. 622 (1940) 30

PAGE

St. Louis-San Francisco Ry., 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940) 26, 27
St. Louis Southwestern Ry. (I. C. C., July 15, 1941, not yet reported) 26, 27
Securities and Exchange Commission v. U. S. Realty & Improvement Co., 310 U. S. 434 (1940) 42
In re 620 Church St. Bldg. Corp., 299 U. S. 24 (1936) 29
Spokane International Ry., 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939) 26, 27

United States v. Louisiana, 290 U. S. 70 (1933) 38
United States v. Morgan, 313 U. S. 409 (1941) 38, 39
Utilities Power & Light Corp., 5 S. E. C. 483 (1939) 27

Western Pacific R. R., 230 I. C. C. 61 (1938), 233 I. C. C. 409 (1939), 236 I. C. C. 1 (1939) 26
West Ohio Gas Co., 3 S. E. C. 1014 (1938) 27, 29

***Statutes*[1]**

Bankruptcy Act, § 24(c) 4
Chapter X 43

Interstate Commerce Act, § 14 (See Appendix, vi) .. 37

Judicial Code, § 240(a) 3

La Follette Act (valuation of railroads) (49 U. S. C. § 19a) 8, 28

Public Utility Holding Company Act, § 11(f) 27, 29

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[1]Citations to Section 77 of the Bankruptcy Act are too frequent to enumerate. Pertinent portions of Section 77 are printed in the Appendix.

Supreme Court of the United States

October Term, 1941

No.

IN THE MATTER OF

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Committee[1] representing a Group of Institutional Holders of the First Mort-

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[1]The Committee was permitted to intervene in the proceeding before the Interstate Commerce Commission by order entered July 9, 1936 (R. 2620) and in the proceeding before the District Court by order entered November 27, 1939 (R. 2620).

gage Bonds of the Debtor,[1] organized pursuant to the provisions of Section 77(p) of the Bankruptcy Act [11 U. S. C. § 205 (p)], respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a Decree entered November 28, 1941, by said Court, reversing an Order of the United States District Court for the Northern District of California, Southern Division.

The District Court, in a proceeding for the reorganization of The Western Pacific Railroad Company, the Debtor, under Section 77 of the Bankruptcy Act (11 U. S. C. § 205), by Order entered August 15, 1940, approved the plan of reorganization (hereinafter called the Commission Plan) formulated and approved by the Interstate Commerce Commission (hereinafter called the Commission) and certified by it to the District Court (R. 1600). On appeal by several junior interests, the Circuit Court of Appeals for the Ninth Circuit entered the Decree here sought to be reviewed, remanding the proceeding to the District Court with directions to dismiss it, or in the Court's discretion or on motion of any party in interest, to refer it back to the Commission for further action. The Decree also imposes costs of the appeal upon the creditors who defended the Commission Plan before the District Court and the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals interprets, your petitioners submit erroneously, the decision of this

[1]The members of the Group are John Hancock Mutual Life Insurance Company; Metropolitan Life Insurance Company; Mutual Benefit Life Insurance Company; New York Life Insurance Company; Prudential Insurance Company of America; Travelers Insurance Company; and The Chase National Bank of the City of New York. Their aggregate holdings of First Mortgage Bonds are $16,641,400, principal amount, out of a total of $49,290,100, or 34%.

Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941). It bases its Decree primarily upon a finding that Section 77 imposed the duty upon the Commission to make 16 specific determinations of value in terms of dollars and cents, and a further finding that "That duty was not performed" (R. 2671), despite specific findings by the Commission that the claims of unsecured creditors and the equity of the stockholders "have no value" and specific evaluations of the other existing claims in terms of the proposed new securities.

OPINIONS BELOW

The Commission's Original Report and Order, dated October 10, 1938 (R. 194), approving a plan for the reorganization of the Debtor, is reported at 230 I. C. C. 61. The Commission's Report and Order on further consideration, dated June 21, 1939 (R. 300), modifying its plan for reorganization of the Debtor, is reported at 233 I. C. C. 409. The Commission's Order dated September 19, 1939 (R. 884), denying the petition of the Debtor seeking modification of the Commission Plan, is reported at 236 I. C. C. 1.

The opinion of the District Court, dated August 15, 1940 (R. 1569), approving the Commission Plan, is reported at 34 F. Supp. 493. The opinion of the Circuit Court of Appeals, dated November 28, 1941 (R. 2663), reversing the District Court, has not yet been officially reported.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. § 347(a)], and Section

24(c) of the Bankruptcy Act [11 U. S. C. § 47(c)]. The Decree of the Circuit Court of Appeals for the Ninth Circuit was entered November 28, 1941 (R. 2675-6).

STATEMENT

This proceeding is the first in which review has been sought before this Court of a plan of reorganization for a railroad corporation, formulated pursuant to the provisions of Section 77 of the Bankruptcy Act (11 U. S. C. § 205). The findings of the Commission and the basic legal principles adopted by the Commission in the distribution of new securities under the Commission Plan, affirmed and approved by the District Court, but now disapproved by the Circuit Court of Appeals for the Ninth Circuit, are substantially the same as the findings made, and the principles adopted, in numerous other railroad reorganizations under Section 77, some of which are pending in district courts and others of which have been approved by various district courts and are now pending on appeal in various circuit courts of appeals.[1]

The Debtor filed its petition under Section 77, August 2, 1935 (R. 11, 18). The proceedings before the Commission, in which hearings commenced March 23, 1936, culminated September 28, 1939, in the certification of the Commission Plan by the Commission to the District Court (R. 1571).

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[1]The Circuit Court of Appeals for the Seventh Circuit, on December 4, 1941, reversed the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, approving the plan of reorganization for the *Chicago, Milwaukee, St. Paul and Pacific R. R.* As hereinafter pointed out, this decision (not yet reported) is in some respects in conflict with that of the Circuit Court of Appeals for the Ninth Circuit in the instant case, but in other respects is in accord.

1. Present Capitalization of the Debtor (R. 1576)

Claim or Interest	Principal of claim or interest	Accrued interest at contract rate to January 1, 1939[1]	Total claim, including interest at contract rate to January 1, 1939[1]
tees' Certificates	$	$	$
RFC)	10,000,000.00	—	10,000,000.00
isturbed existing equip-			
ent obligations	2,750,050.00	94,202.00	2,844,252.00
Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
[2] Notes[3]	2,963,000.00	899,869.98	3,862,869.98
[2] Notes[3]	2,445,609.88	145,314.23	2,590,924.11
[2] Notes[3]	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$ 72,448,559.88	$15,533,112.87	$87,981,672.75
Corp.[2] and Western Realty			
.[4] advances on open ac-			
unt	5,818,791.00	1,992,096.00	7,810,887.00
Total debt	$ 78,267,350.00	$17,525,208.87	$ 95,792,559.75
Corp., owner of the			
tire outstanding 283,000			
ares of Preferred Stock,			
r value $100 per share	28,300,000.00	—	28,300,000.00
Corp., owner of the			
tire outstanding 475,000			
ares of Common Stock,			
r value $100 per share	47,500,000.00	—	47,500,000.00
Totals	$154,067,350.88	$17,525,208.87	$171,592,559.75

The effective date of the Commission Plan.

Hereinafter the following abbreviations are used: RFC—Reconstruction Finance Corpora- RCC—Railroad Credit Corporation; ACJ—A. C. James Co.; WP Corp.—Western ic Railroad Corporation.

The RFC Notes, the RCC Notes, and the ACJ Notes are collectively secured, in the ic amounts hereinafter stated, by all of the $18,999,500, principal amount, of the Debtor's nding Bonds. No Refunding Bonds have been issued except for such pledge.

The RFC Notes are secured by the pledge of $10,750,000 of said Refunding Bonds and by ond lien upon $2,000,000 of Refunding Bonds pledged under the RCC Notes.

The RCC Notes are secured by the pledge of $4,000,000 of Refunding Bonds, of which 0,000 were repledged with it by ACJ, and by a second lien on all the collateral pledged RFC.

The ACJ Notes are secured by the pledge of $4,249,500 of Refunding Bonds and by a d lien upon $2,000,000 of Refunding Bonds originally pledged under the ACJ Notes but lged by ACJ under the RCC Notes.

n addition, both the RFC Notes and the RCC Notes are secured by certain so-called "ac- nodation collateral", not owned by the Debtor, but pledged to secure said Notes by WP

The RCC Notes are also secured by a first lien on the Debtor's distributive share in und established by the Marshalling and Distributing Plan, 1931. The right of RFC and to resort to this collateral is not affected by the Commission Plan (R. 271, 394-5).

Western Realty Co. is a wholly owned subsidiary of WP Corp., and a small part of the ured debt of the Debtor stands in its name.

2. New Capitalization under the Commission Plan (R. 1575)

Title of issue	Presently to be issued	Annual charges
Undisturbed existing equipment obligations	$ 2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total annual fixed charges		$ 494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative	21,219,075	954,858
Total funded debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$ 1,949,060
Income Mortgage Sinking Fund		106,095
Participating 5% Preferred Stock ($100 par value). Dividends non-cumulative, participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of $3 per share	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$ 3,647,670
Common Stock (without par value)	319,441 shs.	

3. Distribution under the Commission Plan

The claim of the First Mortgage to a first lien, subject to the Trustees' Certificates, upon substantially all the Debtor's assets, except the securities of certain subsidiary corporations specifically pledged with the Refunding Mortgage Trustee,[1] was disputed, and the value of the collateral upon which the Refunding Mortgage is admittedly a first

[1] In 1934, pursuant to an agreement extending the payment of 1934 interest on the Debtor's First Mortgage Bonds, RFC,

lien was also disputed. In order to allocate the new securities, the Commission preliminarily decided the disputed lien questions, deciding them in favor of the First Mortgage, but expressly subject to ultimate determination by the District Court.[1] The Commission also decided the disputed value questions, in the manner hereinafter stated.

The Commission then found that "the equity of the existing stock has no value," that "the claims of the unsecured creditors have no value," that the securities allocable to the RFC Notes, RCC Notes, and ACJ Notes are "inadequate in value to satisfy their claims," and that "the equity of" RCC in the collateral pledged with RFC "has no value". After making the additional findings hereinafter stated, the Commission excluded from participation in the reorganization the unsecured claims and stock held by WP Corp. and Western Realty Co., and distributed the new capitalization as follows (R. 1578):

Existing Securities of Debtor	New First Mortgage 4% Bonds Series A	New Income Mortgage 4½% Bonds Series A	New 5% Preferred Stock Series A ($100 Par)	New Common Stock (No Par)
First Mortgage 5% Bonds		$19,716,040	$29,574,060	230,593 shs.
RFC (In exchange for Trustees' Certificates and RFC Notes)	$10,000,000	1,185,200	1,777,800	15,788 shs.
RCC Notes		154,111	241,681	35,425 shs.
ACJ Notes		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

ACJ, RCC and WP Corp. (the only other creditors affected by the Commission Plan) agreed to subordinate their claims against the Debtor until this 1934 interest (still unpaid) is paid in full. Accordingly the case presents no problem as to the relative rights of senior and junior creditors in unmortgaged assets. I. C. C. Exhibits 117-121 (not printed pursuant to stipulation at R. 2532-8, 2614).

[1]Record references for all the factual statements made under this heading are hereinafter set forth.

4. Valuation Data before the Commission

The Commission Plan was formulated by the Commission itself after more than a dozen different plans had been proposed by the various parties and upon evidence occupying 743 pages of the record. This evidence included physical descriptions of the properties of the Debtor and each of its subsidiaries (R. 1861-3, 1886-1898, 2049-2060), comprehensive data concerning valuation proceedings affecting those properties conducted by the Commission under Section 19(a) of the Interstate Commerce Act (R. 2044-8), analyses of the Debtor's investment accounts (R. 1874-5, 1885-1894, 2040-2043, 2058-2060) and its financial history (R. 1859-1873), detailed studies of revenues and expenses for the years since 1922, broken down as among the Debtor and its subsidiaries (R. 1958, 2033-2092, 2121-8, 2239-2260), detailed forecasts of revenues and earnings for the then future years 1936 to 1940, also broken down as among the Debtor and its subsidiaries (R. 1959-1998, 2027-2032, 2118-2193), and testimony with reference to the probable effect upon revenues and net income of the rehabilitation program then under way (R. 1985-6, 2145-2152, 2172-2185, 2225-2233), of the Northern California Extension, completed in 1931 (R. 1942-8, 2094-8), and of the Dotsero Cutoff, completed in 1934 (R. 1939, 2099-2100). Extensive testimony also dealt with the various lien controversies between the First Mortgage and the Refunding Mortgage (R. 2295-2563).

After hearings, the Commission's Bureau of Finance served upon all the parties a Tentative Report proposing findings and conclusions, including a reorganization plan (R. 116). Following exceptions to this Tentative Report by all parties and a hearing before the full Commission, the

Commission entered its Report and Order dated October 10, 1938, making findings and approving a plan of reorganization (R. 194). Upon petitions for modifications of this Report and Order and a hearing before the full Commission, the Commission entered its Report and Order dated June 21, 1939 (R. 300), modifying both the findings and the plan of reorganization embodied in its earlier Report and Order. After a petition by the Debtor for a "further rehearing and modification", the Commission entered its Report and Order dated September 19, 1939 (R. 884), reaffirming its findings and conclusions of October 10, 1938, as modified June 21, 1939, and denying the Debtor's petition.

5. Findings Made by the Commission

The Commission defined the requirements of "the public interest" with respect to the new capital structure as follows:

"The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent, be within its probable earning power" (R. 243-4).

"If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that

such investment is justified by the probable earnings reasonably foreseeable for the future" (R. 244).

The Commission then made the following findings which the Circuit Court of Appeals for the Ninth Circuit has now held to be inadequate:

A. *Findings as to capitalization*

1. Following analysis of the various proposals of the different parties in the light of the Debtor's earnings experience: "if these data are not to be ignored, * * * the fixed interest charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and secure necessary new capital in the future" (R. 246).

2. Following further analysis of the Debtor's earnings experience and analysis of the testimony respecting prospective earnings: "On the basis of the facts heretofore recited with respect to traffic and earnings, we find that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital and sinking funds should not exceed $2,000,000 per annum" (R. 253).

3. Following further analysis of the proposals of the various parties with respect to the new stock issuable and further analysis of the Debtor's forecasts of future earnings: "As hereinbefore stated, the debtor's estimate of income available for interest averaged $2,715,306 per year for the period 1936-40, inclusive, the maximum amount for any one year in the period (1940) being $3,769,836. That

amount, with prior charges of $1,898,223, would permit the payment of dividends at the rate of 5 percent on only $37,432,000 of stock. It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740-3/10 shares of preferred stock of the par value of $100 per share, and not more than 313,703 shares of no-par-value common stock"[1] (R. 257).

4. On the basis of the foregoing findings the Commission, by its Report and Order dated October 10, 1938, fixed the permissible new capitalization (R. 259, 268). By its later Report and Order dated June 21, 1939, it slightly modified this capitalization to that provided by the Commission Plan (R. 309-310).

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[1]The amounts of Preferred and Common Stock thus found permissible were slightly modified by the Commission's Report and Order dated June 21, 1939, and the amounts thereof fixed as provided by the Commission Plan. (R. 310-311).

B. *Findings as to classes excluded from participation*

5. "We have hereinbefore found that considering the past, present, and probable future earnings of the debtor, its investment, the data of record pertaining to its rate-making value, and all other relevant data of record, we can not approve the issue of new securities in a greater amount than that hereinbefore approved. On the same basis and for the same reasons we find, therefore, that there is no equity over and above the securities hereinbefore approved; that *the equity of the existing stock has no value,* and hence holders of such stock are not entitled to participate in the plan. Further, considering that the reorganized company's income available for interest and dividends must total $4,318,035, plus any undistributed profits tax that will be payable, before dividends of $3 per share may be paid on the new common stock, it is clear that *even though all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims.* For this reason, and for the reasons stated with respect to the finding that the equity of the existing stock has no value, we find that *the claims of the unsecured creditors,* of the Western Pacific Railroad Corporation, and of the Western Realty Company, *have no value,* and hence no securities or cash should be distributed under the plan in respect to those claims"[1] (R. 269-270) (Italics added).

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[1]The Commission had no problem of dealing with the rights of unsecured creditors to participate in unmortgaged assets. See p. 6, n. 1, *supra.*

6. Upon the Debtor's petition for modification of the Reports and Orders dated October 10, 1938, and June 21, 1939, by increasing the amount of Income Bonds $4,475,000, decreasing the amount of Preferred Stock $3,278,137, and increasing the no par value Common Stock 205,859 shares: "The allocation of 8.54 percent of the new common stock to the Western Pacific Railroad Corporation, in its capacity as a general creditor, and 23.59 percent to it in its capacity as a stockholder, and 0.07 percent to the Western Realty Company as a general creditor would require a reversal of our findings that those interests have no value, or a finding that the concessions required of the senior interests are justified and are compensated by concessions to be made by the junior interests. This proposed sharing of common stock affects also our previous finding as to what constitutes fair and equitable treatment of part of the interests of the first-mortgage bondholders. The debtor's petition does not set forth or offer to prove facts indicating that our findings with respect to these matters were erroneous or furnish any other basis for a finding that the proposed new plan would be fair and equitable". (R. 889-890).

C. *Findings as to allocation of new securities*

7. The Commission found that all of the permissible new fixed charge securities would be absorbed by undisturbed equipment obligations and new First Mortgage Bonds required to pay or refund the admittedly preferred $10,000,000 Trustees' Certificates (R. 247, 311).

8. As already stated, the Commission found that the First Mortgage was a legal or equitable first lien upon all of the assets of the Debtor, except cash and securities

specifically held in pledge by the Refunding Trustee. In its Report and Order dated October 10, 1938, the Commission found that the First Mortgage Bondholders' claim of $49,290,100 principal amount, plus accrued interest, secured by these assets, entitled them to all the new Income Mortgage Bonds ($19,716,040), and all the new Preferred Stock ($29,574,060), a par value total of $49,290,100, and 154,241 shares, or slightly less than half, of the new no par Common Stock (R. 270). This allocation was modified by the Report and Order dated June 21, 1939, primarily by increasing the no par Common Stock allocable to the existing First Mortgage Bondholders, as against their accrued interest of $13,143,777, to 230,593 shares and by allocating additional Income Bonds and Preferred Stock to the existing Refunding Bonds (R. 317).

9. The securities pledged under the Refunding Mortgage[1] were a note and stock of Tidewater Southern Railway Company, all of whose funded debt and 97.5% of whose stock are owned and so pledged by the Debtor (R. 313), Central California Traction Company, of whose bonds and stock the Debtor owns and has pledged 33⅓% (R. 314), and Alameda Belt Line Company, of whose stock the Debtor owns and has pledged 50% (R. 315). The Commission analyzed the property accounts, earnings records and earnings prospects of these three companies. In the light of the contributions which the Debtor has been compelled to make to continue the operations of the last two mentioned companies[2] and their poor earnings record, the

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[1]In addition there are so pledged some admittedly worthless notes of other subsidiaries (R. 1095).

[2]These unreimbursed contributions totalled more than $384,000 for the six years 1930-1935 (R. 2084, 2088).

Commission found that "The holdings of the debtor in the securities of the Central California Traction Company and the Alameda Belt Line, * * *, do not appear to be of much value, except as the debtor through such holdings may be able to secure traffic for its lines which it might not otherwise be able to secure. * * * Thus the lien on the securities of these two companies *has no material value*" (R. 314-5) (Italics added). In respect of Tidewater Southern, the Commission found that the rate-making value of all its property as of December 31, 1935 was $1,850,000 (R. 314). This was 1.3% of the comparable System valuation found by the Commission as of the same date. The Commission also found Tidewater Southern's reported earnings and the revenues from traffic interchanged between it and other lines of the Debtor's System (R. 314). Such reported earnings for the six-year period 1930-1935 (R. 2077) were 7.2% of System earnings, as adjusted (R. 1592), for the same period before deducting from System earnings the Debtor's contributions (R. 2084, 2088) to the deficits of the other two properties on whose securities the Refunding Mortgage was also a first lien. But, said the Commission, "It is apparent that the Tidewater Southern is a paying railroad and also a valuable feeder for the debtor. But its earnings are, to a large extent, dependent upon the divisions of joint rates accorded it by the debtor" (R. 315).[1] After the foregoing findings and after reference to the cash held by the Refunding Mortgage Trustee (R. 313), the Commission found: "From the foregoing, it ap-

[1]It will be remembered that the Debtor owns all the funded debt and 97.5% of the outstanding stock of Tidewater Southern Railway Company, so that the fairness of these rate divisions was not a matter of importance except in reorganization.

pears that the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955" (R. 315). The amounts stated represent 3.5% of the total Income Bonds and Preferred Stock to be issued in the reorganization.

10. The RFC Notes, the RCC Notes, and the ACJ Notes were secured by pledge, respectively, of 56.6%, 21.1%, and 22.3% of the outstanding Refunding Bonds. "Having found that" the securities "available for distribution are inadequate in value to satisfy the aggregate claims of these parties" (R. 271) the Commission found that "The value of each of the claims is proportionate to the collateral securing it," (R. 271) and hence that the allotment of new securities representing the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271).

No findings were made as to the value of so-called "accommodation collateral" held by RFC and RCC, but the right of these parties to resort to this collateral was expressly left unimpaired by the Commission Plan (R. 271, 394-5).

11. To insure payment or refunding of the $10,000,000 Trustees' Certificates upon terms not unduly onerous to the other creditors, the Commission Plan, as approved by the Report and Order dated June 21, 1939, provided for treating RFC's entire "bundle of rights" (its $10,000,000 Trustees' Certificates and the RFC Notes) together, by allotting RFC $10,000,000 of new First Mortgage Bonds (to be taken by RFC in exchange for the Trustees' Certificates or to be purchased by RFC at par and the proceeds thereof ap-

plied to the payment of the Trustees' Certificates) and allotting to the RFC Notes treatment *pari passu* with that allotted the Debtor's existing First Mortgage Bonds. With respect to RFC's acceptance of the new First Mortgage Bonds in exchange for its Trustees' Certificates, the Commission found "that in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the debtor's existing first-mortgage bonds" (R. 312). RFC was thus allotted, to offset the difference between the value of its $10,000,000 short term Trustees' Certificates and the value of the $10,000,000 new long term First Mortgage Bonds, to be issued under an open mortgage, $771,025 more new Income Mortgage Bonds and $1,128,282 more new Preferred Stock, but 29,360 less shares of new no par value Common Stock than it would have received solely on the basis of the Refunding Bonds pledged as collateral for the RFC Notes.

12. The "allocation of reorganization securities to the Finance Corporation exhausts the value of the collateral pledged by the debtor under the notes held by the Finance Corporation, and * * * *the equity of the Credit Corporation in such collateral has no value*" (R. 316) (Italics added).

13. On the basis of the findings referred to in the foregoing paragraphs 8, 9, 10 and 12, the Commission divided between the RCC Notes and the ACJ Notes the Income Bonds and Preferred Stock found by the Commission to be allocable as against their respective pledged proportions of the Refunding Bonds. The no par Common Stock remaining after filling out the existing First Mortgage Bonds with 230,593 shares against their accrued interest of $13,143,777, and allotting the RFC Notes *pari passu*

treatment, was then divided between RCC and ACJ. Since this Common Stock necessarily represented (a) the value of the second lien of the Refunding Mortgage upon those assets of the Debtor upon which the First Mortgage was a first lien (R. 267, 271) and (b) any hope for future value of the assets upon which the Refunding Mortgage was a first lien but which the Commission found to be of "no material value" (R. 315), it was allocated to the RCC Notes and ACJ Notes proportionately to the Refunding Bonds held by them as collateral.

14. The ultimate finding of the Commission was: "These securities [*i.e.*, all the new securities available for distribution] represent the equitable equivalent of the debtor's assets available for the satisfaction of claims * * *. Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: (1) First-mortgage bondholders, $19,716,040 of income-mortgage bonds, $29,574,060 of preferred stock, and 230,593 shares of common stock (the common stock to be taken at the price of $57 a share); (2) Finance Corporation, $1,185,200 of income-mortgage bonds, $1,777,800 preferred stock, and 15,788 shares of common stock (the common stock to be taken at a price of $57 a share); (3) Credit Corporation, $154,111 of income mortgage bonds, $241,681 preferred stock, and 35,425 shares of common stock, (the common stock to be taken at a price of $62 a share); and (4) James Company, $163,724 of income mortgage bonds, $256,756 preferred stock, and 37,635 shares of common stock (being the amount of common stock which bears to the amount of common stock allotted to the claim of the

Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim)" (R. 316-318).

The Commission did not specifically find any certain and absolute value in terms of dollars and cents for all or any part of the Debtor's property, for any of the existing claims against or interests in the Debtor, or for any of the new securities contemplated by the Commission Plan. The lack of such findings is held by the Circuit Court of Appeals for the Ninth Circuit to vitiate a[illegible]e other findings and all the conclusions of the Commission.

6. Proceedings before the District Court

Upon certification of the Commission Plan to the District Court, objections and claims for equitable treatment were filed by RCC, ACJ, WP Corp., Western Realty Company, the Debtor, and the Refunding Trustee, which attacked, as to both form and substance, substantially every provision of the Commission Plan. Although the Committee and RFC also filed some objections and claims for equitable treatment, each of them stated that if the District Court approved the Commission Plan as an entirety they would waive their objections (R. 1760-1761, 1770).

Before the District Court, testimony was taken occupying 293 pages of the record (R. 1283-1529; 1530-1567). On August 15, 1940, the District Court filed a 31 page opinion (R. 1569-1600) overruling all of the objections and, after dealing specifically with the Commission's findings of value, determining them to be adequate in form and correct in substance. The District Judge's opinion further

expressed his accord with all of the conclusions of the Commission on the numerous points in dispute.

Pursuant to its opinion, the District Court, on August 15, 1940, entered an Order approving the Commission Plan, adopting the findings of fact made by the Commission, and making all the other findings in respect of the Commission Plan required at that stage of the proceedings by Section 77 (R. 1600-1607).

7. Action of the Circuit Court of Appeals

From the Order last mentioned appeals were taken to the Circuit Court of Appeals for the Ninth Circuit by RCC, ACJ, the Refunding Mortgage Trustee, WP Corp., and the Debtor.[1] Again the appellants attacked almost every aspect of the Commission Plan, although many of the objections argued before the District Court seem to have been abandoned. The Committee, the First Mortgage Trustees and RFC, designated as appellees, defended the Commission Plan as an entirety.

The Order of the District Court was reversed and the proceeding remanded to the District Court "with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action" (R. 2674). Without referring to any of the extensive findings of the Commission above recited, or the careful discussion by the District Court of the prob-

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[1] The appeals of the Refunding Mortgage Trustee and the Debtor were dismissed upon the ground that neither "was adversely affected" (R. 2668). The pledgees of all the Refunding Bonds were parties to the appeal. On December 20, 1941, counsel for the Refunding Trustee sent counsel for the petitioners a copy of a petition for rehearing, which they stated they intended to file in the Circuit Court of Appeals.

lems of value, the Circuit Court of Appeals thus disposed of the case:

> "Subsection (e) of § 77 provides: 'If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan.' In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed" (R. 2670-2671).

In addition to this holding, the Circuit Court of Appeals "made certain statements which if taken literally do not

comport with the requirements of the absolute priority rule". *Consolidated Rock Products Co.* v. *Du Bois, supra,* 312 U. S. at 530. As in that case, these statements, together with other statements of the Circuit Court of Appeals with reference to the relative functions of the Court and the Commission, require correction by this Court.

The opinion announces this guiding rule for distribution among existing securityholders: "Fairness requires that their participation should be in proportion to the value of their respective claims" (R. 2669). The opinion does not further clarify its announced rule. A mathematical formula based on dollars and cents valuations of properties, existing claims, and new securities seems to be required rather than determination of the relative order of priority of the participating existing claims in the system earnings.

The opinion of the District Court, in addition to expressing the District Judge's own independent analysis of the valuation problem and his own independent conclusions, had said:

> "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned" (R. 1588).

Quoting the foregoing statement of the District Court, the opinion of the Circuit Court of Appeals states:

> "The statement indicates a possible misconception. * * *
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> * * * * * * *

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject * * *" (R. 2672-4).

The significance of this comment of the Circuit Court of Appeals, as evidencing its belief that the District Court was under a duty to redetermine *all* of the issues involved in the reorganization and assert its own "informed independent judgment" if in any respect its views differed from those of the Commission, is accentuated by the fact that the District Court, following the quotation commented on by the Circuit Court of Appeals, had said (R. 1596-7):

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court."

QUESTIONS PRESENTED

1. Were the findings that "the equity of the existing stock has no value" and that "the claims of the unsecured

creditors * * * have no value," if supported by the requisite valuation data, sufficient to sustain the conclusions that the holders of such stock and such unsecured creditors are not entitled to participate in the reorganization?

2. Were the findings that the securities available for distribution to the RFC Notes, the RCC Notes and the ACJ Notes against the Refunding Bonds held by them as collateral were "inadequate in value to satisfy the aggregate claims of these parties," and that the "allocation of reorganization securities to" RFC "exhausts the value of the collateral pledged by the debtor" under the RFC Notes and that "the equity of" RCC "in such collateral has no value," if supported by the requisite valuation data, sufficient to support the conclusion that the allocation of new securities representing the pledged Refunding Bonds, as between RFC, RCC and ACJ, "should be made on the basis of the collateral held rather than on the amount of the claims"?

3. Must the allocation of new securities under a Section 77 railroad reorganization plan between mortgage bonds, having liens of different rank on the same assets and also liens on different assets, be "in proportion to the value of their respective claims", determined by absolute dollars and cents valuations (a) of the properties upon which they are, respectively, first liens, and (b) of the new securities proposed to be distributed in the reorganization? Or should each existing class be given its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim in terms of the various classes of new securities, having regard for the relative order of priority of the respective existing claims upon the system earnings at the

various levels represented by the proposed new securities and all other relevant factors, all appraised by the Commission's expert judgment subject to the Court's approval of the result as fair and equitable?

4. Even if other allocations must be made on the basis of the mathematical dollars and cents valuation formula prescribed by the Circuit Court of Appeals, may not the preferred claim of RFC on its $10,000,000 Trustees' Certificates and its junior claim on the RFC Notes be dealt with as an "entire bundle of rights" and on the basis of a practicable and fair compromise in order to obviate the necessity of providing $10,000,000 of new money on terms necessarily more onerous to all present creditors of the Debtor?

5. Was the valuation data contained in the record sufficient to support the findings and conclusions of the Commission as to those entitled to participate in the reorganization and as to the allocations of new securities made by the Commission Plan?

6. What are the respective jurisdictions of the Commission and the Court with respect to approval of a reorganization plan under Section 77? Specifically, does not Section 77 vest in the Commission exclusive jurisdiction (subject only to review for arbitrary exercise) to determine whether a railroad reorganization plan is "compatible with the public interest", including jurisdiction to determine total capitalization, the classification thereof, and the financial details of each class of proposed capitalization?

7. Should not this Court, upon the entire record, reverse the Decree of the Circuit Court of Appeals and

affirm the Order of the District Court, approving the Commission Plan, in order to expedite the reorganization in the public interest and obviate the delay and expense which would otherwise result both to the public and to the private parties involved?

8. Are securityholders who defend in the circuit courts of appeals plans promulgated and approved by the Commission, and also approved by the district courts, liable for the costs of the appeals if the appeals are successful, or should such costs be assessed directly against the debtor's estate?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Pursuant to Section 77, the Commission has formulated plans of reorganizations for fifteen Class I railroads.[1] Of these plans six have been consummated,[2] the remainder being at various stages of the procedure pre-

[1] *Akron, Canton & Youngstown Ry.*, 228 I. C. C. 645 (1938); *Chicago & Eastern Illinois Ry.*, 230 I. C. C. 199 (1938), 230 I. C. C. 571 (1939); *Chicago Great Western R. R.*, 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939); *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940); *Chicago & North Western Ry.*, 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940); *Chicago, Rock Island & Pacific Ry.*, 242 I. C. C. 298 (1940); *Denver & Rio Grande Western R. R.*, 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940); *Erie R. R.*, 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940); *Louisiana & North West R. R.*, 224 I. C. C. 58 (1937), 230 I. C. C. 171 (1938); *Missouri Pacific R. R.*, 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940); *New York, New Haven & Hartford R. R.*, 239 I. C. C. 337 (1940); *St. Louis-San Francisco Ry.*, 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940); *St. Louis Southwestern Ry.* (July 15, 1941, not yet reported); *Spokane International Ry.*, 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939); *Western Pacific R. R.*, 230 I. C. C. 61 (1938), 233 I. C. C. 409 (1939), 236 I. C. C. 1 (1939).

[2] Akron, Canton & Youngstown Ry.; Chicago & Eastern Illinois Ry.; Chicago Great Western R. R.; Erie R. R.; Louisiana & North West R. R.; and Spokane International Ry.

scribed by Section 77. In thirteen of these plans,[1] classes of stockholders have been excluded from participation, and in four,[2] classes of creditors have also been excluded. In all these plans the findings of the Commission upon which the exclusions of stockholders and creditors and allocations of new securities among existing claims were based, the valuation data upon which the findings were based, and the legal principles applied in allocation were substantially identical in character with those found by the Circuit Court of Appeals for the Ninth Circuit to be inadequate and erroneous in the instant case.

The Securities and Exchange Commission, in dealing with the bankruptcy reorganization of public utility holding companies under Section 11(f) of the Public Utility Holding Company Act (15 U. S. C. § 79k(f)), performing functions similar to those performed by the Interstate Commerce Commission under Section 77 [*Peoples Light and Power Co.*, 2 S. E. C. 829, 847 (1937)], has in many cases predicated its plans upon similar findings and similar valuation data.[3]

If, therefore, the decision of the Circuit Court of Appeals for the Ninth Circuit is to stand, the years of effort and the literally millions of dollars expended by both the Interstate Commerce Commission and the affected security-

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[1]Akron, C. & Y.; Chicago & E. I.; Chicago Great Western; Chicago, M., & St. P. & P.; Chicago & North Western; Chicago, R. I. & P.; Denver & R. G. W.; Missouri Pacific; New York, N. H. & H.; St. Louis-S. F.; St. Louis Southwestern; Spokane International; Western Pacific.

[2]Denver & R. G. W.; St. Louis-S. F.; Spokane International; Western Pacific.

[3]*Mountain States Power Co.*, 5 S. E. C. 1 (1939); *National Public Utilities Corp.*, 5 S. E. C. 601 (1939); *Utilities Power & Light Corp.*, 5 S. E. C. 483 (1939); *West Ohio Gas Co.*, 3 S. E. C. 1014 (1938).

holders in all pending railroad reorganizations will have been largely futile. They will all revert to the Commission for detailed dollars and cents valuations of properties and old and new securities, inevitably resulting in long delay and great expense to all concerned. Memory of the Commission's valuation proceedings under the La Follette Act (49 U. S. C. § 19a) and their ultimate futility makes this an unhappy prospect. And then, says the Circuit Court of Appeals for the Ninth Circuit, the district courts must determine anew, by their own independent judgments, not concluded by any determination of the Commission, all of the questions involved in the reorganizations.

If this decision is not required by any existing decision of this Court, and as is believed, is in square conflict with decisions of this Court hereinafter referred to, the public interest will be promoted by the prompt settlement in this Court of all the questions involved.

2. In holding inadequate, as a basis for excluding stockholders from participation in the reorganization, the Commission's finding and certification that "the equity of the existing stock has no value" (and, by parity of reasoning, in holding inadequate the Commission's finding that "the claims of the unsecured creditors * * * have no value" and that "the equity of" RCC in "the collateral pledged" under the RFC Notes "has no value"), the Circuit Court of Appeals for the Ninth Circuit decided an important question of federal law in conflict with the decisions of this Court in *Consolidated Rock Products Co.* v. *DuBois*, *supra*; *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939), with the decision of the Circuit Court of Appeals for the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul and Pacific R.R.* (December 4, 1941, not yet reported), and with

the decisions of the federal district courts in *In re Akron, Canton & Youngstown Ry.* (not reported, N. D. Ohio, 1939), *In re Chicago & North Western Ry.*, 35 F. Supp. 230, 245 (N. D. Ill., 1940), and *In re Missouri Pacific R.R.*, 39 F. Supp. 436, 444 (E. D. Mo., 1941), being all the district court decisions dealing with the specific point.

The express language of Section 77(e), as well as the decisions of this Court above cited, establish that the fact which necessitates exclusion of any class of existing securityholders from participation in a reorganization is the fact that the claim or interest of that class "has *no* value". *In re 620 Church St. Bldg. Corp.*, 299 U. S. 24, 27 (1936). If absence of value is certified by the Commission to the Court pursuant to subsection (e), and is established by adequate valuation data, it is submitted that it is wholly unimportant to know by how great a margin the claim or interest having no value falls short of having value. Hence, for the purposes of the finding and certification under immediate discussion, the determination of the absolute dollars and cents value of the Debtor's property, while it would be relevant as evidence, seems wholly unnecessary if other adequate valuation data is present to support the finding.[1]

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[1]Such, apparently, has been the rule followed by the Securities and Exchange Commission under Section 11(f) of the Public Utility Holding Company Act. See particularly *West Ohio Gas Co.*, *supra*, 3 S. E. C. at 1026-7 (1938), where the Commission said:

> "In passing upon the fairness of this plan it is not necessary for us to determine the exact value of the property or the amount at which its value shall be recorded on the books of the reorganized company. The evidence which has been submitted to us points to the conclusion that the property has very little, if any, value in excess of the aggregate amount ($1,755,977) of the claims of the bondholders."

If the decision of the Circuit Court of Appeals for the Ninth Circuit with respect to the findings under discussion is not in conflict with the decisions of this Court above cited, then the decision decided an important question of federal law which has not been, but should be, settled by this Court.

3. In deciding that allocations of new securities between those entitled to participate in a reorganization must be "in proportion to the value of their respective claims," determined in accordance with absolute dollars and cents valuations of properties, existing claims, and new securities, the Circuit Court of Appeals for the Ninth Circuit decided an important question of federal law in conflict with the decisions of this Court in *Consolidated Rock Products Co.* v. *DuBois*, *supra*, and *Case* v. *Los Angeles Lumber Products Co.*, *supra*, with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Jameson* v. *Guaranty Trust Co.*, 20 F. (2d) 808 (1927), *cert. denied*, 275 U. S. 569 (1927), and of the Circuit Court of Appeals for the Second Circuit in *In re Radio-Keith-Orpheum Corp.*, 100 F. (2d) 22 (1939), *cert. denied*, 308 U. S. 622 (1940), and with the decisions of the federal district courts in *In re Akron, Canton & Youngstown Ry.*, *supra*; *In re Chicago & North Western Ry.*, *supra*; *In re Denver & R. G. W. R. R.*, *supra*; *In re Erie R. R.*, 37 F. Supp. 237 (N. D. Ohio, 1940); *In re Missouri Pacific R. R.*, *supra*, and *In re New York, N. H. & H. R. R.*, *supra*.

While this Court, in its decisions above cited, stressed the necessity for adequate valuation data in order to determine the right of a class to participate in a reorganization and the fairness and equity of allocations among those classes entitled to participate, this Court emphasized that

the real measure of allocation is the earning power of the interests represented by the respective existing classes. And while this Court has held that mere observance of the relative order of priorities was not sufficient to validate a reorganization plan in which stockholders whose equity had no value had been admitted to participation, this Court has never indicated that a plan would be valid which did not recognize the relative priorities of the existing classes in the earning power of the venture, in such manner as might be practicable under all the circumstances. *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482 (1913); *Kansas City Terminal Ry.* v. *Central Union Trust Co.*, 271 U. S. 445 (1926); *Consolidated Rock Products Co.* v. *DuBois*, *supra*; *Case* v. *Los Angeles Lumber Products Co.*, *supra*.

The relative priorities of different claims against overall earning power may be dependent either upon the relative rank of their claims against the same assets, or, in the case of claims secured by liens upon different assets, upon the varying levels of the venture earnings at which the different assets securing the different claims begin to show earning power. Particularly is this true in the case of a railroad reorganization, where the property securing some bonds may show earning power even though the system as a whole may be operating at a deficit, while the property securing other bonds may not show earning power except at a relatively high level of system earnings.

If allocations among those entitled to participate in a reorganization must recognize the relative order of their priorities with respect to the earning power of the venture, at various levels, allocation cannot be made by any mathematical formula dependent upon absolute dollars and cents valuations of the property, existing claims, or new securities. Absolute dollars and cents valuations must neces-

sarily assume some precise level of earnings to be capitalized at some precise rate, and it would, in the case of a railroad, be illusory to attempt to fix such values at any particular earnings level.[1] The problem of a "fair and equitable" reorganization is, as the Commission said in the instant case, to give to each existing class of securities its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim (R. 316) in terms of the new securities to be issued in the reorganization—new securities which will return the "equitable equivalent" to each existing claim *whatever* may be the level to which the earnings of the reorganized venture may fall or rise. The old claims participating in the reorganization must be fitted into the new capital structure at the levels of their respective priorities in the venture earnings so that, as nearly as may be at any given level of earnings, the new securities will produce for the claimant the equitable equivalent of what would have been produced by his old securities.

Such has been the method of allocation followed by the Commission, not only in the instant case, but in all the other reorganization plans approved by it under Section 77. Such too has been the test applied by all of the district courts which have thus far passed upon such plans whether or not they have approved the Commission's allocations.

This Court's decision in *Consolidated Rock Products Co.* v. *DuBois*, *supra*, does not prevent—it requires—that method of allocation.

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[1] This Court has recognized that "The very notion of a 'full cash value' for a railroad is in many respects artificial. * * * Whatever may be the pretenses of exactitude in determining such a 'value', to claim for it 'scientific' validity, is to employ the term in its loosest sense." *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 370 (1940).

The opinion of the Circuit Court of Appeals may also imply that upon determination of all of the values found to be necessary, each class of the new securities is to be distributed in the mathematical proportions stated to each class of existing claims entitled to participate. Patently, therefore, the statement of the Circuit Court of Appeals with respect to allocation, "if taken literally", does "not comport with the requirements of the absolute priority rule" or with the necessity for maintaining the relative priorities, and therefore requires correction by this Court. *Consolidated Rock Products Co.* v. *DuBois, supra,* 312 U. S. at 530.

If this decision of the Circuit Court of Appeals for the Ninth Circuit as to the proper basis for allocation of new securities is not in conflict with the decisions of this Court and of the Circuit Courts of Appeals for the Seventh Circuit and the Second Circuit above cited, then it decided an important question of federal law which has not been, but should be, settled by this Court.

4. If the decision of the Circuit Court of Appeals for the Ninth Circuit means that, since no absolute dollars and cents valuations of the claims and new securities involved were made, a fair and practical compromise of the claims of RFC on the $10,000,000 Trustees' Certificates and on the RFC Notes cannot be effected by treating the two claims as an "entire bundle of rights",[1] in order to obviate the necessity of providing $10,000,000 of new money on onerous terms, the Circuit Court of Appeals for the Ninth Circuit decided an important question of federal law in conflict

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[1] *Consolidated Rock Products Co.* v. *DuBois, supra,* 312 U. S. at 528.

with the decision of this Court in *Case* v. *Los Angeles Lumber Products Co., supra*, 308 U. S. at 130.

RFC gives up the right to collect $10,000,000 in cash on its one-year Trustees' Certificates, a right obviously readily enforceable. The $10,000,000 new 35-year, open-end First Mortgage Bonds into which RFC is willing to permit its Trustees' Certificates to be funded, are clearly less valuable. How much so, it is difficult to say with exactness. The Commission, as an expert in railroad securities, was competent to make an approximate appraisal. Testimony before the District Court indicated that a proper discount at the time of the District Court hearing was somewhere between 10% and 15% (R. 1530, 1532, 1536, 1554). To offset this sacrifice RFC was given, as against its RFC Notes, more Income Bonds and Preferred Stock, but less no par value Common Stock, than it would have been entitled to strictly upon the basis of the collateral securing these Notes. Both the Commission and the District Court thought the compromise fair. The First Mortgage Bondholders and the First Mortgage Trustees supported it. No evidence impugning its fairness was even offered.

To test the fairness and equity of such practical compromises upon the basis of a mathematical formula dependent upon dollars and cents valuations of properties, old securities, and new securities (which would probably be obsolete the day after they were made) is to adopt a wholly unrealistic approach to practical reorganization problems.

5. In deciding that "lacking the requisite valuation data" the District Court "was in no position to exercise the 'informed, independent judgment' which appraisal of

the fairness of a plan of reorganization entails" (R. 2671), the Circuit Court of Appeals for the Ninth Circuit decided an important question of federal law in conflict with the decisions of this Court in *Consolidated Rock Products Co.* v. *DuBois, supra; Case* v. *Los Angeles Lumber Products Co., supra;* and with the decisions of the federal district courts in *In re Akron, Canton & Youngstown Ry., supra; In re Denver & R. G. W. R. R., supra; In re Erie R. R., supra; In re Louisiana & N. W. R. R., supra; In re Missouri Pacific R. R., supra; In re New York, N. H. & H. R. R., supra.*

The Commission had before it almost every conceivable type of valuation study of the properties of the Debtor and of its subsidiaries. Particularly, it had before it studies of past, present, and then prospective earnings, segregated as among the Debtor and each of its subsidiaries, and thus as between the First Mortgage and the Refunding Mortgage.[1]

Exclusion of Classes

The Commission's finding that the equity of the existing stock has no value, and that the claims of the unsecured creditors have no value, was necessarily a finding that the properties embraced in the reorganization, and the new securities to be issued against those properties, had a value less than $87,981,672.75, the aggregate amount of the secured claims as of the effective date of the Commission Plan.

The Commission's finding that the new no par value Common Stock should be allocated against the claim of the existing First Mortgage Bondholders for accrued interest at the price of $57 per share (after allocating Income

[1]See p. 8, *supra.*

Bonds and Preferred Stock of a principal amount and par value equal to the principal amount of the claims of the existing First Mortgage Bondholders), was necessarily a finding that all the properties and new securities had a value for reorganization purposes not in excess of $84,027,559, which is the aggregate of the proposed new securities having a principal amount or par value, plus the entire 319,441 shares of no par value Common Stock taken at $57 per share.

If the valuation data contained in the record establishes that such properties and new securities have a value for reorganization purposes of not more than $84,027,559, then that valuation data clearly sustains the findings excluding unsecured creditors and stockholders from participation in the reorganization, as well as the findings that the second lien equity of RCC in the collateral pledged to secure the RFC Notes has no value, and that the allocation made to RFC in respect of its Notes "exhausts the value of the collateral pledged by the debtor" for the RFC Notes.

To sustain a finding of value for RCC's equity in the Refunding Bonds pledged to secure the RFC Notes[*] (let alone a value for the unsecured debt or stock), the 1934-1940 average earnings would have to be capitalized on at least a 1.72% basis; the 1930-1940 average earnings on at least a 1.91% basis; the 1922-1940 average earnings on at least a 2.76% basis; and the 1940 adjusted earnings on at least a 3.10% basis.

In the light of these facts it is submitted that no possible useful purpose could have been served by any finding

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[*] Such a finding would require an over-all value in excess of $84,027,559, the total new capitalization if the no par Common Stock is taken at $57 per share, the price at which it was allotted, to RFC. R. 312, 317.

of the Commission as to the precise amount in dollars and cents by which the value of the properties or of the new securities was less than $84,027,559.

Allocations of New Securities

The problem as to the adequacy of the valuation data to sustain allocations among securityholders entitled to participate in the reorganization is slightly different from the problem of its adequacy to support the exclusion or partial exclusion of various classes.

If the proper basis for allocation between two such claims as the existing First Mortgage Bonds and the existing Refunding Bonds is a determination of the equitable equivalents of the two existing claims in the earning power of the reorganized property, in terms of new securities reflecting such earning power, then your petitioners submit that in the instant case the Commission had before it the requisite financial data and made all the requisite findings and certifications.

Form of Valuation Data

In insisting upon findings of precise dollars and cents valuations, your petitioners submit that the Circuit Court of Appeals for the Ninth Circuit ignored substance for form.

Section 77 does not require formal findings, but merely that, "The commission shall state fully the reasons for its conclusions." Section 14 of the Interstate Commerce Act (49 U. S. C. § 14) requires merely that the Commission make its reports in writing, except in cases where damages are awarded, when findings of fact must

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[1] See *supra*, pp. 4, 13-19.

be included. In other proceedings, "there are no formal requirements for the findings to be made by the Commission." *United States* v. *Louisiana*, 290 U. S. 70, 80 (1933).

6. In deciding that the District Court "misconceived" its duties under Section 77 and should have exercised its own independent judgment with respect to every determination made by the Commission, the Circuit Court of Appeals for the Ninth Circuit decided an important question of federal law in conflict with the decisions of this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939), *Palmer* v. *Warren*, 310 U. S. 132 (1940), *United States* v. *Morgan*, 313 U. S. 409 (1941), *Gray* v. *Powell*, 10 U. S. L. W. 4096 (U. S. S. C., December 15, 1941), and with decisions of the federal district courts in *In re Akron, Canton & Youngstown Ry., supra; In re Erie R.R., supra; In re Missouri Pacific R.R., supra; In re New York, N. H. & H. R.R., supra*. If said decision of the Circuit Court of Appeals for the Ninth Circuit is not in conflict with the decisions cited, then it decided an important question of federal law which has not been, but should be, settled by this Court.

There is no question of railroad reorganization practice more important than the demarcation of the functions of the Commission and the courts under Section 77.

Subsection (d) requires that the Commission shall determine that the plan which it approves shall be "compatible with the public interest". The subjects as to which Section 77 requires the District Court to be "satisfied" relate to either (a) matters affecting the private rights of the securityholders, such as the fairness or equity of allocation, or (b) purely formal requirements. The question whether the

plan is "compatible with the public interest" is not included. If the District Court is "satisfied" as to the matters committed to its jurisdiction it *"shall"* approve the plan certified to it by the Commission (Italics added).

If, in the face of this distinction so clearly made by the language of Section 77, the district courts must, as the Circuit Court of Appeals for the Ninth Circuit now indicates, redetermine all questions previously determined by the Commission, then the authority of the Commission and the courts would be hopelessly entangled, rather than "intertwined", it would be substantially impossible for the two bodies to "work cooperatively in reorganizations", and "the judicial process", rather than being "brigaded with the administrative process of the Commission"[1] would be off on a frolic of its own.

Obviously the only sensible interpretation of Section 77, as well as the only practical procedure for reorganization, is that the questions of "public interest", *i.e.*, over-all capitalization, classification of capitalization, and financial details of the new securities, as contrasted with the questions of private rights, shall be determined by the Commission, subject only to judicial review for abuse of administrative power. This Court has many times said that such review should be consistent with the principle that administrative agencies and the courts "are to be deemed collaborative instruments of justice and the appropriate independence of each should be respected by the other." *United States* v. *Morgan, supra,* 313 U. S. at 422.

The District Judge in the instant case recognized and, as his opinion indicates, carefully performed his duty to

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[1]The quotations are from *Palmer* v. *Massachusetts, supra,* 308 U. S. at 87, and *Palmer* v. *Warren, supra,* 310 U. S. at 138.

decide whether the Commission, in its determination of the questions of public interest, had "acted fairly, within the bounds of the Constitution, and not arbitrarily" (R. 1596-7). To the limited extent of such judicial review, he did regard himself, in the language of the Circuit Court of Appeals (R. 2674) as "not concluded by any determination made by the Commission" and, within the proper demarcation of his jurisdiction, he did exercise his "independent judgment".

7. In view of its failure, in conflict with the decision of this Court in *Continental Illinois National Bank & T. Co.* v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648, 685 (1935), to determine all the objections to the Commission Plan raised on appeal, the Circuit Court of Appeals for the Ninth Circuit has left unanswered important questions which the public interest requires promptly to be settled in this Court.

This Court in *Continental Illinois National Bank & T. Co.* v. *Chicago, R. I. & P. Ry., supra,* said, at page 685:

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted. Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude, should, so far as practi-

cable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined."

For nearly eight years the Debtor has been in default in the payment of interest on its First Mortgage Bonds, and for nearly seven of those years this reorganization proceeding has been dragging its weary way through the Commission, the District Court, and the Circuit Court of Appeals, over every obstacle which the junior interests could manage to interpose. As already stated, these junior interests, both before the Commission and in the courts, have attacked substantially every feature of the Commission Plan, including the interest rates on the new securities (notwithstanding that they are less than the interest rates on the existing securities against which they are allocated), the conversion right provided for the new Income Bonds, the participating rights granted to the new Preferred Stock, and the terms of the Sinking Fund and the Capital Fund. They have inspired the Refunding Mortgage Trustee to raise numerous lien questions, many of them so frivolous that they have been abandoned by the Refunding Mortgage Trustee along the road, and all of them determined (clearly correctly) by the Commission and the District Court in favor of the First Mortgage. They have set up mutually contradictory claims with respect to the provision of the Commission Plan that reorganization should be effected without prejudice to any claims on "accommodation collateral," one junior interest contending that the Commission Plan should have expressly released the "accommodation collateral" to its pledgors, and another claiming that the Commission Plan should have expressly appropriated this "accommodation collateral" for the benefit of the claim for which it was pledged.

The substance of many of these objections relates to matters of "public interest" and is within what is submitted to be the exclusive jurisdiction of the Commission. In urging that the "accommodation collateral" should be dealt with directly by the plan although it is not the property of the Debtor, these junior interests request action clearly beyond the jurisdiction of a bankruptcy court. The correctness of the determinations of the Commission and the District Court with respect of these and all other objections will be clear to this Court upon a summary examination of the questions involved.

In view of the great public interest in promoting the prompt reorganization of railroads generally, as well as of the present Debtor, your petitioners urge that this Court, as it recently did in *Securities and Exchange Commission* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434 (1940), and in *Consolidated Rock Products Co.* v. *DuBois, supra,* deal with the entire case upon the entire record.[1] Your petitioners believe that upon such consideration of the case this Court can reach no other conclusion than that the decision of the Circuit Court of Appeals for the Ninth Circuit should be reversed and the order of the District Court dated August 15, 1940, affirmed. If, however, this Court shall, as your petitioners do not believe will be the case, find any error in the action of the Commission or the District Court in the entire record, your petitioners urge that this Court, in addition to correcting such error, also affirm such of the determinations of the District Court as may be found to be without error. Only by such action can repetition of pos-

[1]In both of these cases, presumably in order to expedite the particular proceeding and all other similarly situated reorganizations, this Court decided several important questions of bankruptcy reorganization law although rulings on some of those questions were not necessary in order to affirm or reverse the Circuit Court of Appeals.

sible errors already made be avoided without ultimate correction in this Court at some indefinite future time, and the reorganization of the Debtor consummated with some degree of expedition.

8. In assessing the costs of the appeal against the Committee, the First Mortgage Trustees, and RFC, named as appellees before it (R. 2675-6), the Circuit Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

Such costs are not nominal. In the instant case they aggregate $4,239.29, and in the more complicated cases already pending in various circuit courts of appeals they will greatly exceed that amount.

Notwithstanding the fact that Section 77 contemplates that the Commission may, as it did in the instant case, formulate its own plan of reorganization independently of any proposals of any of the parties, whereas under Chapter X of the Bankruptcy Act the Securities and Exchange Commission acts only in an advisory capacity in the formulation of reorganization plans (§ 172, 11 U. S. C. § 573), Section 77, unlike Chapter X (§ 208, 11 U. S. C. § 608), provides no specific machinery whereby the Commission may appear in the proceeding in the district court with reference to the plan. Those railroad securityholders who assume the responsibility and expense of defending Commission proposals in the district courts are therefore supplying to the district courts assistance which they might not otherwise have in performing their functions under Section 77.

To penalize such securityholders for continuing to defend the Commission's plans in the circuit courts of appeals after the district courts have approved such plans is not

only wholly unfair and inequitable but necessarily will discourage securityholders or mortgage trustees from performing a useful, if not a necessary, function in assisting the circuit courts of appeals to arrive at proper decisions. See *In re Chicago & North Western Ry.*, 121 F. (2d) 791, 798 (C. C. A. 7th, 1941).

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, commanding that Court to certify and send to this Court on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9714, *In the Matter of the Western Pacific Railroad Company, a corporation, Debtor; Western Pacific Railroad Corporation, a corporation, et al., Appellants* v. *Institutional Bondholders Committee, et al., Appellees*, to the end that said cause may be reviewed and determined by this Court; that the Decree of said Court, entered November 28, 1941, be reversed, that the Order of the District Court entered August 15, 1940, be affirmed; and that petitioners be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated: December 20, 1941.

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Petitioners.

HERBERT W. CLARK,
Of Counsel.

APPENDIX

Bankruptcy Act, § 77 (11 U. S. C. § 205).

* * * * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are

reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceeding under the provisions of subsection (d) hereof. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) hereof, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of

the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: Provided further, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purposes of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class

which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): Provided further, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: Provided further, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion, with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons there-

for, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

* * * * * * * * *

Interstate Commerce Act, § 14(1) [49 U. S. C. § 14(1)].

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"*§ 14. Reports and decisions of commission.* (1) *Reports of investigations by commission.* Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

* * * * * * * * *

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DEC 30 1941.
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1941.

No. ~~820~~ 8

IN THE MATTER OF

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,

Petitioners,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ORVILLE W. WOOD,
Attorney for Petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

Dated, New York, N. Y., December 23, 1941.

INDEX.

	PAGE
PETITION	1
Summary Statement of Matter Involved	3
Questions Presented	4
Reasons Relied on for the Allowance of the Writ	6
BRIEF	13
Opinions Below	13
Jurisdiction	13
Statement of the Case	13
Statutes Involved	13
Argument	14
POINT I. The decision of the Circuit Court of Appeals raises questions of far-reaching importance in railroad reorganizations under Section 77	14
POINT II. The decision of the Circuit Court of Appeals on the valuation questions is in conflict with the applicable decisions of this Court and with the decisions of other Circuit Courts of Appeals	15
POINT III. The decision of the Circuit Court of Appeals as to the relative functions of the Commission and of the District Court in approving a plan of reorganization is in conflict with the applicable decisions of this Court	18
CONCLUSION	20
APPENDIX	21
The Statutes Involved	21

TABLE OF AUTHORITIES CITED.

CASES.

	PAGES
Case v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939)	2, 7, 8, 9, 16, 17
Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Debtor, In the Matter of, (C. C. A., 7th Circ., December 4, 1941, not yet reported)	6, 14, 16
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510 (1941)	2, 6, 8, 16, 17
Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935)	10
Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541, 547-548 (1912)	9, 18
Jameson v. *Guaranty Trust Co. of New York*, 20 F. (2d) 808 (C. C. A., 7th Circ., 1927), cert. denied, 275 U. S. 569 (1927)	7, 17
Palmer v. *Massachusetts*, 308 U. S. 79 (1939)	9, 19
Radio-Keith-Orpheum Corporation, In re, 106 F. (2d) 22 (C. C. A., 2nd Circ., 1939), cert. denied, 308 U. S. 622 (1940)	7, 17
620 Church Street Building Corp., In re, 299 U. S. 24	16
Warren v. *Palmer*, 310 U. S. 132 (1940)	9, 19

STATUTES.[1]

Bankruptcy Act, § 24 (c)	13
Judicial Code, § 240 (a), as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347 (a))	13
Rule 38 (U. S. Sup. Ct.)	3

[1] Citations to Section 77 of the Bankruptcy Act are too frequent to enumerate. The pertinent portions of Section 77, i. e., Subsections (d) and (e), are printed in the Appendix at pages 21 and 22, respectively.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1941.

No. .....

IN THE MATTER OF

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,

Petitioners,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage of The Western Pacific Railroad Company, respectfully pray for a writ of certiorari to review a deci-

sion of the United States Circuit Court of Appeals for the Ninth Circuit rendered on November 28, 1941 (R. 2663, 2675), which reversed an order of the District Court of the United States for the Northern District of California, Southern Division, entered on August 15, 1940 (R. 1569). The order of the District Court approved a plan of reorganization (hereinafter called the "Commission Plan") for the Debtor, The Western Pacific Railroad Company, which had theretofore been approved and certified to the District Court by the Interstate Commerce Commission (R. 1600), in a proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205).

The Circuit Court of Appeals based its reversal of the order of the District Court upon the narrow ground that Section 77 imposed upon the Commission a duty to determine and certify to the District Court the values of sixteen separate items, that the Commission failed to perform that duty, and that the District Court therefore lacked the "requisite valuation data" to enable it to appraise the fairness of the Commission Plan. The Circuit Court of Appeals cited as authority the decision of this Court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941). (R. 2670-2672.)

The Circuit Court of Appeals also criticized, as indicating "a possible misconception", a statement in the opinion of the District Court as to the relative functions of the Commission and of the District Court in approving a plan of reorganization (R. 2672-2674).

In discussing the basis upon which the secured creditors should participate in the reorganization, the Circuit Court of Appeals stated that "Fairness requires that their participation should be in proportion to the value of their respective claims" (R. 2669). Although the meaning is not clear, this statement apparently prescribes a rule of distribution at variance with the "full and absolute priority rule" enunciated by this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), and *Consolidated Rock Products Co.* v. *Du Bois, supra.*

The decision of the Circuit Court of Appeals omits to discuss the correctness of the District Court's determination of other issues which were before the Circuit Court of Appeals, thereby leaving unanswered important questions which, unless settled by this Court, may become the subject of further litigation having the effect of needlessly prolonging the reorganization proceedings.

The Institutional First Mortgage Bondholders Committee is filing a petition for a writ of certiorari to review the decision of the Circuit Court of Appeals on grounds similar to those urged in this petition and is filing with its petition a certified transcript and additional printed copies of the record in the case, including the proceedings in the Circuit Court of Appeals, in accordance with Rule 38 of this Court. The petitioners beg leave to refer to the certified transcript and additional printed copies of the record so filed by the Institutional First Mortgage Bondholders Committee for all purposes of this petition and respectfully pray that such certified transcript and additional printed copies of the record be deemed to accompany this petition, within the meaning of Rule 38 of this Court.

Summary Statement of Matter Involved.

A statement of the relevant facts as to the nature and history of the proceedings, the findings of the Commission, and the action taken by the District Court and by the Circuit Court of Appeals appears at pages 4-23 of the above-mentioned petition of the Institutional First Mortgage Bondholders Committee. To avoid burdening this Court with what seems an unnecessary repetition, the petitioners beg leave to refer to that statement in the petition of the Institutional First Mortgage Bondholders Committee, which sets forth the factual data relevant to the consideration of this petition.*

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* The petition of the Committee states, in a footnote on page 20, that counsel for the Committee had received on December 20, 1941, a copy of a petition of the Refunding Mortgage Trustee for a rehearing in the Circuit Court of Appeals. Counsel for your petitioners also received on December 20, 1941, a copy of said petition of the Refunding Mortgage Trustee.

Questions Presented.*

1. Are the Commission's findings (a) that "the equity of the existing stock has no value" (R. 269) and (b) that "the claims of the unsecured creditors * * * have no value" (R. 269-270), if supported by the requisite valuation data, sufficient to sustain the Commission's conclusions that the stockholders and unsecured creditors should be excluded from participation in the reorganization?

2. As to the following findings of the Commission: (a) that the securities available for distribution to the secured creditors holding notes secured by the pledge of Refunding Bonds "are inadequate in value to satisfy the aggregate claims of these parties" (R. 271), (b) that the "allocation of reorganization securities to" Reconstruction Finance Corporation "exhausts the value of the collateral pledged by the debtor under the notes held by" Reconstruction Finance Corporation (R. 316), and (c) that "the equity of" The Railroad Credit Corporation "in such collateral has no value" (R. 316),—are these findings sufficient, if supported by the requisite valuation data, to sustain the Commission's conclusions that the "value of each of the claims is proportionate to the collateral securing it" (R. 271) and that the allocation of new securities issued in respect of the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271)?

3. Should the participation in the reorganization of the holders of First Mortgage Bonds and of the pledgee holders of Refunding Bonds, respectively, be "in proportion to the value of their respective claims", ascertained by determining the exact dollar values of (1) the Debtor's entire prop-

* The questions presented and the reasons relied on for the allowance of the writ as set forth in this petition are substantially identical with those set forth in the petition of the Committee. This method of presentation has been adopted because the petitioners and the Committee are similarly situated in respect of their applications for certiorari.

erty, (2) the property subject to the First Mortgage as a first lien and to the Refunding Mortgage as a second lien, (3) the property subject to the Refunding Mortgage as a first lien, and (4) the new securities distributable to each class? Or should their participation be based upon a determination by the Commission, in terms of the new securities, of the "equitable equivalent of the debtor's assets available for the satisfaction" of the respective claims of each class, giving due effect to the relative priorities of the respective mortgages upon system earnings at the different levels which such earnings must reach in order to service the various classes of new securities and all other factors which should be considered in order that the District Court may approve the result as being fair and equitable?

4. May not the two claims of Reconstruction Finance Corporation, the one represented by the outstanding Trustees' Certificates and the other represented by notes secured by the pledge of Refunding Bonds, be treated as an "entire bundle of rights" and dealt with on the basis of a practicable and fair compromise which will eliminate the necessity of obtaining elsewhere on less favorable terms the new money needed to refinance the outstanding Trustees' Certificates?

5. Does the present record contain sufficient valuation data to support the Commission's findings and conclusions as to what classes are entitled to participate in the reorganization and as to what new securities should be allocated to each of such classes?

6. Does not Section 77 vest exclusively in the Commission jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest", including jurisdiction to determine the amount, character and financial details of capitalization, and is not the scope of the judicial review of the Commission's determination of such matters limited to an inquiry as to whether the Commission's action was arbitrary or in excess of its constitutional or statutory powers?

7. Should not this Court, upon the entire record, reverse the judgment or decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan, in view of the public interest in bringing about a speedy termination of the reorganization proceedings, and in order to prevent further and unnecessary litigation of questions which were before the Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination?

8. Should the costs of a successful appeal be assessed against mortgage trustees whose appearance as appellees before a circuit court of appeals is occasioned solely by reason of the circumstance that the appellants challenge the fairness of the treatment accorded their *cestuis que trustent* under a plan of reorganization approved by the Commission and by a district court, or should such costs be assessed directly against the debtor's estate?

Reasons Relied on for the Allowance of the Writ.

1. The Commission, in finding that "the equity of the existing stock has no value" (R. 269) and that "the claims of the unsecured creditors * * * have no value" (R. 269-270), in effect determined that the value of the Debtor's property did not exceed the value of the claims of the secured creditors. The decision of the Circuit Court of Appeals apparently requires a determination of the exact dollar value of the Debtor's property in order to sustain the exclusion of stockholders and unsecured creditors from participation in the reorganization.

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *In the Matter of Chicago, Milwaukee, St. Paul & Pacific R. R. Co., Debtor,* (C. C. A., 7th Circ., December 4, 1941, not yet reported), and with the decisions of this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 2,

and *Case* v. *Los Angeles Lumber Products Co., Ltd., supra*, p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The question here presented is not peculiar to this case. The method of determining and stating values employed by the Commission in this case has been employed by it in formulating other railroad reorganization plans, some of which have been consummated, after receiving final approval by the courts, and some of which are now pending before various district courts and circuit courts of appeals. The question is therefore one of widespread public interest which can be authoritatively settled only by this Court.

2. The Circuit Court of Appeals held that the participation in the reorganization of the holders of First Mortgage Bonds and of the pledgee holders of Refunding Bonds, respectively, "should be in proportion to the value of their respective claims" and, to that end, required a determination of the respective values of (1) the Debtor's entire property, (2) the property subject to the First Mortgage as a first lien and to the Refunding Mortgage as a second lien, (3) the property subject to the Refunding Mortgage as a first lien, and (4) the new securities distributable to each class (R. 2669-2670). This apparently requires that the allocation of new securities to these secured creditors be made in accordance with a precise mathematical formula based upon exact dollar values.

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Jameson* v. *Guaranty Trust Co. of New York*, 20 F. (2d) 808 (C. C. A., 7th Circ., 1927), cert. denied, 275 U. S. 569 (1927), and the decision of the Circuit Court of Appeals for the Second Circuit in *In re Radio-Keith-Orpheum Corporation*, 106 F. (2d) 22 (C. C. A., 2nd Circ., 1939), cert.

denied, 308 U. S. 622 (1940). It is also believed to be in conflict with the decisions of this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 2, and *Case* v. *Los Angeles Lumber Products Co., Ltd., supra,* p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

If the decision of the Circuit Court of Appeals be interpreted as requiring that new securities of each available class be allocated to each class of these secured creditors in amounts proportionate to the respective dollar values of their claims, without regard to the relative priorities of the mortgage liens securing their claims, then the decision of the Circuit Court of Appeals prescribes a rule of distribution which violates the "full and absolute priority rule" enunciated by this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd., supra,* p. 2, and *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 2.

3. If the decision of the Circuit Court of Appeals be interpreted as holding that the two claims of Reconstruction Finance Corporation may not be treated as an "entire bundle of rights" and dealt with on the basis of a practicable and fair compromise which will eliminate the necessity of obtaining elsewhere on less favorable terms the new money needed to refinance the outstanding Trustees' Certificates, the decision of the Circuit Court of Appeals is in this respect believed to be in conflict with the decision of this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd., supra,* p. 2.

4. The Circuit Court of Appeals held that the District Court lacked "the requisite valuation data" to enable it "to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails" (R. 2671).

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decisions of

this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd., supra,* p. 2, and *Consolidated Rock Products Co.* v. *Du Bois, supra,* p. 2.

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court above cited, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

5. The Circuit Court of Appeals criticized, as indicating "a possible misconception" (R. 2672), a statement in the opinion of the District Court as to the relative functions of the Commission and of the District Court in approving a plan of reorganization and held that:

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject" (R. 2674).

In this respect, the decision of the Circuit Court of Appeals is believed to be in conflict with the decision of this Court in *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541, 547-548 (1912), and other decisions of this Court enunciating the familiar doctrine of the finality of administrative determinations, and with the decisions of this Court in *Palmer* v. *Massachusetts,* 308 U. S. 79 (1939), and *Warren* v. *Palmer,* 310 U. S. 132 (1940).

If the decision of the Circuit Court of Appeals is not in conflict with the decisions of this Court referred to above, then the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

6. In omitting to discuss all of the issues which were before the Circuit Court of Appeals, the decision of the

Circuit Court of Appeals has left unanswered many important questions, affecting virtually every feature of the Commission Plan. An authoritative determination of all of these questions is essential to the final approval of a plan of reorganization. Unless these questions are settled by this Court, they are likely to become the subject of further litigation, which will result in further and unnecessary delay and expense to the parties concerned.

The petitioners believe that the public interest will be promoted by prompt settlement in this Court of these questions.

In *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), this Court said (p. 685):

> "The delay and expense incident to railroad receiverships and foreclosure sales constituted, probably, the chief reasons which induced the passage of § 77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted. Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Commission to see that they do."

To the end that these reorganization proceedings, which have been pending since 1935, may be speedily determined, the petitioners respectfully pray that this Court review the entire case upon the entire record and determine all of the questions involved.

7. The Circuit Court of Appeals, in assessing the costs of the appeal against the petitioners and the other appellees, the Institutional First Mortgage Bondholders Committee and Reconstruction Finance Corporation (R. 2676), has decided an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, the petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all of the proceedings had in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of the Circuit Court of Appeals be reversed; that the order of the District Court be affirmed; and that the petitioners be granted such other and further relief as may be proper.

Dated, New York, N. Y., December 23, 1941.

ORVILLE W. WOOD,
Attorney for Petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Commission's report and order (R. 284) dated October 10, 1938, approving a plan of reorganization for the Debtor, is reported at 230 I. C. C. 61. The Commission's report and order on further consideration (R. 300, 362) dated June 21, 1939, modifying the plan of reorganization approved in the Commission's report and order dated October 10, 1938, is reported at 233 I. C. C. 409. The Commission's order (R. 884) dated September 19, 1939, denying the Debtor's petition for modification of the Commission Plan, is reported at 236 I. C. C. 1.

The opinion of the District Court (R. 1569) dated August 15, 1940, approving the Commission Plan, is reported at 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals dated November 28, 1941, reversing the order of the District Court, has not yet been officially reported but appears at R. 2663.

Jurisdiction.

The decree of the Circuit Court of Appeals now sought to be reviewed was entered on November 28, 1941. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)) and Section 24(c) of the Bankruptcy Act (11 U. S. C. A., § 47(c)).

Statement of the Case.

A summary statement of the relevant facts is incorporated by reference in the petition, *supra*, p. 3.

Statutes Involved.

The statutes involved are set forth in the Appendix, *infra*, pp. 21-26.

ARGUMENT.

POINT I.

The Decision of the Circuit Court of Appeals Raises Questions of Far-reaching Importance in Railroad Reorganizations under Section 77.

Since the enactment of Section 77, the Commission has formulated and certified to various district courts numerous plans of reorganization. In formulating these plans of reorganization, the Commission has uniformly, so far as we are aware, employed methods of determining and stating values similar to those which it employed in formulating the Commission Plan. Many of these plans of reorganization have received the final approval of the courts having jurisdiction and have already been consummated. Others are still pending before various district courts and circuit courts of appeals.

Prior to the decision of the Circuit Court of Appeals in this case, no court, so far as we are aware, had questioned the correctness or sufficiency of the Commission's methods of determining and stating values. Consequently, the decision of the Circuit Court of Appeals in this case fell like a bombshell. Its unsettling effect upon other pending plans of reorganization is apparent.

Less than a week after the Circuit Court of Appeals rendered its decision in this case, the Circuit Court of Appeals for the Seventh Circuit rendered its decision in the *Milwaukee* case (*supra*, p. 6), which added to the confusion, because it agreed in some respects and disagreed in other respects with the conclusions reached in this case with respect to the Commission's methods of determining and stating values.

Under these circumstances, we submit, the public interest urgently requires that the questions involved be authoritatively settled by this Court.

The valuation questions raised by the decision of the Circuit Court of Appeals in this case go to the heart of the entire reorganization process under Section 77. The

other questions raised by the decision—such as the question as to the relative functions of the Commission and of the district courts in approving plans of reorganization—are likewise of far-reaching importance in railroad reorganizations under Section 77. This case is therefore a particularly appropriate one for the granting of a writ of certiorari.

POINT II.

The Decision of the Circuit Court of Appeals on the Valuation Questions is in Conflict with the Applicable Decisions of this Court and with the Decisions of Other Circuit Courts of Appeals.

The valuation questions raised by the decision of the Circuit Court of Appeals have a twofold aspect: (1) in relation to the exclusion of particular classes of stockholders or creditors from participation in the reorganization, and (2) in relation to the allocation of new securities among those entitled to participate.

A. In the first aspect, the question is simply this: May a particular class be excluded from participation in the reorganization upon the basis of a finding that the value of the property does not exceed the amount of all prior claims, provided that the evidence in the record supports that finding? Or must the finding state the exact dollar value of the property?

A finding that the equity of the stock has no value is a finding that the value of the Debtor's property does not exceed the Debtor's liabilities. It is in substance and effect a finding of insolvency in the bankruptcy sense. A finding that the claims of a particular class of creditors have no value is a finding that the value of the property available for the satisfaction of those claims does not exceed the amount of the prior claims against that property.

In the *Los Angeles Lumber Products* case (*supra*, p. 2), this Court said (p. 126):

> "Furthermore, stockholders and other junior interests may be excluded from any plan of reorganization if the court finds that the debtor is insolvent. *In re 620 Church Street Building Corp.*, 299 U. S. 24."

In the *Consolidated Rock Products* case (*supra*, p. 2), this Court, in emphasizing the "criterion of earning capacity" as the essential one in determining values, said (p. 526):

> "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."

In the *Milwaukee* case (*supra*, p. 6), the Circuit Court of Appeals for the Seventh Circuit, in the light of the evidence in the record before it, regarded as sufficient to sustain the exclusion of stockholders from participation in the reorganization a finding by the Commission that the equity of the stock had no value, substantially identical with the finding made by the Commission in this case.

In finding that the equity of the stock and the claims of the unsecured creditors have no value, the Commission in this case has made a finding of the ultimate fact upon which the exclusion of the stockholders and unsecured creditors from participation in the reorganization depends. An examination of the record will show that it contains abundant valuation data to support those findings. We submit that no useful purpose would be served by requiring a finding of the exact dollar value of the Debtor's property.

B. In the second aspect, the question broadly stated is this: Must the allocation of new securities among those entitled to participate in the reorganization be based upon a precise mathematical formula, expressed in terms of equivalents of exact dollar values of claims to exact dollar

values of new securities, such dollar values to be ascertained by determining the exact dollar values of the properties securing the respective claims and the respective new securities? Or may the allocation be based upon a determination of the "equitable equivalent of the assets available for the satisfaction" of the respective claims of each class, expressed in terms of new securities?

This question strikes at the very vitals of the reorganization process under Section 77. A requirement that the allocation of new securities be fitted into a precise mathematical formula such as that prescribed by the Circuit Court of Appeals is, we submit, violative of reorganization principles which have received the sanction of this Court in the *Los Angeles Lumber Products* case (*supra*, p. 2) and in the *Consolidated Rock Products* case (*supra*, p. 2), and which have received the sanction of the Circuit Court of Appeals for the Seventh Circuit in the *Jameson* case (*supra*, p. 7) and of the Circuit Court of Appeals for the Second Circuit in the *Radio-Keith-Orpheum* case (*supra*, p. 7).

In the *Consolidated Rock Products* case, this Court held that the "criterion of earning capacity is the essential one" (p. 526). Subsection (e) of Section 77 (11 U. S. C. A., § 205(e)) likewise makes earning capacity the essential criterion of value.

As stated in the *Consolidated Rock Products* case, since the application of the criterion of earning capacity "requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made" (p. 526). To apply this test in the strait-jacket formula required by the decision of the Circuit Court of Appeals is a practical impossibility.

A finding of the exact dollar values of railroad properties in terms of earning capacity requires the assumption of a precise level of earnings. The relative priorities of claims of different classes may depend upon the varying

levels of prospective earnings at which the various properties begin to shown earning power.

To adopt the principle enunciated by the Circuit Court of Appeals would be to substitute a rigid scholastic formula for a flexible realistic approach to the complex problems of railroad reorganization.

POINT III.

The Decision of the Circuit Court of Appeals as to the Relative Functions of the Commission and of the District Court in Approving a Plan of Reorganization is in Conflict with the Applicable Decisions of this Court.

Subsection (d) of Section 77 (11 U. S. C. A., § 205(d)), which defines the functions of the Commission in approving a plan of reorganization, confers upon the Commission jurisdiction to determine whether the plan "will be compatible with the public interest". Subsection (e), which defines the functions of the District Court, confers no such jurisdiction upon the District Court. Thus, by the express terms of the statute, jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest" is vested exclusively in the Commission.

This exclusive jurisdiction, we submit, includes jurisdiction to determine the amount, character and financial details of capitalization.

In *Interstate Commerce Commission* v. *Union Pacific Railroad Company, supra*, p. 9, and in other decisions enunciating the well-established doctrine of the finality of administrative determinations, this Court has held that the scope of the judicial review of the Commission's determinations upon matters committed to its administrative juris-

diction is limited to an inquiry as to whether the Commission's action was arbitrary or in excess of its constitutional or statutory powers.

The applicability of this doctrine to the Commission's determinations of the "public interest" questions under Section 77 is indicated by the expressions of this Court in *Palmer* v. *Massachusetts, supra*, p. 9, and *Warren* v. *Palmer, supra*, p. 9.

In *Palmer* v. *Massachusetts*, this Court said (p. 87):

> "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission."

And in *Warren* v. *Palmer*, this Court said (p. 138):

> "The judicial functions of the bankruptcy court and the administrative functions of the Commission work coöperatively in reorganizations."

The decision of the Circuit Court of Appeals in this case that,

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject" (R. 2674),

is, we submit, not only contrary to the express provisions of Section 77; it runs counter to a principle of administrative law which has long been established by this Court.

Conclusion.

This case involves questions of widespread public interest and far reaching importance in the field of railroad reorganizations which should be reviewed by this Court, and a writ of certiorari should issue for that purpose as prayed for in the foregoing petition.

Dated, New York, N. Y., December 23, 1941.

Respectfully submitted,

ORVILLE W. WOOD,
Attorney for Petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

Appendix.

The Statutes Involved.

Subsection (d) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(d)) provides as follows:

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of

its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

Subsection (e) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(e)) provides as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such

hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity

of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission

is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the revelant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the

proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

Nos. 819-820 ~~885~~ 20

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor and Cross Petitioner.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation, *et al.*,
Respondents.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor and Cross Petitioner.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation, *et al.*,
Respondents.

CROSS PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY, THE DEBTOR, FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FOR A LIMITED REVIEW OF ITS DECREE ENTERED NOVEMBER 28, 1941

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Dated, New York, N. Y., January 17, 1942.

TABLE OF CONTENTS

PAGES

First, the reasons for a denial of the Petitions of the Institutional Bondholders' Committee and the Trustees of the Debtor's First Mortgage..... 2

Second, the reasons for granting the Cross-Petition of the Debtor for a limited review of the decision of the Circuit Court of Appeals..... 5

TABLE OF CASES

Consolidated Rock Products Co., et al. v. *Du Bois*, 312 U. S. 510.....3, 5, 9

Denver and Rio Grande Western Railroad Company v. *McCarthy, et al.*, 111 F. (2d) 820..... 6

IN THE

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OCTOBER TERM—1941

Nos. 819-820

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
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CROSS PETITION OF THE WESTERN PACIFIC RAILROAD COMPANY, THE DEBTOR, FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FOR A LIMITED REVIEW OF ITS DECREE ENTERED NOVEMBER 28, 1941

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Western Pacific Railroad Company, Cross-Petitioner (herein called the Debtor) respectfully asks that

the Petition of Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting an Institutional Bondholders' Committee, and the Petition of Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the Debtor's First Mortgage dated June 26, 1916, bearing Docket Nos. 819 and 820, respectively, be denied as unwarranted by the usages of this Court and that this Court, pursuant to this Cross-Petition, issue a *writ of certiorari* to the Circuit Court of Appeals for the Ninth Circuit for a limited review of the Decree of that Court entered November 28, 1941.

The Debtor, for all purposes of this Cross-Petition, begs leave to refer to the certified transcript and additional printed copies of the record filed by the Institutional Bondholders' Committee with its petition for a writ of certiorari, and respectfully prays that such certified transcript and additional printed copies of the record be deemed to accompany this Cross-Petition, within the meaning of Rule 38 of this Court.

Our reasons may be briefly stated:

First, the reasons for a denial of the Petitions of the Institutional Bondholders' Committee and the Trustees of the Debtor's First Mortgage.

The somewhat elaborate Petitions filed by the Institutional Bondholders' Committee and the Trustees of the Debtor's First Mortgage are significant not for what they disclose but for what they omit. So, without attempting to tear apart the mosaic that these Petitioners have put together by the artful use of detached and deleted sentences from the Reports of the Interstate Commerce Commission, we shall, in the interest of brevity, go straight to the omissions.

The opinion of this Court in *Consolidated Rock Products Co., et al.* v. *Du Bois*, 312 U. S. 510, leaves no doubt in any reasonable mind that it was the duty of the Interstate Commerce Commission in the proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act to find and to certify to the District Court the value of the Debtor's property as an entirety in order to determine whether the Debtor was solvent or insolvent and, if solvent, the value of the equity represented by its capital stock and, if insolvent, the value, if any, of its unsecured debt and the value of the several secured claims; and (we here quote subsection (d) of said Section 77) "to state fully the reasons for its conclusions."

The Circuit Court of Appeals held (we think properly held) that "that duty was not performed" (Tr. 2671).

Assuming, as seems clearly to be the contention of the Petitioners in Nos. 819 and 820, that the bald statement in the Reports of the Interstate Commerce Commission that it finds the Debtor's unsecured debt and capital stock to be without value is the mathematical equivalent of a Finding that the value of the Debtor's entire estate is no greater than its secured debt at the effective date of the Plan—an assumption we deem highly controversial—it nevertheless was not a Finding within the requirements of this Court's opinion in the *Consolidated Rock Products* case "supported by requisite valuation data" that would place the Court in a position "to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails" because the Interstate Commerce Commission

(a) failed to disclose the factors to which it gave consideration;

(b) failed to disclose the weight which it gave to any one factor;

(c) failed to disclose (as counsel for the Appellants have insisted it was required by law to do) whether it treated earnings as the fundamental test of permissible capitalization and value;

(d) if it did exclude all other factors (as the record indicates must have been done) and based its conclusions *solely* on a capitalization of the Debtor's regulated earnings in a sub-normally depressed period, it failed to disclose either the precise period used or the interest rate at which such earnings were capitalized; and

(e) in any event, it failed to disclose the amount by which the value of the property was inadequate to satisfy in full the secured claims and the true value of each such claim.

In the absence of all this and much other vital information, it was manifestly impossible for the District Court or for the Circuit Court of Appeals to be judicially "satisfied" ("satisfied" is the imperative word used in subsection (e) of Section 77 of the Bankruptcy Act) that the Plan was fair and equitable and afforded due recognition to the rights of creditors and stockholders and otherwise complied with the law of the land.

Accordingly, no course was open to the Circuit Court of Appeals but to reverse the Order of the District Court so that the proceedings might be referred back to the Interstate Commerce Commission to be reconsidered in conformity with the law, and we respectfully submit that such would necessarily be the ultimate action taken by this Court should it issue the *writ of certiorari* asked by the Institutional Bondholders' Committee and the Trustees of

the Debtor's First Mortgage. Under these circumstances, no useful purpose could be served by the issuance of such *writ of certiorari* unless it be to enable this Court to write a new opinion to substitute for the very comprehensive and satisfactory opinion already written in the case of *Consolidated Rock Products Co., et al.* v. *Du Bois* (*supra*).

Second, the reasons for granting the Cross-Petition of the Debtor for a limited review of the decision of the Circuit Court of Appeals.

Notwithstanding that the Opinion and Decision of the Circuit Court of Appeals in all fundamental aspects are sound and salutary, we think the Court of Appeals overlooked paragraph (13) of subsection (c) of Section 77 when it dismissed the appeals taken from the Order of the District Court by the Debtor and by the Irving Trust Company. Each of these parties is named specifically in paragraph (13) among those that "shall have the right to be heard on *all* questions arising in the proceedings" (italics ours). The Debtor was the party which filed the original Petition for reorganization under Section 77 of the Bankruptcy Act and conducted the proceeding through the Interstate Commerce Commission, and in the performance of its duties under Section 77 it filed Objections to the Plan certified to the District Court by the Interstate Commerce Commission and appealed from the Order of the District Court overruling its Objections, its main contention being that the Plan was confiscatory in failing to give recognition to the equity represented by the Debtor's unsecured indebtedness and capital stock (Tr. 1648; 2667-2668, 2671). This fundamental contention was upheld by the Circuit Court of Appeals in connection with an appeal taken by The Western Pacific Railroad Corporation, holder of the Debtor's un-

secured debt and capital stock, which had intervened in the District Court to support the position taken by the Debtor (Tr. 1612, 1635). This action of the Circuit Court of Appeals seems quite at variance with the decision of the Circuit Court of Appeals in the Tenth Circuit cited below* and raises a serious question as to the status of the Debtor and of mortgage trustees in many other proceedings pending under Section 77 of the Bankruptcy Act. For that reason this Court may deem it proper to issue a *writ of certiorari* for the limited purpose of correcting the apparently inadvertent decision of the Circuit Court of Appeals on this minor issue and perhaps also may wish to clarify another feature of the opinion of the Court of Appeals as to which there may be ambiguity.

Referring to the basic objection that the Interstate Commerce Commission had improperly excluded the Debtor's stockholders and unsecured creditors from participation in the Plan, the Court of Appeals said:

> "• • • The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion there-

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* In the case of *Denver and Rio Grande Western Railroad Company* v. *McCarthy, et al.*, 111 F. (2d) 820, the Circuit Court of Appeals for the Tenth Circuit, in an opinion written by Circuit Judge PHILLIPS, said:

> "Undoubtedly, the debtor has important duties to perform in the reorganization proceedings, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 679, 55 S. Ct. 595, 79 L. Ed. 1110, and is entitled to the services of competent counsel to aid it in the performance of those duties and to have reasonable allowances made for the expenses incurred and the services rendered by such counsel, not only in connection with the formulation and presentation of the plan of the debtor but also in connection with the proceeding, the debtor having the right to be heard on all questions arising therein."

> from is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939" (Tr. 2668).

In view of this language, the question arises whether, when the case is referred back to the Interstate Commerce Commission, interests which would profit from a restricted valuation may urge the Commission to value the property of the Debtor *retroactively* at January 1, 1939, so as to exclude from consideration the favorable earnings experience of the property during the years 1939, 1940 and 1941 (Tr. 2635; 2656). To exclude these recent earnings, which not only demonstrate earning power greatly in excess of what reasonably might have been anticipated as of January 1, 1939, and which show that the earnings experience in prior years cannot be used as a "reliable criterion of future performance" and which, moreover, furnish a fair test and demonstration of the natural strength of important new mileage constructed too recently to be reflected in any average based on the Debtor's earning experience prior to January 1, 1939, would be grossly inequitable and unjust to the Debtor.

While it might be difficult to urge that such a retroactive valuation would be justified by the language quoted above from the opinion of the Circuit Court of Appeals and while it is at least doubtful whether the Interstate Commerce Commission would so proceed, nevertheless, as the question is a critical one from the Debtor's standpoint and the language may not be entirely free from doubt or ambiguity, this Court may find the matter of sufficient importance to justify the issuance of a *writ of certiorari* on the

Debtor's Cross-Petition filed only by way of abundant caution to avoid a possible claim that the Debtor had acquiesced in a retroactive valuation; which it does not. On the contrary, it insists that a retroactive valuation would be inadmissible. Subsection (e) of Section 77 expressly provides that the Interstate Commerce Commission upon reference back "shall proceed to a reconsideration of the proceedings under the provisions of subsection (d)" which can only mean that it shall proceed *de novo*.

It will soon be apparent to this Court that the great concentrations of capital as represented by the life insurance companies and the savings banks have reached an accord with the Interstate Commerce Commission in the various Section 77 proceedings whereby the equity interests represented by junior debt and capital stock are to be *theoretically* extinguished by drastic writing down of capitalization but in *reality* are to be transferred by allotments of new stock without par value to the holders of the senior debt.

The present case is typical.

The 19A Valuation is in excess of $150,000,000 (Tr. 1062). The original cost fully depreciated is in excess of $120,000,000 (Tr. 1044-1047; 1114). The secured debt permitted to participate in the reorganization amounted as of January 1, 1939, to only $87,712,654 (Tr. 1576). So, assuming the fair capitalizable value of the Debtor's property to be $120,000,000 (which was what was recommended in the dissenting opinion of Commissioner Miller and is a sum upon which more than 4% is being earned currently as shown by the supplemental tables in Volumes VII and VIII of the Transcript) there is an equity of $32,287,346

for the junior debt and capital stock, all of which would be transferred to the senior creditors under the Commission's Plan. Such facts cannot be concealed if the Interstate Commerce Commission is required to make and certify findings of value supported by adequate underlying data agreeably to the decision of this Court in *Consolidated Rock Products Co. et al.* v. *Du Bois* (*supra*). Naturally there will be a concerted drive (of which the present Petitions may be a part) to undermine that decision.

The Circuit Court of Appeals left undecided a very serious controversy involving conflicting lien claims in respect of more than $10,000,000 of property between the Trustees of the Debtor's First Mortgage and the Irving Trust Company, as Trustee of its Refunding and General Mortgage. These questions were fully argued in the Circuit Court of Appeals both orally and upon brief and being pure questions of law should, we submit, be determined before the Interstate Commerce Commission is asked to value the properties covered by the respective mortgages. A lay Board such as the Interstate Commerce Commission ought not to be required to guess how these lien questions ultimately will be decided by the Courts.

WHEREFORE, the Cross-Petitioner prays that the Petitions in Docket Nos. 819 and 820 be denied and that pursuant to this Cross-Petition a *writ of certiorari* issue to the United States Circuit Court of Appeals for the Ninth Circuit to the ends (a) that so much of the Decree of that Court dated November 28, 1941, as dismisses the appeal of The Western Pacific Railroad Company and the Irving Trust Company, as Trustee, be reversed and directed to be stricken from said Decree, and (b) that this Court may give

such directions as to the further course of this proceeding as to it may seem meet.

Respectfully submitted,

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Dated, New York, N. Y., January 17, 1942.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	3
Statute involved	4
Statement	4
Reasons for granting the writ	5
Conclusion	9

CITATIONS

Cases:	
Chicago, Milwaukee, etc., Railroad Company, Matter of, pending on petitions for writs of certiorari, Nos. 875–883, this Term	8
Chicago and North Western Ry. Co., Matter of, decided February 9, 1942 (C.C.A.7)	8
Consolidated Rock Products Co. v. *DuBois*, 312 U. S. 510	7
Crocker First National Bank et al. v. *Western Pacific Railroad Corp.*, No. 820, this Term	5
Ecker et al. v. *Western Pacific Railroad Corporation*, No. 819, this Term	4, 5
Palmer v. *Massachusetts*, 308 U. S. 79	9
Statutes:	
Act of January 22, 1932, c. 8, 47 Stat. 5	2
Bankruptcy Act, Section 77	4

446409—42

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. ——

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

WESTERN PACIFIC RAILROAD CORPORATION, A CORPORATION; A. C. JAMES CO., A CORPORATION; THE RAILROAD CREDIT CORPORATION, A CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY, A CORPORATION; IRVING TRUST COMPANY, A CORPORATION, AS SUBSTITUTED TRUSTEE UNDER THE GENERAL AND REFUNDING MORTGAGE OF THE WESTERN PACIFIC RAILROAD COMPANY; FREDERICK H. ECKER, JOHN W. STEDMAN AND REEVE SCHLEY, CONSTITUTING THE INSTITUTIONAL FIRST MORTGAGE BONDHOLDERS COMMITTEE; AND CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE FIRST MORTGAGE OF THE WESTERN PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Reconstruction Finance Corporation, a public corporation

created by Act of Congress,[1] prays that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit rendered in this cause on November 28, 1941 (R. 2663), reversing an order of the District Court for the Northern District of California. The latter order approved a plan of reorganization which had theretofore been approved and certified to the District Court by the Interstate Commerce Commission in proceedings for the reorganization of The Western Pacific Railroad Company.

OPINIONS BELOW

The initial report and order of the Interstate Commerce Commission (R. 194) are reported in 230 I. C. C. 61; its report and order on further consideration (R. 300) are reported in 233 I. C. C. 409; and its order denying the further petition of the Debtor for modification of the plan approved by it (R. 884) is reported in 236 I. C. C. 1. The opinion of the District Court (R. 1569) is reported in 34 F. Supp. 493. The opinion of the Circuit Court of Appeals (R. 2663) is reported in 124 F. (2d) 136.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 28, 1941 (R. 2675–2676). Petitions for rehearing were filed by Irving Trust Company, a trustee under a mortgage indenture, and by the Debtor, The Western Pacific Railroad

[1] Act of January 22, 1932, c. 8, 47 Stat. 5.

Company, whose appeals had been ordered dismissed by the decree of November 28, 1941. On February 12, 1942, a rehearing was granted. On February 16, 1942, an order was entered setting aside so much of the decree of November 28, 1941, as had dismissed the appeals of the Irving Trust Company and of the Debtor, but denying all further relief sought by the petitions for rehearing (R. 2618). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 24 (c) of the Bankruptcy Act.

QUESTIONS PRESENTED

1. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the exclusion of the stockholders and unsecured creditors of the Debtor from participation in the reorganized company, as provided in the plan approved by the Commission and the District Court.

2. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the allocation of the securities of the reorganized company among those found to be entitled to share therein, in the manner provided in the plan.

3. Whether, as the Circuit Court of Appeals indicated in its opinion, the District Court misconceived the relationship between the functions of the Interstate Commerce Commission and those

of the District Court in connection with plans of reorganization under Section 77 of the Bankruptcy Act.

STATUTE INVOLVED

The relevant portions of Section 77 of the Bankruptcy Act are set forth in the Appendix to the petition for a writ of certiorari in *Ecker et al.* v. *Western Pacific Railroad Corp.*, No. 819, this Term, seeking review of the same decree of which review is sought by this petition.

STATEMENT

The Western Pacific Railroad Company filed its petition for reorganization under Section 77 of the Bankruptcy Act on August 2, 1935 (R. 4–11). Plans of reorganization were filed with the District Court and with the Interstate Commerce Commission in accordance with Section 77 (d). Hearings before the Commission commenced March 23, 1936 (R. 1853), and on September 28, 1939, a plan was certified by the Commission to the District Court (R. 1034–1035). The District Court approved the plan certified by the Commission (R. 1600). The Circuit Court of Appeals, however, reversed the order approving the plan and remanded the cause to the District Court with directions to dismiss it or, in the court's discretion, to refer it back to the Commission for further action (R. 2675–2676).

Reconstruction Finance Corporation holds (1) Trustees' Certificates in the principal amount of

approximately $10,000,000, which were issued by the Trustees of the Debtor with the approval of the District Court, and (2) five secured promissory notes issued by the Debtor, which aggregate, with interest to January 1, 1939, the sum of $3,862,869.98. Reconstruction Finance Corporation was permitted to intervene in the court and Commission proceedings (R. 2621–2622) and has actively supported the plan of reorganization which the District Court approved.

Petitions for writs of certiorari to review the decree of the Circuit Court of Appeals have been filed by the Institutional Bondholders Committee and by Crocker First National Bank of San Francisco and Samuel Armstrong, as trustees under a mortgage given by the debtor. *Ecker et al.* v. *Western Pacific Railroad Corp.*, No. 819, this Term; *Crocker First National Bank et al.* v. *Western Pacific Railroad Corp.*, No. 820, this Term.[2] The relevant facts are adequately stated in those petitions and need not be repeated.[3]

REASONS FOR GRANTING THE WRIT

1. In the present reorganization proceedings the Interstate Commerce Commission, after detailed consideration of the assets and financial history of

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[2] A cross-petition has been filed by the Debtor, No. 885, present Term.

[3] It is respectfully requested that the certified transcript of record and additional printed copies filed with the petition in No. 819 be deemed to accompany this petition within the meaning of Rule 38 and that reference may be made to them accordingly.

the Debtor and of its past, present, and probable future earnings, determined the maximum permissible capital structure for the Debtor (R. 364). Since the capital structure so determined would not justify any participation by the stockholders of the Debtor, the Commission found that the equity of the stockholders was without value; it further found that the claims of the unsecured creditors were without value and that therefore they, too, must be excluded from participation (R. 269–270, 392–393).[1] The Commission then allocated the proposed new securities among the classes of creditors held entitled to share in the plan in the manner provided therein (R. 389–394). It based this allocation upon detailed consideration of the various claims and of the assets available, for the payment thereof and, in its report, it set forth at length the reasons for its conclusions (R. 194, 300, 884). The District Court approved the plan certified to it by the Commission and adopted the Commission's findings as its own (R. 1600). The court below, however, reversed on the ground that the Commission had not made findings of fact as to the value of the railroad as a whole, the value of the securities held by each class of creditors, and the value of the new securities to be issued. According to the opinion of the court below, some sixteen separate dollar and cents valua-

[1] The Commission found in addition that the junior claim of The Railroad Credit Corporation in the collateral pledged under the notes held by the Reconstruction Finance Corporation had no value (R. 316, 392).

tions should have been made by the Commission. The Court stated that it believed its action was required by the decision of this Court in *Consolidated Rock Products Co. v. DuBois,* 312 U. S. 510.

The decision of the court below presents questions of very substantial importance in the administration of Section 77 of the Bankruptcy Act. The Commission has already certified to the appropriate district courts numerous plans of reorganization of other railroads formulated upon the same general principles and accompanied by a report essentially the same as those involved in this case. It must, in the future, certify plans of reorganization for other railroads which are now in reorganization under Section 77. The aggregate principal amount of the outstanding loans from Reconstruction Finance Corporation alone to railroads or trustees of railroads now in reorganization whose plans of reorganization may be affected by the decision in the present case exceeds $125,000,000. If the requirements as to valuation set forth in the decision below were to be adopted, it would probably be necessary for substantially all of the pending reorganization proceedings to be referred back to or reopened by the Commission, resulting in substantial expense and prolonged delay. It is accordingly essential to the public interest, both from the standpoint of efficient railroad operation and for the rehabilitation of railroad credit, that the validity of the Commis-

sion's procedure be settled by a definitive decision of this Court.

Due to the lack of such a definitive ruling, confusion exists in the decisions of the lower federal courts. The decision below is in square conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Matter of Chicago, Milwaukee, etc., Railroad Company*, decided December 4, 1941, now pending in this Court on a petition for writs of certiorari, Nos. 875–883, this Term, upon the question of whether stockholders can be excluded from participation in the reorganized company upon a finding that their equity is without value because the earnings of the Debtor would not support a capital structure large enough to include them. And although in other respects the Circuit Court of Appeals for the Seventh Circuit adopted the same approach as the court below, nevertheless, in *Matter of Chicago and North Western Ry. Co.*, decided February 9, 1942, it held that valuation findings, of the same type as those here involved were, in the particular circumstances of that case, sufficient.

2. An additional reason for review of the present case is the statement in the opinion of the court below (R. 2672) that the District Court had been acting under "a possible misconception" of the respective functions of the Commission and of the courts under Section 77. The court based this statement upon the fact that

the District Court had referred in its opinion to the specialized knowledge and experience of the Commission and its consequent qualification to find the ultimate facts with respect to the Debtor's financial situation. If the opinion of the court below is to be construed as requiring an independent determination by the District Court of all questions of valuation, despite an initial determination of such questions by the Commission, it constitutes, we believe, a serious misconstruction of the provisions of Section 77. So construed, the opinion is contrary to the views expressed by this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79, 87, where the Court specifically pointed out that "the whole scheme of section 77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates."

CONCLUSION

In view of the large public importance of the questions involved and of the contrariety of views expressed by the lower federal courts, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

CLAUDE E. HAMILTON, JR.,
General Counsel,
Reconstruction Finance Corporation.

FEBRUARY 1942.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1086 61

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,

Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

HAROLD C. McCOLLOM,
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ORRIN G. JUDD,
Of Counsel.

Dated, New York, March 28, 1942.

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INDEX

PAGE

Opinions below 2

Jurisdiction 3

Statement of the matters involved 3

Proceedings in the Circuit Court of Appeals 5

The lien questions 6

Questions presented 11

Reasons relied on for the allowance of the writ 12

Cases Cited

American Brake Shoe & Foundry Co. *v.* New York Railways Co., 277 Fed. 261, 271-72 (S.D.N.Y.) 9

Bay of Naples, The, 48 Fed. 737 (C.C.A. 2) 14

Case *v.* Los Angeles Lumber Co., 308 U. S. 106, 122 13

Chicago Great Western R. Co. *v.* Basham, 249 U. S. 164 3

Chicago, Milwaukee, St. P. & P. R. Co., In re, 124 F. (2d) 945 (C.C.A. 7) 10, 15

Citizens Savings and Trust Co. *v.* Cincinnati and Dayton Traction Co., 106 Ohio St. 577 9

Consolidated Rock Products Co. *v.* DuBois, 312 U. S. 510 ..... 10, 12, 13

Continental Illinois National Bank *v.* Chicago, Rock Island & Pacific Ry., 294 U. S. 648, 685 16

Delk *v.* St. Louis & San Francisco R. R., 220 U. S. 580 16

PAGE

Donovan *v.* Pennsylvania Co., 199 U. S. 279 16

"Francis Wright", The, 105 U. S. 381, 387..... 14

Humphreys *v.* McKissock, 140 U. S. 304, 313-14..... 8

Liberty Oil Co. *v.* Condon National Bank, 260 U. S. 235, 245 16

Merchants Insurance Co. *v.* Allen, 121 U. S. 67, 71..... 14

New Orleans Pacific R. Co. *v.* Parker, 143 U. S. 42, 55 8

Northern Pacific Ry. Co. *v.* Boyd, 228 U. S. 482..... 13

Smith *v.* McCullough, 104 U. S. 25..... 9

Story Parchment Co. *v.* Paterson Parchment Paper Co., 282 U. S. 555..... 15

Authorities Cited

Robertson, Practice & Procedure in the Supreme Court of the United States (Rev. Ed. 1929) p. 4.... 3

Statutes Cited

Judicial Code, Section 240-a (U. S. Code, Title 28, Section 347-a) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

In the Matter

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
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CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company, dated as of Janu-

ary 1, 1932 (hereinafter respectively called the "Refunding Mortgage Trustee" and the "Refunding Mortgage"), respectfully prays for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit, rendered February 16, 1942 (R. 2681), on rehearing of an earlier decree of said Court dated November 28, 1941 (R. 2663, 2675), which reversed an order of the United States District Court for the Northern District of California, entered August 15, 1940 (R. 2569), approving a plan of reorganization for the Debtor under Section 77 of the Bankruptcy Act.

The review sought by this petition is limited to the questions concerning the relative liens of the Refunding Mortgage and the so-called First Mortgage of the Debtor. Petitions for writs of certiorari to review said decree of November 28, 1941 in other respects are already pending, having been filed respectively by Frederick H. Ecker, *et al.* (No. 819), and Crocker First National Bank of San Francisco, *et al.* (No. 820).

The record on this petition is the same as the record on No. 819 (which constitutes the record on No. 820 also). This petitioner begs leave to refer to the certified transcript filed in No. 819, and prays that such certified transcript be deemed to accompany this petition within the meaning of Rule 38 of this Court.

Opinions below.

The opinion of the District Court, dated August 15, 1940 (R. 1569), is reported in 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals, dated November 28, 1941 (R. 2663), is reported in 124 F. (2d) 136.

No opinion was rendered by the Circuit Court of Appeals in deciding the petitions for rehearing. The order thereon dated February 16, 1942, amending a prior order dated February 12, 1942, is printed in the supplemental record (R. 2681).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347-a).

Petitioner's time to apply for certiorari runs from the date of the Circuit Court of Appeals' decision on rehearing, namely, three months from February 16, 1942. *Chicago Great Western R. Co.* v. *Basham*, 249 U. S. 164; *Robertson, Practice & Procedure in the Supreme Court of the United States* (Rev. Ed. 1929), p. 4.

Statement of the matters involved

Petitioner, Irving Trust Company, was substituted as Trustee under Debtor's Refunding Mortgage on November 13, 1936 (R. 1053) during the course of hearings before the Interstate Commerce Commission on various proposed plans of reorganization. Bonds outstanding under the Refunding Mortgage aggregate $18,999,500 principal amount (R. 1056), and all of them are pledged, in varying amounts, with three creditors, namely, A. C. James Company, Railroad Credit Corporation, and Reconstruction Finance Corporation.

The Refunding Mortgage is a lien on substantially all the property of the Debtor (R. 1231-46).* The lien of

* The granting clauses of the Refunding Mortgage are printed in the record at the pages indicated. The balance of the Mortgage (I.C.C. Ex. 6) is not printed, but constitutes part of the record, under a stipulation approved by the Circuit Court of Appeals (R. 2612-25).

the Refunding Mortgage is subject "in so far, but only in so far (in extent, degree of priority or otherwise), as in law the same respectively may attach" (R. 1247) to the First Mortgage of the Debtor dated June 26, 1916, under which there are outstanding approximately $50,000,000 principal amount of bonds (R. 1047).

Evidence respecting the relative lien of the two mortgages on various parcels of property was introduced before the Interstate Commerce Commission. The Commission, while stating that "final adjudication of this and similar questions must be made by the court" (R. 262), made a preliminary determination, overruled the Refunding Mortgage Trustee's contentions and stated that the First Mortgage bondholders should be "considered as having a first lien upon practically all the assets of the Debtor" (R. 267). In consequence, its original Report provided for the issuance of nothing but common stock to the creditors secured by Refunding Mortgage bonds (R. 278) in respect of the security afforded by such bonds.

Following a petition for modification filed by the Refunding Mortgage Trustee, the Commission, in a supplemental report, recognized that deposited cash and certain securities of Tidewater Southern Railway Company, which were admittedly subject to the Refunding Mortgage as a first lien, had substantial value, and directed that the holders of Refunding Mortgage bonds be awarded, in consideration thereof, new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955 (R. 315).

The Refunding Mortgage Trustee filed objections to the approval of the Plan, which were overruled by the District Court (R. 1597).

Thereafter, the Refunding Mortgage Trustee appealed to the Circuit Court of Appeals from the order approving the Plan. The appeal was limited (R. 1616, 1651) to questions relating to the lien of the Refunding Mortgage, in respect of which the pledgees of the Refunding Mortgage bonds have recognized that the Refunding Mortgage Trustee was the appropriate party to present such questions (R. 911, 961, 1631, 1644; I.C.C. Min. 477, 550-51). The present petition is filed at the express request of two of such bondholders.

Proceedings in the Circuit Court of Appeals

The opinion of the Circuit Court of Appeals did not deal with the legal questions of conflicting lien, and made no determination with respect thereto. In its original opinion, the Circuit Court of Appeals ruled that the Refunding Mortgage Trustee was not adversely affected by the Plan and was not entitled to appeal, and dismissed its appeal (R. 2668; 124 F. (2d) at 138).

Thereafter the Refunding Mortgage Trustee filed a timely petition for rehearing seeking to have the Circuit Court of Appeals' decision modified so as to determine that the Refunding Mortgage Trustee was a proper party appellant, and so as to include an immediate determination of the lien question.

The Circuit Court of Appeals, on such petition for rehearing, set aside that portion of the decree dismissing the appeal of the Refunding Mortgage Trustee, but denied the petition for other relief (R. 2681).

In other words, the Circuit Court of Appeals has recognized the standing of the Refunding Mortgage Trustee as a proper party appellant, but has declined to decide at this time the questions raised by its appeal with respect to the extent of the lien of the Refunding Mortgage.

One other portion of the Circuit Court of Appeals' original opinion is very pertinent to the claims of the Refunding Mortgage Trustee. The Court, in directing that the Plan be remanded to the Commission, stated that it was necessary for the Commission to make findings with respect to the *value* of

> "(1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage." (R. 2670; 124 F. (2d) at 139.)

It will be difficult, to say the least, for the Commission to make such findings until there has been a final determination of the extent of the respective liens of the two mortgages.

The lien questions

Without attempting to argue the merits of the lien controversy in this petition, we set forth below a summary of the facts and legal contentions on each question, so that this Court may have before it both the nature of the items involved and the principal legal issues which are presented with respect to each item.

1. The first issue of lien relates to certain of the Debtor's rolling-stock, which was acquired under conditional sale or equipment-trust agreements, and in which the Debtor had an equity at the date of institution of the proceedings of over $6,000,000 (R. 1074). All the payments on account of this rolling-stock were made from the Debtor's free funds, or from proceeds of Refunding Mortgage bonds (R. 1073-74). None of it was owned by the Debtor at the time of the execution of the First Mortgage.

The exclusion from the lien of the First Mortgage of equipment-trust rolling stock bought with free funds is clearly set forth in the granting clause of the First Mortgage, which provides (R. 1229):

> "and the Company may, *unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same,* purchase and acquire equipment, *free from the lien hereof,* by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture." (Italics supplied by counsel.)

The Refunding Mortgage contains express provision pledging the equity in such rolling-stock (R. 1244-45).

The reason given by the Commission (R. 266) and adopted by the Court (R. 1597) for nevertheless holding such rolling-stock to be subject to the First Mortgage was an alleged inconsistency between the free funds clause and the subject clause of the First Mortgage, which latter provided (R. 1230):

> "SUBJECT, HOWEVER, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject *as permitted hereby* * * *." (Italics supplied by counsel.)

The fallacy of this argument lies in the failure to consider the first italicized provision of the free funds clause above which, we believe, clearly contemplates that rolling-stock may be acquired under equipment-trust either (1)

with First Mortgage funds—in which event the First Mortgage will be a lien thereon "subject * * * to the equipment trust or conditional sale agreements * * * permitted hereby", or (2) with free funds—in which event the equipment will be "free from the lien hereof".

2. The second lien question relates to the Debtor's Northern California Extension. This extension was completed in 1932, at a cost of over $10,000,000 (R. 1078), and has proved to be one of the most valuable parts of the Debtor's system (R. 1935, 1942-48, 1980). The Refunding Mortgage Trustee claims that the Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage bonds ($5,000,000 principal amount) used in the construction thereof and that otherwise it is subject, under the facts appearing in the record, to the *pari passu* lien of the Refunding Mortgage, inasmuch as the moneys for the completion of the Extension (over $5,000,000) were supplied by the Refunding Mortgage creditors (R. 1078; I.C.C. Ex. 52, p. 647), and less than half the cost of land on which it is built was paid from First Mortgage funds (R. 1082-84).

The extension is specifically described in the Refunding Mortgage (R. 1236).

No supplemental indenture was ever executed subjecting the Extension to the lien of the First Mortgage (R. 1077). It cannot be brought under the after-acquired property clauses as an appurtenance of the mortgaged property (*New Orleans Pacific R. Co.* v. *Parker*, 143 U. S. 42, 55; *Humphreys* v. *McKissock*, 140 U. S. 304, 313-14).

The holding that the First Mortgage was nevertheless a first lien on the entire Extension to the full extent of the $50,000,000 of First Mortgage bonds outstanding was

rested on that portion of the after-acquired property clause which gives a lien where First Mortgage bonds or their proceeds were used "on account of the purchase, acquisition or construction thereof or work thereon" (R. 122). This was construed as granting a lien for the entire $50,000,000 on the entire extension if it was financed "*in any part*" (even $1,000) "with first-mortgage bonds or cash deposited under that mortgage" (R. 264). This holding is inconsistent with the strict construction of after-acquired property clauses (*Smith* v. *McCullough*, 104 U. S. 25) and with the doctrine of *pari passu* lien, exemplified by the case of *Citizens Savings and Trust Co.* v. *Cincinnati and Dayton Traction Co.*, 106 Ohio St. 577.

3. The third lien question relates to non-carrier real estate (R. 1089-91), of a book value of approximately $1,850,000, which the Refunding Mortgage Trustee contends is free from both the First Mortgage and the Refunding Mortgage, and must be given consideration, as unmortgaged property, in the allocation of securities to the Refunding Mortgage creditors, as well as the First Mortgage creditors, in the event it is found that they are not fully secured.

The Refunding Mortgage Trustee's argument is based on the provisions of the 1915 plan of reorganization of the Debtor's predecessor, which restricted the lien of the First Mortgage to "existing railway properties" (R. 1141), and on the lack of any express reference in the First Mortgage to these very substantial pieces of real estate. We consider the interpretation of the First Mortgage as covering such property to be inconsistent with established rules of construction and also to violate the contract created by the 1915 reorganization agreement (Cf. *American Brake Shoe & Foundry Co.* v. *New York Railways Co.*, 277 Fed. 261, 271-72—S.D.N.Y.).

4. A fourth lien question was presented to the Circuit Court of Appeals, relating to the amount and type of securities that should be issued to the Refunding Mortgage creditors in recognition of thei undisputed first lien on pledged securities of Alameda Belt Line and Central California Traction Company (R. 1042-43), in respect of which no new securities are proposed, under the Plan, to be issued.

The supplemental report of the Commission stated that "the lien on the securities of these two companies has no material value" (R. 315), but it made no specific finding concerning the value of the securities, as required by *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, and *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 124 F. (2d) 754 (C.C.A. 7).

Moreover, the record shows that *some* value *must* be given to these securities, since they carry ownership of important feeder lines, which produce an aggregate of $500,000 per year of traffic for the Debtor (R. 110, 203, 1312); and the Debtor's Trustees have testified that the benefit derived by the Debtor from its ownership of these lines is greater than any loss it suffers from having to make advances to them (R. 1315; see also R. 1262-63, 1102).

By requiring that the Interstate Commerce Commission find the value of the property subject to the Refunding Mortgage (R. 2670), the Circuit Court of Appeals has paved the way for a proper solution of this question, and it need not be considered further in this Court.

The Circuit Court of Appeals' decision requires, as observed above, that the Commission value the property subject to each mortgage. But an attempt to fix the

values of separate parts of the Debtor's properties, and to make a correct allocation of securities on the basis of such values, will be difficult and wasteful, if not impossible, until there has been a final adjudication concerning the priority of liens on the Debtor's properties.

Therefore it is desirable and necessary that such questions of priority be determined at this time.

Questions presented

The first and fundamental questions presented by this petition are:

1. Should a proceeding be remanded to the Interstate Commerce Commission for determination of the value of the properties subject to the liens of various mortgages without a final adjudication by the Court of legal questions squarely and properly presented to it concerning the extent of the lien of such mortgages?

2. Is it proper for an appellate court, reviewing objections to a reorganization plan, to leave undetermined questions of law, squarely and properly presented to it, affecting the priority of lien on over $12,000,000 worth of the Debtor's property?

If this Court reviews the whole case on certiorari, the following further questions will be presented to it for determination:

3. Is equipment acquired by a mortgagor with free funds under equipment-trust agreements subject to the lien of the Company's First Mortgage when that Mortgage provides:

> "The Company may, unless First Mortgage bonds shall have been authenticated and delivered or their proceeds or other cash deposited here-

under paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust * * *." (R. 1229)

4. Where less than half the total cost of the Debtor's Northern California Extension was supplied from the proceeds of First Mortgage bonds, and less than half of the cost of the land on which it was built was paid from proceeds of First Mortgage bonds, and the balance (over $5,000,000) of such cost was furnished by creditors who are pledgees of Refunding Mortgage bonds, is such Northern California Extension subject, under the facts shown in the record, to the exclusive prior lien of the First Mortgage to the extent of the entire $50,000,000 of First Mortgage bonds outstanding, or is it subject to the First Mortgage only to the extent of the proceeds of First Mortgage bonds used in its construction, and otherwise subject to the *pari passu* lien of the Refunding Mortgage?

5. Is non-carrier real estate which is not described in the First Mortgage nevertheless subject to its lien, particularly when the reorganization plan under which such Mortgage was created restricted its lien to railway properties?

Reasons relied on for the allowance of the writ

1. The Circuit Court of Appeals has decided a federal question respecting the necessity of determining the lien status of property of a company in reorganization, in a way which is in conflict with the decision of this Court in *Consolidated Rock Products Co.* v. *DuBois,* 312 U. S. 510.

Determination of the property on which creditors hold liens is fundamental to the enforcement of the absolute or full priority doctrine of *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 122. This Court's opinion in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 520, made that plain at the outset, the Court mentioning not only the necessity of "the requisite valuation data" (312 U. S. 520), but also stating (*ibid.*):

> "In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met."

The decision below fails to distinguish between the questions of fact respecting the value of the property subject to the liens of the respective mortgages, and the questions of law concerning what properties are affected by those liens. The former questions may properly be remitted to the Commission for determination in the first instance; the latter questions must be decided by the courts at the earliest opportunity, and the duty to make such decision may not be avoided or postponed.

2. The Circuit Court of Appeals, by failing to decide all the questions before it, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The questions concerning the extent of lien were squarely presented to the Circuit Court of Appeals on this appeal. They are set forth in the Refunding Mortgage Trustee's statement of points on its appeal (R. 1652-53). They were fully briefed and argued before the

Circuit Court of Appeals, but its opinion contains not a word relating to such issues, except the statement (124 F. (2d) at 139) that the determination of the value of the property subject to the Refunding Mortgage and the First Mortgage "of course, necessitated a determination as to which of the Debtor's property is, and which is not, subject to each mortgage."

Nothing can be gained but delay by referring these legal questions to the Commission again. The Commission has already made its provisional determination (R. 267) of what property is subject to the Refunding Mortgage, although recognizing (R. 262) that its determination was only preliminary and that final adjudication of such matters must be made by the court. The District Court has already passed on the matter (R. 1597), albeit in a summary fashion.

In the normal and orderly course of procedure, the errors which the Refunding Mortgage Trustee complained of in the action of the Commission and the District Court should have been decided before the case was remanded.

As was stated in *The Bay of Naples* (48 Fed. 737—C.C.A. 2):

> "when the law gives a party a right to appeal, he has the right to demand the conscientious judgment of the appellate court on every question in the case."

This Court has held, in reviewing decisions of the old Circuit Courts, that it is reversible error to refuse to make a finding one way or another on a question of fact material to the determination of the cause (*The Francis Wright*, 105 U. S. 381, 387; *Merchants Insurance Co.* v. *Allen*, 121 U. S. 67, 71). The same principle should apply to the decision of questions of law.

The decision here is also inconsistent with the theory of the ruling of the Circuit Court of Appeals for the Seventh Circuit in *In re Chicago, Milwaukee, St. P. & P. R. Co.*, 124 F. (2d) 754-63, that

> "findings must be made on all vital issues, controverted or uncontroverted, and must include values of property separately considered, and also of Debtor's property as a whole."

Although the *Milwaukee* opinion refers to findings of fact concerning value, it is equally applicable to the necessity of determining what property is to be valued.

As the record now stands, the Commission and the District Court may rule, when the case is remanded, that their prior determinations respecting lien are the law of the case; if so, the first opportunity to correct them will arise when a new plan of reorganization has been adopted by the Commission, approved by the Court, and brought before the Circuit Court of Appeals on a second appeal many months hence.

All the facts necessary to decide the extent of the lien of the Refunding Mortgage are already in the record. Before being instructed to make findings concerning the value of the property subject to the Refunding Mortgage, the Commission was entitled to the answer of the Circuit Court of Appeals to the legal questions presented by the Refunding Mortgage Trustee's appeal concerning what property is, in point of law, subject to the Refunding Mortgage.

3. This Court has power, if it grants certiorari, to dispose of all questions arising on the record.

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-68;

Donovan v. *Pennsylvania Company*, 199 U. S. 279, 292;

Delk v. *St. Louis & San Francisco R.R.*, 220 U. S. 580, 588-89.

Although the Court may remand the case to the Circuit Court of Appeals for the decision of questions which the Circuit Court of Appeals erroneously refused to consider (*Liberty Oil Co.* v. *Condon National Bank*, 260 U. S. 235, 245), such a remand here would inevitably mean a longer delay before the final approval of the Plan than if this Court itself shall decide the lien questions.

In order to carry out the policy of expediting railroad reorganizations (*Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Ry.*, 294 U. S. 648, 685), this Court should itself consider and decide the lien questions in conjunction with any other matters of which it shall grant review.

4. Since this petition relates not to error in any rulings by the Circuit Court of Appeals on the lien questions, but only to its refusal to decide them, we deem it unnecessary to present in any further detail the arguments supporting the Refunding Mortgage Trustee's position on questions 3, 4 and 5 above until after certiorari has been granted.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of this Court to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, dated February 16, 1942, amending on rehearing its order entered November 28, 1941, in respect of the questions mentioned in the above petition concerning the lien of the Refunding Mortgage

on the properties of the Debtor; and that petitioner be granted such other and further relief as to this honorable Court may seem just and proper.

Dated: March 28, 1942.

HAROLD C. MCCOLLOM,
Attorney for Petitioner, Irving Trust Company, as Successor Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company.

ORRIN G. JUDD,
Of Counsel.

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FILED
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1942
No. 7

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Petitioners.

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

September 14, 1942.

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 3

Statement 4

1. Present Capitalization of the Debtor..... 4
2. Earnings Record of the Debtor's Properties.. 6
3. New Capitalization under the Commission Plan. 8
4. Distribution under the Commission Plan..... 10
5. Valuation Data before the Commission..... 13
6. Findings Made by the Commission..... 14
   (a) Findings as to capitalization..... 16
   (b) Finding as to classes excluded from participation 17
   (c) Findings as to distribution of new securities 18
7. Proceedings before the District Court..... 22
8. Action of the Circuit Court of Appeals..... 23

Argument 27

I. The findings of the Commission and the District Court that the Debtor's stock and unsecured debt "have no value," as supported by the valuation data and the other findings in the record, are sufficient to sustain the exclusion of such stock and unsecured debt from participation in the reorganization 27

PAGE

1. The Los Angeles Lumber Case and the Consolidated Rock Products Case 27
2. The Meaning of "Value" as Used in Section 77 35
   (a) Rate-making value; depreciated investment; depreciated reproduction cost ... 35
   (b) Market values 41
   (c) Capitalization of prospective earning power 44
3. Suggested Standard for Determining, as to any Class of Securityholders, the Necessity for its Admission to, or its Exclusion from, Participation in a Section 77 Reorganization. 47
4. The Commission's Determination of the "Reorganization Value" of the Western Pacific.. 50
   (a) The negotiations among the securityholders 50
   (b) The Commission's conclusions 52
   (c) Valuation Data 55
      (i) Physical Value 56
      (ii) Earning Power 57
5. The Effect of War Boom Earnings..... 61
6. The Absence of a Formal Finding of a Dollars and Cents Value of the Debtor's Properties as an Entirety 68
7. Conclusion 78

II. The determinations by the Commission and the District Court of the equitable equivalent of the Debtor's assets available for the satisfaction of

PAGE

each class of participating claims, in terms of the various new securities, as supported by the valuation data and the other findings in the record, are sufficient to sustain the allocations contained in the Commission plan 79

1. The Purpose of Reorganization 79

2. The Practice of the Commission 80

3. The Rule Imposed by the Decision Below ... 89

4. The Allocations Under the Commission Plan. 96

(a) Allocations as between the First Mortgage and the Refunding Mortgage 96

(b) Allocations as between pledgees of Refunding Bonds 104

(c) The compromise of RFC's entire "bundle of rights" 107

5. Conclusion 111

III. The District Court properly recognized the jurisdiction of the Commission under Section 77 and, in the exercise of an informed and independent judgment, fully performed the Court's functions under Section 77 113

1. Three Opposing Views 113

2. Section 20a of the Transportation Act and Reorganizations in Equity 115

3. The Reorganization Process Under Section 77 119

4. Extension of the Commission's Power Under Section 20a of the Transportation Act to Reorganizations Under Section 77 122

PAGE

5. The Ultimate Jurisdiction of the Court to Determine the Private Rights of the Various Securityholders 127

6. Conclusion 137

IV. Upon the entire record, this Court should reverse the decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission plan 138

V. Securityholders who defend in the Circuit Courts of Appeals plans promulgated and approved by the Commission, and also approved by the District Courts, should not be assessed the costs of the appeals if the appeals are successful. Such costs should be assessed directly against the Debtor's estate 145

VI. Conclusion 146

Appendix A i

Appendix B vii

CASES CITED

PAGE

In re Akron, Canton & Youngstown Ry. (not yet reported, N. D. Ohio, 1939) 39, 86, 135
Akron, Canton & Youngstown Ry., 228 I. C. C. 645 (1938) 38, 45, 68
Akron, Canton & Youngstown Ry. Co. v. *Hagenbuch*, 128 F. (2d) 932 (C. C. A. 6th, 1942) 39, 65, 115, 127, 136
Alabama, Tennessee & Northern R. R., 247 I. C. C. 453 (1941) 64
Atlanta, Birmingham & Coast R. R. v. *U. S.*, 296 U. S. 33 (1935) 36
In the Matter of Atlas Pipeline Corp., SEC Corp. Reorg. Release No. 42 (June 7, 1941) 44
Bond Application of Texas Short Line Ry., 67 I. C. C. 400 (1921) 123
City of Buffalo v. *N. Y. Cent. R. R.*, 125 Misc. 801, 212 N. Y. Supp. 1 (1925), aff'd 218 App. Div. 810, 218 N. Y. Supp. 713 (1926) 116
Case v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939) 27, 29, 31, 36, 48, 81, 89, 144
Central Trust Co. v. *Cincinnati, H. & D. Ry.*, 169 Fed. 466 (C. C. S. D. Ohio, 1908) 105
Chicago & E. I. Ry. v. *Miller*, 309 Ill. 257, 140 N. E. 823 (1923) 116
Chicago & Eastern Illinois Ry., 230 I. C. C. 199 (1938), 230 I. C. C. 571 (1939) 38, 45, 68
In re Chicago & Eastern Illinois Ry. (not yet reported, N. D. Ill., 1940) 39
Chicago Great Western R. R., 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939) 38, 68
In re Chicago Great Western R. R., 29 F. Supp., 149 (N. D. Ill., 1939) 39, 86, 99

PAGE

Chicago, Milwaukee & St. Paul Investigation, 131 I. C. C. 615 (1928) 117
Chicago, Milwaukee, St. Paul & Pacific R. R., 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940) ..38, 45, 68
In re Chicago, Milwaukee, St. Paul & Pacific R. R., 36 F. Supp. 193 (N. D. Ill., 1940) .39, 70, 72, 86, 99, 135
In re Chicago, Milwaukee, St. Paul & Pacific R. R., 124 F. (2d) 754 (C. C. A. 7th, 1941) ...39, 71, 90, 136
Chicago & North Western Ry., 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940) 38, 68, 85
In re Chicago & North Western Ry., 35 F. Supp. 230 (N. D. Ill. 1940) 39, 70, 72, 86, 99, 135
In re Chicago & North Western Ry., 121 F. (2d) 791 (C. C. A. 7th, 1941) 128, 136, 146
In re Chicago & North Western Ry., 126 F. (2d) 351 (C. C. A. 7th, 1942) 39, 62, 71, 90
Chicago, Rock Island & Pacific Ry., 242 I. C. C. 298 (1940), 247 I. C. C. 533 (1941), 249 I. C. C. 297 (1941) 38, 64, 69
Cole v. *Ralph,* 252 U. S. 286 (1920) 138
Consolidated Rock Products Co. v. *Du Bois,* 312 U. S. 510 (1941) ..27, 31, 32, 33, 34, 36, 41, 44, 45, 48, 52, 56, 71, 73, 74, 79, 81, 82, 87, 88, 90, 99, 110, 139
In the Matter of Deep Rock Oil Corp., 7 S. E. C. 174 (1940) 40
Delk v. *St. Louis & San Francisco R. R.,* 220 U. S. 580 (1911) 138
Denver & Rio Grande Western Reorganization, 90 I. C. C. 141 (1924) 117, 123
Denver & Rio Grande Western R. R., 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940), (Finance Docket No. 11002, July 13, 1942, not yet reported) 38, 65, 69, 77, 93
In re Denver & Rio Grande Western R. R., 38 F. Supp. 106 (D. Colo., 1940) 39, 86, 133
Donovan v. *Pennsylvania Co.,* 199 U. S. 279 (1905) 138

PAGE

In re English, Scottish and Australian Chartered Bank, 3 Ch. 385 (1893) ..... 143.
Equitable Trust Co. v. *Great Shoshone & T. F. W. P. Co.*, 228 Fed. 516 (D. Idaho, 1915) 105
Equitable Trust Co. of New York v. *Chicago, P. & St. L. Ry.*, 223 Ill. App. 445 (1921) 116
Erie R. R., 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940) 39, 68
In re Erie R. R., 37 F. Supp. 237 (N. D. Ohio 1940) 39, 86, 126, 135

Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942) 36
First National Bank v. *Fleischem*, 290 U. S. 504 (1934) 32
Florida East Coast Ry. (Finance Docket No. 13170, April 6 and August 10, 1942, not yet reported) 39, 65, 69
Florida v. *United States*, 282 U. S. 194 (1931) 73
In the Matter of Flour Mills of America, Inc., 7 S. E. C. 1 (1940) 40, 44
Fonda, Johnstown & Gloversville R. R., 249 I. C. C. 455 (1941) 45, 65
Fort Dodge, Des Moines & Southern R. R., 244 I. C. C. 625 (1941) 64

Galveston, Harrisburg & San Antonio Ry. v. *Texas*, 210 U. S. 217 (1908) 41
In the Matter of Genesee Valley Gas Company, Inc., 3 S. E. C. 104, 112, n. 19 (1938) 38, 40
Great Northern Ry. v. *Weeks*, 297 U. S. 135 (1936) 37
In the Matter of The Griess-Pfleger Tanning Co., 5 S. E. C. 72 (1939) 40, 44

Hancock & Toledo, P. & W. R. Co., 9 Fed. 738 (1882) 29
In the Matter of The Higbee Co., 8 S. E. C. 777 (1941) 40

Jamieson v. *Watters*, 91 F. (2d) 61 (C. C. A. 4th, (1937) 56

PAGE

Kansas City Terminal Ry. v. *Central Union Trust Co.*, 271 U. S. 445 (1926) 82

In the Matter of La France Industries, 5 S. E. C. 917 (1939) 40

Louisville Trust Co. v. *Louisville, New Albany & Chicago Ry.*, 174 U. S. 674 (1899) 42, 70

Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257 (1910) 138

Manufacturers Ry. v. *United States*, 246 U. S. 457 (1918) 73

Merrill v. *National Bank*, 173 U. S. 131 (1899) 105

Miller v. *United States*, 277 Fed. 95 (S. D. N. Y., 1921) 116

Minneapolis, St. Paul & Sault Ste. Marie Ry. (Finance Docket No. 11897, March 17 and June 17, 1942, not yet reported) 39, 65, 69

Minneapolis, St. P. & S. S. M. Ry. v. *Railroad Commission of Wisconsin*, 183 Wis. 47, 197 N. W. 352 (1924) 116

In the Matter of Minnesota and Ontario Paper Co., 7 S. E. C. 456 (1940) 40, 44

Mississippi Valley Barge Line v. *United States*, 292 U. S. 282 (1934) 126

Missouri-Kansas-Texas Reorganization, 76 I. C. C. 84 (1922) 117

Missouri Pacific R. R., 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940) 39, 68

In re Missouri Pacific R. R., 39 F. Supp. 436 (E. D. Mo. 1941) 39, 70, 86, 135

In the Matter of Mountain States Power Co., 5 S. E. C. 1 (1939) 44

McCart v. *Indianapolis Water Co.*, 302 U. S. 419 (1938) 62

In the Matter of McKesson & Robbins, Inc., 8 S. E. C. 853 (1941) 40, 44

PAGE

Nashville, Chattanooga & St. Louis Ry. v. *Browning*, 310 U. S. 362 (1940) 75
In the Matter of National Radiator Corp., 4 S. E. C. 690 (1939) 40
National Surety Co. v. *Coriell*, 289 U. S. 426 (1933) .. 32.
New York Central Securities Co. v. *United States*, 287 U. S. 12 (1932) 116
N. Y. L. & W. Stock and Bonds, 131 I. C. C. 34 (1927) 123
New York, New Haven & Hartford R. R., 239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941) 39, 64, 68
In re New York, New Haven & Hartford R. R. (D. Conn., Dec. 8, 1941, not yet reported) 39, 86, 133
City of New York v. *New York Cent. R. R.*, 275 N. Y. 287, 9 N. E. (2d) 931 (1937) 116
New York Trust Co. v. *Continental & Commercial Trust & Savings Bank*, 26 F. (2d) 872 (C. C. A. 8th, 1928) 36
Northern Pacific Ry. v. *Boyd*, 228 U. S. 482 (1913) 28, 29, 42, 70, 82, 89

Palmer v. *Massachusetts*, 308 U. S. 79 (1939) 135
In the Matter of Peoples Light and Power Co., 2 S. E. C. 829, 847 (1937) 70
In the Matter of the Philadelphia and Reading Coal and Iron Co., S. E. C. Corp. Reorg. Rel. No. 55 (July 25, 1942) 40
Pittsburgh & West Virginia Ry. v. *I. C. C.*, 293 Fed. 1001 (App. D. C. 1923), appeal dismissed, 266 U. S. 640 (1924) 116
In the Matter of Porto Rican American Tobacco Co., 7 S. E. C. 301 (1940) 40, 44
Prentis v. *Atlantic Coast Line Company*, 211 U. S. 210 (1908) 115

Richardson's Executor v. *Green*, 133 U. S. 30 (1890) 105
Rowley v. *Chicago & North Western Ry.*, 293 U. S. 102 (1934) 75

PAGE

St. Louis-San Francisco Ry., 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940) 39, 68, 85
In re St. Louis-San Francisco Ry. (E. D. Mo., May 25, 1942, not yet reported) 70, 86, 133, 135
St. Louis Southwestern Ry., 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942) 39, 43, 44, 64, 69, 84, 92, 93
St. Paul & K. C. S. L. R. R. Bonds, 189 I. C. C. 715 (1933) 123
In the Matter of San Francisco Bay Toll-Bridge Co., 6 S. E. C. 863 (1940) 40, 44
Sauve v. *Fleschutz*, 219 Fed. 542 (C. C. A. 8th, 1915) 105
In the Matter of Sayre & Fisher Brick Co., S. E. C. Corp. Reorg. Release No. 47 (September 12, 1941) 45
Securities Application of Asherton & Gulf Ry., 71 I. C. C. 281 (1922) 123
Securities of L. Ry. & Nav. Co. of Texas, 99 I. C. C. 357 (1925) 123
Securities of Yankton N. & S. R. R., 154 I. C. C. 669 (1929) 123
In re 620 Church Street Building Corp., 299 U. S. 24 (1936) 75
Smyth v. *Ames*, 169 U. S. 466 (1898) 36
Snyder v. *New York, C. & St. L. R. R.*, 118 O. St. 72, 160 N. E. 615 (1928), writ of error dismissed, 278 U. S. 573 (1928), judgment of dismissal vacated and case affirmed, 278 U. S. 578 (1928) 116
Southwestern Bell Telephone Co. v. *Public Service Commission*, 262 U. S. 276 (1923) 37
Spokane International Ry., 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939) 39, 68
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931) 138
Temmer v. *Denver Tramway Co.*, 18 F. (2d) 226, (C. C. A. 8th, 1927) 36
Ticonic Bank v. *Sprague*, 303 U. S. 406 (1938) 139
In the Matter of Ulen & Co., S. E. C. Corp. Reorganization Rel. No. 43 (June 21, 1941) 70

PAGE

United States v. *Baltimore & Ohio R. R.*, 293 U. S. 454 (1935) 73
United States v. *Chicago, M. St. P. & P. Ry.*, 282 U. S. 311 (1931) 116
United States v. *Chicago, Milwaukee, St. Paul & Pacific Ry.*, 294 U. S. 499 (1935) 73
United States v. *Louisiana*, 290 U. S. 70 (1933) 73
United States v. *Morgan*, 313 U. S. 409 (1941) ..126, 135
In the Matter of Utilities Power & Light Corp., 5 S. E. C. 483 (1939) 40, 45
In re Utilities Power & Light Corp., 29 F. Supp. 763, 770 (N. D. Ill., 1939) 66

Warren v. *Palmer*, 310 U. S. 132 (1940) 135
In the Matter of West Ohio Gas Co., 3 S. E. C. 1014 (1938) 40, 70, 74, 87
In the Matter of West Ohio Gas Co., 4 S. E. C. 377 (1939) 44
Western Pacific R. R., 230 I. C. C. 61 (1938), 233 I. C. C. 409 (1939), 236 I. C. C. 1 (1939) 39, 68
In re Western Pacific R. R., 38 F. Supp. 877 (N. D. Calif., 1941) 109
Whitman v. *Northern Central Ry.*, 146 Md. 580, 127 Atl. 112 (1924) 116

TEXT AUTHORITIES

PAGE

Bonbright, The Problem of Judicial Valuation (1927) 27 Col. L. Rev. 493 37

Bonbright and Bergerman, Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization (1928) 28 Col. L. Rev. 127 .....28, 30

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Bourne, Findings of "Value" in Railroad Reorganization (1942) 51 Yale L. J. 1057 .....42, 70, 95

Cravath, The Reorganization of Corporations (1917) Some Legal Phases of Corporate Financing, Reorganization and Regulation..... 70

Craven and Fuller, The 1935 Amendments of the Railroad Bankruptcy Law (1936) 49 Harv. L. Rev. 1254..... 35

Dean, A Review of the Law of Corporate Reorganizations (1941) 26 Cornell L. J. 537..... 34

Dodd, The Los Angeles Lumber Products Company Case and Its Implications (1940) 53 Harv. L. Rev. 713 31

Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization (1933) 19 Va. L. Rev. 541 .....30, 42, 143

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PAGE

Gerdes, General Principles of Plans of Corporate Reorganization (1940) 89 U. Pa. L. Rev. 39 ..30, 34, 49

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Glenn on Liquidation (1935) §436..... 30

Harv. L. Rev. 55: 125, Note (1941)..... 45

Adrian H. Joline, Some Legal Phases of Corporate Financing, Reorganization and Regulation, p. 197 (1917) 70

8 Lectures on Legal Topics, 133, 142..... 29

Reorganization of Corporations: Certain Developments of the Last Decade (1927) 27 Col. L. Rev. 901 29

Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act, (1933) 33 Col. L. Rev. 571..... 118

Rostow and Cutler, Competing Systems of Corporate Reorganization; Chapters X and XI of the Bankruptcy Act (1939) 48 Yale L. J. 1334.....28, 31

Spaeth and Windle, Valuation of Railroads Under Section 77 of the Bankruptcy Act (1938) 32 Ill. L. Rev. 517 37

Wash. U. L. Q. 23: 543 Note (1938)..... 31

Weiner, Conflicting Functions of the Upset Price in a Corporate Reorganization (1927) 27 Col. L. Rev. 132 42

Yale L. J. 49: 1099, Note (1940) 34

Yale L. J. 51:85, Comment (1941)..... 28

Yale L. J. 51:967, Comment (1941) 113

Lecture, 27 Col. L. Rev. 901 (1927) 29

MISCELLANEOUS CITATIONS

PAGE

Consolidations and Combinations of Carriers, 12 I. C. C. 277, 305 (1907) 122

Hearings before the Senate Committee on Finance on H. R. 7378 (77th Cong., 2nd Sess.) at p. 766 63

72nd Cong., 2nd Sess., Report No. 1897 to accompany H. R. 14359 125

72nd Cong. S. 4921 134

76th Cong. Rec. 2927 125

76th Cong. 2nd Sess. (1939) 551
Transcript of Hearings before Judiciary Committee on S. 1869 47

STATUTES[1]

Bankruptcy Act § 24(c) 2
§ 172 145
§ 208 145
Chapter X 40

Judicial Code
Act of Feb. 13, 1925 [28 U. S. C. § 347(a)] 2, 3

Interstate Commerce Act
[49 U. S. C. § 1, et seq.] 122
§ 19a 56

Public Utility Holding Company Act
§ 11(f) 40, 70

Transportation Act of 1920
§ 268a; 40 U. S. C. § 20a .. 116, 122, 129

[1]Citations to Section 77 of the Bankruptcy Act are too frequent to enumerate. Pertinent portions of Section 77 are printed in Appendix A.

Supreme Court of the United States

October Term, 1942

No. 7

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, PETITIONERS[1]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

OPINIONS BELOW

This case involves a plan of reorganization formulated and approved by the Interstate Commerce Commission in a proceeding for the reorganization of The Western Pacific

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[1]Messrs. Frederick H. Ecker, John W. Stedman and Reeve Schley, Petitioners, constitute a Committee representing a Group of Institutional Holders of the First Mortgage Bonds of The Western Pacific Railroad Company, the Debtor, organized pursuant to the provisions of Section 77(p) of the Bankruptcy Act [11 U. S. C. § 205(p)]. The Committee was permitted to inter-

Railroad Company under Section 77 of the Bankruptcy Act (11 U. S. C. § 205).[1] The Commission's various Reports and Orders are reported at 230 I. C. C. 61, 233 I. C. C. 409 and 236 I. C. C. 1.[2]

The opinion of the District Court for the Northern District of California, Southern Division, accompanying its Order entered August 15, 1940, approving the Commission Plan is reported at 34 F. Supp. 493.[3]

The opinion of the Circuit Court of Appeals, dated November 28, 1941, reversing the District Court, is reported at 124 F. (2d) 136.[4]

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. § 347(a)], and Section 24(c) of the Bankruptcy Act [11 U. S. C. § 47(c)].

The Decree of the Circuit Court of Appeals for the Ninth Circuit was entered November 28, 1941.[5] By order

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vene in the proceeding before the Interstate Commerce Commission by order entered July 9, 1936 (R. 2620) and in the proceeding before the District Court by order entered November 27, 1939 (R. 2620). The members of the Group are John Hancock Mutual Life Insurance Company; Metropolitan Life Insurance Company; Mutual Benefit Life Insurance Company; New York Life Insurance Company; Prudential Insurance Company of America; Travelers Insurance Company; and The Chase National Bank of the City of New York. Their aggregate holdings of First Mortgage Bonds are $16,641,400, principal amount, out of a total of $49,290,100, or 34%.

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[1]The plan of reorganization is hereinafter called the Commission Plan, the Interstate Commerce Commission is hereinafter called the Commission and The Western Pacific Railroad Company is hereinafter called the Debtor. Pertinent portions of Section 77 are printed in Appendix A.

[2]R. 194, 300, 884. [3]R. 1569 and 1600, respectively.

[4]R. 2663. [5]R. 2675-6.

filed February 12, 1942, as amended by order of February 16, 1942, said Decree was amended in a manner not relevant to the present issues.[1] Petition for writ of certiorari was filed by the Committee on December 20, 1941, and was granted on April 27, 1942. This Court also granted writs of certiorari to the Trustees under the First Mortgage of the Debtor (No. 8), the Trustee under the General and Refunding Mortgage of the Debtor (No. 61), Reconstruction Finance Corporation (No. 33), and the Debtor (No. 20). No issue is raised on any of these writs which is not raised by the writ granted to the Committee.

QUESTIONS PRESENTED

Four broad questions are presented:

1. Are the findings of the Commission and the District Court that the existing stock and unsecured debt of the Debtor "have no value," sufficient to sustain the exclusion of such stock and unsecured debt from participation in the reorganization, without a specific dollars and cents valuation of the Debtor's entire properties?

2. Are the determinations by the Commission and the District Court of the "equitable equivalent of the Debtor's assets available for the satisfaction" of each class of participating claims, in terms of the various new securities, sufficient to sustain such allocations, without dollars and cents valuations of (i) the properties upon which the mortgages are, respectively, first liens, (ii) each of the several classes of old securities and (iii) each of the several classes of new securities?

3. Did the District Court properly recognize the jurisdiction of the Commission under Section 77 and, in

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[1] R. 2681-3.

the exercise of an informed and independent judgment, fully perform the Court's functions under Section 77?

4. Should this Court, upon the entire record, reverse the Decree of the Circuit Court of Appeals and affirm the Order of the District Court approving the Commission Plan?

A further question is also before the Court:

5. Are securityholders who have defended in the Circuit Court of Appeals a plan promulgated and approved by the Commission, and also approved by the District Court, liable for the costs of the successful appeal, or should such costs be assessed directly against the Debtor's estate?

STATEMENT

The Debtor has paid no interest on its First Mortgage Bonds since September 1, 1933.[1] To provide time both to determine how severe was the Debtor's financial problem and to work out through voluntary negotiation a definitive reorganization plan, the two semi-annual installments maturing in 1934 were extended by voluntary arrangement, but they were not met at their extended maturity.

The Debtor filed its petition under Section 77, on August 2, 1935.[2] The proceedings before the Commission culminated September 28, 1939, in the certification of the Commission Plan to the District Court.[3]

1. Present Capitalization of the Debtor[4]

The existing claims against, and interests in, the Debtor dealt with by the Commission Plan, including interest accrued to the effective date of the Commission Plan, January 1, 1939, computed at the contract rates, are as follows:

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[1]R. 58. [2]R. 4, 11. [3]R. 1571. [4]R. 1576

Claim or Interest	Principal of claim or interest	Accrued interest at contract rate to January 1, 1939	Total claim, including interest at contract rate to January 1, 1939
Trustees' Certificates (RFC)	$ 10,000,000.00	$ —	$ 10,000,000.00
Undisturbed existing equipment obligations	2,750,050.00	34,672.00	2,784,722.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
RFC[1] Notes[2]	2,963,000.00	899,869.98	3,862,869.98
RCC[1] Notes[2]	2,445,609.88	145,314.23	2,590,924.11
ACJ[1] Notes[2]	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$ 72,448,559.88	$15,473,582.87	$ 87,922,142.75
WP Corp.[1] and Western Realty Co.[3] advances on open account	5,818,791.00	1,992,096.00	7,810,887.00
Total debt	$ 78,267,350.88	$17,465,678.87	$ 95,733,029.75
WP Corp., owner of the entire outstanding 283,000 shares of Preferred Stock, par value $100 per share	28,300,000.00	—	28,300,000.00
WP Corp., owner of the entire outstanding 475,000 shares of Common Stock, par value $100 per share	47,500,000.00	—	47,500,000.00
Totals	$154,067,350.88	$17,465,678.87	$171,533,029.75

[1]Hereinafter the following abbreviations are used: RFC—Reconstruction Finance Corporation; RCC—Railroad Credit Corporation; ACJ—A. C. James Co.; WP Corp.—Western Pacific Railroad Corporation.

[2]The RFC Notes, the RCC Notes, and the ACJ Notes are collectively secured, in the specific amounts hereinafter stated, by all of the $18,999,500, principal amount, of the Debtor's Refunding Bonds. No Refunding Bonds have been issued except for such pledge. Except for certain securities specifically pledged with the Trustee of the Refunding Mortgage, the Commission and the District Court found the lien of the Refunding Mortgage to be junior to that of the First Mortgage.

The RFC Notes are secured by the pledge of $10,750,000 of said Refunding Bonds and by a second lien upon $2,000,000 of Refunding Bonds pledged under the RCC Notes.

The RCC Notes are secured by the pledge of $4,000,000 of Refunding Bonds, of which $2,000,000 were repledged with it by ACJ, and by a second lien on all the collateral pledged with RFC.

The ACJ Notes are secured by the pledge of $4,249,500 of Refunding Bonds and by a second lien upon $2,000,000 of Refunding Bonds originally pledged under the ACJ Notes but repledged by ACJ under the RCC Notes.

In addition, both the RFC Notes and the RCC Notes are secured by certain so-called "accommodation collateral," not owned by the Debtor, but pledged to secure said Notes by WP Corp. The RCC Notes are also secured by a first lien on the Debtor's distributive share in the fund established by the Marshalling and Distributing Plan, 1931. The right of RFC and RCC to resort to this collateral is not affected by the Commission Plan (R. 271, 394-5).

[3]Western Realty Co. is a wholly owned subsidiary of WP Corp., and a small part of the unsecured debt of the Debtor stands in its name.

2. Earnings Record of the Debtor's Properties[1]

The consolidated earnings available for interest of the Debtor and its subsidiaries for the years 1922 to 1941, both as reported and as adjusted, are set out in the following table. Adjustments have been made first, to add back to reported income all the charges against income account for the rehabilitation expenditures made during 1927-31 and 1934-8 and all charges for amortization of discount; second, to take into account deductions and credits made by the Commission in accordance with its accounting rules and regulations; and third, in the case of the 1940 and 1941 earnings, to take into account Federal income (*but not excess profits*) taxes which would be payable in respect of such earnings if the Commission Plan had been in effect during those years.

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[1]R. 1592. The Debtor's mileage comprises 924 miles of main line track from Oakland, California to Salt Lake City, Utah, and approximately 112 miles of main line track connecting the Debtor's main line with the lines of the Great Northern in north central California. It also includes branch lines aggregating approximately 119 miles. The Debtor also owns (in addition to substantially valueless and unimportant securities) substantially all of the outstanding capital stock and indebtedness of Sacramento Northern Railway (an electric line of 276 miles operating in general between San Francisco and the Sacramento Valley) and Tidewater Southern Railway Company (an exclusively freight line of 61 miles operating in the San Joaquin Valley); and fractional interests in the securities of Central California Traction Company (an electric line of about 54 miles between Stockton and Sacramento, California) and the Alameda Belt Line (a 16 mile belt line at Alameda, California).

Year	Earnings Available for Interest[1] Reported	As Adjusted
1922	$2,306,124	$2,404,890
1923	3,313,976	3,412,234
1924	3,144,124	3,241,823
1925	4,454,352	4,567,798
1926	4,759,282	4,868,390
1927	2,674,494	3,470,861
1928	2,964,371	4,376,972
1929	2,529,846	3,718,436
1930	1,552,487	2,381,529
1931	186,708(D)	220,494(D)
1932[2]	252,706	283,912
1933	674,007	474,365
1934[3]	1,084,244	1,396,353
1935	805,589	1,377,026
1936	181,102	1,901,423
1937	903,113(D)	1,077,407
1938	1,243,916(D)	225,431
1939	1,384,515	1,519,916
1940	2,649,797	2,361,620[4]
1941	4,548,138	3,587,674[4]

(D) Deficit

[1]R. 1064-6, 2629, 2635. The adjusted figure of $4,412,234 for 1923 contained in the Stipulation before the District Court is an obvious typographical error. See R. ~~2626~~ 2036

[2]The Northern California Extension was put into operation November 10, 1931, so that the properties covered by this earnings record from 1932 on are the same properties as those to be acquired by the reorganized company. That Extension (112 miles) forms a connection in north central California between the main line of the Debtor, at a point 281 miles from San Francisco, with a branch of the Great Northern running southward through central Oregon into northern California. It created a new north-south route over the combined lines of the Great Northern and the Debtor, and further southward over the Santa Fe, competitive with the Southern Pacific System.

[3]The Dotsero Cut-off was put into operation in 1934. It is a 38 mile line, a part of the lines, not of the Debtor, but of the Denver & Rio Grande, one of the Debtor's connections, which resulted in shortening by 175 miles the joint route of the Debtor and the D & R G from Salt Lake City into Denver.

[4]These figures are after deducting Federal income taxes payable on 1940 and 1941 earnings under the capitalization contemplated by the Commission Plan. Adjusting reported earnings for such taxes upon the basis of the Debtor's present capitalization, but disregarding losses aggregating $2,799,265 incurred in prior years and claimed by the Debtor to be deductible for the purpose of computing 1941 taxes, the adjusted earnings for 1940 would be the same as reported earnings, and for 1941 $4,315,834. If such deductions for antecedent losses claimed by the Debtor are allowable, they will so reduce 1941 earnings as to result in no Federal income taxes for that year. Computations of these taxes are set forth in Appendix B. *No adjustment of 1941 earnings has been made for any possible Federal excess profits tax.* Whether such earnings may be subject to such a tax depends upon tax legislation not yet enacted.

The earnings for the years 1922 to 1938 were before the Commission and are as found by the Commission; those for 1939 were before the District Court; and those for 1940 were before the Circuit Court of Appeals. Those for 1941 are computed from the monthly statements of earnings which by stipulation filed July 23, 1942, the parties agreed may be considered by this Court.

In considering the overall picture presented by these earnings it must be borne in mind that the $9,268,373 of rehabilitation expenditures added back to the adjusted earnings for the years 1927-31 and 1934-8 represent deferred maintenance which had accrued prior to 1927.[1] The exact amount of the accruals of such deferred maintenance for the various years prior to 1927 cannot be computed with any accuracy, but as *no* adjustment has been made in the foregoing table to take into account such deferred maintenance for the prior years, the earnings of those years, even as adjusted, are necessarily overstated by a substantial amount.

3. New Capitalization under the Commission Plan

The Commission Plan provides the following capital structure for the reorganized company, effective as of January 1, 1939,[2] the Commission, as hereinafter pointed out, having found upon consideration of all the various factors affecting the value of the Debtor's property, that no

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[1]R. 1052, 1063, 1065, 1214. [2]R. 1575.

larger capitalization was compatible with the public interest:[1]

Title of issue	Presently to be issued	Annual charges
Undisturbed existing equipment obligations	$ 2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total annual fixed charges		$ 494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative. Convertible at the option of the holder into new Common Stock at the price of $50 per share	21,219,075	954,858
Total funded debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund (½%)		106,095
Participating 5% Preferred Stock ($100 par value). Preferred on liquidation to extent of par value plus any accrued cumulative dividends. Dividends cumulative only to the extent earned in any calendar year but not paid; otherwise non-cumulative. Participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of $3 per share	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shs.	

[1] R. 889-90.

4. Distribution under the Commission Plan

The Trustees' Certificates were sold to RFC early in the reorganization proceeding to provide $10,000,000 for rehabilitation of the Debtor's properties and elimination of the substantial amount of deferred maintenance hereinbefore referred to.[1] Those Certificates are admittedly secured by a first lien upon all the assets of the Debtor and the Trustees.[2]

The claim of the First Mortgage to a first lien, subject to the Trustees' Certificates, upon substantially all the Debtor's assets, except the securities of certain subsidiary corporations specifically pledged with the Refunding Mortgage Trustee,[3] was disputed. Likewise disputed was the value of the collateral pledged under the Refunding Mortgage. In allocating the new securities, the Commission preliminarily decided the disputed lien questions in favor of the First Mortgage, subject to ultimate determination by the District Court.[4] The Commission also decided the disputed value questions.

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[1]R. 1834-6. [2]R. 1836.

[3]In 1934, pursuant to an agreement extending the payment of 1934 interest on the Debtor's First Mortgage Bonds, RFC, ACJ, RCC and WP Corp. (the only other creditors affected by the Commission Plan) agreed to subordinate their claims against the Debtor until this 1934 interest (still unpaid) is paid in full. Accordingly the case presents no problem as to the relative rights of senior and junior creditors in unmortgaged assets. I. C. C. Exhibits 117-121 (not printed pursuant to stipulation at R. 2532-8, 2614, but before this Court pursuant to stipulation filed on July 23, 1942).

[4]R. 262. The District Court affirmed the Commission's determination of the lien questions but, although the propriety of the District Court's action was raised upon appeal (R. 1652-3), the Circuit Court of Appeals failed to decide any of these questions. Their final determination by this Court is sought not only under the writ granted the Committee, but also under the writs granted

The Commission then found that "the equity of the existing stock has no value," that "the claims of the unsecured creditors have no value," that the securities allocable to the RFC Notes, RCC Notes, and ACJ Notes are "inadequate in value to satisfy their claims," and that "the equity of" RCC in the collateral pledged under the RFC Notes "has no value."

After making the additional findings hereinafter stated, the Commission excluded from participation in the reorganization the unsecured claims and stock held by WP Corp. and Western Realty Co., and distributed the new capitalization as follows:[1]

Existing Securities of Debtor[2]	New First Mortgage 4% Bonds Series A	New Income Mortgage 4½% Bonds Series A	New 5% Preferred Stock Series A ($100 Par)	New Common Stock (No Par)
First Mortgage 5% Bonds ($62,433,876.66)		$19,716,040	$29,574,060	230,593 shs.
RFC (In exchange for Trustees' Certificates and RFC Notes) ($13,862,869.98)	$10,000,000	1,185,200	1,777,800	15,788 shs.
RCC Notes ($2,590,924.11)		154,111	241,681	35,425 shs.
ACJ Notes ($6,249,750)		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

The existing First Mortgage 5% Bonds are allotted new Income Mortgage 4½% Bonds for 40% of the principal

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the First Mortgage Trustees and the Refunding Mortgage Trustee. Separate briefs are being filed in respect of the lien questions, and this brief in its further discussion will assume the correctness of the decisions of the Commission and the District Court.

[1] R. 1578.

[2] The figures in this column include accrued interest to January 1, 1939.

amount of their claim, new 5% Preferred Stock for 60% of the principal amount of their claim and 4.67 shares of new Common Stock for the $266.67 of accrued interest per $1,000 bond.[1] The price at which the Common Stock was so allotted is therefore $57 per share.[2]

RFC, in consideration of its exchanging its $10,000,000 of Trustees' Certificates for $10,000,000 of new, less valuable, First Mortgage Bonds, is allotted treatment in respect of the RFC Notes *pari passu* with the treatment allotted the First Mortgage Bonds.[3]

RCC and ACJ are allotted new securities on the following basis:

Because of the first lien of the Refunding Mortgage on the securities specifically pledged with the Refunding Mortgage Trustee, the Commission found certain amounts of new Income Mortgage Bonds and Preferred Stock properly issuable in respect of the Refunding Mortgage Bonds held as collateral for the RFC, RCC and ACJ Notes.[4] The Commission allotted to the RCC Notes and the ACJ Notes amounts of these Income Mortgage Bonds and Preferred Stock in the proportions that the amounts of Refunding Bonds pledged with them, respectively, bore to the total amount of Refunding Bonds.[5]

All the new Common Stock not previously allocated necessarily represented (1) the value of the second lien of the Refunding Mortgage upon those assets of the Debtor upon which the First Mortgage is a first lien and (2) any hope for future value of the assets upon which the Refunding Mortgage is a first lien but which the Commission found

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[1]R. 390. [2]R. 391. [3]R. 391. [4]R. 312-6. [5]R. 391-2.

to be of "no material value."[1] The Commission divided this remaining new Common Stock between RCC[2] and ACJ, again in proportion to the amounts of Refunding Bonds held by them, respectively, as collateral.[3]

5. Valuation Data before the Commission

The Commission Plan was formulated by the Commission itself after more than a dozen different plans had been proposed by the various parties and upon evidence occupying 743 pages of the record. This evidence included

physical descriptions of the properties of the Debtor and each of its subsidiaries,[4]

comprehensive data concerning valuation proceedings affecting those properties conducted by the Commission under Section 19(a) of the Interstate Commerce Act,[5]

analyses of the Debtor's investment accounts[6] and its financial history,[7]

detailed studies of revenues and expenses for the years since 1922, broken down as among the Debtor and its subsidiaries,[8]

detailed forecasts of revenues and earnings for the then future years 1936 to 1940, also broken down as among the Debtor and its subsidiaries,[9] and

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[1]R. 315.

[2]To cover the RCC Notes in full, taking new senior securities at par, this stock must attain a value of at least $62 per share.

[3]R. 317-8, 392. [4]R. 1861-3, 1886-98, 2049-60.

[5]R. 2019, 2044-8.

[6]R. 1874-5, 1885-94, 2019, 2040-3, 2058-60. [7]R. 1859-73.

[8]R. 1958, 2033-92, 2121-8, 2239-60.

[9]R. 1950, 1959-98, 2027-32, 2118-93.

testimony with reference to the probable effect upon revenues and net income of the $10,000,000 rehabilitation program,[1] of the Northern California Extension[2] and of the Dotsero Cut-off.[3]

6. Findings Made by the Commission

After hearings, the Commission's Bureau of Finance served upon all the parties a Tentative Report proposing findings and a reorganization plan.[4] Following exceptions to this Tentative Report and a hearing before the full Commission, the Commission entered its Report and Order dated October 10, 1938, making findings and approving a plan of reorganization.[5] Upon petitions for modifications of this Report and Order and another hearing before the full Commission, the Commission entered its Report and Order dated June 21, 1939,[6] modifying both the findings and the plan of reorganization embodied in its earlier Report and Order and approving the Commission Plan. After a petition by the Debtor for a "further rehearing and modification," the Commission entered its Report and Order dated September 19, 1939,[7] reaffirming its findings and conclusions of October 10, 1938, as modified June 21, 1939, and denying the Debtor's petition.

The Commission defined the requirements of "the public interest" with respect to the new capital structure as follows:

> "The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure

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[1]R. 1985-6, 2145-52, 2172-85, 2225-33.
[2]R. 1942-8, 2094-8, and see description *supra*, p. 7, note 2.
[3]R. 1939, 2099-2100, and see description *supra*, p. 7, note 3.
[4]R. 116. [5]R. 194. [6]R. 300. [7]R. 884.

> for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent, be within its probable earning power."[1]
>
> "If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future."[2]

After pointing out that the Debtor was the product of a previous equity reorganization of its properties in 1916, the Commission made the following fundamental finding as to the prudence of the Debtor's investment in its property:

> "The present reorganization of the debtor is the second since it began complete operations in 1911. A review of its financial history shows that due to an inherent lack of earning power its past operations have resulted in financial failure, and that the investment in its property has not been justified by its earnings. In Denver & Rio Grande Investigation, 113 I. C. C. 75, we pointed out that economically the original construction of the debtor was an ill-advised undertaking."[3]

The Commission then made the following findings which the Circuit Court of Appeals for the Ninth Circuit has now held to be inadequate:

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[1]R. 243-4. [2]R. 244. [3]R. 244.

(a) *Findings as to capitalization*

1. "If these data [*i.e.* earnings] are not to be ignored, * * * the fixed interest charges of the reorganized company should not * * * exceed $500,000, if the reorganized company is to maintain its property properly and secure necessary new capital in the future."[1]

2. "On the basis of the facts heretofore recited with respect to traffic and earnings, we find that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital and sinking funds, should not exceed $2,000,000 per annum."[2]

3. "As hereinbefore stated, the debtor's estimate of income available for interest averaged $2,715,306 per year for the period 1936-40, inclusive, the maximum amount for any one year in the period (1940) being $3,769,836. That amount, with prior charges of $1,898,223, would permit the payment of dividends at the rate of 5 percent on only $37,432,000 of stock. It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determi-

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[1]R. 246. [2]R. 253.

nation of the capital structure for the reorganized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed" the amounts of Preferred and Common Stock provided by the Commission Plan.[1]

4. On the basis of the foregoing findings the Commission fixed the permissible new capitalization.[2] Twice it found that it could not approve any larger capitalization.[3]

(b) *Finding as to classes excluded from participation*

5. "We have hereinbefore found that considering the past, present, and probable future earnings of the debtor, its investment, the data of record pertaining to its rate-making value, and all other relevant data of record, we can not approve the issue of new securities in a greater amount than that hereinbefore approved. On the same basis and for the same reasons we find, therefore, that there is no equity over and above the securities hereinbefore approved; that *the equity of the existing stock has no value,*[4] and hence holders of such stock are not entitled to participate in the plan. Further, considering that the reorganized company's income available for interest and dividends must total $4,318,035,[5] plus any undistributed profits tax that will be payable, before dividends of $3 per share may be paid on the new common stock, it is clear that *even*

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[1]R. 257. The amounts of Preferred and Common Stock originally found permissible were slightly increased in the final Commission Plan (R. 310-311).

[2]R. 259, 310. [3]R. 310, 889-90.

[4]All italics in quoted matter throughout this brief have been supplied, unless the contrary is indicated.

[5]Under the final Commission Plan this became $4,605,993.

though all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims. For this reason, and for the reasons stated with respect to the finding that the equity of the existing stock has no value, we find that *the claims of the unsecured creditors,* of the Western Pacific Railroad Corporation, and of the Western Realty Company, *have no value,* and hence no securities or cash should be distributed under the plan in respect to those claims."[1]

(c) *Findings as to distribution of new securities*

6. The Commission found that all of the permissible new fixed charge securities would be absorbed by undisturbed equipment obligations and new First Mortgage Bonds required to pay or refund the admittedly preferred $10,000,000 Trustees' Certificates.[2]

7. The Commission found that the first lien of the First Mortgage (subject to the Trustees' Certificates) upon all of the assets of the Debtor, except cash and securities specifically held in pledge by the Refunding Trustee, required allocation to the First Mortgage of the new securities allocated by the Commission Plan as above stated.[3]

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[1]R. 269-70. The Commission had no problem of dealing with the rights of unsecured creditors to participate in unmortgaged assets. See p. 10, n. 3, *supra.*

[2]R. 247, 311.

[3]R. 270, 317. The original allocation by the Report and Order dated October 10, 1938, was modified by the Report and Order dated June 21, 1939, by increasing the no par value Common Stock originally allocated to the First Mortgage as against accrued interest, and by allocating Income Bonds and Preferred Stock to the Refunding Bonds, as stated in paragraph 8, *infra.*

8. The securities pledged under the Refunding Mortgage were a note and stock of Tidewater Southern Railway Company, all of whose funded debt and 97.87% of whose stock are owned and so pledged by the Debtor,[1] bonds and stock of Central California Traction Company, of which the Debtor owns and has pledged 33⅓%,[2] and stock of Alameda Belt Line, of which the Debtor owns 50% and has pledged 49.4%,[3] plus some admittedly worthless notes of other subsidiaries.[4] The Commission analyzed the property accounts, earnings records and earnings prospects of these three companies. In the light of the contributions which the Debtor has been compelled to make to continue the operations of the last two mentioned companies[5] and their poor earnings record, the Commission found that "the lien on the securities of these two companies *has no material value.*"[6] As to Tidewater Southern, the Commission found its rate-making value as of December 31, 1935, to be $1,850,000 (1.3% of the comparable System valuation).[7] Reported earnings and the revenues from traffic interchanged between it and other lines of the Debtor's System were also analyzed.[8] Such reported earnings for the six-year period 1930-1935[9] were 7.2% of System earnings as adjusted,[10] before deducting the Debtor's contributions to the deficits of the other two Refunding Mortgage first lien properties.[11] But, said the Commission, "its earnings are, to a large extent, dependent upon the divisions of joint

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[1]R. 313. [2]R. 314. [3]R. 315. [4]R. 1095.

[5]These unreimbursed contributions totalled more than $384,000 for the six years 1930-1935 (R. 2019, 2084, 2088).

[6]R. 314-5. [7]R. 314. [8]R. 314. [9]R. 2019, 2077. [10]R. 1592.

[11]R. 2019, 2084, 2088.

rates accorded it by the debtor."[1] After the foregoing findings and after reference to the cash held by the Refunding Mortgage Trustee,[2] the Commission found that the Refunding Mortgage should be allotted $732,010 new Income Mortgage Bonds and $1,147,995 new Preferred Stock[3] (being 3.5% of the total issues), and all the Common Stock remaining after provision for the First Mortgage.

9. The RFC Notes, the RCC Notes, and the ACJ Notes were secured by pledge, respectively, of 56.6%, 21.1%, and 22.3% of the outstanding Refunding Bonds. The Commission found that the securities "available for distribution are *inadequate in value to satisfy the aggregate claims of these parties,*"[4] that "the value of each of the claims is proportionate to the collateral securing it," and hence that the allotment of new securities representing the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims."[5]

10. "The allocation of reorganization securities" to the RFC Notes collateral "exhausts the value of the collateral,"[6] and * * * *"the equity of the Credit Corporation* [RCC] *in such collateral has no value."*[7]

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[1]R. 315. It will be remembered that the Debtor owns all the funded debt and 97.87% of the outstanding stock of Tidewater Southern Railway Company, so that the fairness of these rate divisions was not a matter of importance except in reorganization.

[2]R. 313. [3]R. 315. [4]R. 271. [5]R. 271.

[6]The Commission here was referring only to the new securities allotted to RFC's pledged Refunding Bonds, *i.e.* it was not including the additional new securities allotted to RFC in consideration of its furnishing new money as explained in paragraph 12, *infra.*

[7]R. 316.

11. On the basis of the findings referred to in the foregoing paragraphs 8, 9 and 10, the Commission allotted to the RCC Notes and the ACJ Notes the Income Bonds and Preferred Stock found by the Commission to be allocable as against their respective pledged proportions of the Refunding Bonds. The no par value Common Stock remaining after filling out the existing First Mortgage Bonds with 230,593 shares against their accrued interest of $13,143,777, and allotting the RFC Notes treatment as stated in the next paragraph 12, was then also allocated to the RCC Notes and ACJ Notes proportionately to the Refunding Bonds held by them as collateral.

12. To insure refunding of the $10,000,000 Trustees' Certificates, RFC was allotted, for its entire "bundle of rights" (its $10,000,000 Trustees' Certificates and the RFC Notes), $10,000,000 of new First Mortgage Bonds (to be taken in exchange for the Trustees' Certificates or to be purchased at par and the proceeds thereof applied to payment of the Trustees' Certificates) and treatment of the RFC Notes *pari passu* with the existing First Mortgage Bonds. The Commission found "that in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the debtor's existing first-mortgage bonds."[1]

13. The ultimate finding of the Commission was: "These securities [*i.e.*, all the new securities available for distribution] represent the equitable equivalent of the debtor's assets available for the satisfaction of claims. * * * *Based upon our conclusion as to the relative priority, value,*

[1] R. 312.

and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted"[1] as provided in the Commission Plan.

The Commission did not specifically find any specific value in terms of dollars and cents for all or any part of the Debtor's property, for any of the existing claims against or interests in the Debtor, or for any of the new securities contemplated by the Commission Plan.

7. Proceedings before the District Court

Upon certification of the Commission Plan to the District Court, objections and claims for equitable treatment were filed by RCC, ACJ, WP Corp., Western Realty Company, the Debtor, and the Refunding Trustee, which attacked, as to both form and substance, substantially every provision of the Commission Plan.[2] Their objections went primarily to alleged undue discrimination in favor of the First Mortgage Bonds and the RFC Notes as against all the junior interests. Although the Committee and RFC also filed some objections and claims for equitable treatment, each of them stated that if the District Court approved the Commission Plan as an entirety they would waive their objections and both of them urged such approval.[3]

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[1]R. 316-7.

[2]The details of these objections (R. 892-1017) are so voluminous, complicated and contradictory, and the extent to which many of them were pressed in the Circuit Court of Appeals is so ambiguous, that no useful purpose will be served by attempting to analyze them at this point of this brief. Such of them as seem to the Petitioners to merit consideration by this Court in determining its ultimate disposition of the entire case upon the entire record will be discussed at the relevant points of the argument.

[3]R. 1760-1, 1770.

Before the District Court, testimony was taken occupying 293 pages of the record embodying substantial additional valuation data.[1] On August 15, 1940, the District Court filed a 31 page opinion overruling all of the objections and, after dealing specifically with the Commission's findings of value, determining them to be adequate in form and correct in substance.[2] The District Judge's opinion further expressed his accord, on the merits, with all of the conclusions of the Commission on the numerous other points in dispute.

Pursuant to its opinion, the District Court, on August 15, 1940, entered an Order approving the Commission Plan, adopting the findings of fact made by the Commission, and making all the other findings in respect of the Commission Plan required at that stage of the proceedings by Section 77.[3]

8. Action of the Circuit Court of Appeals

From the Order last mentioned appeals were taken to the Circuit Court of Appeals for the Ninth Circuit by RCC, ACJ, the Refunding Mortgage Trustee, WP Corp., and the Debtor. Again the appellants attacked almost every aspect of the Commission Plan, although many of the objections argued before the District Court seem to have been abandoned. The emphasis of their briefs and arguments was upon alleged failure (1) of the Commission to make necessary findings of value of properties and securities, old and new, and (2) of the District Court to exercise an independent informed judgment. The Commit-

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[1]R. 1283-1529, 1530-1567. [2]R. 1569-1600. [3]R. 1600-1607.

tee, the First Mortgage Trustees and RFC, designated as appellees, defended the Commission Plan as an entirety.

The Circuit Court of Appeals reversed the Order of the District Court.[1] Without referring to any of the extensive findings of the Commission above recited, or the careful discussion by the District Court of the problems of value, the Circuit Court of Appeals thus disposed of the case:

> "Subsection (e) of § 77 provides: 'If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan.' In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject

[1] R. 2663-74.

> to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed."[1]

In addition to this holding, the opinion of the Circuit Court of Appeals announced this guiding rule for distribution among existing securityholders: "Fairness requires that their participation should be in proportion to the value of their respective claims."[2] The opinion does not further clarify its announced rule. Taken in connection with its holding above quoted, requiring specific dollars and cents valuations, the Circuit Court of Appeals thus seems to require distribution based upon a mathematical formula derived from dollars and cents valuations of properties, existing claims, and new securities, rather than distribution based upon a determination of the equitable equivalents of the participating existing claims in the system assets and earnings, expressed in terms of the new securities.

The opinion of the Circuit Court of Appeals also commented on the functions of the court and the Commission in effecting a railroad reorganization under Section 77.

The opinion of the District Court, in addition to expressing the District Judge's own independent analysis of the valuation problem and his own independent conclusions, had said:

> "It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability

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[1]R. 2670-1. [2]R. 2669.

> and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned."[1]

Quoting the foregoing statement of the District Court, the opinion of the Circuit Court of Appeals stated:

> "The statement indicates a possible misconception. * * *
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> * * * * * * *
>
> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject."[2]

The significance of this comment of the Circuit Court of Appeals, as evidencing its belief that the District Court was under a duty to redetermine *all* of the issues involved in the reorganization and assert its own "independent judgment" if in any respect its views differed from those of the Commission, is accentuated by the fact that the District Court, following the quotation commented on by the Circuit Court of Appeals, had said:[3]

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of

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[1]R. 1588.
[2]R. 2672-4. [3]R. 1596-7.

its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court."

ARGUMENT

I

THE FINDINGS OF THE COMMISSION AND THE DISTRICT COURT THAT THE DEBTOR'S STOCK AND UNSECURED DEBT "HAVE NO VALUE," AS SUPPORTED BY THE VALUATION DATA AND THE OTHER FINDINGS IN THE RECORD, ARE SUFFICIENT TO SUSTAIN THE EXCLUSION OF SUCH STOCK AND UNSECURED DEBT FROM PARTICIPATION IN THE REORGANIZATION.

1. The Los Angeles Lumber Case[1] and the Consolidated Rock Products Case[2]

The Court below rested its decision upon what is believed to be an erroneous interpretation of those two decisions of this Court.

Prior to those two decisions the legal periodicals for more than a decade had filled many pages with controversial discussion as to the validity of two alleged "rival" or "competing" theories of priority rights in reorganization, one called "the theory of absolute priority" and the other

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[1]*Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939).

[2]*Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941).

"the theory of relative priority."[1] The two decisions have been hailed as marking the final establishment of the "absolute priority" theory and the "demise of the relative priority theory."[2]

But doubt continues as to what is meant, not only by "absolute priority," but by many other words and phrases of the two opinions.

On the simple facts involved the two decisions were clear. Neither of the plans involved could be justified except by the brutal "composition theory" that substantially any settlement for which stockholders could procure the statutory assents of creditors was "fair and equitable." However, two points as to which there had been substantial controversy were decided: (1) that the words "fair and equitable" in Section 77B and Chapter X, being words of art, import into reorganization under those sections the standards of the so-called rule of the *Boyd* case,[3] and hence that the principles applicable to ordinary bankruptcy compositions are inapplicable to such reorganizations; and (2) that interest on creditors' claims accruing but unpaid after the initiation of the reorganization proceeding is included in the amount of the claims whose priority must be fully observed.

The opinions also broadly discussed the principles applicable to the recognition of the priority rights of cred-

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[1]Compare Bonbright and Bergerman, *Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization* (1928) 28 Col. L. Rev. 127, and Rostow and Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act* (1939) 48 Yale L. J. 1334.

[2]Comment (1941) 51 Yale L. J. 85, 86.

[3]*Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482 (1913).

itors both as against stockholders and as between separate classes of creditors.

The following summary of the relevant portions of those opinions is given to bring into focus words and phrases as to whose meaning debate persists.

It is not enough, says the Court in the *Los Angeles Lumber* case, that "the *relative priorities*[1] * * * are maintained." The rule is one of *"full or absolute priority."*[2] But the opinion approves the dictum of the *Boyd* case

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[1]Throughout these quotations italics have been added to indicate the words or phrases whose meaning is disputed.

[2]It is not desired to bestir a ghost. However, the story of "the relative priority theory" evidences the dangerous ambiguities inherent in such pat phrases and words as "relative priorities," "absolute priority," "full payment," "full compensation," "make whole," "findings" and, worst of all, "value."

As early as 1882 the United States District Court for the Northern District of Illinois, in *Hancock* v. *Toledo, P. & W. R. Co.*, 9 Fed. 738, at 742, approved a railroad reorganization on the ground that it seemed to "fairly contemplate the protection of all classes of creditors of the old company in the equitable order of their priority."

In 1927 a Lecture before the Bar Association of the City of New York sought to trace judicial treatment of the problem of securityholders' priorities through subsequent decisions leading up to the historic *Boyd* case and the larger number of decisions subsequent to the *Boyd* case. These later cases had largely involved railroad reorganizations, in all of which the stocks involved not only had antecedent records of substantial earning power but evidenced a recovery of earning power following the reorganization.

The Lecture (27 Col. L. Rev. 901, 907, and 8 Lectures on Legal Topics 133, 142) made the mistake of trying to reduce a complex problem to a concise rule without adequate definition of the words and phrases employed: "The rule as I see it, and as I believe it will ultimately be developed by the courts, is that the relative priorities of the old securities, senior to the most junior securities which continue to have any interest in the property, must not be inequitably disturbed."

A host of lances appeared from the halls of legal learning to

that this rule does not "require the impossible and make it necessary to pay an unsecured creditor in cash as a condi-

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do to death any such "rule."

On the one hand, Frank (overlooking that the Lecture did not purport to derive the "rule" solely from the *Boyd* case) insisted that the *Boyd* case depended solely upon the rule with respect to fraudulent conveyances and therefore furnished no basis whatever for the Lecture's statement that it applied as between any securities other than creditors on the one hand and stockholders on the other (*Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 Va. L. Rev. 541, 551-3). In this he was seconded by Gerdes (II Gerdes on Corporate Reorganizations (1936) §1085, and *General Principles of Plans of Corporate Reorganization* (1940) 89 U. Pa. L. Rev. 39, 48 *et seq.*), and Glenn (Glenn on Liquidation (1935) §436). This criticism, however, went only to the accuracy of the Lecture's citations of judicial precedent. The reorganization amendments to the Bankruptcy Act, with the cooperation of several of these critics, adopted the Lecture's "rule" that a reorganization plan must be "fair and equitable" as between all classes of securities.

The more persistent and effective attack on the Lecture's "rule," however, was from an entirely different angle. Bonbright (Bonbright and Bergerman, *Two Rival Theories of Priority Rights of Security Holders in a Corporate Reorganization* (1928) 28 Col. L. Rev. 127) set up two antithetic theories, one of which he called "the relative priority theory" and the other "the absolute priority theory." To more easily destroy it, he defined the former, whose origin he ascribed to the Lecture above referred to, as contemplating the perpetuation of the entire old hierarchy of securities no matter how clearly it might be established that some of the more junior among them were entirely without value. (See also Gerdes, *General Principles of Plans of Corporate Reorganization, supra,* at p. 58.) In this he overlooked both the phrase of the Lecture "junior securities which continue to have any interest in the property" and also the fact that the Lecture had expressly stated that the relative priorities might be fully observed in a simplified capital structure. The rule of "absolute priority," as stated in antithesis, contemplated that each class of senior securities, starting at the top, must be given in reorganization new securities having a "value" (and the context indicates intent to mean market price) equal to its full

tion of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on

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principal and interest before anything can be given to the next junior class. The authors of the article, however, recognized that neither theory as thus stated had ever been applied by any court (and they might have added, advocated by any responsible lawyer), and so they concluded with advocacy of "a modified form of the doctrine of relative position."

With the evaporation of corporate earnings in the depression of the early 30's, and particularly with the enactment of Sections 77 and 77B as part of "An Act for the Relief of Debtors," the "relative priority theory" sank into extreme degeneracy. It lost all semblance to the "rule" above quoted from the Bar Association Lecture and even assumed a new name, the "composition theory" (Rostow and Cutler, *Competing Systems of Corporate Reorganization: Chapters X and XI of the Bankruptcy Act* (1939) 48 Yale L. J. 1334, 1356). The theory, as thus developed, urged that the principles of old-fashioned bankruptcy composition should govern reorganizations under the new sections. It sought to impose all the sacrifices of reorganization on senior interests for the benefit of junior interests. "Relative priorities" were regarded as "maintained" if some part of the creditors' claim preserved seniority over the allotment to stockholders and if the reduction of the creditor interests did not exceed, percentage-wise, the reduction of the stockholder interests. (Note (1938) 23 Wash. U. L. Q. 543, 544).

It must have been with this last-mentioned meaning content that the opinions of this Court in the *Los Angeles Lumber* and the *Consolidated Rock Products* cases both say: "True, the relative priorities * * * are maintained" (308 U. S. 106, 119; 312 U. S. 510, 527), for in the former case creditors received nothing for 75% of their claim, and in the latter nothing for their accrued interest. That this was a use of the expression "maintenance of relative priorities" in a sense entirely in conflict with that of the early use of the term has been pointed out by Dodd (*The Los Angeles Lumber Products Company Case and its Implications* (1940) 53 Harv. L. Rev. 713, 733, n. 48).

Any "rule" or "theory" capable of such prostitution obviously merited an even earlier "demise."

The moral to be drawn from this history is that the "absolute priority theory" must be bulwarked with accurate definitions of the words and phrases which give it expression if it is not also to experience distortion.

equitable terms, of income bonds or preferred stock." However, a class of securityholders may not "be perpetuated in the new company" if "the assets [are] insufficient to *pay*—in new bonds or stock—the amount owing senior creditors." "The value to the bondholders * * * of avoiding litigation with the old stockholders" does not justify "the inclusion of the latter in the plan," for, says the Court, "the strategic or nuisance value of such parties * * * is irrelevant * * *. In these proceedings there is no occasion for the court to yield to such pressures." This, however, does not prevent compromise of "conflicting claims to specific assets which may * * * be more wisely settled by compromise rather than by litigation."

In the *Consolidated Rock Products* case, where no serious effort had been made in the District Court to develop the valuation data necessary under this Court's earlier decisions,[1] this Court pointed out that *"absent the requisite valuation data,* the court was in no position to exercise the 'informed, independent judgment' * * * which appraisal of the fairness of a plan of reorganization entails. * * * *No adequate finding was made as to the value of the assets* * * *. * * * *a determination of that value must be made* so that criteria will be available *to determine an appropriate allocation* of new securities * * *."

As to "the method of valuation" the opinion stressed the necessity that the lower court "value the whole enterprise by *a capitalization of prospective earnings.*" It pointed out that "a sum of values based on physical factors and assigned to separate units of the property without regard to

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[1] *National Surety Co.* v. *Coriell,* 289 U. S. 426 (1933); *First National Bank* v. *Flershem,* 290 U. S. 504 (1934).

the earning capacity of the whole enterprise is plainly inadequate." This fact was "emphasized by the poor earnings record of this enterprise in the past." "Unless meticulous regard for earning capacity be had, indefensible participation of junior securities" might result.

The rights of the creditors were not "satisfied even though the 'relative priorities' of creditors and stockholders were maintained."[1] The bondholders must be *"made whole."* Their loss of their former senior fixed charge position through allotment of "an inferior grade of securities" necessitates that *"full compensatory* provision * * * be made for the entire bundle of rights which the creditors surrender." But "the absolute priority rule does not mean that bondholders cannot be given inferior grades of securities, or even securities of the same grade as are received by junior interests." Feasibility, presumably public interest in the case of a railroad, permits "practical adjustments" and dispenses with the necessity of a "rigid formula," but for surrendering senior rights creditors must receive *"full compensatory treatment,"* and they "are entitled to have the *full value* of the property, whether 'present or prospective, for dividends or only for purposes of control,' first appropriated to *payment* of their claims. * * * So long as *the new securities offered are of a value equal to the creditors' claims,* the appropriateness of the formula employed rests in the informed discretion of the court. * * * So long as they receive *full compensatory treatment* and so long as each group shares in the securities of the whole enterprise on an equit-

[1]As pointed out above, "relative priorities" were "maintained" in the Consolidated Rock Products Plan only in a most loose and inaccurate sense.

able basis, the requirements of "fair and equitable" are satisfied."

If the opinions in these two cases are read in the light of their entire content, without detaching particular words and phrases and giving them meanings inconsistent with their context, the opinions would seem to constitute a clear chart for reorganization.

Unhappily, however, the controversy as to the proper method of dealing with the priorities of creditors seems not to have been settled.[1] On the one hand junior interests, relying upon the two opinions, have belied this Court's assurance that there is no occasion for senior securityholders to yield to "pressures" from junior interests by insisting (as here successfully before the Circuit Court of Appeals) upon specific dollars and cents findings of value of properties, old claims and new securities. On the other hand, it has been insisted that the two opinions establish that the most senior classes of creditors must first receive "*payment*" in new securities having a presently realizable *market value* or *worth* equal to the full amount of their claims before anything can remain for distribution to junior classes.[2]

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[1]See Note (1940) 49 Yale L. J. 1099, 1102.

[2]That the *Consolidated Rock Products* case established such a rule was asserted by Professor Gerdes in an article in the New York Herald Tribune of March 9, 1941, Section II, p. 11, col. 3; Prentice-Hall Bankr. Serv., Report Letter No. 15, (March 26, 1941), in contradiction of his earlier view, expressed in *General Principles of Plans of Corporate Reorganization* (1940) 89 U. Pa. L. Rev. 39, 47. Fear that such a rule has been established was expressed by Dean, *A Review of the Law of Corporate Reorganizations* (1941) 26 Cornell L. J. 537, 559, n. 63. But see Gilchrist, *"Fair and Equitable" Plan of Reorganization: A Clearer Concept* (1941) 26 Cornell L. J. 592, 617.

2. The Meaning of "Value" as Used in Section 77

The 1935 amendments to Section 77 incorporated in subsection (e) the following definition:

> "The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

(a) Rate-making value; depreciated investment; depreciated reproduction cost

The chief author of the 1935 amendments, Mr. Leslie Craven, has said:[1]

> "The purpose of these provisions is * * * to incline the determination away from the doctrine of *Smyth* v. *Ames,* under which the value is fixed on the basis of a consideration of the original and reproduction cost of the property and the investment therein. The actual value of the property cannot be determined, nor is it ordinarily evidenced by the investment in the property or its present cost of construction. The railroads are competitive properties. The value of their operative property, for purposes of reorganization, must necessarily be what, for better terms, we may call the actual value or the economic worth of the property, as de-

[1] Craven and Fuller, *The 1935 Amendments of the Railroad Bankruptcy Law* (1936) 49 Harv. L. Rev. 1254, 1274.

termined primarily by its present and prospective earning capacity. The actual value of the property depends upon the demand for its service and its ability to meet the demand economically. The provisions of the amended statute, therefore, make clear that emphasis shall be put on a consideration of earning power, past, present, and prospective."

The statute thus expressly adopted, with perhaps an unnecessary cautious nod at *Smyth* v. *Ames*,[1] the rule of "valuation for reorganization purposes" which had uniformly been adopted in the old equity reorganizations of railroads,[2] and which was later declared by this Court to be applicable to reorganizations under Section 77B.[3]

Yet notwithstanding this express provision of Section 77, the Western Pacific junior interests urged before the Commission that in determining both permissible capitalization and the distribution of new securities in the reorganization, controlling weight must be given to the elements of physical value evidenced by depreciated reproduction cost and depreciated investment. Notwithstanding this Court's intervening decision in the *Los Angeles Lumber* case, they persisted in this contention before the District Court. Even after this Court had made its contrary position doubly clear in the *Consolidated Rock Products* case, they urged before the Circuit Court of Appeals that the judicial test taboos

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[1] 169 U. S. 466 (1898). Compare *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942).

[2] *Temmer* v. *Denver Tramway Co.*, 18 F. (2d) 226, 229 (C. C. A. 8th, 1927); *New York Trust Co.* v. *Continental & Commercial Trust & Savings Bank*, 26 F. (2d) 872, 874 (C. C. A. 8th, 1928); *cf. Atlanta, Birmingham & Coast R. R.* v. *U. S.*, 296 U. S. 33, 38 (1935).

[3] *Case* v. *Los Angeles Lumber Products Co., Ltd.*, *supra*; and *Consolidated Rock Products Co.* v. *DuBois*, *supra*.

the use of regulated earnings as proof of value" of a railroad[1] and argued that this was so because the Commission's control over the Debtor's rates results in a hopeless "downward spiral" wherein earning power determines value, value determines rates, and rates in turn determine earning power.[2]

This persisting error of the Western Pacific junior interests is due to a not uncommon failure to recognize the truism by Mr. Justice Brandeis, that "value is a word of many meanings."[3] Its meaning in connection with any specific problem must depend upon the character of the problem involved and the purpose for which "value" is being determined.[4]

The problem of determining the amount at which the property of a railroad company or other utility may fairly be taxed, *i.e.*, its taxable "value;" the problem of determining fair compensation for the property of a railroad or other utility taken over by a governmental authority, *i.e.*, its condemnation "value;" and, most clearly of all, the prob-

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[1]Debtor's brief in C. C. A., p. 58.

[2]WP Corp. brief in C. C. A., p. 65.

[3]*Southwestern Bell Telephone Co.* v. *Public Service Commission*, 262 U. S. 276, 310 (1923).

[4]Thorough and illuminating discussions of the necessity for a "purposive" determination of the meaning of the word "value" are to be found in Bonbright, *The Problem of Judicial Valuation* (1927) 27 Col. L. Rev. 493; Bonbright and Pickett, *Valuation to Determine Solvency Under the Bankruptcy Act* (1929) 29 Col. L. Rev. 582; Spaeth and Windle, *Valuation of Railroads Under Section 77 of the Bankruptcy Act* (1938) 32 Ill. L. Rev. 517. These articles contain exhaustive collections of the decisions of this Court, as well as of the lower Federal Courts, establishing the soundness of the statement of the text and the unsoundness of the perhaps contrary dictum of Mr. Justice Butler in *Great Northern Ry.* v. *Weeks*, 297 U. S. 135, 139 (1936).

lem of determining the rates which a railroad or other utility may fairly charge, *i.e.*, its rate-making "value," are not at all the problem of determining how a financially defunct railroad or other utility shall be recapitalized and its new securities fairly distributed among its old creditors and stockholders, *i.e.*, the reorganization "value" of the property, the old securities and the new securities. As the Securities and Exchange Commission aptly put it in a utility reorganization under Section 77B:[1] "Valuation for rate-making purposes is not the same. There the question is how much the utility will be allowed to earn—if it can. Here the question is how much can it earn—even if allowed."

In every railroad reorganization case which has come before it under Section 77, the Interstate Commerce Commission, while considering elements of physical value and including in the "valuation data" full studies of depreciated investment and depreciated cost of reproduction, has refused to treat those elements as controlling, and has determined both the capitalization of the reorganized company "compatible with the public interest" and the rights of existing securityholders to participation, primarily upon the basis of the future earning power of the venture reasonably to be foreseen.[2]

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[1] *In the Matter of Genesee Valley Gas Company, Inc.*, 3 S. E. C. 104, 112, n. 19 (1938).

[2] *Akron, Canton & Youngstown Ry.*, 228 I. C. C. 645 (1938); *Chicago & Eastern Illinois Ry.*, 230 I. C. C. 199 (1938), 230 I. C. C. 571 (1939); *Chicago Great Western R. R.*, 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939); *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940); *Chicago & North Western Ry.*, 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940); *Chicago, Rock Island & Pacific Ry.*, 242 I. C. C. 298 (1940), 247 I. C. C. 533 (1941); *Denver & Rio Grande Western R. R.*, 233 I. C. C. 515 (1939), 239 I. C. C.

The standards of "value for reorganization" thus adopted by the Commission have been approved by the United States District Courts in every case which has come before them,[1] and in the only decisions of the Circuit Courts of Appeals which have discussed the point.[2] Indeed, the decision of the Circuit Court of Appeals for the Ninth Circuit here under review can afford the Western Pacific junior interests no support for their insistence upon the

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583 (1940), (Finance Docket No. 11002, July 13, 1942, not yet reported); *Erie R. R.*, 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940); *Florida East Coast Ry.* (Finance Docket No. 13170, April 6 and August 10, 1942, not yet reported); *Minneapolis, St. Paul & Sault Ste. Marie Ry.*, (Finance Docket No. 11897, March 17 and June 17, 1942, not yet reported); *Missouri Pacific R. R.*, 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940); *New York, New Haven & Hartford R. R.*, 239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941); *St. Louis-San Francisco Ry.*, 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940); *St. Louis Southwestern Ry.*, 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942); *Spokane International Ry.*, 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939); *Western Pacific R. R.*, 230 I. C. C. 61 (1938), 233 I. C. C. 409 (1939), 236 I. C. C. 1 (1939).

[1] *In re Akron, Canton & Youngstown Ry.* (N. D. Ohio 1939, not reported); *In re Chicago & Eastern Illinois Ry.* (N. D. Ill. 1940, not reported); *In re Chicago Great Western R. R.*, 29 F. Supp. 149 (N. D. Ill. 1939); *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 36 F. Supp. 193 (N. D. Ill. 1940); *In re Chicago & North Western Ry.*, 35 F. Supp. 230 (N. D. Ill. 1940); *In re Denver & Rio Grande Western R. R.*, 38 F. Supp. 106 (D. Colo. 1940); *In re Erie R. R.*, 37 F. Supp. 237 (N. D. Ohio 1940); *In re Missouri Pacific R. R.*, 39 F. Supp. 436 (E. D. Mo. 1941); *In re New York, New Haven & Hartford R. R.* (D. Conn., Dec. 8, 1941, not yet reported); *In re Western Pacific R. R.*, 34 F. Supp. 493 (N. D. Calif. 1940).

[2] *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 124 F. (2d) 754 (C. C. A. 7th, 1941); *In re Chicago & North Western Ry.*, 126 F. (2d) 351 (C. C. A. 7th, 1942); *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C. C. A. 6th, 1942).

controlling effect of physical value, for that Court's opinion is silent as to the standards of "value" to be employed in the many "findings" of "value" which it requires.

Similarly, the Securities and Exchange Commission, in acting upon reorganizations of public utilities under Section 11(f) of the Public Utility Holding Company Act and under Chapter X of the Bankruptcy Act, has uniformly adhered to the view that "for purposes of reorganization as distinguished from 'value for rate-making purposes' earning power becomes in the final analysis a paramount criterion."[1]

Whether a reorganization be that of a railroad or other utility or that of an industrial company, a capitalization must be found which fairly represents the prospective earning power of the property involved. That capitalization must then be distributed in such manner as to give each of the old creditors and stockholders, to the extent that they have any interest represented by such earning power, the "equitable equivalent" of their contractual rights. The

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[1] *In the Matter of Genesee Valley Gas Co., Inc.*, 3 S. E. C. 104, 112 (1938); *In the Matter of West Ohio Gas Co.*, 3 S. E. C. 1014, 1019 (1938); *In the Matter of National Radiator Corp.*, 4 S. E. C. 690, 695 (1939); *In the Matter of The Griess-Pfleger Tanning Co.*, 5 S. E. C. 72, 76 (1939); *In the Matter of Utilities Power & Light Corp.*, 5 S. E. C. 483, 500 (1939); *In the Matter of La France Industries*, 5 S. E. C. 917, 926 (1939); *In the Matter of San Francisco Bay Toll-Bridge Co.*, 6 S. E. C. 863, 873 (1940); *In the Matter of Flour Mills of America, Inc.*, 7 S. E. C. 1, 9 (1940); *In the Matter of Deep Rock Oil Corp.*, 7 S. E. C. 174, 181 (1940); *In the Matter of Porto Rican American Tobacco Co.*, 7 S. E. C. 301, 305 (1940); *In the Matter of Minnesota and Ontario Paper Co.*, 7 S. E. C. 456, 476 (1940); *In the Matter of The Higbee Co.*, 8 S. E. C. 777, 782 (1941); *In the Matter of McKesson & Robbins, Inc.*, 8 S. E. C. 853, 858 (1941); *In the Matter of the Philadelphia and Reading Coal and Iron Co.*, S. E. C. Corp. Reorg. Rel. No. 55 (July 25, 1942).

opinion of this Court in the *Consolidated Rock Products* case took no distinction between industrials and utilities in its declaration:

> "Whether or not the earnings may reasonably be expected to meet the interest and dividend requirements of the new securities is a *sine qua non* to a determination of the integrity and practicability of the new capital structure. It is also essential for satisfaction of the absolute priority rule * * *." (p. 525.)

It is significant that the earlier authority quoted in the *Consolidated Rock Products* opinion, as evidencing that the rule there laid down was nothing new, was the statement of Mr. Justice Holmes with reference to a railroad property in *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 226 (1908): "* * * the commercial value of property consists in the expectation of income from it."

(b) MARKET VALUES

As "value for rate-making purposes" cannot be the basis of a "value for reorganization purposes" *inflated* beyond the limits of a fair capitalization of prospective earning power, neither should the "market value," whether of the properties themselves, or of the old claims, or of the new securities issuable in the reorganization, *deflate* the "value for reorganization purposes" below that reasonably justified by a liberal estimate of future earning capacity.

It has been pointed out both by this Court and by the commentators that as a practical matter a railroad system

has no "market value."[1] Accordingly, those who believe that "valuation for reorganization purposes" is the same thing as "market value" would apply the "absolute priority rule" by attempting to determine the prospective "market values" of the new securities issuable in the reorganization and applying such market values toward payment of the full face amounts of old claims in order of seniority.[2] There is in fact no "market" for such new securities during the long period elapsing between the original proposal of plans in a railroad reorganization proceeding and the ultimate confirmation of a plan. Hence determination of the "market value" or, to use Gerdes' expression, the "worth" of the new securities is sheer guess work.

It would be of immediate advantage to the present First Mortgage Bonds of the Western Pacific were such a rule to be applied to the Western Pacific reorganization, for it would result in the allotment to them, as the most senior security, of most, if not all, of the Common Stock allotted by the Commission Plan to the RCC Notes and the ACJ Notes. The Committee, however, recognizes that wholly unjust confiscation of actual values for reorganization purposes would result from the application of any such rule.

If any such test were to be applied to determine whether or not a class of creditors or stockholders should be excluded from a Section 77 reorganization, the same test

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[1] *Louisville Trust Co.* v. *Louisville, New Albany & Chicago Ry.*, 174 U. S. 674, 683 (1899); *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482, 504 (1913).

Bourne, *Findings of "Value" in Railroad Reorganizations* (1942) 51 Yale L. J. 1057, 1068; Weiner, *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 Col. L. Rev. 132, 137; Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 Va. L. Rev. 541, 554-5.

[2] See p. 34, n. 2, *supra*.

would necessarily apply to the determination of "insolvency." By such a test hardly any railroad in the United States would be solvent today. As of July 1, 1942, the aggregate "market value" of the entire capital structure of the New York Central Railroad Company, including its $626,190,200 principal amount of debt, was $429,211,979; that of the Southern Pacific Company, with $375,232,117 principal amount of debt, was $288,561,456; that of the Northern Pacific Railway Company, with $324,283,000 principal amount of debt, was $212,073,750; and that of the Southern Railway Company, with $279,142,500 principal amount of debt, was $267,904,430. Upon the basis of market value of securities all those properties would have to be treated as insolvent. Yet in 1941 the New York Central earned $4.07 per share on its Capital Stock; the Southern Pacific System $9.16 per share; the Northern Pacific $3.13 per share; and the Southern Railway $12.61 per share upon its Common Stock after full provision for its Preferred Stock; and it is common knowledge that 1942 per share earnings of all those properties are at a substantially increased rate.[1]

Neither the Interstate Commerce Commission nor the Securities and Exchange Commission, nor any of the courts in passing upon plans approved by either of the two Commissions, has intimated that "market value" of either the old securities or the new securities was any test of the aggregate "value for reorganization purposes." In its report on the *Cotton Belt* case, decided since the *Western Pacific* decision below, the Commission has expressly re-

[1]The debt structures and per share earnings thus stated have been computed from Moody's Manual and the respective companies' annual reports; market prices have been taken from the Commercial & Financial Chronicle.

fused to accept "market values" as affording "a proper basis for the reorganization of railroads for the long future term."[1] The constant references to "earning capacity" in this Court's opinion in the *Consolidated Rock Products* case and its direction that the lower court should "value the whole enterprise by a capitalization of prospective earnings," seem to negative the "market value" test.

(c) Capitalization of Prospective Earning Power

In the Courts below the Western Pacific junior interests were concerned at the failure of the Commission to find a specific number of dollars and cents as the Debtor's prospective earnings and then to capitalize them at a specified rate.

In dealing with this problem of the rate at which earnings should be capitalized for reorganization purposes, the Securities and Exchange Commission has applied, to some definite estimate of earning power, rates ranging from 4½% to 12%, depending upon the facts of each case.[2]

The approach of the Interstate Commerce Commission to this problem seems more appropriate to the case of a

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[1] *St. Louis Southwestern Ry.*, 252 I. C. C. 325, 356 (1942).

[2] *In the Matter of West Ohio Gas Co.*, 4 S. E. C. 377 (1939) (6%); *In the Matter of Mountain States Power Co.*, 5 S. E. C. 1 (1939) (6% to 7%); *In the Matter of McKesson & Robbins, Inc.*, 8 S. E. C. 853 (1941) (8.7%); *In the Matter of The Griess-Pfleger Tanning Co.*, 5 S. E. C. 72 (1939) (10%); *In the Matter of San Francisco Bay Toll-Bridge Co.*, 6 S. E. C. 863 (1940) (10%); *In the Matter of Porto Rican American Tobacco Co.*, 7 S. E. C. 301 (1940) (10%); *In the Matter of Minnesota and Ontario Paper Co.*, 7 S. E. C. 456 (1940) (10%); *In the Matter of Flour Mills of America, Inc.*, 7 S. E. C. 1 (1940) (12%); *In the Matter of Atlas Pipeline Corp.*, SEC Corp. Reorg. Release No.

large railroad property such as that of the Debtor. The Commission recognizes, as did this Court in its opinion in the *Consolidated Rock Products* case,[1] that the prognostication of future earnings cannot be precise but must be an approximation only. Furthermore, as any estimate of prospective earnings increases to amounts exceeding past earnings, it becomes increasingly more speculative. Hence, while in many cases the Commission has had before it expert testimony as to hypothetical "earnings for a future normal year," and while it has discussed such testimony in relation to its approved capitalization, the Commission has not predicated aggregate capitalization generally, or solely, on any fixed rate of capitalizing a fixed dollars and cents estimate of future annual earnings.[2] It has been its practice, broadly speaking, after full analysis of past and

42 (June 7, 1941) (12%); *In the Matter of Sayre & Fisher Brick Co.*, SEC Corp. Reorg. Release No. 47 (September 12, 1941) (12%). See also Note (1941) 55 Harv. L. Rev. 125, 133; and *In the Matter of Utilities Power & Light Corp.*, 5 S. E. C. 483 (1939) (4½% to 5%).

[1] 312 U. S. 510, at p. 526.

[2] In fourteen reorganization cases before the Commission in which definite estimates of future average annual earnings are referred to, the Commission has approved capitalizations which in effect capitalized such prospective average annual earnings in twelve cases at rates ranging from 2.90% in the *Milwaukee* case, 239 I. C. C. 485, 515, 539 (1940), to 4.14% in the *Fonda, Johnstown and Gloversville* case, 249 I. C. C. 455, 469-70, 473 (1941). In the thirteenth case, *Akron, Canton & Youngstown Ry.*, 228 I. C. C. 645 (1938), the approved capitalization is equivalent to the capitalization at 5% of the rough average between the prospective average annual earnings as testified to by the debtor and by the bankruptcy trustee. In the fourteenth case, *Chicago & Eastern Illinois Ry.*, 230 I. C. C. 199, 230-1 (1938), the Commission capitalized at 5% prospective average annual earnings estimated at an amount unusually high with reference to average past earnings as well as actual 1941 earnings and the 1942 estimate.

present earnings and factors which may make prospective earnings either larger or smaller than those of the past,[1] to make a liberal aggregate estimate of "prospective earnings" divided roughly into four classifications:

1. Those reasonably certain to continue without serious interruption, with a sufficient excess to provide for new fixed charge obligations the "adequate coverage" required by Section 77 for fixed charges.[2] Against these earnings the Commission has permitted the issue of new fixed charge obligations, usually with an interest rate of 4%.

2. Those of which there is substantial probability but whose regular annual continuance cannot be counted upon in a period of general business depression. Against these additional earnings the Commission has permitted the issue of contingent interest bearing obligations, usually with an interest rate of 4½%.

3. Those of which there is reasonable probability, but which, on the basis of the past earnings record, may frequently be interrupted. Against these additional earnings the Commission has permitted the issue of Preferred Stock, usually with a 5% dividend rate.

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[1]Such as the opening of the Northern California Extension and the Dotsero Cut-Off in the case of the Western Pacific. See R. 210, 215, and remarks of Commissioner Eastman, Transcript of hearings before Judiciary Committee on S. 1869 (76th Cong. 2nd Sess. 1939) 551-3.

[2]"A plan of reorganization * * * shall provide for fixed charges * * * in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof * * *."—Subsection (b) of Section 77.

4. Those of which there is no probability of uninterrupted realization but which will probably be realized from time to time and, if optimistic hopes are fulfilled, may ultimately be maintained. Against these additional earnings, together with the potential increment to the ultimate equity arising from the operation of any Capital Fund or Sinking Fund, the Commission has permitted the issue of Common Stock, which it has usually allotted at a price requiring a 6% dividend to make whole the most senior existing securities to which it is allotted.

This practical approach, if fairly applied in the light of all the "valuation data" offered by the affected securityholders, will produce, it is submitted, a capital structure for a reorganized railroad, and an aggregate "value for reorganization purposes," not only meeting the requirements of the public interest, but also adapted to recognizing fully the priorities, "relative" and "absolute," of the various classes of securities.

3. Suggested Standard for Determining, as to any Class of Securityholders, the Necessity for its Admission to, or its Exclusion from, Participation in a Section 77 Reorganization

Out of his abundance of experience Commissioner Eastman has observed:

> "Any estimate of the future earnings of a railroad can at best be no more than an 'educated guess' * * *. Anything remotely approaching accuracy is impossible."[1]

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[1]Transcript of hearings before Judiciary Committee on S. 1869 (76th Cong. 2nd Sess. 1939) 551.

To attempt to fix a precise number of dollars and cents as representing future earning power of a railroad and in turn to capitalize that earning power at a fixed rate into a precise number of dollars and cents reorganization value would be sheer unrealistic pretense. There can be no absolute and fixed dollars and cents figure marking a point of earning power or of reorganization value on one side of which, were the earnings or reorganization value a penny more, a class of creditors or stockholders must be admitted to participation in reorganization if its own rights are not to be violated, and on the other side of which, were the earnings or reorganization value a penny less, the same class must be excluded if the rights of senior classes are not to be violated.

Under the old equity practice, prior to Section 77, the securityholders' representatives, as "reorganizers," determined by "bargaining" what marginal classes of creditors or stockholders might be admitted to participation in reorganization, and the terms of such admission, subject to court approval of the result as "fair and equitable" and to Commission approval of the proposed new capitalization as "compatible with the public interest." The opinion has currently been often expressed that senior creditors were too merciful to junior classes or too yielding to their "pressures."

Section 77, as administered by the Commission, has substituted the Commission as the "reorganizer" and its expert judgment for the old "bargaining" among the securityholders. That substitution cannot, however, make certainty out of educated guess work. In the implications of such certainty in some of their words and phrases lie the possible ambiguities of the opinions in the *Los Angeles Lumber* and *Consolidated Rock Products* cases.

With recognition of the dangers inherent in any formula, the following is submitted as a standard for determining, as to any class of creditors or stockholders, the *necessity* for its admission to, or its exclusion from, participation in reorganization:

If, upon all the relevant valuation data, it is affirmatively established that earning power will, on the average over reasonable periods, probably be sufficient, not only to insure full coverage of the existing contractual income rights of senior classes and ultimate cash recovery of the full amount of the claims of such senior classes, but also to provide some surplus of earnings available to service the junior class, then such demonstrated *presence* of earning power (*i.e.*, value for reorganization purposes) for the junior class compels its admission to participation if its own rights are not to be violated.

If, on the other hand, upon all the relevant valuation data, it is affirmatively established that there is no reasonable probability of earning power to provide such income coverage and ultimate full cash recovery for senior classes, then such demonstrated *absence* of earning power (*i.e.* value for reorganization purposes) for the junior class compels its exclusion from participation if the rights of the senior classes are not to be violated.

Between the lines of demonstrated *presence* and demonstrated *absence* of such earning power will inevitably lie a substantial zone within which a class may be admitted without violation of the rights of senior classes, or may be excluded without violation of its own rights.[1] Unless the determination of admission or exclusion by the Commission, as the expert reorganizer under Section 77, is

[1] *Cf.* Gerdes, *General Principles of Plans of Corporate Reorganization* (1940) 89 Pa. L. Rev. 39, 54.

founded upon insufficient valuation data or is clearly arbitrary, it should not be rejected by the court.

Application of the suggested standard in the Western Pacific reorganization, as will be shown in the next succeeding pages, presents no problem of a nice judgment within the possible zone. There is affirmative demonstration of *absence* of earning power for the classes excluded by the Commission Plan.

4. The Commission's Determination of the "Reorganization Value" of the Western Pacific

(a) THE NEGOTIATIONS AMONG THE SECURITYHOLDERS

The A. C. James Co. and its affiliates own, in addition to the ACJ Notes, more than $8,000,000 of First Mortgage Bonds of the Debtor[1] and 8.76% of the outstanding Preferred Stock and 61.2% of the outstanding Common Stock, or 40.36% of all the outstanding capital stock of WP Corp.[2] WP Corp., with its 100% owned subsidiary, Western Realty Company, in turn owns all the unsecured debt and 100% of the Preferred and Common Stock of the Debtor.[3] All of the outstanding Refunding Bonds of the Debtor are pledged under the RFC, RCC and ACJ Notes. The only securityholders of the Debtor who have not appeared in the reorganization proceeding are thus the First Mortgage Bondholders other than those represented by the Committee and ACJ.[4]

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[1]Transcript of oral argument of counsel for A. C. James Co. before the Interstate Commerce Commission, November 17, 1937, p. 788 (not printed in the Record by stipulation, R. 2616, but before this Court pursuant to stipulation filed on July 23, 1942).

[2]R. 1051. [3]R. 1026-7, 1030, 1051.

[4]No other First Mortgage Bondholders than those represented by the Committee and by the James interests have appeared in the reorganization proceeding either before the Com-

Following the default of the Debtor in the payment of its First Mortgage Bond interest in March, 1934, the Committee entered into negotiations with the James interests, RFC and RCC. These negotiations continued after the institution of this reorganization proceeding in August, 1935, and until the final decision of the Commission in June, 1939.[1] Their object was to work out, if possible, a reorganization plan which would be acceptable to the four interests involved, the First Mortgage Bonds, RFC, RCC and the James interests; and at the same time be approved by the Commission.

Both in these negotiations and formally before the Commission, the Committee made its own proposals and supported proposals of other parties, providing for allotments of warrants or of Common Stock for the Debtor's unsecured debt and stock held by WP Corp. Particularly did the Committee support the proposal of RCC[2] (following the Commission's first Report and Order in 1938) that the capitalization be increased beyond that contemplated by the Commission Plan, by adding $18,413,928 of 4% Preferred Stock (largely for allocation against accrued First Mortgage interest), and 30,000 shares of no par value Common Stock in order to permit some participation for WP Corp.

This action of the Committee was not dictated by any belief that the prospective earning power of the Debtor was sufficient to *entitle* the junior interests to any larger participation than that given them by the Commission Plan. Indeed, the Committee recognized that prospective earning power for those junior interests was so extremly remote as

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mission or in the Courts. These scattered small holders are, however, represented by the First Mortgage Trustees to the extent provided in subsection (c)(7) of Section 77.

[1]R. 690. [2]R. 693.

to raise a serious question as to whether the admission of the WP Corp. to any participation, or of the RCC and ACJ Notes to any greater participation than that provided by the Commission Plan, would not violate the rights of First Mortgage Bondholders not represented by the Committee. The Committee recognized, however, that the large and diversified James holdings created serious risk of those "pressures" of which this Court spoke in the *Consolidated Rock Products* case. The Committee therefore felt that a prompt reorganization without continued litigation was of much greater value to the First Mortgage Bondholders than the small amount of Common Stock proposed to be given up.

Despite the urging by all the parties that representatives of the Commission sit informally with them to endeavor to reach a compromise which the Commission might approve, the Commission refused in any way to participate in the negotiations. So, too, the Commission expressly refused to approve any of the proposals of the various parties to give participation to the junior interests beyond that provided by the Commission Plan.

(b) THE COMMISSION'S CONCLUSIONS

Four times, once by its Bureau of Finance and three times by action of the full Commission, the Commission found that "the equity of the existing stock has no value."[1] Three times the full Commission also found that "even though all the securities remaining available for distribution after satisfying the claims of the first mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims."[2] Hence, the full Commission three times found

[1]R. 269. See also R. 185, 393, 889. [2]R. 269. See also R. 392, 889.

that "the claims of the unsecured creditors * * * have no value."[1]

Upon all the "valuation data" before it (which has been described generally, *supra*, pp. 13-14, and will later be discussed in detail, *infra*, pp. 56-61), the Commission reached the following conclusions as to prospective earning power and the proper new capitalization:

1. The prospective earnings sufficiently certain to meet the statutory standard of "adequate coverage" for fixed charges did not exceed $500,000. Accordingly, it limited fixed charges to the $2,750,050 of undisturbed existing Equipment Obligations and $10,000,000 new First Mortgage 4% Bonds having an aggregate annual fixed charge of $494,202.

2. The prospective earnings found to have sufficient probability to justify contingent debt charges, including sinking funds, and a Capital Fund, did not exceed $2,000,000. Against the approximately $1,000,000 thus left over after fixed charges and a Capital Fund of $500,000, which the Commission found required by the public interest, it permitted the issuance of $21,219,075 Income Mortgage Bonds with 4½% interest, representing an annual contingent charge of $954,858, and with an annual ½% Sinking Fund, representing an annual contingent charge of $106,095, or a total annual contingent debt charge of $1,060,953.

3. The "most optimistic estimate of earnings of record" indicated support for "dividends at the rate of 5% on only $37,432,000 of stock."[2] However, the Commission treated substantially all of that "most optimistic estimate" as being of sufficient probability to justify the

[1] R. 269-70. See also R. 392, 889.
[2] R. 257.

issuance of approximately $31,850,297 par value of Preferred Stock with a 5% dividend, or a total annual dividend charge of $1,592,515.

Thus the Commission created a capital structure with approximately $66,000,000 of par value securities and approximately $3,650,000 annual charges through Preferred dividends.

4. The small amount of earning power remaining, evidenced by "the most optimistic estimate of earnings of record" for any one year ($120,000 on the Commission's figures[1] and $400,000 on the Debtor's figures[2]), together with the capital accretions arising from the Capital Fund and the Income Bond Sinking Fund, the Commission found to be the basis for authorizing the 319,441 shares of no par value Common Stock. It indicated hope that earnings might some day even attain the still higher annual level of $4,600,000, permitting dividends at the rate of $3 per share on the Common Stock,[3] and it allocated the new Common Stock to the senior First Mortgage Bonds at a price of $57 per share.[4]

While the Commission did not state a specific over-all dollars and cents figure thought by the Circuit Court of Appeals to be "necessary to determine the value of the debtor's entire property," the foregoing determinations do include all the figures necessary for a mathematical com-

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[1]As indicated on page 16, *supra*, the Commission adopted a figure of approximately $3,770,000.

[2]The Debtor's highest estimate for any one year was approximately $4,050,000. R. 142, 2019, 2027.

[3]R. 269.

[4]R. 317. One share was allotted for each $57 of accrued interest.

putation of the *maximum amount* of such a "value" for reorganization purposes.

The Commission's allotment of the no par value Common Stock to the First Mortgage Bondholders at $57 per share (particularly in the light of the finding, referred to in Point II of this brief, that the equity of the RCC Notes in the collateral securing the RFC Notes "has no value") was necessarily in substance a finding that the "value for reorganization purposes" of the Debtor's properties *did not exceed* $84,027,559. That is the amount produced by taking all the par value securities, undisturbed and new, at their par values (at which they were allotted against First Mortgage Bond principal and RFC Note principal) and the entire 319,441 shares of no par value Common Stock at $57 per share (the price required to "make whole" the First Mortgage Bondholders and the RFC Notes).[1]

(c) VALUATION DATA

Examination of the "valuation data" upon which the Commission made the determinations set forth above demonstrates that they violate no right of any of the complaining junior interests.

Every conceivable type of valuation data suggested as being relevant by either the Commission or any of the parties was made part of the record before the Commission.[2]

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[1]It should be noted that, even if a $3 annual dividend will cause the Common Stock to be salable at $57 per share and all the new securities senior thereto to be salable at their par value, thus making the old First Mortgage Bondholders whole as to the *principal* amount of their claims, the *annual return* which they will then receive on their entire present claim ($1,266.67 per $1,000 Bond) will be only 4.896% as contrasted with the 5% to which they are now contractually entitled on that amount.

[2]While in their petitions for modification of the Commission's Report and Order of October 10, 1938, both the Debtor and ACJ

Before the District Court all the additional valuation data offered by any of the parties was received by the Court.

This, therefore, is not a case like *Jamieson* v. *Watters*, 91 F. (2d) 61 (C. C. A. 4th, 1937), (relied on below by the objecting junior interests), in which valuation data proffered by the appellants had been excluded. Nor is it like that case or like the *Consolidated Rock Products* case in any sense that there was "absent the requisite valuation data."

(i) *Physical Value.*

Included in the "valuation data" were full records of the valuation of the Debtor's properties under Section 19a of the Interstate Commerce Act in 1929 and as to the original cost of, or investment in, those properties. Full studies of depreciation were also included. They evidenced that the net "value for rate-making purposes" of the Debtor's System as of December 31, 1935, was $139,600,455,[1] that a similar value as of December 31, 1938 was $150,907,623[2] and that its investment in road and equipment (book value), less equipment depreciation, as of December 31, 1938, was $144,978,559.[3]

While the Commission refused to give controlling effect to these elements of value, or even on that basis to approve

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asserted that the record lacked evidence to support the Commission's conclusions, neither they nor any other of the objecting junior interests offered any additional valuation data. On challenge by one of the Commissioners as to what additional evidence could be taken to "arrive at some idea regarding values," the Debtor's counsel stated that he did not believe it "necessary or expedient to reopen the record" (Transcript referred to on p. 50, n. 1, *supra*, p. 893), and ACJ's counsel answered, "The only question in my mind as to the record * * * is whether you have in your full figures for accrued depreciation" (*id.*, p. 968).

[1]R. 224. [2]R. 1061-62. [3]R. 1063.

the capitalization urged by Commissioner Miller of $120,000,000 in order to "give the present stockholders a chance to participate in the future profits of the reorganized company" by giving them some "no-par-value common stock" which "may have little or no market value,"[1] the Commission did, in fact, give substantial consideration and weight to these elements of physical value.

That it gave substantial consideration to such elements is shown by the many references to them in the Tentative Report of the Bureau of Finance and the three Reports of the Commission.[2]

That it also gave substantial weight to the elements of physical value becomes evident upon the consideration of "the earning power of the property, past, present, and prospective" and its inadequacy, taken alone, to support the capitalization contemplated by the Commission Plan.

(ii) *Earning Power.*

As already noted (p. 54, *supra*), the capitalization provided by the Commission Plan requires annual earnings of approximately $3,650,000 for coverage of charges through dividends on Preferred Stock, and a total of approximately $4,600,000 to achieve earnings of $3 per share on the new Common Stock after all prior charges.

Sustained earnings to create a continuous record of actual payment of dividends of at least $3 per share on the Common Stock must be realized if the value of that stock is ever to approach the sum of $57 per share. That is the figure at which it was allotted to the First Mortgage Bondholders under the Commission Plan and represents the value which it must attain if the value of the securities allotted to the First Mortgage Bondholders is ever to make

[1] R. 283-4. [2] R. 123-4, 144, 203, 224, 313-4.

them whole by equalling the amount of their claims as of January 1, 1939.

$4,600,000 in annual earnings is thus the minimum annual earnings level which the Debtor's properties must attain and continuously maintain before the new securities allotted to the senior First Mortgage Bonds under the Commission Plan can give to the First Mortgage Bondholders, in any sense of those terms, full recognition of their absolute priorities and full compensation for their surrendered rights.

The Debtor's earnings record, set forth above at page 7, gives little basis for hope of the maintenance of any such level.

The relationship of this earnings record to the capital structure contemplated by the Commission Plan is strikingly shown by the graph inserted opposite this page. The earnings of the Debtor's properties available for interest, adjusted as stated above at page 6, have only once in the last twenty years (1926) reached the amount continuously necessary to "make whole" the First Mortgage Bondholders; and only in two additional years (1925 and 1928) have they even approximated that amount. And this, the record indicates, was at the expense of substantial undermaintenance,[1] for which no deduction has been made in the adjusted earnings as stated on page 7 and in the graph.

It will further be noted that in only two additional years (1929 and 1941) were the Preferred dividends substantially fully covered and in only six additional years (1922, 1923, 1924, 1927, 1930 and 1940), have there been any earnings available for *any part* of the dividends on the new Preferred Stock.

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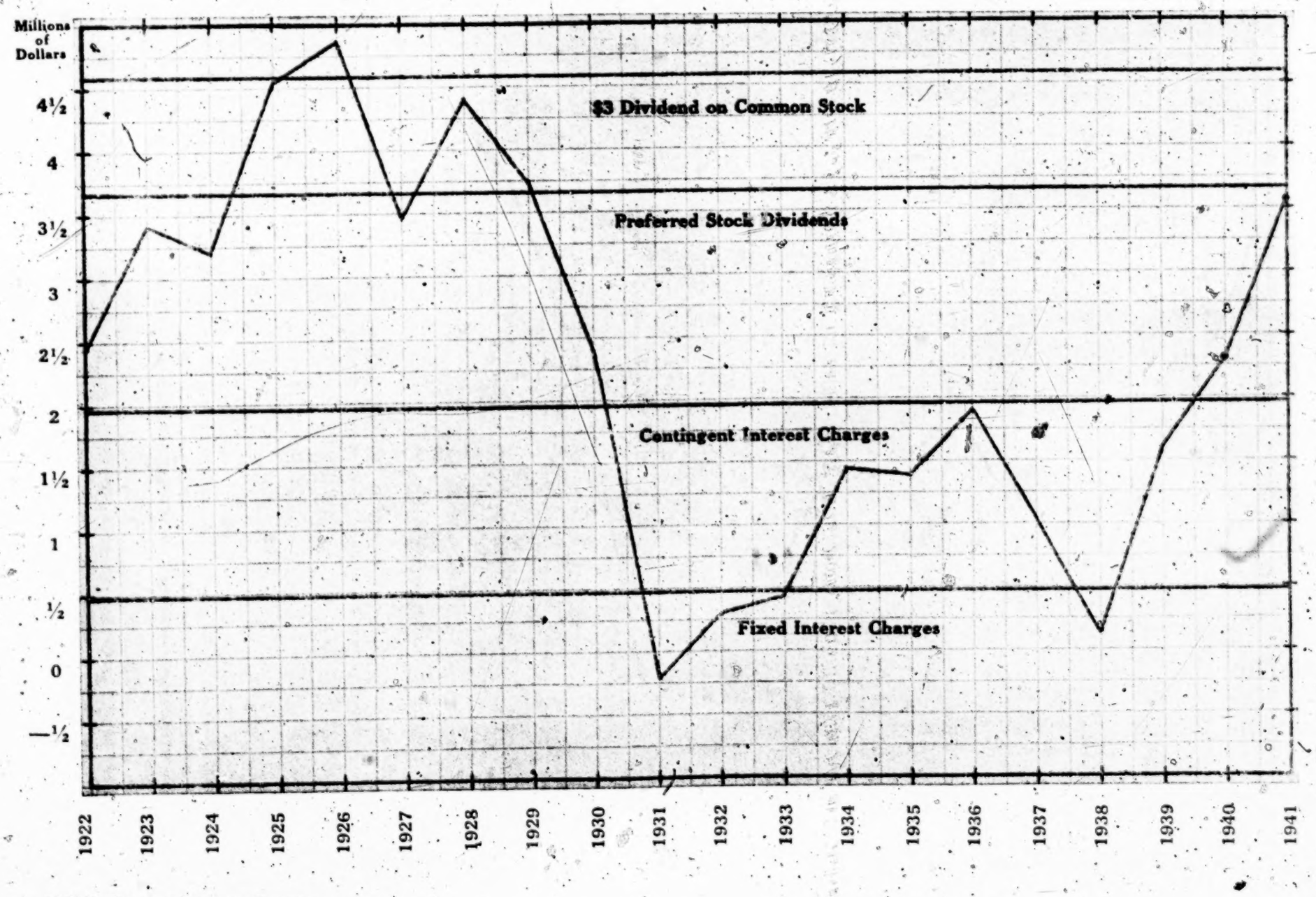
[1] R. 1052.

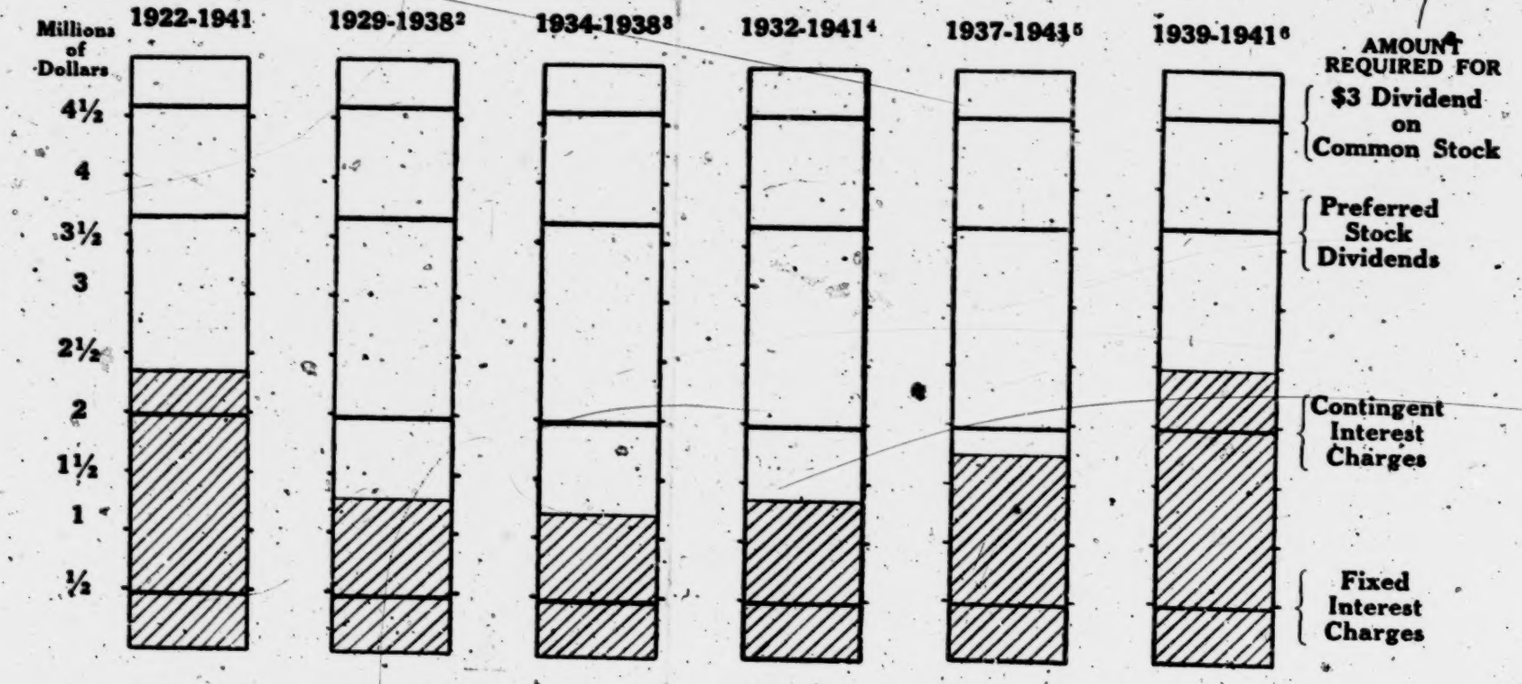
APPLICATION OF DEBTOR'S EARNINGS[1] TO CAPITALIZATION UNDER COMMISSION PLAN



[1] Adjusted as stated on page 6, *supra*.

AVERAGE ANNUAL EARNINGS[1] AS APPLIED TO CAPITALIZATION UNDER COMMISSION PLAN

[The diagonally hatched portions of the blocks represent earnings; the blank portions represent deficits.]



[1]Adjusted as stated on page 6, *supra*.
[2]10 years preceding Commission action.
[3]5 years preceding Commission action.
[4]The most recent 10 years.
[5]The most recent 5 years.
[6]The 3 years since the effective date of the Commission Plan.

In four of the twenty years (1931, 1932, 1933 and 1938) the earnings were inadequate to cover even fixed charges under the Commission Plan, and in five additional years (1934, 1935, 1936, 1937 and 1939) they were inadequate to cover contingent debt charges.

The inadequacy of the Debtor's earnings to support any larger capital structure than that contemplated by the Commission Plan is further evidenced by the graphs inserted opposite this page showing the application of average adjusted earnings for the various indicated periods to the amounts required to service the capitalization under the Commission Plan.[1]

The averages for none of those periods, except for the entire twenty years and for the three years since January 1, 1939, have been adequate to cover even full contingent debt charges under the Commission Plan. Were the earnings for the full twenty years to be further adjusted to deduct the large amount of under-maintenance which accrued prior to 1927, it is doubtful that the average for the twenty year period would cover the full contingent debt charges.

In none of the periods have the average earnings been sufficient fully to cover the requirements for Preferred Stock dividends, let alone anything toward Common Stock dividends.

The liberality to the junior interests of the capitalization proposed by the Commission Plan, as well as the optimism with which the future must be regarded, in the light of past

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[1]Average earnings for the various indicated periods on the graph are as follows:

1922-1941	$2,320,878	1932-1941	$1,420,513
1929-1938	$1,261,539	1937-1941	$1,754,410
1934-1938	$1,195,528	1939-1941	$2,489,737

earnings, to justify the maximum value for reorganization purposes found by the Commission, is evidenced by the following illustrative tabulations. That maximum value, it will be remembered, is $84,027,559.[1]

To produce that amount average earnings must be capitalized:

for 1922 to 1941 at the rate of 2.76%
for 1929 to 1938 at the rate of 1.50%
for 1934 to 1938 at the rate of 1.42%
for 1932 to 1941 at the rate of 1.69%
for 1937 to 1941 at the rate of 2.09%
for 1939 to 1941 at the rate of 2.96%

Especially striking is the fact that the earnings for the years 1939 to 1941, to which the Commission Plan will actually be applied if it is consummated, must be capitalized at the rate of 2.96% to produce the Commission-found maximum "value for reorganization purposes" of $84,027,559.

Before the unsecured debt and stock of the Debtor held by WP Corp. can have any "value for reorganization purposes" an aggregate of such value for the Debtor's properties must be found, not of $84,027,559, but in excess of $87,922,143.

The foregoing computations put beyond any possibility of reasonable dispute the soundness of the Commission's

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[1]The aggregate amount of the par value securities plus the price of $57 per share for the Common Stock, required to "make whole" the First Mortgage Bondholders and the RFC Notes.

finding that the unsecured debt and the stock of the Debtor "have no value."

5. The effect of War Boom Earnings

As the European war began to affect the national economy after the Commission had certified its Plan to the District Court, the Debtor's earnings began a marked upward trend. 1940 earnings were substantially twice those for 1939. 1941 earnings showed a further large increase. In the first six months of 1942 the Debtor's total consolidated system operating revenues were $16,235,602, as compared with $10,111,000 for the corresponding six months of 1941 and, for the same periods, its income available for income and excess profits taxes and interest was $4,108,290 in 1942 as compared with $1,081,727 in 1941. We believe that there is no question but that those increases were the result of a combination of accelerating "defense" and war activities, the shortage of shipping tonnage and the practical cessation of transportation between the East Coast and the West Coast through the Panama Canal. Those increases in earnings have kept close pace with the change-over to the war time economy.

The junior interests urged, before both the District Court and the Circuit Court of Appeals, that increasing earnings of the Debtor made the Commission Plan obsolete and required a new "valuation" which, they argued, would evidence a "value" for the Debtor's unsecured debt and its stock. As the increasing trend of the Debtor's earnings has accelerated rather than diminished since the argument before the Circuit Court of Appeals, the same issue will be presented to this Court.

That issue, the Committee believes, should be faced squarely by this Court.[1] If war boom earnings of the nature experienced by the Debtor (and in varying degrees by most other railroads) are to require a reconsideration of "prospective earning power" of properties in Section 77 proceedings, in the face of such records of "past earnings" as that of the Debtor, the parties to all Section 77 proceedings, as well as the Commission, should know it at the earliest possible moment.

Before consideration of the legal effect of war inflated earnings, it should be noted that the reported amounts may be disputed on two counts.

Those earnings, as reported, are not mathematically comparable with the prior record of the Debtor's earnings. No account is taken in the available 1942 figures, as set forth above, of the increasingly heavy Federal income and excess profits taxes necessarily resulting from the very facts which give rise to the increased revenues. No accurate determination can be made at this time of the Federal taxes properly to be deducted from 1942 earnings on the basis of the Commission's capitalization, in part because the relevant tax legislation has not yet been enacted. An example of the material nature of such tax liability is the fact that, on the basis of the income available for such taxes and interest for the first six months of 1942 ($4,108,290), after deducting six months interest charges under the Commission Plan and applying the tax rates contained in the proposed Revenue

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[1] Judicial notice may be taken of such increasing earnings. See *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419 (1938); *In re Chicago & North Western Ry.*, 126 F. (2d) 351, 364 (C. C. A. 7th, 1942).

Act of 1942 as passed by the House of Representatives and as approved by the Senate Committee at the date of this brief, the Federal income tax payable with respect to those earnings would be approximately $1,500,000.[1] Thus an apparent war boom figure of $4,108,290 is reduced, with respect to income available for both interest and dividends, to about $2,600,000. Even this figure is before deducting for any excess profits tax which may be imposed upon the reorganized Western Pacific at the current earnings level, depending upon tax legislation as finally enacted.

Also, no account has been taken of the fact that the Debtor's properties are all being put to extraordinary wear and tear in the production of these increased earnings, and that shortages and priorities of both labor and materials are preventing expenditures for maintenance of way, structure and equipment commensurate with the increased use.[2]

The question here is whether the Debtor's war time boom earnings, clearly temporary (and also subject to the indeterminate tax and deferred maintenance deductions

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[1]Non-recurring losses or other deductions might well reduce the income tax in one year, but they are not material in the search for indicia of "prospective earnings" over a period. The above figure of $1,500,000 is computed without allowing any credit for any excess profits taxes payable. While the imposition of an excess profits tax would decrease the income tax payable, it would increase the over-all income and excess profits tax liability of the Debtor.

[2]R. V. Fletcher, Vice President of the Association of American Railroads, recently pointed out that due to shortages of labor and materials, the railroads "are going to come out of this war * * * with their tracks more or less run down and with their equipment in a shaky condition." Hearings before the Senate Committee on Finance on H. R. 7378 (77th Cong., 2nd Sess.) at p. 766.

indicated), are sufficiently reliable evidence of the Debtor's "prospective earning power" to justify the abandonment of the findings of the Commission and the District Court that the Debtor's unsecured debt and stock "have no value"—findings based on the record of the past twenty years of the Debtor's operations and earnings and all other relevant factors with respect to the Debtor's "prospective earnings."

The Committee does not believe that a railroad reorganization having as its objective the creation of a sound financial structure which can continue unscathed through the probable depressions of the post-war period and the inevitable ups and downs of railroad earnings can be predicated on the hypothesis of indefinite continuance of a war economy, carrying with it the cessation of water, truck and air competition. As Commissioner Eastman in an address before the National Association of Mutual Savings Banks at Philadelphia on May 7, 1941, said:

> "Let me suggest, however, that those who regard these present earnings as evidence of the unsoundness of our reorganization plans may well give heed to the source from which these earnings spring and to the future conditions which are likely to flow from this same source. * * * All this in the end means burden and sacrifice for all concerned. * * *"

Since the beginning of 1941 the Commission has approved plans for the reorganization of nine railroads.[1] In

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[1] *Fort Dodge, Des Moines & Southern R. R.*, 244 I. C. C. 625 (1941); *New York, New Haven & Hartford R. R.*, 244 I. C. C. 239 (1941); *Alabama, Tennessee & Northern R. R.*, 247 I. C. C. 453 (1941); *Chicago, Rock Island & Pacific Ry.*, 247 I. C. C. 533 (1941), 249 I. C. C. 297 (1941); *St. Louis Southwestern*

none of those plans has the Commission regarded war boom earnings as furnishing any controlling or reliable indicia of the railroad's prospective earning power. In one of its latest decisions the Commission summarized its position in this respect:

> "In the report of April 6, 1942, Division 4 recognized the fact that 1941 earnings were influenced by the extraordinary conditions existing as the result of the war and in the report stated fully all considerations leading to its conclusions as to justifiable amounts of capitalization and of new general mortgage bonds. Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases sought."[1]

Two months ago the Circuit Court of Appeals for the Sixth Circuit likewise squarely rejected the argument that 1940 and 1941 earnings of a railroad, representing abnormal increases attributable to the prosecution of the war effort, were any support for a Debtor's objection that the Commission's valuation of the railroad was too low.[2]

Ry., 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942); *Fonda, Johnstown & Gloversville R. R.*, 249 I. C. C. 455 (1941); *Minneapolis, St. Paul & Sault Ste. Marie Ry.*, (Finance Docket No. 11897, March 17 and June 17, 1942, not yet reported); *Denver & Rio Grande Western R. R.* (Finance Docket No. 11002, July 13, 1942, not yet reported); *Florida East Coast Ry.* (Finance Docket No. 13170, April 6 and August 10, 1942, not yet reported).

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[1] *Florida East Coast Ry.* (Finance Docket No. 13170, August 10, 1942, not yet reported).

[2] *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C. C. A. 6th, 1942).

With reference to such war boom earnings the Court stated:

> "It is conceded that these abnormal increases [earnings from January 1, 1940, to October 31, 1941] are solely attributable to the prosecution of the war effort of the Government. These abnormalities are not proper tests by which to measure the Commission's determination of the somewhat imponderable prospective earnings in 1937. Subsequent earnings due to unforseeable circumstances may not be used to check the correctness of prospective earnings as determined by the Commission under the Act. Naturally such earnings could not have entered into any purchaser's estimate of value." (at p. 939)

A similar attempt to increase the total capitalization approved by the Securities and Exchange Commission in the reorganization of a utility was rejected by a District Court which pointed out that such booms are generally followed by periods of depression.[1]

Apparently the investing public does not regard the present abnormally high level of railroad earnings as any criterion of the long-range value of railroad securities. That opinion is shown by the substantial discounts at which the securities constituting the entire capital structures of such solvent roads as the New York Central, Northern Pacific, Southern Pacific and Southern Railway are selling (see page 43, *supra*) and, again, by the prices at which the senior obligations of recently reorganized

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[1] *In re Utilities Power & Light Corp.*, 29 F. Supp. 763, 770 (N. D. Ill., 1939).

railroads are selling. Examples of the latter include the market price of 64 for the First Mortgage Bonds of the new Chicago Great Western, of 90¼ for those of the new Erie and of 78 for those of the new Wabash.[1] The extreme to which the investing public is discounting war boom earnings is further demonstrated by the fact that stocks of many solvent railroads are selling at less per share than their estimated 1942 earnings per share after taxes.[2]

Finally, it is relevant to compare even the war earnings of Western Pacific with the capitalization provided by the Commission Plan. Under that Plan the new Western Pacific will need to have *continuously* available for interest and dividends, after proper deductions for Federal income and excess profits taxes and adequate maintenance, earnings of at least $4,600,000 per annum. That level of earnings, as we have shown above, is the necessary minimum available for dividend payments to give the new company's no par value common stock the value of $57 a share which would in any sense approximately "make whole" the present First Mortgage Bondholders. Nothing has been shown to date to suggest any likelihood of that figure being continuously maintained, much less surpassed

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[1] The prices given are the July 31, 1942, prices, at a time when the great increases in war time earnings were evident. The September 1, 1942 prices for the same issues, following a recent increase in market prices of railroad securities, were Chicago Great Western 66, Erie 91, and Wabash 80¼.

[2] For example, Standard Statistics estimated on August 4, 1942, that the 1942 earnings after taxes of Southern Railway will be $17.40 on its Common Stock, which was then selling at 15. Similarly, estimated earnings of Southern Pacific are $14.35 per share as compared with a market value of 13⅝, and earnings of $6.05 are predicted for Kansas City Southern stock selling at 4.

The only effect that Western war boom earnings can have on the Commission Plan is to give its optimistic capital structure some degree of substance. This case involves no change of facts justifying a reconsideration of the previous determinations by the Commission and the District Court that the unsecured debt and stock of the Debtor "have no value."

6. The Absence of a Formal Finding of a Dollars and Cents Value of the Debtor's Properties as an Entirety

It will be the purpose to discuss here only the "findings" necessary to sustain exclusions of classes of creditors and stockholders. The problem of the "findings" necessary for allocations of securities among participating classes will be discussed under Point II.

Pursuant to Section 77, the Commission has formulated plans of reorganization for sixteen Class I railroads.[1]

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[1] *Akron, Canton & Youngstown Ry.*, 228 I. C. C. 645 (1938); *Chicago & Eastern Illinois Ry.*, 230 I. C. C. 199 (1938), 230 I. C. C. 571 (1939); *Chicago Great Western R. R.*, 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939); *Spokane International Ry.*, 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939); *Western Pacific R. R.*, 230 I. C. C. 61 (1938), 233 I. C. C. 409 (1939), 236 I. C. C. 1 (1939); *Chicago & North Western Ry.*, 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940); *Missouri Pacific R. R.*, 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940); *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940); *Erie R. R.*, 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940); *St. Louis-San Francisco Ry.*, 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940); *New York, New*

Of these plans four have been consummated,[1] the remainder being at various stages of the procedure prescribed by Section 77. In thirteen of these plans[2] classes of stockholders have been excluded from participation, and in five, classes of creditors have also been excluded.[3] In all these plans the findings of the Commission upon which the exclusion of stockholders and creditors (as well as the allocations of new securities) were based were substantially identical in form with those in the *Western Pacific* case and were supported by substantially similar "valuation data."

Attacks by the excluded junior classes upon the sufficiency of such findings have been overruled by every Dis-

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Haven & Hartford R. R., 239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941); *Chicago, Rock Island & Pacific Ry.*, 242 I. C. C. 298 (1940), 247 I. C. C. 533 (1941), 249 I. C. C. 297 (1941); *St. Louis Southwestern Ry.*, 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942); *Minneapolis, St. Paul & Sault Ste. Marie Ry.*, (Finance Docket No. 11897, March 17 and June 17, 1942, not yet reported); *Denver & Rio Grande Western R. R.*, 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940), (Finance Docket No. 11002, July 13, 1942, not yet reported); *Florida East Coast Ry.* (Finance Docket No. 13170, April 6 and August 10, 1942, not yet reported).

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[1]Chicago & Eastern Illinois Ry.; Chicago Great Western R. R.; Erie R. R.; and Spokane International Ry.

[2]Chicago & Eastern Illinois Ry.; Chicago Great Western R. R.; Chicago, Milwaukee, St. Paul & Pacific R. R.; Chicago & North Western Ry.; Chicago, Rock Island & Pacific Ry.; Denver & Rio Grande Western R. R.; Minneapolis, St. Paul & Sault Ste. Marie Ry.; Missouri Pacific R. R.; New York, New Haven & Hartford R. R.; St. Louis-San Francisco Ry.; St. Louis Southwestern Ry.; Spokane International Ry.; and Western Pacific R. R.

[3]Denver & Rio Grande Western R. R.; Minneapolis, St. Paul & Sault Ste. Marie Ry.; St. Louis-San Francisco Ry.; Spokane International Ry.; and Western Pacific R. R.

trict Court before which those plans have come, and the exclusions sustained.[1]

The Securities and Exchange Commission, in dealing with bankruptcy reorganizations of public utility holding companies under Section 11 (f) of the Public Utility Holding Company Act [15 U. S. C. §79k (f)], performing functions similar to those performed by the Interstate Commerce Commission under Section 77,[2] has predicated exclusions of classes upon similar findings and valuation data.[3]

The effectiveness of findings of "no value," when supported by valuation data similar to that in the present record, had thus become, in practice, established law prior to the decision of the Circuit Court of Appeals for the Ninth Circuit here under review. That decision came as a shock to the "reorganization bar"[4] greater even than that experienced upon the decisions in the *Monon* case[5] and the *Boyd* case.[6] Notwithstanding that the Circuit Court of Appeals for the Seventh Circuit somewhat equivocally con-

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[1] *In re Chicago & North Western Ry.*, 35 F. Supp. 230, 245 (N. D. Ill. 1940); *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 36 F. Supp. 193, 203 (N. D. Ill. 1940); *In re Missouri Pacific R. R.*, 39 F. Supp. 436, 444 (E. D. Mo. 1941); *In re St. Louis-San Francisco Ry.* (not yet reported, E. D. Mo. 1942).

[2] *In the Matter of Peoples Light and Power Co.*, 2 S. E. C. 829, 847 (1937).

[3] *In the Matter of West Ohio Gas Co.*, 3 S. E. C. 1014 (1938); *In the Matter of Ulen & Co.*, S. E. C. Corp. Reorg. Rel. No. 43 (June 21, 1941).

[4] See Edward W. Bourne (1942) *Findings of "Value" in Railroad Reorganization*, 51 Yale L. J. 1057.

[5] *Louisville Trust Co.* v. *Louisville, New Albany & Chicago Ry.*, 174 U. S. 674 (1899); see statement of Adrian H. Joline quoted at p. 197 of Some Legal Phases of Corporate Financing, Reorganization and Regulation (1917).

[6] See Cravath, *The Reorganization of Corporations* (1917) Some Legal Phases of Corporate Financing, Reorganization and Regulation 153.

curred with that for Ninth Circuit as to the necessity of more specific valuation findings for purposes of distribution, the Seventh Circuit refused to go along with the Ninth Circuit on the point here under discussion; it twice sustained the effectiveness of findings of "no value" for the purpose of exclusion from participation.[1]

It is submitted that nothing in Section 77 or in this Court's opinion in the *Consolidated Rock Products* case, which the Court below thought compelled its decision, lends any support to that decision.

Section 77 (d) requires that "the Commission shall render a report and order in which it shall approve a plan * * * that will in its opinion meet with the requirements of subsections (b) and (e) * * * and will be compatible with the public interest; * * * In such report the Commission shall *state fully the reasons for its conclusions.*"

Certainly this provision affords no possible basis for a requirement of formal findings of fact, and certainly no one can contend that in the voluminous reports and orders of the Commission in this case the Commission has failed to "state fully the reasons for its conclusions."

The only references in Section 77 to a "finding" by the Commission or by the District Court include, as a basis of exclusion, findings in exactly the words of the findings in the present case. Subsection (e) provides that the

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[1] *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 124 F. (2d) 754 (C. C. A. 7th, 1941); *In re Chicago & North Western Ry.*, 126 F. (2d) 351 (C. C. A. 7th, 1942). In its supplemental opinion in the former case (unreported, see Record before this Court, p. 2335, in Docket Nos. 11-19), the Circuit Court held

> "* * * that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain, and fully meets the rule which requires finding on values of assets."

> "submission [of a plan] to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding * * * that at the time of the finding the equity of such class of stockholders has no value,"

and that

> "submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding * * * that at the time of the finding the interests of such class of creditors have no value * * *."

That provision of subsection (e) upon which the Court below relied does not require the Commission to determine and certify "value" in detail of exact dollars and cents in every case. It provides for a determination and certification of value only "if it shall be necessary * * * for any purpose under this section * * *."

Nor is there anything in the Interstate Commerce Act which requires the Commission to make such formal findings of detailed values as the Court below would require. Section 14 of that statute provides:

> "(1) Whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

[1]This was pointed out in the opinions of Barnes, J., in *In re Chicago & North Western Ry.*, 35 F. Supp. 230, 244 (N. D. Ill. 1940); and of Igoe, J., in *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 36 F. Supp. 193, 203 (N. D. Ill. 1940).

In the light of Section 14 this Court has held that "There are no formal requirements for the findings to be made by the Commission in this type of case * * *" [a removal of rate discrimination].[1] This being the only provision of the Interstate Commerce Act providing for express "findings of fact," it is clear that the only situation in which the Commission's report must contain such findings is a case where damages are awarded.

Nor is there any requirement of such findings under the Constitution. The objecting junior interests relied below upon this Court's opinions that the Commission must find the facts necessary to exist before the Commission has jurisdiction to issue the order in question.[2] Obviously there is no "jurisdictional" distinction between a finding, supported by adequate valuation data, that the interest of a class of creditors or stockholders "has no value" and a finding giving the mathematical demonstration of that conclusion by finding a dollars and cents value for the property of a debtor in an amount less than the amount of the claims senior to those found to "have no value."

Least of all does the opinion of this Court in the *Consolidated Rock Products* case support the conclusions of the Court below. To be sure, that opinion contains the phrase which became the theme song of the objectors below and was echoed in the opinion of the Circuit Court of Appeals—

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[1] *United States* v. *Louisiana*, 290 U. S. 70, 80 (1933). See *Manufacturers Ry.* v. *United States*, 246 U. S. 457, 489-90 (1918).

[2] *Florida* v. *United States*, 282 U. S. 194 (1931); *United States* v. *Baltimore & Ohio R. R.*, 293 U. S. 454 (1935); *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Ry.*, 294 U. S. 499 (1935).

"absent the requisite valuation data"[1] and also the statement almost equally stressed in the arguments below— "* * * no adequate finding was made as to the value of the assets * * *. * * * a determination of that value must be made * * *."[2] The factual situation in which those expressions were used in the *Consolidated Rock Products* case, however, was one in which there was substantially no "valuation data" and no attempt to determine, upon any basis, relative values as between different properties securing two different bond issues. It requires extreme distortion[3] of the quoted words of the opinion to convert them into a rejection of the sufficiency of the "valuation data" and the "findings" actually made in the *Western Pacific* case.

The whole context of the opinion in the *Consolidated Rock Products* case, as well as its factual background, evidences that the writer of the opinion had no intention of over-riding the practice followed by the Securities and Exchange Commission at a time when he was a member of that Commission. In *In the Matter of West Ohio Gas Co.*, 3 S. E. C. 1014, at 1026-27 (1938), the SEC said:

> "In passing upon the fairness of this plan it is not necessary for us to determine the exact value of the property or the amount at which its value shall be recorded on the books of the reorganized company. The evidence which has been submitted to us points to the conclusion that the property has very little, if any, value in excess of the aggregate amount ($1,755,977) of the claims of the bondholders."

The basic fact which determines whether or not any class of existing securityholders *must* be excluded from par-

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[1] 312 U. S. 510, 520 (1941). [2] *Id.*, at 524.

[3] Similar to that experienced by the term "relative priorities." See p. 29, *supra*, n. 2.

ticipation in a reorganization is not the precise dollars and cents value of the property but the ultimate fact that the interest or equity of that class "has no value." Not only is this evidenced by the express language of Section 77 (e), which contemplates findings of "no value," but it is equally established by the decisions of this Court.[1] If *absence* of value is certified by the Commission to the court, as it was here, and is established by adequate valuation data, as it was here, it is wholly unimportant to know by how great a margin the interest or equity having no value falls short of having value.

The recognized impossibility of determining an exact dollars and cents value for a great railroad system, as of any given date, argues strongly against the existence of any such requirement under Section 77 and is compelling proof that the Congress did not intend to prescribe any such futile procedure. As this Court has stated:

> "The very notion of a 'full cash value' for a railroad is in many respects artificial. * * * Whatever may be the pretenses of exactitude in determining such a 'value,' to claim for it 'scientific' validity, is to employ the term in its loosest sense."[2]

But even if some type of dollars and cents value were required to be found, it is submitted that the findings made by the Commission in this case, amplified and affirmed by the opinion of the District Judge, would fully satisfy any such requirement.

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[1] *In re* 620 *Church Street Building Corp.*, 299 U. S. 24, 27 (1936).

[2] *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U. S. 362, 370 (1940). See also *Rowley* v. *Chicago & North Western Ry.*, 293 U. S. 102, 109 (1934).

As has been pointed out above,[1] the Commission not only found that the unsecured debt and stock of the Debtor "have no value," but, having found the aggregate amount and character of the capitalization permissible under the provisions of Section 77, *i.e.*, the maximum aggregate "reorganization value," it also found that the entire permitted capitalization was "inadequate in value to satisfy" the secured claims.[2]

It requires but a simple mathematical process of adding together five classes of claims, the amounts of which are stated in dollars and cents in the Commission's Report and Order dated June 21, 1939,[3] to develop the fact that the claims senior to the unsecured debt and stock of the Debtor aggregate $87,922,142.75. The Commission therefore found, in substance, that the reorganization value of the Debtor's properties (and of all the new capitalization) was *less than* $87,922,142.

Similarly, it requires only the mathematical process of adding the par value securities provided for by the Commission Plan, and which it distributed at their par value, to the sum obtained by multiplying 319,441 by $57, the price at which those shares of Common Stock was allotted to the First Mortgage Bondholders to "make whole" their claims, to establish the *maximum* "reorganization value" attributed by the Commission to the Debtor's properties as represented by the entire new capitalization. That amount is $84,027,559.

The Commission therefore *did* find in the *Western Pacific* case, in every substantive sense, the only kind of "value" which was relevant to the exclusion of the Debtor's

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[1]See pp. 17-18, *supra*. [2]R. 269. [3]R. 316-7, 390-2.

unsecured debt and stock. It did find, in substance, that the "reorganization value" of the Debtor's properties fell short by at least $3,894,583.75 of providing any participation for that unsecured debt and stock.

The complete lack of realism in the decision of the Court below upon this point is evidenced by what the Commission has tried to do to bring its more recent reports and orders into colorable compliance with that decision. In those cases the Commission, after making exactly the same type of findings with respect to earning power and permitted capitalization that were made in the *Western Pacific* case, has added a final finding of which that in the *Denver & Rio Grande Western* case[1] is typical:

> "Considering the entire record, and taking into account the elements of value of the properties involved, their past and present earnings and prospects for future earnings, as well as other pertinent factors, we conclude and find *that the value of the properties for the purposes of this proceeding* is $154,521,612, and that the total capitalization upon consummation of the plan should not exceed approximately that amount."

It is submitted that the addition of the italicized words, which are not to be found *in haec verbes* in the Commission's *Western Pacific* Report, would add absolutely nothing of substance for the information either of the court or of the securityholders beyond what the Commission provided in the findings summarized at pages 14 to 18, *supra*, and the voluminous "valuation data" discussed by the Commission in "stating fully the reasons for its conclusions."

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[1]Finance Docket No. 11002 (July 13, 1942), not yet reported.

7. Conclusion

The valuation data contained in this record strongly supports the conclusion that there is no reasonable probability that the earning power of the Debtor's properties will be sufficient to provide, over any reasonable period, full service of the present contractual income rights of the secured creditors or to provide ultimate cash recovery of the full claims of those creditors. That valuation data wholly fails to indicate the *presence* of earning power for the Debtor's unsecured debt and stock. Hence the exclusion of that debt and stock from participation in the reorganization does not violate any rights of their holder, WP Corp.

Indeed, the demonstrated *absence* of such reasonable probability of earning power compels exclusion of the unsecured debt and stock of the Debtor if the rights of the secured creditors are not to be violated.

The findings of the Commission that "the equity of the existing stock has no value" and that "the claims of the unsecured creditors have no value" are sufficient to support that exclusion.

No factual change has occurred which requires reconsideration of those findings and conclusions.

II

THE DETERMINATIONS BY THE COMMISSION AND THE DISTRICT COURT OF THE EQUITABLE EQUIVALENT OF THE DEBTOR'S ASSETS AVAILABLE FOR THE SATISFACTION OF EACH CLASS OF PARTICIPATING CLAIMS, IN TERMS OF THE VARIOUS NEW SECURITIES, AS SUPPORTED BY THE VALUATION DATA AND THE OTHER FINDINGS IN THE RECORD, ARE SUFFICIENT TO SUSTAIN THE ALLOCATIONS CONTAINED IN THE COMMISSION PLAN.

1. The Purpose of Reorganization

The purpose of a reorganization under Section 77 is not liquidation by the payment either of cash or of cash equivalents in new securities. Its purpose is rather to insure to each class of old securities admitted to participation (*i.e.*, those which have any interest of "value" in the property) its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim on a going concern basis. That "equitable equivalent" must be found, not in terms of dollars and cents, but in terms of the new securities to be issued in the reorganization, *i.e.*, new securities which will return to each existing class its "equitable equivalent," whatever may be the level to which the earnings of the reorganized venture may fall or rise.

To that end the relative priorities[1] of the existing classes in the earning power and assets of the venture must be fully recognized.

So far as feasibility and the public interest permit, such recognition should be given "qualitatively," *i.e.*, by

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[1]These words are used in this Point II, not in the sense in which they are used in the opinion in the *Consolidated Rock Products* case, but to denote the relative positions of different classes in respect of their *full* amounts. See p. 29, *supra*, n. 2.

allocation to the participating old securities new securities of relative rank in their claims to income and assets comparable to the relative rank of the old securities. Equitable compensation for rights which the exigencies of reorganization compel the senior securities to surrender should also, so far as permitted by feasibility and the public interest, be incorporated in the new securities. Examples of such compensating provisions are conversion rights and participation rights which will tend to make up in periods of high earnings for income lost in periods of low earnings.

In so far as feasibility and the public interest prevent such relative priorities being "made whole" "qualitatively," they must be made whole, and equitable compensation for surrendered rights must be made, "quantitatively," *i.e.*, by giving to the old senior securities new securities of the same classes as those given existing junior securityholders but upon terms sufficiently more favorable than those given the junior securityholders.

The solution of these problems of allocation in a complicated railroad reorganization does not require, or even admit of, a "rigid formula." It necessitates "practical adjustments" based upon experienced judgment.

2. The Practice of the Commission

By hypothesis the problem of distributing a reorganized capital structure among old securityholders admitted to participation is not reached until the over-all "reorganization value" of the properties and the permissible aggregate capitalization, and the classification thereof, have been determined. By hypothesis, therefore, the interests of the creditors or stockholders excluded are without such value to the extent of their exclusion. By the same hypothesis the

participating securities are covered by "reorganization value," supported by "prospective earning power," to the full amount of the "reorganization value" thus determined.

But as there are different degrees of probability of prospective earning power, the Commission has classified aggregate capitalization into classes of new securities representing claims in a heirarchy of rank within the earning power, as well as against the assets, of the reorganized venture. Generally it has adopted the four broad classifications of fixed charge obligations, contingent charge obligations, preferred stock, and common stock.

It has also sought to "tailor" the new securities to the requirements of a "fair and equitable" distribution, so designing the new securities as to facilitate giving to each participating old class its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim.

In almost every complicated railroad reorganization the Commission has had the problem of allocation before it in two aspects: (a) allocation as between two classes of creditors having successive liens upon the same property, and (b) allocation as between two classes of creditors having liens of the same rank upon different properties. In the *Western Pacific* case (as we shall see in our subsequent discussion of the allocations made in the Commission Plan[1]) the Commission had to determine allocations between the First Mortgage Bonds and the Refunding Bonds which involved a combination of both these aspects.

While this Court has held that mere observance of the relative priorities[2] was not sufficient to validate a reor-

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[1]Page 96, *infra*.

[2]See p. 29, *supra*, n. 2, for a statement of the very limited sense in which that phrase was appropriate upon the facts of the *Los Angeles Lumber* and *Consolidated Rock Products* cases.

ganization plan in which stockholders whose equity had no value had been admitted to participation, this Court has never indicated that a plan would be valid which did not fully recognize the relative priorities of the existing classes in the earning power of the venture in such manner as might be practicable under all the circumstances. Indeed, the whole trend of the Court's decisions is to the contrary.[1]

Accordingly, as between creditors having liens of successive rank upon the same assets (whether the more junior claim was admitted to full participation or, as in the case of the Western Pacific Refunding Bonds, only to partial participation), the Commission has consistently followed the practice above urged. It has sought, so far as possible from the standpoint of feasibility and public interest, to preserve the seniority, as against both earnings and assets, of the new securities given to the old senior securityholders. It has endeavored to include in such new senior securities elements compensatory, to the extent practicable, for the surrender of such rights as early maturity, fixed interest, or debt position. In other words, so far as feasibility and public interest permitted, the seniority of the old securities has been given "qualitative" recognition in the new securities.

Where such qualitative recognition has been impossible, the Commission has sought to give reasonably compensating "quantitative" recognition. That is to say, it has awarded to the old securities, to the extent necessary, new junior securities of the same class allotted to old securityholders having a lien upon the same assets but of junior

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[1] *Northern Pacific Ry.* v *Boyd, supra; Kansas City Terminal Ry.* v. *Central Union Trust Co.*, 271 U. S. 445 (1926); *Consolidated Rock Products Co.* v. *Du Bois, supra.*

rank, but such allotments to the old senior securities have been upon more favorable terms, *i.e.*, at a lower price, than the allotments to the old junior securities.

In determining allocations among old securities secured by liens upon different assets, the Commission has recognized that the relative priorities of the different claims against over-all venture earning power necessarily depend upon the varying levels of the venture earnings at which the different assets securing the different claims show earning power. A main line of railroad will frequently show substantial earning power even when the system as a whole will be operating at a deficit. The relative priorities against over-all venture earning power also necessarily depend on the respective rates of acceleration of the earning power of the respective security assets as the venture earnings move up or down. The earnings experience of the various parts of a railroad property may demonstrate that, while at a given level of system earnings the earnings of two lines are substantially the same, the earnings of one line will accelerate much more rapidly than those of the other as system earnings increase above that level. It has therefore been the object of the Commission to fit old participating claims into the new capital structure at the levels of the respective contributions of their security to the venture earnings so that, as nearly as may be at every level of earnings, the new securities will produce for the claimant the "equitable equivalent" of what would have been produced by his old securities.

To assist it in reaching a judgment based not only upon its experience as an expert in the earning power of all the American railroads, but also upon "scientific" analyses by engineers and accountants, the Commission has in many

cases received voluminous "segregation studies,"[1] "severance studies,"[2] and "contributed traffic studies."[3] In any complicated case such studies obviously involve numerous assumptions, none of which can have any demonstrated certainty, and particularly do they involve informed and expert judgment. Even in those cases in which the experts have taken an entirely professional and judicial approach, as contrasted with one of advocacy, there has been no unanimity of opinion, and the results have been compromise approximations. While these studies have been helpful, and perhaps necessary, in determining allocations in complicated reorganizations involving many different securities having separate liens of equal rank upon many separate properties, the Commission has never sought to deduce from them any specific dollars and cents values for the separate properties so studied.

Nor has the Commission ever attempted any consideration of "market values" of properties or old securities or new securities. In the recent *Cotton Belt* case,[4] decided by

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[1]Studies in which earnings are allocated between different parts of the property on accounting and engineering bases believed by their proponents to have scientific foundation. Such studies are expressly provided for in Subsection (c) of Section 77.

[2]Studies in which it is sought to develop on the one hand the earning power of a particular line if its operation were severed from the remainder of the property, and on the other hand, the loss of earnings which the remaining property would suffer from the severance of the particular property, again all upon accounting and engineering bases believed by their proponents to have scientific foundation.

[3]Studies similarly purporting to establish on a scientific basis the amounts contributed by a particular line (usually one otherwise showing very low earning power) to the earning power attributed to the other lines in the "segregation studies."

[4]*St. Louis Southwestern Ry.*, 252 I. C. C. 325, 356 (1942).

the Commission since the *Western Pacific* decision of the Court below, the Commission recognized that the principle of allocation here urged

> "has been the customary method of the most successful railroad reorganizations of the past, and is generally well understood and acceptable in principle to the investors in securities of the highest grade. A reorganization based on expected value of the new securities on the immediate market would necessarily be much more drastic, and result in great, and in our view unnecessary, hardship to the junior creditors. Distress selling of defaulted bonds to bond speculators, and such markets as exist while such selling is taking place, do not, in our view, afford a proper basis for the reorganization of railroads for the long future term."

There have been but two exceptions to the Commission's refusal to give any weight to "market values":

(1) In those situations in which an old security was secured by property having a liquidation value readily realizable in cash in excess of the full amount of its claim, the Commission has sought to allocate to the claim so secured either cash or new securities having a presently estimated realizable cash value equal to the amount of the claim.[1] As we shall later see, the Trustees' Certificates constitute such a claim in the *Western Pacific* case.

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[1]For example, the holders of Birmingham bonds were allocated first mortgage fixed interest bonds for the full face amount of their claims in *St. Louis-San Francisco Ry.*, 240 I. C. C. 383, 417-8 (1940), and in *Chicago & North Western Ry.*, 236 I. C. C. 575, 633, 647-9 (1939); the plan provided that the Sioux City & Pacific first 3½s and the Des Plaines 4½s be exchanged for 4% divisional mortgage bonds.

(2) When, as also in the *Western Pacific* case, new money is required to be provided, the "market value" of the new securities to be issued for that purpose becomes relevant.

The practice of the Commission as thus outlined, it is submitted, is the only rational approach to a "fair and equitable" distribution of new securities designed to give to each existing class of securities its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim. It insures to each participating class, as nearly as may be, the same position it formerly had in respect to the venture earnings at any given level, high or low, and in respect of the venture assets. Its validity has been sustained by every District Court before which any railroad reorganization plan of the Commission has been submitted for approval.[1] This has been true even in the three cases in which, although approving the Commission's method of approach, the District Court disagreed with the result.[2]

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[1] *In re Akron, Canton & Youngstown Ry.* (N. D. Ohio 1939, not reported); *In re Chicago Great Western R. R.*, 29 F. Supp. 149 (N. D. Ill. 1939); *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 36 F. Supp. 193 (N. D. Ill. 1940); *In re Chicago & North Western Ry.*, 35 F. Supp. 230 (N. D. Ill. 1940); *In re Denver & Rio Grande Western R. R.*, 38 F. Supp. 106 (D. Colo. 1940); *In re Erie R. R.*, 37 F. Supp. 237 (N. D. Ohio 1940); *In re Missouri Pacific R. R.*, 39 F. Supp. 436 (E. D. Mo. 1941); *In re New York, N. H. & H. R. R.* (D. Conn., Dec. 8, 1941, not yet reported); *In re St. Louis-San Francisco Ry.* (E. D. Mo., May 25, 1942, not yet reported); *In re Western Pacific R. R.*, 34 F. Supp. 493 (N. D. Calif. 1940).

[2] *In re Denver & Rio Grande Western R. R.*, 38 F. Supp. 106 (D. Colo. 1940); *In re New York, N. H. & H. R. R.* (D. Conn., Dec. 8, 1941, not yet reported); *In re St. Louis-San Francisco Ry.* (E. D. Mo., 1942, not yet reported).

While the utilities and other business ventures with the reorganizations of which the Securities and Exchange Commission has had to deal have seldom involved the complexities of different liens existing in most of the railroad systems dealt with by the Interstate Commerce Commission, the SEC has followed essentially the same principles as those adopted by the Interstate Commerce Commission in dealing with liens of the same rank upon different assets.[1]

This Court's decision in the *Consolidated Rock Products* case, relied upon by the Court below as requiring a different rule, does not prevent—it indeed requires—the method of allocation consistently followed by the Commission.

There can be no doubt of the soundness of the foregoing assertion when those words of the *Consolidated Rock Products* opinion,

> "a determination of that value [*i.e.*, of assets] must be made so that criteria will be available to determine an appropriate allocation of new securities * * *" (p. 524)

are read in the light of that opinion's insistence upon capitalization of prospective earnings, its recognition of the necessity for "practical adjustments," and its negation of any requirement for a "rigid formula."

On the other hand, it must be conceded that those who stress the importance of "market values" or present "worth" in allocating new securities, particularly as between old securities having liens of different rank on the same assets, can find some arguable support in certain phrases of the *Consolidated Rock Products* opinion. For example, for sur-

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[1] *In the Matter of West Ohio Gas Co.*, 3 S. E. C. 1014, 1026 (1938).

rendering senior rights creditors must be *"made whole. * * * Full compensatory provision* must be made for the entire bundle of rights which the creditors surrender;" they must receive *"full compensatory treatment"* and they "are entitled to have the *full value* of the property * * * first appropriated to *payment* of their claims. * * * So long as the new securities offered are of a *value equal to the creditors' claims*, the appropriateness of the formula employed rests in the informed discretion of the court."[1] But it is submitted that by those words the Court did not mean to hold either (1) that each class of senior securities, in the order of the old hierarchy, must receive new securities having a present *market* value equal to the full amount of the old claim before anything can be distributed to the next junior claim, or (2) that old securities having liens of equal rank on different assets should divide up the same classes of new securities on a market value basis in complete disregard of the differing relationships of earning power at different levels of venture earnings.

To attribute that meaning to the language of the opinion would be to disregard its stress of capitalization of earnings and reduce "reorganization value" to nothing but liquidation value based on the estimated "market value" of the new securities. Mathematically it would permit participation of claims only to a dollars and cents amount equal to the dollars and cents amounts of the estimated market value of the new securities, a result more harsh and drastic than has ever been imposed in the most drastic railroad reorganization plans either under the old equity practice or under Section 77. Such a construction would even more disregard the opinion's statement that "so long as

[1] 312 U. S. 510, at 528-30.

each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied." Such a construction would also render meaningless the famous dictum of the *Boyd* case, quoted with approval in the *Los Angeles Lumber* opinion, that its rule does not "require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company."

3. The Rule Imposed by the Decision Below

Rejecting the Commission's practical application in the *Western Pacific* case of the procedure outlined in the foregoing subsection 2, the Circuit Court below held that allocations of new securities between those entitled to participate in the reorganization must be "in proportion to the value of their respective claims." While it did not define what it meant by "value," its listing of sixteen separate items which it held must be valued indicates that it meant some kind of precise dollars and cents valuations.[1] The items so to be valued are not only the Debtor's properties in the aggregate, but the properties under each of its existing mortgages taken separately, and (apparently in disregard of the fact that the new First Mortgage and the new Income Mortgage are both to cover all the property of the reorganized company, being also all the property of the Debtor) separately, the property subject to each of the two new mortgages. In addition, it requires dollars and cents valuations of each of the existing claims against the Debtor (as to the RFC Notes, the RCC Notes and the ACJ Notes, stated not only severally, but also for the Refunding Bonds

[1] R. 2670-71; see p. 24, *supra*.

pledged to secure those Notes) and similar valuations of each class of the proposed new securities.[1]

The lack of any definition of what was meant by "value" as to each of the sixteen separate items makes it difficult to attempt application. However, if any single meaning be given to the term "value" as applied to all the sixteen items, the rule thus laid down becomes wholly unrealistic, exceedingly dangerous, and violative of the long line of decisions of this Court culminating in the decision in the *Consolidated Rock Products* case.

If by "value" the Court below meant "market value" as to all sixteen items, then, since it contemplates distribution "in proportion to the value of existing claims," and makes no distinction between old securities and new securities, it envisages that senior securities shall not receive "full compensation" for the full face amount, principal and interest, of their claims, but only new securities having a present "market value" equal to the present "market value" of the existing claims. This would mean, in the *Western Pacific* case, that the First

[1] While the Circuit Court of Appeals for the Seventh Circuit in the *Chicago, Milwaukee, St. Paul & Pacific* and *Chicago & North Western* cases (p. 71, *supra*, n. 1) followed the Ninth Circuit in holding inadequate, as to form, for allocation purposes, findings similar to those in the *Western Pacific* case, it not only failed to define what it meant by "value" but, probably because there would literally have been scores of detailed items on the Ninth Circuit theory, failed even to indicate what the express valuations should cover. The uncertainty of the Seventh Circuit as to the soundness of any such valuation requirements was accentuated by its decision in the *North Western* case that such valuations were merely procedural and were waived either as the result of the express assents of securityholders or as the result of assents which the Court assumed to "accept the responsibility" to give for the non-voting securityholders.

Mortgage Bondholders could have been satisfied at any time since 1933 by any sort of new securities having a "market value" of not more than 50—today approximately 35—, while junior securities (none of which have any market in their specific form) would have received some participation based on the estimated "market value" of the existing securities and the estimated "market value" of the new securities. After these "market values" had been estimated, a mathematical proportion between such "values" would be determined and the new securities distributed upon that basis in disregard of the relative positions of the existing claims against the venture earning power and the venture assets. Any such rule would obviously preserve junior securities having purely speculative market values at the expense of senior securities, whose market values would be depressed by the very fear of such a rule.

The rule is almost equally fantastic if it be assumed that the Court below really did mean by "value," as applied to all sixteen items, what the decisions of this Court establish to be the true test of "reorganization value," viz., capitalization of prospective earnings.

By hypothesis there is "full value" in all the securities embraced within those constituting the aggregate capitalization representing such "reorganization value." Such of them as have a par value must thus be treated as having a "reorganization value" substantially equal to their par value, whatever their rank, and such of them as have no par value must be treated as having a "reorganization value" equal to the amount at which they are allocated to "make whole" the most senior class of old securities. Otherwise, if the lower classes of the new securities are

reduced in their "reorganization value," the upper classes immediately attain a "reorganization value" materially in excess of their par value, or the aggregate "reorganization value" will not be maintained. The rule of the Court below becomes wholly meaningless under such an interpretation of its use of the word "value." Claims having successive liens upon the same assets, but each of them entitled to full participation in the reorganization upon the basis of capitalized prospective earnings, would be equal in "value" to each other and hence entitled to get exactly the same new securities irrespective of their old relative positions.

The futility of the added words incorporated by the Commission in its recent reports and orders in an attempt to conform them to the requirements of the decision below for the purpose of excluding classes of creditors and stockholders whose interests "have no value" has been noted above.[1] Attempted conformation to the rule for distribution stated in the decision below is reduced to an absurdity in the language used by the Commission in such an attempt in the *Cotton Belt* case.[2]

There, after a finding of an aggregate value of $75,000,000, being the permissible maximum capitalization or "reorganization value," the Commission continued by finding that "the sum of the undisturbed and new securities, representing as they do the sum of the interests of all those who will have an interest in the properties of the reorganized company, are of the same $75,000,000 value" and that "the new securities may be equitably exchanged for the existing claims on the basis of $1 par value of any of the new securities for $1 of value of existing claims."

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[1] Page 77, *supra*.

[2] *St. Louis Southwestern Ry.*, 252 I. C. C. 325 (1942).

Taken literally, this means that it would have been "fair and equitable" to have allotted the most senior old bonds $1 par value of new common stock for $1 of such senior claim, while at the same time allotting $1 of the most senior new bonds to $1 of the most junior old claim admitted to participation.[1] Of course the Commission meant no such thing.

This mumbo-jumbo "valuation" of the new securities, however, left but half done (or perhaps only one-third done) the task of making the valuations required by the Court below for distribution by mathematical proportions. There still remained the necessity of finding separate dollars and cents valuation for the various lien properties and for each of the old securities.

That additional step the Commission found both impossible and futile. It stated:

> "The properties comprise one operating unit; a complete separation of values would necessarily have to be based on extensive assumptions of unprovable validity; and any attempt at such a separation would in the end serve no purpose except to present an apparent certainty in the formulation of the plan which does not exist in fact. The Act calls for valuations only where necessary, and in our view further valuations are not necessary here."[2]

In the *D. & R. G.* case[3] (the Commission's most recent dealing with the problem), after analysis of the segregation, severance and contributed traffic studies before it, and full

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[1]The absurdity of this result demonstrates the necessity that relative priorities be maintained.

[2]*St. Louis Southwestern Ry., supra*, p. 92, at p. 361.

[3]Finance Docket No. 11002 (July 13, 1942).

statement of "the reasons for its conclusions," the Commission followed in principle the same method of allocation adopted by it in the *Western Pacific* case and above outlined in subsection 2. No reference was made to the decision of the Court below in the *Western Pacific* case nor was any effort made to give even colorable observance to the rule there laid down.

If the objective of a reorganization is to give to each existing class of securities its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim, is it not clear that that objective can best be attained by valuing existing claims in terms of the new securities? Is not the problem one of comparing an old "bundle of rights" with a new package of different rights evidenced by new securities, which may be of one or more classes? What contribution will be made to the attainment of that objective —or to insuring that holders of old securities will be fitted into the new capital structure at the levels of their respective priorities in the venture earnings, and, at any given level of earnings, receive on their new securities the substantial equitable equivalent in income and assets of what their old securities would have produced—by attempting to reduce all of the old securities and all of the new securities to a fictitious common denominator expressed in terms of dollars and cents?

The impossibility of valuing a railroad property, even as an entirety, in terms of dollars and cents, has often been recognized by this Court.[1] Even more impossible is it to ascribe absolute dollars and cents values to parts of a system. Reference has already been made to the practical difficulties of the Commission in applying the rational rule

[1] See pp. 41-42, *supra*.

which it does apply in its present practice. What possible realism could there be to an effort to d duce, from segregation, severance and contributed traffic studies, precise dollars and cents values for pieces of a main line and various branches having separate underlying first liens and overlapping second and third liens?

Reorganization is primarily a business or administrative problem, once the technical legal rights of the parties under their contracts are determined. This is particularly true of a determination of the "reorganization value" of those legal rights, and of the "full satisfaction" or "payment" or "making whole" of those rights in terms of new securities. Section 77 as administered by the Commission has eliminated "bargaining" among securityholders, based upon their self interest and their experience in security values, as the method of solving the problem of allocation. It is submitted, however, that Section 77 did not substitute any fictitious mathematical formula as the *sine qua non* of the "fair and equitable" plan. It left the problem of such allocation to the expert judgment of a body already long experienced in the problems of security values before Section 77 was enacted. It may be that the Commission, as the substituted "reorganizer," might well have secured greater expedition of this and other reorganizations, without loss of a judicial approach to the "fair and equitable" problem, by the informal mediation conferences urged upon it by all the parties in the *Western Pacific* case.[1] However, be that as it may, the Commission has dealt with the problem of allocation scientifically, sensibly, fairly and in a practical manner. This Court should place the stamp of approval upon the Commission's methods of valuation and

[1] *Cf.* Bourne, *Findings of "Value" in Railroad Reorganizations* (1942) 51 Yale L. J. 1057, 1090.

allocation and should, by reversing the decision below in the *Western Pacific* case, refuse to hamstring the reorganization process by tying it up with impossible mathematical red tape which can only produce years of litigation and result in nothing but wasteful expense to all concerned.

4. The Allocations Under the Commission Plan

(a) Allocations as Between the First Mortgage and the Refunding Mortgage.

The correctness of the decisions of the Commission and the District Court that the First Mortgage is a first lien, subject only to the Trustees' Certificates, upon all the assets of the Debtor and the Trustees except for certain securities specifically pledged with the Refunding Mortgage Trustee, is assumed in this discussion. Affirmance by this Court of those decisions will be urged in separate briefs.

The First Mortgage Bonds as of January 1, 1939, had for each $1,000 of principal claim an equally secured claim for accrued interest of $266.67. Upon that aggregate claim of $1,266.67 each is entitled by contract to receive 5% interest annually.

The Commission Plan requires the following surrenders of rights and seniority by the First Mortgage Bondholders:

> 1. Upon no part of their claim are they hereafter to receive fixed interest. The likelihood of their ever receiving the income to which they are presently entitled is, if the record of past earnings analyzed above is any criterion, somewhat remote.[1]

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[1] Pages 57-68, *supra*.

2. In respect of 40% of the principal amount of their Bonds they are to receive new Income Mortgage Bonds with an annual interest rate of 4½%, or 10% less than the 5% to which they are presently entitled.[1] This new 4½% rate is to be contingent upon income, and to the extent that deficiencies of income exceed three years' interest at the reduced rate, the bondholders are wholly deprived even of the reduced rate of return.

3. In respect of 60% of the principal amount of their Bonds they are to receive new Preferred Stock. As to that 60%, they are to be transferred from a creditor position to the position of a stockholder. While their annual rate of return remains unchanged at 5%, such return is to be dependent wholly upon annual income, and to the extent of any income deficiency, is lost forever. The income on which they must hereafter depend is that *after* income and excess profits taxes; whereas as creditors they came ahead of such taxes. Moreover, dividends on the Preferred Stock (though cumulative to the extent earned) need not be paid unless the Board of Directors of the new company deems payment advisable.

4. In respect of that part of the claim representing the accrued and unpaid interest on their Bonds to January 1, 1939, they are not only to be transferred

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[1]The Committee urged before the Commission that the Income Mortgage Bond interest rate should be 5%, believing that no consideration of public interest required the sacrifice imposed upon the First Mortgage by reducing the existing rate. Complaining junior interests, however, urged that the rate should be but 4% and that the contingent interest should be wholly non-cumulative.

from a position of creditor to the position of stockholder, but the relative priority of that portion of their claim against the assets of the Debtor is to be taken away by the simultaneous allotment of Common Stock to the pledgees of the junior Refunding Bonds as against the second lien of those Bonds. The allotment to junior creditors is upon terms not substantially less favorable than the terms upon which the Common Stock is allotted to the First Mortgage Bondholders. The price to the First Mortgage Bondholders is $57 per share; to the RCC Notes $62 per share.

In partial compensation for the drastic sacrifices, both of principal position and income rights, imposed upon the existing First Mortgage Bondholders as above outlined, the Commission found that the public interest permitted incorporation in the new securities proposed under the Commission Plan of the following features, all of which were objected to in the Courts below by the junior interests:

1. A Sinking Fund, amounting to ½% of the principal amount of outstanding Income Mortgage Bonds annually, but dependent upon the existence of available net income, is created for the redemption or purchase of Income Mortgage Bonds;

2. The new Income Mortgage Bonds are convertible into new Common Stock at the rate of 20 shares for each $1,000 Bond; and

3. The new Preferred Stock is made participating with the Common Stock, share for share, in dividends paid in any year after the payment in such year of dividends of $3 per share on the Common Stock.

As between the First Mortgage and the Refunding Mortgage considered as liens of successive rank on substantially all the Debtor's assets (and it will be seen in our later discussion that the first lien of the Refunding Mortgage represents a relatively small portion of the assets), there may be some question whether this treatment of the First Mortgage Bondholders affords them the full compensation for their surrendered rights contemplated by the *Consolidated Rock Products* case. Certainly the three features above enumerated, and objected to by the junior interests, afford slight compensation to the First Mortgage Bondholders for the drastic sacrifices imposed upon them. That these three compensating features do not violate any rights of the objecting junior interests would seem to be beyond reasonable doubt.

The objections that the Sinking Fund of ½% of the principal amount of the outstanding Income Mortgage Bonds, payable only out of available net income after Income Mortgage Bond interest, would interfere with future financing through stock and would depreciate the stock allotted to junior interests by applying to retirement of the Income Mortgage debt cash which otherwise might be applicable to dividends on that stock, seem to demonstrate their lack of merit by their very statement.[1]

The conversion privilege attaching to the Income Mortgage Bonds, to which the junior creditors have objected, furnishes, on the basis of the Debtor's earnings record,

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[1]Similar objections have been overruled in *In re Chicago Great Western R. R.*, 29 F. Supp. 149 (N. D. Ill. 1939); *In re Chicago & North Western R. R.*, 35 F. Supp. 230 (N. D. Ill. 1940); and *In re Chicago, Milwaukee, St. Paul and Pacific R. R.*, 36 F. Supp. 193 (N. D. Ill. 1940).

rather illusory compensation for the "lost rights" of the First Mortgage Bondholders. Before the conversion privilege can ever be of value the reorganized company will have to establish a *seasoned* record of payment of dividends in excess of $2.25 per share. This would require *sustained* annual earnings in excess of $4,260,000, an amount earned by the Debtor in only three of the last twenty years.

Similarly, the objection of the junior interests that the participating right of the new Preferred Stock in dividends after annual Common Stock dividends of $3 per share depreciates the allotment to the junior interests would seem to be baseless. The average earnings illustrated by the graphs opposite pages 58 and 59, *supra,* indicate that, in all of the average periods of the past there considered, the Preferred Stock dividends, and in most of those periods also the Income Mortgage Bond interest, would have failed of realization by substantial amounts. The limited accumulation of unearned Income Bond interest and the absence of accumulation of unearned Preferred Stock dividends means that the First Mortgage Bondholders will lose forever a substantial part of the income required as the "equitable equivalent" of their present income rights. Before the participating right will be effective the reorganized company will have to earn in excess of $4,600,000 annually, an earnings record, as already pointed out, not in reasonable contemplation for the estimable future. Certainly this participating feature also affords but illusory compensation for lost income rights of the First Mortgage Bondholders.

In dealing with the relative allocations of securities between the First Mortgage and the Refunding Mortgage in respect of the assets as to which they are, respectively, first

liens, the Commission Plan is liberal to the Refunding Bonds.

There are physically pledged with the Trustee under the Refunding Mortgage securities constituting all the funded debt and 97.87% of the stock of Tidewater Southern, 33⅓% of the bonds and stock of Central California Traction, and 49.4% of the stock of Alameda Belt Line.[1]

In its Original Report and Order the Commission allotted only new Common Stock in respect of this collateral.[2] On reconsideration upon the Petition of the Refunding Mortgage Trustee, the Commission, in its final Report and Order, found that the Tidewater Southern properties were of value, but that the lien of the Refunding Mortgage upon the securities of Central California Traction Company and Alameda Belt Line "has no material value."[3]

The simplicity, in the *Western Pacific* case, of this problem of allocation between the two liens of equal rank upon different assets (*i.e.*, determining the value of the Refunding Mortgage first lien assets in relation to the great part of the system upon which the First Mortgage is a first lien) obviated the necessity for the elaborate segregation, severance and contributed traffic studies which the Commission has used in the more complicated reorganization cases. Nevertheless, from the very fact that the three Refunding Mortgage properties are separately operated and maintain separate accounts, the Commission did have before it what was in effect a segregation study. A study

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[1]In addition there are so pledged some admittedly worthless notes of other subsidiaries (R. 1095).

[2]R. 270-1. [3]R. 315.

of the traffic contributed by each of the three properties to the System was also made.[1]

This valuation data evidenced that the average operating loss of the Central California Traction Company during the 12 years 1928 to 1939, inclusive, was in excess of $14,000 per year,[2] while that of the Alameda Belt Line was about $28,000 per year,[3] and that the Debtor had made cash contributions to the deficit burden of carrying the properties for the Central California Traction property during the period 1928 to 1938, an average of $31,919 per year, and, for the Belt Line, $22,095 per year.[4]

While the record showed that the traffic carried by other lines of the Debtor which originated or terminated on the Central California Traction and Alameda Belt properties was substantial,[5] there was no evidence that that traffic would not have come to the Debtor even if it had not had its fractional investments in those separate companies. Nor did the record show how much of the gross revenues upon the traffic so obtained by the Debtor had been carried through to net. It would seem doubtful upon the record whether the Debtor realized, upon the traffic so contributed and which it carried upon interchange, an amount any more than sufficient to offset its contributions toward the deficits of the two properties.

The "valuation data" in respect of these two properties therefore affirmatively established the correctness of the Commission's findings that they "do not appear to be of much value, except as the debtor through such holdings

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[1]R. 1950, 1954, 2019, 2037, 1105-6.
[2]R. 2019, 2084-5, 1100, 1309.
[3]R. 2019, 2088-9, 1103, 1111.
[4]R. 1101, 1104-5.
[5]R. 2019, 2037, 1105-6.

may be able to secure traffic for its lines which it might not otherwise be able to secure. * * * Thus the lien on the securities of these two companies has no material value."[1] Nevertheless, as is indicated below, some recognition of a possible value of that lien is included in the Common Stock allocated to the RCC and ACJ Notes.

The Commission found the rate-making value of Tidewater Southern in an amount representing 1.3% of the comparable System valuation, and the reported earnings for the six year period 1930-1935, in an amount representing 7.2% of adjusted System earnings, before deducting therefrom the Debtor's contributions to the deficits of the Central California Traction and the Alameda Belt Line. While the Commission recognized that on the basis of this valuation data "the Tidewater Southern is a paying railroad and also a valuable feeder," the Commission also recognized that as the owner of all the funded debt and 97.87% of the outstanding stock of Tidewater Southern the Debtor's determination of its rate divisions with that property was not a matter of arms-length negotiation nor of any importance except in reorganization. "Its earnings," said the Commission, "are, to a large extent, dependent upon the divisions of joint rates accorded it by the debtor."[2]

The Commission, upon its analysis of all the "valuation data" before it, allotted to the Refunding Mortgage first lien property 3.5% of the total Income Bonds and Preferred Stock to be issued in the reorganization, and it gave further recognition to the value of that property by the allocation of Common Stock, as next explained.

Both the second lien of the Refunding Mortgage upon the assets upon which the First Mortgage is a first lien,

[1]R. 314-5. [2]R. 315.

and the Refunding Mortgage first lien assets were given further recognition by allocating to the RCC Notes and the ACJ Notes all the Common Stock remaining out of the aggregate "reorganization value" after making the allocations to the First Mortgage Bondholders hereinbefore explained and the compromise allocations to the RFC Notes discussed below.[1] Because this last-mentioned compromise, as will be later seen, allotted to the RFC Notes, 29,360 shares less of Common Stock than the amount to which its proportion of pledged Refunding Bonds would entitle it out of the amount allotted to the Refunding Mortgage, the effect of the compromise was to increase the amount of Common Stock distributed to the RCC Notes and the ACJ Notes.

The ultimate result of these allocations is that RCC Notes are allocated Common Stock at $62 per share. There may be doubt whether the difference between this price and the $57 per share at which the new Common Stock is allocated to the First Mortgage Bond interest sufficiently recognizes the priority of the First Mortgage Bonds. Whatever error there may be thus favors the objecting junior interests.

(b) Allocations as Between Pledgees of Refunding Bonds

The RFC Notes, the RCC Notes, and the ACJ Notes are secured by the pledge, respectively, of 56.6%, 21.1%, and 22.3% of the outstanding Refunding Bonds.

The Commission found that the securities available for distribution against the Refunding Bonds are "inadequate in value to satisfy the aggregate claims of" the pledgees,

[1] Page 107, *infra*

that the "allocation of reorganization securities" to RFC "exhausts the value of the collateral pledged" under the RFC Notes and that hence the equity of RCC in such collateral "has no value."[1]

As has been fully pointed out in the discussion of the valuation data supporting the Commission's finding that the unsecured debt and stock of the Debtor "have no value," these additional findings by the Commission constituted, by simple mathematical computation, a finding that the aggregate "reorganization value" of the Debtor's properties, and of the new securities available for distribution, did not exceed $84,027,559. The conclusive force of the valuation data in support of these findings has already been indicated.

Where two or more primary claims against a debtor (*e.g.*, collateral notes, such as the RFC, RCC and ACJ Notes) are secured by the pledge of unequal amounts of mortgage bonds of a debtor equally secured under the same mortgage, the pledgees, as between themselves, share in the net proceeds of the assets of the estate according to the face value of the pledged bonds held by them (*i.e.*, are entitled to dividends on the pledged bonds in the enforcement thereof at the same rate per pledged bond) until, in the case of each pledgee, its primary claim (*i.e.*, the claim for which the bonds were pledged) is paid in full as to both principal and interest.[2]

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[1] R. 271, 316.

[2] *Richardson's Executor* v. *Green*, 133 U. S. 30 (1890); *Merrill* v. *National Bank*, 173 U. S. 131 (1899); *Equitable Trust Co.* v. *Great Shoshone & T. F. W. P. Co.*, 228 Fed. 516 (D. Idaho 1915); *Central Trust Co.* v. *Cincinnati, H. & D. Ry.*, 169 Fed. 466 (C. C. S. D. Ohio 1908); *Sauve* v. *Fleschutz*, 219 Fed. 542 (C. C. A. 8th, 1915).

The Commission's findings as to the reorganization value of the Refunding Mortgage interest in the Debtor's properties compelled the application of the principle of law above stated. Hence they compelled the findings of the Commission that "the value of each of the claims" (*i.e.*, RFC, RCC and ACJ Notes) "is proportionate to the collateral securing it," and that the allotment of new securities respecting the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims."[1] The Commission, therefore, properly, as a matter of law, allocated to the RCC Notes and the ACJ Notes out of the new Income Mortgage Bonds and Preferred Stock allocated to the Refunding Mortgage, amounts of those new securities in the proportions which the pledged Refunding Bonds held by them respectively bore to the aggregate amount of pledged Refunding Bonds.

All the permissible Common Stock remaining after the allocation to the First Mortgage above discussed and to the RFC Notes under the compromise next discussed, was divided between the RCC Notes and the ACJ Notes, in the proportions which their pledged Refunding Bonds bore to each other. As already noted, the compromise with the RFC Notes resulted in such allocation of an amount of Common Stock substantially larger than would have been available had there not been such a compromise.

This allocation among the pledgees of the Refunding Mortgage Bonds was the one feature of the Commission Plan which permitted—indeed required as a matter of law—application of a mathematical formula. No other type of allocation would have lawfully recognized the relative priorities of the respective pledgees.

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[1] R. 271.

(c) THE COMPROMISE OF RFC'S ENTIRE "BUNDLE OF RIGHTS"

As of January 1, 1939, RFC was the holder of $10,000,000 Trustees' Certificates and a claim for $3,862,869.98 on the RFC Notes. This latter claim was secured by a first lien pledge of $10,750,000 principal amount of Refunding Bonds or 56.6% thereof. This pledge was at the rate of $3,628 of Refunding Bonds for each $1,000 principal amount of Notes as compared with a pledge at the rate of $1,635 of Refunding Bonds for each $1,000 principal amount of the RCC Notes.

That the Trustees' Certificates which originally matured in 1935 and 1936,[1] and have since been extended from year to year, could enforce, and readily realize, payment in full in cash upon any maturity has always been conceded by all the parties. The refunding of these Trustees' Certificates has been a foremost problem of the reorganization from the beginning of the negotiation of a reorganization plan following the Debtor's default in First Mortgage interest in 1934.

This was true even in advance of the issue of the Trustees' Certificates, for it was then known that the $10,000,000 would have to be raised to rehabilitate the property and make good deferred maintenance, and it was equally known that the only then available source of such funds was the purchase of Trustees' Certificates by RFC.

It has also been recognized throughout the reorganization proceeding that, in the state of railroad credit which has existed, and still exists, ultimate refunding of the Trustees' Certificates into long-term securities would probably

[1] R. 1054-6.

require resort to RFC and that the consideration to be furnished to RFC for supplying long-term funds on a basis more favorable than current market prices would probably have to take the form of granting to the RFC Notes treatment more favorable than RFC might deserve on the basis solely of the pledged Refunding Bonds. Accordingly, save for but one proposal,[1] every one of the more than a dozen different plans proposed by the various parties before the Commission contemplated that RFC would permanently fund the $10,000,000 for a consideration.

The Commission Plan dealt with the problem by allotting to RFC in exchange for its entire "bundle of rights" $10,000,000 new First Mortgage Bonds having an admittedly prospective realizable market value less than the value of the Trustees' Certificates, and participation in respect of the RFC Notes on the same basis as an equal amount of old First Mortgage Bonds.

Before the Commission there was no attempt at testimony as to the prospective market values of the new First Mortgage Bonds. The Commission, however, by reason of its experience in the regulation of railroad security issues and its consequent continuous familiarity with market values, was an expert as to what would constitute a fair consideration for the RFC's permanently funding the $10,000,000 Trustees' Certificates into such Bonds.

There was evidence before the District Court as to the probable market value of the new First Mortgage Bonds, both in connection with the District Court's hearing upon

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[1]R. 104. This one exception was an early proposal by ACL that the money be provided by WP Corp. However, WP Corp. was not a party to the proceeding before the Commission and no one ever gave the slightest assurance that it could or would provide the $10,000,000.

the Commission Plan[1] and again upon an abortive attempt made by ACJ to render the Commission Plan incapable of consummation by denuding the Trustees of cash in order to pay off the Trustees' Certificates.[2] That evidence indicated a probable market value of the new First Mortgage Bonds of between 85 and 90, so that the new First Mortgage Bonds to be taken by RFC are probably worth from $1,000,000 to $1,500,000 less than the amount readily realizable in cash on the Trustees' Certificates.[3]

Were RFC to receive for the RFC Notes amounts of new securities proportionate to its pledged Refunding Bonds it would receive

$414,175 new Income Bonds
$649,518 Preferred Stock
45,148 shares of new no par value Common Stock.

Under the allotment of the Commission Plan, *pari passu* with the existing First Mortgage Bonds, it receives

$1,185,200 new Income Bonds
$1,777,800 new Preferred Stock
15,788 shares of new no par value Common Stock.

Thus, in order to facilitate a reorganization of the Western Pacific, a legitimate objective for this Government corporation, RFC will accept for its "entire bundle of rights"

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[1]R. 1530, 1532, 1536, 1554.

[2]*In re Western Pacific R.R.*, 38 F. Supp. 877, 879 (N.D. Calif. 1941).

[3]First Mortgage Bonds of recently reorganized railroads were selling, as of July 31, 1942, at the following prices: Chicago & Great Western, 64; Erie, 90¼; Gulf, Mobile & Ohio, 67¾; Wabash, 78 (Commercial & Financial Chronicle, vol. 156, pp. 409-12).

$771,025 principal amount more Income Bonds, $1,128,282 par value more new Preferred Stock, but 29,360 less shares of new no par value Common Stock than it might have obtained against that "entire bundle of rights" by standing on those rights and requiring cash payment of its Trustees' Certificates. While the aggregate additional face amounts of Income Bonds and Preferred Stock thus allocated to RFC is slightly greater than the probable discount upon the $10,000,000 of new First Mortgage Bonds, obviously those new securities do not have a presently realizable value even approximating their face amounts. The consideration furnished by the increased amounts of these new senior securities allocated to RFC is further offset by the 29,360 shares reduction in the amount of Common Stock allocated to it.

The argument of the objecting junior interests that the two claims of RFC cannot be treated as a single "bundle of rights" but must be dealt with entirely separately is, it is submitted, without merit. The contention seems to violate the express language of this Court's opinion in the *Consolidated Rock Products* case.

If the fair compromise of the RFC's entire "bundle of rights" provided for by the Commission Plan is not adopted, not only the First Mortgage Bondholders, but to an even greater degree the RCC Notes and the ACJ Notes, will be seriously injured.

The rapidly mounting gross income of the Debtor's properties, before Federal taxes, is resulting in a rapid accumulation of cash by the reorganization trustees. As of September 1, 1942, the cash on hand and on deposit with RFC aggregated $10,493,000, of which a substantial amount, however, must be reserved for taxes and

deferred maintenance, as well as for the additions and betterments necessary to meet additional traffic demands. If any of the remaining cash is used to pay down, or possibly pay off, the Trustees' Certificates, so that the RFC Notes will be left to be dealt with solely upon the basis of their pledged Refunding Bonds, the reorganized company will be denuded of the cash necessary to service the new securities from January 1, 1939, the effective date of the Commission Plan. Not only will the First Mortgage Bondholders' realization of any cash income out of the earnings of their properties thus be substantially delayed to their own injury, but if the Commission Plan is thus rendered abortive, at least $10,000,000 more of interest will have accrued upon the First Mortgage since January 1, 1939. This will have to be provided for in any new plan with due recognition of its priority over the pledged Refunding Bonds.

5. Conclusion

The allocation of new securities under a Section 77 railroad reorganization plan between mortgage bonds having liens of different rank on the same assets and also liens on different assets must be on the basis of giving to each mortgage its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim in terms of the various classes of new securities, having regard for the relative order of priority of the respective existing claims upon system earnings at the various levels represented by the proposed new securities and all other relevant factors, all as appraised by the Commission's expert judgment and subject to the court's approval of the result as fair and equitable within the limits stated in Point III of this brief.

Such allocation cannot be made "in proportion to the value of the respective claims" determined by dollars and cents valuations of properties, old claims and new securities, and no such valuations are necessary to determine fair and equitable allocations, except in those cases where it is necessary to determine whether the readily realizable market value of the assets securing an old claim exceeds the full amount of that claim.

The valuation data contained in the record supports the Commission's findings of the relative values, in terms of new securities, of the liens of the First Mortgage and the Refunding Mortgage, respectively, as well as the Commission's findings that the securities available for distribution to the RFC Notes, the RCC Notes and the ACJ Notes against the Refunding Bonds held by them as collateral are "inadequate in value to satisfy the aggregate claims" and that "the equity of" RCC in the collateral pledged under the RFC Notes "has no value." Hence, as a matter of law, the basic allocation of new securities as between the First Mortgage and the Refunding Mortgage made by the Commission violates no right of RCC or ACJ as pledgees of Refunding Bonds, and as between RCC and ACJ the new securities representing the pledged Refunding Bonds must be divided on the basis of the amounts of such pledged Bonds rather than on the basis of the amounts of the claims on the RCC Notes and the ACJ Notes.

The preferred claim of RFC on its $10,000,000 Trustees' Certificates and its junior claim on the RFC Notes may properly be dealt with as an "entire bundle of rights." The compromise of the aggregate RFC claims provided for by the Commission Plan is practicable and fair and in the interest of all of the securityholders of the Debtor.

Neither any apparent increase in the annual earnings of the Debtor's property (analyzed under subsection 5 of Point I above) nor the accumulation of cash by the reorganization trustees requires reconsideration of any of the Commission's findings or conclusions with respect to allocations.

III

THE DISTRICT COURT PROPERLY RECOGNIZED THE JURISDICTION OF THE COMMISSION UNDER SECTION 77 AND, IN THE EXERCISE OF AN INFORMED AND INDEPENDENT JUDGMENT, FULLY PERFORMED THE COURT'S FUNCTIONS UNDER SECTION 77.

1. Three Opposing Views

Three opposing constructions have been taken of Section 77 as to the relative jurisdictions of the Commission and the courts over the approval of a plan of reorganization.[1]

(1) The construction taken by the Circuit Court of Appeals in this case:

> None of the findings or conclusions of the Commission, whether as to questions affecting the "public interest" or as to questions affecting "the rights of each class of creditors and stockholders," are in any way binding on the court. The court must independently determine each such question as an original matter. Only if all its determinations coincide with all the determinations of the Commission may

[1] See Comment (1941) 51 Yale L. J. 967, at 972, *et seq.*

the court approve the plan approved by the Commission.

(2) The extreme opposite construction:

All the findings and conclusions of the Commission upon both types of questions are binding and conclusive upon the court except for errors of law. The court must therefore approve the plan approved by the Commission, in the absence of errors of law, if there is any evidence to support the Commission's findings of fact, notwithstanding that the court may be strongly of the opinion that the Commission's determinations of facts upon which depend the rights of classes of creditors and stockholders are contrary to the weight of the aggregate evidence, including both that in the record certified by the Commission and that taken by the court.

(3) The construction taken by the District Court in this case:

The findings and conclusions of the Commission upon questions affecting the public interest, *e.g.*, the amount and classification of the new capitalization, are binding and conclusive upon the court, in the absence of errors of law or lack of supporting evidence. The findings and conclusions of the Commission as to the rights of each class of creditors and stockholders are preliminary only. It is the duty of the court to exercise its independent judgment as to such questions, giving, however, great weight to the Commission's judgments upon such of the questions affecting such rights as to which the Commission is an experienced expert, *e.g.*, rela-

> tive earning power and values of properties and securities. If, notwithstanding absence of any errors of law, the court's judgment upon questions of fact affecting the rights of any class of creditors or stockholders (based both upon the evidence taken by the Commission and that taken by the court) differs from the preliminary findings of the Commission, it is the court's duty to return the case to the Commission for modification of the plan or other further action in accordance with Section 77.

This third construction the Committee believes to be both practical and required by the express language and the legislative history of Section 77.

2. Section 20a of the Transportation Act and Reorganizations in Equity

In *Prentis* v. *Atlantic Coast Line Company* Mr. Justice Holmes said:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[1]

The determination of a capital structure for a railroad is essentially a legislative and not a judicial function.[2] When, therefore, in 1920, Congress vested the Commission

[1] 211 U. S. 210, 226 (1908).

[2] *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932, 940 (C. C. A. 6th, 1942).

with exclusive and plenary power to determine whether the issue of securities by a common carrier was in the public interest, Congress was delegating to the Commission a part of the Congressional legislative power.[1]

The Commission's action in exercising the power so granted has been uniformly upheld by the courts in every case of which we are aware,[2] with one exception.[3]

After the enactment of Section 20a, a railroad corporation organized to carry out a reorganization plan approved by a Federal court in an equity proceeding was obliged to obtain the authorization of the Commission before it could issue new securities under the plan in exchange for the old securities. As a result, the Commission was in a position to block a reorganization approved by a Federal

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[1]Transportation Act, 1920, § 268a; 49 U. S. C. A. § 20a.

[2]*New York Central Securities Co.* v. *United States*, 287 U. S. 12 (1932); *Miller* v. *United States*, 277 Fed. 95 (S. D. N. Y. 1921); *Pittsburgh & West Virginia Ry.* v. *I. C. C.*, 293 Fed. 1001 (App. D. C. 1923), appeal dismissed, 266 U. S. 640 (1924); *Equitable Trust Co. of New York* v. *Chicago, P. & St. L. Ry.*, 223 Ill. App. 445 (1921); *Chicago & E. I. Ry.* v. *Miller*, 309 Ill. 257, 140 N. E. 823 (1923); *Minneapolis, St. P. & S. S. M. Ry.* v. *Railroad Commission of Wisconsin*, 183 Wis. 47, 197 N. W. 352 (1924); *Whitman* v. *Northern Central Ry.*, 146 Md. 580, 127 Atl. 112 (1924); *City of Buffalo* v. *N. Y. Cent. R. R.*, 125 Misc. 801, 212 N. Y. Supp. 1 (1925), aff'd. 218 App. Div. 810, 218 N. Y. Supp. 713 (1926); *Snyder* v. *New York, C. & St. L. R. R.*, 118 O. St. 72, 160 N. E. 615 (1928), writ of error dismissed, 278 U. S. 573 (1928), judgment of dismissal vacated and case affirmed, 278 U. S. 578 (1928); *City of New York* v. *New York Cent. R. R.*, 275 N. Y. 287, 9 N. E. (2d) 931 (1937).

[3]*United States* v. *Chicago, M. St. P. & P. Ry.*, 282 U. S. 311 (1931). In that case the Commission sought to regulate reorganization expenses payable out of assessments for which new securities were not, at least in form, being issued. The majority of this Court held that such regulation could not be imposed as a condition of the Commission's approval of the proposed new securities under Section 20a.

court of equity by refusing approval to the issue of the new securities if it deemed such securities incompatible with the public interest. It was the practice, however, in the old equity reorganizations to bring the plan substantially to consummation, not merely through the determination of the nature and extent of the securityholders' rights, but through the steps of securityholder consents, final Federal district court approval and organization of the proposed reorganized corporation, before the Commission was asked to pass upon the proposed new capitalization from the standpoint of the public interest under Section 20a.

This practice left the Commission in a dilemma. To refuse approval of the proposed new securities would undo much work already done at great expense of both money and time, and, in the cases which arose, a majority of the Commission believed that the paramount public interest required that the receivership be ended and the properties returned to their owners rather than that otherwise desirable standards of public interest be enforced with respect to the proposed new capitalization. Of this dilemma the Commission began to complain as early as 1922[1] and its complaints accelerated in forcefulness[2] until the Commission, in strongest terms, declared that the then practice was "fundamentally unsatisfactory and requires reform."[3] It should be noted, however, that those complaints in no wise related to the courts' determinations of the contractual

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[1] *Missouri-Kansas-Texas Reorganization*, 76 I. C. C. 84 (1922). See particularly Commissioner Eastman's remarks at page 108.

[2] See *Denver & Rio Grande Western Reorganization*, 90 I. C. C. 141, 158 (1924).

[3] *Chicago, Milwaukee & St. Paul Investigation*, 131 I. C. C. 615, 671 (1928).

rights of the securityholders and involved no suggestion that the courts should be deprived of their ultimate jurisdiction over such determinations.

The Commission's dissatisfaction was shared by Congress. The flood of railroad bankruptcies which began in 1932 resulted in a demand for resort to the Federal bankruptcy powers for a new railroad reorganization procedure which would obviate the fictions of the old equity receiverships, the possible disruptions through ancillary receiverships, and the necessity for providing cash to meet the claims of small minorities of securityholders not assenting to approved reorganization plans.[1] But even more insistent was the demand that any new reorganization procedure should require submission of the plan to the Commission at an early stage of the proceeding in order primarily to enable it to pass on those questions affecting the public interest, *i.e.*, those relating to capitalization and classification of capitalization. Consequently, Section 77 reversed the previous practice of first submitting railroad reorganization plans to the courts for determination of the private rights of the securityholders *inter se*, and thereafter submitting them to the Commission for determination of questions of public interest.

Indeed the new legislation, as has already been stated, created a procedure under which the Commission has in effect become substituted for the securityholders as the "reorganizer" and its expert judgments substituted for the "bargaining process" among securityholders for the determination in the first instance, not only of the over-all ques-

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[1]Rodgers and Groom, *Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act* (1933) 33 Col. L. Rev. 571, 572.

tions of public interest, such as the total amount and character of capitalization to be issued in the reorganization, but also of the financial and other factual problems affecting the distribution of that capitalization in accordance with the legal rights of the old securityholders.

3. The Reorganization Process under Section 77

Under subsection (d) of Section 77, proposals of railroad reorganization plans are made by filing them with the Commission. Thereafter the Commission holds public hearings. Following such hearings,

> "* * * the Commission shall render a report and order in which it shall approve a plan, *which may be different from any which has been proposed*, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; * * * In such report the Commission *shall state fully the reasons for its conclusions.*"

It will be noted that in approving a plan the Commission must:

(1) *Determine* that it will be compatible with the public interest;

(2) Be of the *opinion* that it will meet the requirements of subsection (b)[1]; and

(3) Be of the *opinion* that it will meet the requirements of subsection (e).[2]

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[1]Subsection (b) deals largely with the mechanics of the plan, as to which no question was involved on the appeals below.

[2]The material portions of subsection (e) are quoted on pp. 120-21, *infra*.

Subsection (d) further provides that the Commission may, upon petition and further hearing, "in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification."

The power of the Commission to control formulation of the plan, subject only to such judicial determination as may be required by Section 77 itself or by general constitutional principles, is emphasized by the further provision of subsection (d) that

> "No plan shall be aproved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission * * *."

Upon the approval of a plan by the Commission, the Commission shall "certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan."

Subsection (c)(7) of Section 77 vests in the judge the duty to "determine * * * for the purposes of the plan * * * the division of creditors and stockholders into classes according to the nature of their respective claims and interests."

Subsection (e) requires that the judge shall hold a hearing upon such "objections" to the plan and "claims for equitable treatment" as may be filed by the parties with the court. At such hearing the judge may receive evidence. After such hearing the judge *shall* approve the plan if *satisfied*[1] that it

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[1]The Committee agrees with the contention of the junior interests below that "satisfied" means satisfied with the ultimate proof itself, rather than the ordinary test in judicial review of administrative action—whether the administrative agency acted lawfully and on substantial evidence.

(1) "complies with the provisions of subsection (b) * * *;" and

(2) "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;" and

(3) complies with certain other requirements respecting expenses and fees incident to the reorganization and administrative costs (as to which no question has been raised in the present case).

Subsection (e) further provides

"If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect * * *."

If the judge shall not approve the plan, subsection (e) provides that he shall either dismiss the proceeding or refer it back to the Commission with his opinion, "stating his conclusions and the reason therefor" and "a copy of *any evidence received.*"

It will be noted that Section 77 does not vest in the court either

(1) jurisdiction to determine whether the plan is "compatible with the public interest" as required by subsection (d); nor

(2) jurisdiction to make original and independent proposals of a plan, if the plan approved by the Commission meets the requirements of subsections (b) and (e), even though the court may be of opinion that some better plan might be devised.

Of course in every complicated situation there may be several plans which might be "compatible with the public in-

terest," but it is that particular plan which the Commission approves as "compatible with the public interest" which "*shall*" be approved by the court if the court is *satisfied* that that plan meets the requirements of subsections (b) and (e) with respect to the private rights of the various classes of creditors and stockholders. No other plan *can* be approved by the court.

4. Extension of the Commission's Power Under Section 20a of the Transportation Act to Reorganizations Under Section 77

The words "compatible with the public interest", like the words "fair and equitable", had become words of art prior to their incorporation in Section 77. Not only Section 20a of the Transportation Act, but subsections 3 and 7 of Section 5, as well as other sections of the Interstate Commerce Act (49 U. S. C. § 1 *et seq.*), required determinations under the test of compatibility with the public interest. The standards applied in all those determinations related to financial and physical capacity for public service and performance of such service, as contrasted with the standards applicable to the determination of litigation between securityholders as to their respective contractual rights in specific property.

More than a decade prior to the enactment of Section 20a the Commission began to urge that for the protection of the public some reasonable regulation should be imposed upon the issuance of securities by railways. In its report on *Consolidations and Combinations of Carriers*, 12 I. C. C. 277, 305, 306 (1907), the Commission said:

> "It is a serious menace to the financial condition of the country to have large railway systems fail to

meet their obligations or go into the hands of receivers, and the object of legislation and administration should be to lessen the risks of railway investments.

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"It is of the utmost importance, also, that railway securities should be safe and conservative investments for the public, and should yield good and ample return for the money invested. Reasonable regulation will tend to make them safer and more secure investments, and thereby benefit not only the railway companies but the public."

Following the enactment of Section 20a, the Commission repeatedly held that the public interest did not permit the issue of securities on which probable earnings would be insufficient to pay charges. In *Denver & Rio Grande Western Reorganization*, 90 I. C. C. 141, 148 (1924), the Commission said:

"The public interests require that, before an issue of securities by a carrier is authorized, the probability of earnings sufficient to pay costs of operation and of fixed charges be reasonably established, with some surplus for dividends and other purposes."

The Commission has often forbidden the issuance of securities where it found that the prospective earnings were not sufficient to justify such issue.[1]

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[1] *Bond Application of Texas Short Line Ry.*, 67 I. C. C. 400 (1921); *Securities Application of Asherton & Gulf Ry.*, 71 I. C. C. 281 (1922); *Securities of L. Ry & Nav. Co. of Texas*, 99 I. C. C. 357 (1925); *Securities of Yankton N. & S. R. R.*, 154 I. C. C. 669 (1929); *cf. N. Y. L. & W. Stock and Bonds*, 131 I. C. C. 34 (1927); *St. Paul & K. C. S. L. R. R. Bonds*, 189 I. C. C. 715, 716 (1933).

The essential jurisdiction of the Commission under Section 20a is carried into Section 77 not only by the requirement that the Commission shall formulate a plan "compatible with the public interest". By the fifth sentence of subsection (f), jurisdiction under Section 20a itself is specifically preserved to the Commission. That subsection provides:

> "* * * Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended."

Any doubts respecting the carrying over into Section 77 of the powers of the Commission under Section 20a are completely removed when the legislative history of Section 77 is examined. The report dated January 23, 1933, of the Committee on Judiciary of the House, of which Representative Sumners of Texas was Chairman, stated in part:

> "Subdivision (f) provides for the final approval of the plan by the Interstate Commerce Commission and, after such approval, for the certification of the plan to the court for its approval. After the acceptance is filed with the commission * * * the commission exercises its powers under section 20a of the interstate commerce act on the approval of issuance of securities necessary in the reorganization. This * * * retains an absolute and complete control

of the reorganization in the Interstate Commerce Commission of the plan recommended and approved by it."[1]

To the same effect are the remarks of Representative LaGuardia of New York, a member of the Committee on Judiciary of the House, who took an active part in guiding the bill through the House.[2]

Congress, therefore, in the enactment of Section 77 clearly contemplated that the Commission would, as it did in the Commission Plan, require that a railroad reorganization plan shall "provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern", "that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company", "that proposed charges, whether fixed or contingent, be within * * * probable earning power" and that the capitalization should "be maintained within strict limits" to insure that "the shares of its stock should not become mere tokens for stock market speculation". Jurisdiction to insure the attainment of these ends in the public interest was vested in the Commission, not in the courts.

This exclusive and plenary power of the Commission over capitalization in a reorganization under Section 77 is in no wise lessened by the fact that the Commission's determination of the capital structure is subject to judicial

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[1]72nd Cong., 2nd Sess., Report No. 1897 to accompany H. R. 14359.

[2]76 Cong. Rec. 2927.

scrutiny.[1] If in the determination of the capitalization which the public interest permits to be issued by a corporation reorganized under Section 77, the Commission misinterprets or misapplies the law under which it is acting (for example in such manner as to result in confiscation of property rights), or exceeds the power constitutionally granted it by Congress, or acts without supporting evidence, then its determination may be set aside, or, in the language of Section 77, be "disapproved," just as can its determination of a rate to be charged in the future.[2] However, barring such an exercise of its power as to constitute a violation of subsection (e), the Commission's determination both of total capitalization, and of the details of that capitalization, like its determination of a rate,[3] must be accepted by the

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[1] In *In re Erie*, 37 F. Supp. 237, 244 (N. D. Ohio 1940) the report of the Special Master, confirmed by the District Court, said

> "it is my opinion that the Commission's determination of the value of the properties * * * for reorganization purposes—*i.e.* the total capitalization—is conclusive unless it clearly appears (1) that the Commission applied improper standards of valuation, or (2) that its finding is wholly unsupported by the evidence. * * * This conclusion is not inconsistent with the view that the court is required to exercise an independent judgment in determining that the Plan complies with the requirements of Section 77."

[2] See *Mississippi Valley Barge Line* v. *United States*, 292 U. S. 282, 286 (1934).

[3] *Cf. United States* v. *Morgan*, 313 U. S. 409 (1941), in which the Court said (p. 417):

> "We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment."

Similarly, Congress has put the responsibility of determining capitalization on the Commission.

court as the basis for its judicial determination of the *remaining* questions of private rights involved in the reorganization.[1]

5. The Ultimate Jurisdiction of the Court to Determine the Private Rights of the Various Securityholders.

Conversely, (1) the determination of whether the Commission's conclusions on the questions thus within the Commission's exclusive jurisdiction contain such errors of law, or are so lacking in evidentiary support, as to violate the private rights of any of the existing securityholders, as well as (2) the ultimate determination of the nature and extent of the contractual rights of each class of existing creditors and stockholders and of whether a plan approved by the Commission affords due recognition of those rights, are essentially judicial functions, within the province of the court.

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[1] In *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932, 940 (C. C. A. 6th, 1942), the Court said:

> "Historically, the power to value railroad properties for rate making and capitalization purposes has always been lodged in the Interstate Commerce Commission.
>
> "There is nothing in the present Act [Section 77] which would indicate that the Congress intended to deprive the Commission of any of the powers it had so long exercised in valuing railroad properties for capitalization purposes.
>
> "The determination of the *value* of the properties, and the *amount* and *character* of *capitalization*, are legislative functions affecting the public interest and are *exclusively* within the province of the Commission under the Act. The only qualification is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly within the bounds of the Constitution and not arbitrarily."

As to many questions essentially within the ultimate jurisdiction of the court, the latter should give great weight to the reasoning and conclusions of the Commission, as an experienced expert. For example, the Commission has particular ability to judge the earning power of the various parts of railroad systems securing different securities and, hence, to determine whether the new securities allocated to the different old securities are such as to insure to each class of creditors the equitable equivalent of the assets of the debtor available for the satisfaction of its claim, as those claims are legally determined by the court.

Respect for the Commission's expert judgments on such questions, even to the point of regarding them as "well nigh conclusive" and "almost as verities,"[1] does not, however, require construction of Section 77 at the extreme opposite pole from that taken by the Circuit Court of Appeals below. Yet revulsion at the unworkability of Section 77 as construed by that Court has led to the argument that Section 77 cannot be made workable unless all the findings and conclusions of the Commission are, except only for errors of law, binding and conclusive upon the court.

In support of this extreme position it is argued (1) that problems affecting the public interest and problems affecting the rights of securityholders are so hopelessly intertwined that their separation is impracticable; (2) that no such distinction of jurisdiction between the two types of problems is made by Section 77 itself; and (3) that unless Congress had intended to divest the courts of, and to vest the Commission with, substantially final jurisdiction, except

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[1] *In re Chicago & North Western Ry.*, 121 F. (2d) 791, 796 (C. C. A. 7th, 1941).

for errors of law, over all questions involved in a reorganization, it would not have enacted Section 77 at all, because Section 20a of the Transportation Act would have sufficed.

These arguments, it is submitted, (1) are factually unsound; (2) disregard the clear, although perhaps not perfect, draftsmanship of Section 77; and (3) are in conflict with the entire legislative history of that Section.

The view that problems of public interest and problems of private rights of securityholders are so hopelessly intertwined as to prevent segregation may in part be due to failure adequately to analyze the problem of formulating a railroad reorganization plan. There are three distinct steps.

From the standpoint of the venture as an entirety a reorganized capitalization must first be found which will represent, both in its aggregate amount and its classification, the probable future earning power of the property at the various levels of changing business cycles. That capitalization must be determined in the light of its being "compatible with the public interest" within the meaning of those words of art which had been established before the enactment of Section 77. To be sure the molding of the capitalization will be affected by the necessities of the two remaining problems, but the controlling factor as to both aggregate amount and classification is the public interest.

Next, the nature and extent of the contractual rights of each existing class of creditors and stockholders must be determined as a basis for determining the nature and extent of the participation by each class. Such a determination will involve not merely questions of law but a multitude of questions of fact, most of which are not even

remotely connected with the public interest. For example, as in the *Western Pacific* case, the relative liens of two mortgages may depend upon disputed factual circumstances in connection with their creation; or upon disputed facts as to whether equipment has been purchased for use upon one property or upon another; or upon disputed facts as to whether the proceeds of bonds under one mortgage have been expended upon property claimed by a specific lien of a later mortgage, as against the after-acquired clause of the earlier mortgage; or upon disputed facts claimed by one security to create an estoppel against the holders of another security, etc. Perhaps the rights of a class will depend upon disputed facts claimed to establish fraud. The Commission had acquired no expertness, indeed it had had no experience, in the determination of such questions prior to the enactment of Section 77. It has acquired little such experience in the administration of that Section. In few cases have disputes between classes of securities as to their respective contractual rights been pressed to a conclusion either before the Commission or before the court prior to Commission action upon a plan. Where they have been so pressed before the Commission, it has itself recognized, as in the *Western Pacific* case, that its determinations are tentative only and that final decision is for the court.[1]

The third step in the reorganization process is the distribution of the capitalization among the several classes of creditors and stockholders in such manner as to give each, in terms of the new securities, its equitable equivalent of the assets of the debtor available for the satisfaction of its claim, as those claims have legally been determined. This

[1] R. 262.

is a problem upon which admittedly the experience of the Commission in determining earning power and security values will be expert and helpful. It is, however, essentially a problem of the relative nature and extent of the private rights of securityholders *inter se* and not a problem comprehended in the words of art, "the public interest." Furthermore, it is not a problem as to which the courts are without experience. The multitude of cases which have arisen under Section 77B and later Chapter X have far exceeded the number of railroad reorganization cases under Section 77. The courts have an experience even on this type of question entirely comparable to that of the Commission.

Had Congress intended to take away from the courts their traditional jurisdiction to determine the purely factual questions embodied in the second category of reorganization problems as above analyzed, indeed, if it had intended such a divestment in respect of the questions involved in the third category, it would have used entirely different language and an entirely different technique of drafting than was used in Section 77.

By subsection (d) the Commission is vested with jurisdiction to *determine* a plan that will be compatible with the public interest. Because the plan must be complete and therefore must allocate new securities with due recognition of the private rights of the securityholders, the Commission is required preliminarily to have an *"opinion"* that its plan will meet the requirements of subsection (e).

As has already been pointed out, the court is not given jurisdiction even to express any "opinion" as to the questions of "public interest". But the grant of jurisdiction to determine the questions of "due recognition of the rights of

each class of creditors and stockholders,"[1] and of "the nature of their respective rights and interests,"[2] is in terms to the court.

Objectors to a plan approved by the Commission are required by subsection (e) to file with the court "detailed and specific objections in writing to the plan and their claims for equitable treatment." Are these words which the expert lawyers who drew Section 77 would have used to limit an objector to raising solely questions of law before the court?

The court is then required to hold a hearing respecting these "claims for equitable treatment," at which the court may receive evidence. It has been the practice of the district courts in most reorganization cases, as was done in the *Western Pacific* case, to receive additional evidence offered by objectors to strengthen their position and in turn evidence offered to rebut the objectors' evidence. After such a hearing, and such receipt of evidence, the court is not merely required to express an "opinion" as to "the due recognition of the rights of each class of creditors and stockholders" raised by such "claims for equitable treatment"; it must be "*satisfied.*" If it is not satisfied and returns the case to the Commission, it certifies to the Commission "a copy of any evidence received." Is this a description of a hearing solely to discover errors of law? If the court is limited to determining whether or not, in a finding respecting a claim, the Commission committed an error of law upon the facts found by it, why should the court take evidence?

By the organization scheme of Section 77, as a matter of draftsmanship, Congress thus took a clear distinction

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[1]Subsection (e). [2]Subsection (c)(7).

between questions affecting the public interest and questions affecting the contractual rights of creditors and stockholders and their due recognition. Even if there were any practical difficulty (which factually there is not) in distinguishing between the two types of questions, the express language and the organization of Section 77 would compel respect for the distinction.

Apart from the traditional jurisdiction of the courts in suits by different creditors involving questions of fact as to their respective rights, Congress had another excellent reason for not vesting in the Commission jurisdiction to determine such questions in a railroad reorganization, free from judicial review except for mistakes of law. Many of the Section 77 reorganizations, as in the *Western Pacific* case, have involved RFC claims. The Commission is an active participant in the creation of RFC loans to railroads and the determination of their security. It would be of doubtful propriety to vest in the Commission jurisdiction finally to determine disputed questions of fact in connection with such loans, perhaps involving even action of the Commission itself. The courts have already found it necessary to set aside two reorganization plans as unduly preferential to RFC, one wholly on factual grounds and the other on grounds involving mixed questions of law and fact.[1] In another case the court found it necessary to set aside a plan approved by the Commission as involving undue preference of certain classes and inadequate treatment of other classes.[2] The court's determination in this third case was upon grounds wholly factual.

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[1] *In re Denver & Rio Grande Western R.R.*, 38 F. Supp. 106 (D. Colo. 1940); *In re St. Louis-San Francisco Ry.* (E. D. Mo., May 25, 1942, not yet reported).

[2] *In re New York, N. H. & H. R. R.* (D. Conn., Dec. 8, 1941, not yet reported).

It is submitted that in all three of these cases the courts exercised a jurisdiction intended to be vested in them by Section 77.

The argument that Section 77 was superfluous unless it vested in the Commission exclusive and final jurisdiction over all questions of fact in railroad reorganizations quite disregards the many reasons, apart from the wish to give the Commission initial control of railroad reorganization plans, for the enactment of Section 77. The first of the several bills out of which that section developed[1] was directed entirely to the elimination of the fictions of the equity receivership and sale, the elimination of the dangers of ancillary receiverships, and the binding of dissenting minorities without provision for cash payment. That original bill contemplated that the Commission would be called upon to act on questions of public interest only after the court had made preliminary decisions on questions of the private rights of the securityholders *inter se*. As has already been pointed out, Section 77 as finally enacted reversed the order of the two types of determinations and contemplated, first, determination of the problems of public interest with a preliminary "opinion" as to the private rights questions, followed, second, by the ultimate determination in the courts of the latter questions. It merely reversed the old order of determination. It no more transferred to the Commission from the courts jurisdiction over the purely judicial types of questions, than did the original bill contemplate transfer to the courts from the Commission of the latter's jurisdiction over the purely legislative types of questions affecting the public interest.

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[1]S., 4921, 72nd Congress, 1st Session (1932).

The job of railroad reorganization is necessarily one in which the Commission and the courts each have an appropriate independent function, each in a field in which jurisdiction follows experience and expertness. It is thus that "the judicial process * * * is, at it were, brigaded with the administrative process of the Commission,"[1] that the authority of the court is "intertwined" with that of the Commission, and that the judicial and administrative functions "work co-operatively in reorganizations."[2] The two bodies are in every respect "to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be recognized by the other."[3]

This broad demarcation of the functions of the Commission and the courts under Section 77 has been recognized not only by the District Court in the instant case but by other district courts in other reorganization cases.[4]

Two Circuit Courts of Appeals, other than the Ninth Circuit in the instant case, have had to deal with the problem, the Sixth Circuit in the *Akron, Canton & Youngstown*

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[1] *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939).

[2] *Warren* v. *Palmer*, 310 U. S. 132 (1940).

[3] *United States* v. *Morgan*, 313 U. S. 409, 422 (1941).

[4] *In re Akron, Canton & Youngstown Ry.* (N. D. Ohio, 1939, not reported); *In re Erie R. R.*, 37 F. Supp. 237, 243-5 (N. D. Ohio 1940); *In re St. Louis-San Francisco Ry.* (E. D. Mo. 1942, not yet reported). In other cases the district courts have said that it was unnecessary for them precisely to determine the respective jurisdictions of the Commission and the Courts in view of the facts that in any event they attached great weight to the Commission's views and, in the particular case, entirely agreed with the conclusions of the Commission on the merits. *In re Chicago & North Western Ry.*, 35 F. Supp. 230, 253 (N. D. Ill. 1940); *In re Chicago, Milwaukee, St. Paul & Pacific R. R.*, 36 F. Supp. 193, 202-3 (N. D. Ill. 1940); *In re Missouri Pacific R. R.*, 39 F. Supp. 436, 442 (E. D. Mo. 1941). The opinion of the District Judge in the instant case indicates that he might have avoided the Circuit Court of Appeals' criticism of his opinion by resting his decision solely upon the same ground (R. 1597).

case and the Seventh Circuit in the *North Western* and *Milwaukee* cases.[1] Both these Courts recognized that the jurisdictions of the Commission and the courts are separate and distinct, and each recognized that the jurisdiction of the courts to review the Commission's determinations of capitalization questions is a limited jurisdiction.[2]

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[1] *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932, 940 (1942); *In re Chicago & North Western Ry.*, 121 F. (2d) 791 (1941); and *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 124 F. (2d) 754 (1941).

[2] In *Akron, Canton & Youngstown* case, *supra*, the Sixth Circuit Court said (at p. 940):

> "The duties imposed on the courts and the powers conferred on the Interstate Commerce Commission under this Section of the Act, when construed in relation to other Sections, are separate and distinct. As to some matters under the Act, such as the determination of value, a broad discretion is lodged in the Interstate Commerce Commission and the court does not sit as a board of revision to substitute its judgment for that of the Commission. In such matters, the judicial inquiry into the facts goes no further than to ascertain whether there is substantial evidence to support the findings of the Commission and the question of the weight of the evidence in determining such matters lies with the Commission when acting within its statutory authority."

The Seventh Circuit in a decision on an interim order in the *North Western* case, 121 Fed. (2d) 791, 796 (1941), stated:

> "In the field wherein it exercises the powers expressly given it, the findings of the I. C. C. are well-nigh conclusive. True, it may not be said that the orders of the I. C. C. are unassailable if wholly lacking in evidentiary support. But where, in matters relating to plans of reorganization, earning power of debtor, its operations, having in view the greatest service to the public and the greatest net earnings for its security holders, the findings of the I. C. C. should be, as they are, accepted almost as verities by the courts."

The final decisions of the Seventh Circuit on the *Milwaukee* and *North Western* plans, however, leave that Court's views of the Commission's jurisdiction somewhat uncertain.

6. Conclusion

In the *Western Pacific* proceeding the Commission and the District Court have each recognized the appropriate jurisdiction and independence of the other.

The Commission's determination of the various questions as to the lien of the two mortgages, affecting solely the private rights of the bondholders, was expressly tentative and subject to the final determination of the District Court.[1]

A superficial perusal of the opinion of the District Judge demonstrates that he recognized and carefully performed his duty to decide whether the Commission, in its determination of the questions of public interest, had "acted fairly, within the bounds of the Constitution, and not arbitrarily" and whether, in its tentative determination of the legal rights of the old securities and its allocations of new securities in recognition of those rights, it had fully complied with subsection (e).[2] To the extent of such judicial review he did regard himself, in the language of the Circuit Court of Appeals,[3] "not concluded by any determination made by the Commission." Within the proper demarcation of his jurisdiction as to the questions of "public interest," and to the full within his jurisdiction to determine the private rights of the existing securityholders and whether allocations conformed to those private rights, he did exercise his "independent judgment."

In his 31-page opinion the District Judge declared that he had "read the record", "carefully considered all the objections" and "read the briefs of the respective counsel in support of the objections".[4] He might have added that

[1]R. 262. [2]R. 1596-7. [3]R. 2674.
[4]R. 1597.

he had heard four days of oral argument. As a result he had reached the independent informed judgment that he was "wholly in accord" with all the conclusions reached by the Commission. He therefore held all the objections to the Commission Plan to be without merit and overruled.

The "possible misconception" as to the respective jurisdictions of the Commission and the courts was on the part of the Circuit Court of Appeals, not the District Court. That "misconception" should be corrected by this Court, but this Court should at the same time negative any "misconception" at an opposite pole.

IV

UPON THE ENTIRE RECORD, THIS COURT SHOULD REVERSE THE DECREE OF THE CIRCUIT COURT OF APPEALS AND AFFIRM THE ORDER OF THE DISTRICT COURT APPROVING THE COMMISSION PLAN.

It apparently is not, and it cannot be, disputed that, notwithstanding the failure of the Circuit Court of Appeals to deal with many of the exceptions of the appellants below, this Court has jurisdiction to examine the entire record and, upon consideration of the objections before the District Court and the exceptions before the Circuit Court of Appeals, direct that all of them be overruled and the appropriate order of the District Court approving the Plan be affirmed.[1]

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[1] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920); *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588 (1911); *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267 (1910); *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279, 292 (1905).

The objecting junior interests filed in the District Court an untold number of objections to the Commission Plan,[1] and in the Circuit Court of Appeals a total of 76 exceptions.[2] Nevertheless, it is believed that the substance of all the objections of all the junior interests have already been discussed in this brief, except for three.

1. Both the Debtor and RCC object to January 1, 1939, as the effective date of the Plan. The Debtor argues that the effective date should be approximately August 2, 1935, the date of the filing of the Debtor's Section 77 petition. RCC, asserting that creditors are entitled to their contract rights to the date of the actual consummation of reorganization, argues that the effective date should be substantially the actual date the Plan is put into effect.

The Debtor's contention is foreclosed by the specific holding of this Court in the *Consolidated Rock Products* case that unpaid interest accruing on senior claims during the reorganization proceeding is part of the claim whose absolute priority must be recognized in reorganization.[3]

The reasoning which defeats the Debtor's contention tends to sustain that of RCC. However, the injury in the present case, arising from computing claims for reorganization purposes as of January 1, 1939, when in fact reorganization cannot now be consummated substantially before 1944, falls upon

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[1]R. 892-1017. [2]R. 1627-54.

[3]See also *Ticonic Bank* v. *Sprague*, 303 U. S. 406, 413 (1938).

the First Mortgage Bondholders, not upon the objecting RCC. If the Commission Plan were to be disapproved and a new plan given an effective date of January 1, 1943, four additional years' interest, aggregating nearly $10,000,000, will have accrued upon the First Mortgage Bonds and require provision senior to any provision for the RCC Notes. If January 1, 1944, is the effective date, the amount of such additional interest will be nearly $12,500,000.

2. The junior interests objected below to the fact, amount, and mandatory character of the Capital Fund provided for by the Commission Plan. This Capital Fund is derived through setting aside, out of available net income after fixed charges and before contingent charges, an amount for capital expenditures not exceeding $500,000 annually, or at any time an aggregate unexpended amount of $1,000,000.[1]

That it is in the interest of both the public and all the creditors that necessary additions and betterments be financed out of earnings rather than by selling First Mortgage Bonds at the prohibitive discounts at which they would now have to be sold, must be patent. The evidence before the Commission as to the Debtor's past requirements for capital purposes supports the $500,000 figure.[2] In the light of today's conditions, it is, if anything, inadequate. While the Committee would have preferred that the creation of the Fund be left to the discretion of

[1]R. 381. [2]R. 309, 1870.

the reorganized company's board of directors, the Committee recognizes that as to this feature, as well as to the fact and amount of such a Fund, the matter is one clearly affecting the public interest and within the exclusive determination of the Commission in the absence of arbitrary action. None of the objectors have suggested that the Commission's decision in respect of this Fund has been arbitrary.

3. The RCC and ACJ Notes are secured, in addition to the collateral pledged by the Debtor and dealt with in the Commission Plan, by so-called accommodation collateral pledged by WP Corp. WP Corp. urges that failure of the Commission Plan affirmatively to provide for the surrender of the accommodation collateral to the pledgors constitutes confiscation; while RCC objects that the failure of the Commission Plan affirmatively to provide that the same collateral may be retained by the pledgees is a violation of RCC's rights.[1]

The problem of this accommodation collateral is not one which can properly be dealt with in a plan of reorganization for the Debtor. Whether the pledgees, after realizing upon the collateral pledged by the Debtor and receiving new securities therefor under the Commission Plan, have a deficit as against the accommodation pledgor is a question not affecting the Debtor but one affecting the relationships between the accommodation pledgor and the pledgees.

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[1]R. 271, 345.

Though this Court may agree that none of the objections of the junior interests would seem to have merit, it may have doubt whether the Commission Plan fully meets the tests laid down by this Court for the "fair and equitable" recognition of the "absolute priorities" of the existing First Mortgage Bonds.

The 4½% rate upon the Income Mortgage Bonds, contrasting with the 5% rate upon the present First Mortgage Bonds, may seem unnecessarily to impose a sacrifice upon the present First Mortgage Bondholders. The matter of the new interest rate, however, the Committee believes to be one affected with a "public interest" and within the exclusive determination of the Commission. The effect of the Commission's imposing the lower rate is to increase the amount of the lost rights of the present First Mortgage Bondholders, for which "full compensation" must be made. The conversion right of the new Income Bonds, the participating right of the new Preferred Stock, and the Income Mortgage Sinking Fund, even taken together, may seem somewhat inadequate compensation for the rights of the existing First Mortgage Bondholders required to be surrendered by the Commission Plan. The differential between $57 and $62 per share, the price at which the new Common Stock is allotted to the senior First Mortgage Bonds and the price at which it is allotted to the RCC Notes, may seem of questionable adequacy to satisfy the "quantitative" test of priority recognition.

But the present First Mortgage Bondholders have now received no interest since September 1, 1933, notwithstanding the recently increasing earnings and rapidly accumulating cash in the reorganization trustees' hands. Were the Commission Plan to be set aside and new allocations made in an attempt fully to compensate for the lost rights of the

existing First Mortgage Bondholders, all the additional value that those Bondholders could receive, within the capitalization representing the "reorganization value" found by the Commission, would be a small amount of Common Stock. The First Mortgage Bondholders, together with the RFC, receive, under the Commission Plan, 77% of the total Common Stock. Commissioner Miller, in urging an increase of the Common Stock in order to allot the junior interests a larger percentage, correctly characterized it as of "little or no market value."

The few shares of additional Common Stock which might thus be added to the allocations to the First Mortgage Bondholders by a theoretically better plan than the Commission Plan are of insignificant value to the existing First Mortgage Bondholders as compared with the importance of getting this property reorganized, securing the cash return upon the existing First Mortgage investment which the earnings reasonably permit, and, not without importance, securing some effective voice in the operating and financial problems of the property.

The Committee therefore urges this Court to take a practical view of the situation and not to push the widely current belief that securityholders are incompetent to take care of themselves[1] to the point of requiring for the First Mortgage Bondholders a degree of compensation for surrendered rights whose attainment would impose upon the

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[1]The first expression of this thought that we have found is that in *In re English, Scottish and Australian Chartered Bank*, 3 Ch. 385, 396 (1893). It has been more picturesquely put by Frank in *Some Realistic Reflections on Some Aspects of Corporate Reorganization* (1933) 19 Va. L. Rev. 541, 569: "Courts of equity have a tradition of aiding the helpless, such as infants, idiots and drunkards. The average security holder in a corporate reorganization is of like kind."

First Mortgage Bondholders far greater injury than any possible value of such compensation.

This reorganization proceeding has now dragged along through the Commission and the Courts for more than seven years over every obstacle which the junior interests could manage to interpose. The multiplicity of corporate entities through which the principal junior interests have acted has created an appearance of confusion of issues and procedural problems, materially adding to the delay. The Committee urges that the public interest in the final disposition of the Western Pacific reorganization and the many questions which it, in common with most other railroad reorganizations, involves, as well as the interests of the First Mortgage Bondholders themselves, require that this Court so act upon the present Commission Plan as to give substance to its earlier assurance that "there is no occasion" for the courts, the Commission or the senior securityholders "to yield to such pressures."[1]

The Committee believes that upon consideration of the entire record this Court can reach no other conclusion than that the decision of the Circuit Court of Appeals for the Ninth Circuit should be reversed, and the Order of the District Court dated August 15, 1940, affirmed. If, however, this Court shall (as the Committee does not believe will be the case) find any error in the action of the Commission or the District Court, the Committee urges that this Court, in addition to correcting such error, also affirm such of the determinations of the District Court as may be found to be without error. Only by such action can repetition of possible errors already made be avoided without

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[1] *Case* v. *Los Angeles Lumber Products Co., Ltd., supra*, at p. 129.

ultimate correction in this Court at some indefinite future time, and only thus may the reorganization of the Debtor be consummated with some degree of expedition.

V

SECURITYHOLDERS WHO DEFEND IN THE CIRCUIT COURTS OF APPEALS PLANS PROMULGATED AND APPROVED BY THE COMMISSION, AND ALSO APPROVED BY THE DISTRICT COURTS, SHOULD NOT BE ASSESSED THE COSTS OF THE APPEALS IF THE APPEALS ARE SUCCESSFUL. SUCH COSTS SHOULD BE ASSESSED DIRECTLY AGAINST THE DEBTOR'S ESTATE.

Such costs are not nominal. In the instant case they aggregate $4,239.29, and in the more complicated cases already pending in various circuit courts of appeals they will greatly exceed that amount.

Section 77 contemplates that the Commission may, as it did in the instant case, formulate its own plan of reorganization independently of any proposals of any of the parties, whereas under Chapter X of the Bankruptcy Act the Securities and Exchange Commission acts only in an advisory capacity in the formulation of reorganization plans.[1] Notwithstanding this fact, Section 77, unlike Chapter X,[2] provides no specific machinery whereby the Commission may appear in the proceeding in the district court with reference to the plan. In practice the Commission has not sought to defend its plans before the courts. Those railroad securityholders who assume the responsibility and expense of defending Commission proposals in the district courts are therefore supplying to the district courts assist-

[1] § 172, 11 U. S. C. § 572.
[2] § 208, 11 U. S. C. § 608.

ance which they might not otherwise have in performing their functions under Section 77.

To penalize such securityholders for continuing to defend the Commission's plans in the circuit courts of appeals, after the district courts have approved such plans, is not only wholly unfair and inequitable but necessarily will discourage securityholders and mortgage trustees from performing a useful, if not necessary, function in assisting the circuit courts of appeals to arrive at proper decisions.[1]

Irrespective of the balance of the case, this Court should reverse that part of the Decree below imposing costs of the appeal from the District Court upon the creditors who defended the Commission Plan before the District Court and the Circuit Court of Appeals.

VI

CONCLUSION

The Decree of the Circuit Court of Appeals for the Ninth Circuit, entered November 28, 1941, as modified by the Orders of February 12 and February 16, 1942, should be reversed, and the Order of the District Court, entered August 15, 1940, should be affirmed.

Dated September 14, 1942.

Respectfully submitted,

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[1]See *In re Chicago & North Western Ry.*, 121 F. (2d) 791, 798 (C. C. A. 7th, 1941).

APPENDIX A

Bankruptcy Act, § 77 (11 U. S. C. § 205).

* * * * * * * *

"(c) * * *

"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests.

* * * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall,

after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing,

and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be sub-

mitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests

or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States

or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof:. *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

APPENDIX B

FEDERAL INCOME TAX LIABILITY FOR 1940 AND 1941

1. Computed on the basis of the existing capitalization of the Debtor

1940

There would be no Federal income tax liability for the year 1940.

1941

Although the net income for the year 1941 was $750,177, there would be no Federal income tax liability for that year if the Debtor's claim of a deduction for a net operating loss carryover of $2,799,265 from the two preceding years is allowed.

If such deduction for a net operating loss carryover is not allowed, the Federal income tax liability for 1941 would be $232,304, computed as follows:

Earnings Available for Fixed Charges	$4,551,738[1]	
Less: Fixed Charges	3,801,561[1]	
Normal Tax Net Income	$ 750,177	
Normal Tax (24%)		$180,042
Surtax		
6% on first $25,000	1,500	
7% on remainder ($725,177)	50,762	52,262
Total Normal Tax and Surtax		$232,304

[1]To reported ~~1940~~ 1941 earnings (see p. 7, *supra*) has been added rent for leased facilities of $3,600, which amount is included in Fixed Charges as shown above.

2. Computed on the basis of the capitalization of the reorganized company

In the following computations, the funded debt of the Reorganized Company is taken at $33,969,125, the amount of debt for which the Commission Plan provides.

1940

On the basis of the above assumption, the total Federal income tax liability of the Reorganized Company for the year 1940 would be ~~$289,041~~ 288,177, computed as follows:

Earnings Available for Interest	$2,649,797	
Less: Interest Charges	1,449,060	
Normal Tax Net Income	$1,200,737	
Normal Tax (24%)		$288,177

1941

On the basis of the above assumption, the total Federal income tax liability of the Reorganized Company for the year 1941 would be $960,464, made up of the following items:

Normal Income Tax	$743,779	
Surtax	216,685	
		$960,464

These figures are computed as follows:

Earnings Available for Interest		$4,548,138
Less: Interest Charges		1,449,060
Normal Tax Net Income		$3,099,078
Normal Tax (24%)		$ 743,779
Surtax		
6% on first $25,000	$ 1,500	
7% on remainder ($3,074,078)	215,185	
		$ 216,685

FILE COPY

Supreme Court of the United States

October Term, 1942

No. 7

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,

Respondents.

REPLY BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

October 12, 1942.

TABLE OF CONTENTS

PAGE

I. The argument that the Commission lacked power to approve the Commission Plan, on the ground that it differs in material respects from any proposal of any of the parties 2

II. The argument that in determining whether a plan is "compatible with the public interest" the Commission may limit only the new fixed charge obligations and is powerless to require that any part of the existing debt shall be converted into stock 5

III. The argument that Section 77 distinguishes "earning power" from "probable prospective earnings" 10

IV. The argument that the physical value of the Debtor's properties as determined under Section 19a of the Interstate Commerce Act is constitutionally protected against foreclosure in a Section 77 reorganization 12

V. The argument that the Commission failed to give consideration to the Debtor's system "as it exists today" 15

VI. The argument that in the twelve months ending July 31, 1942, the Debtor's properties earned "available for interest, a sum sufficient to cover its old fixed charges more than twice" 18

VII. The argument that the Commission made no specific finding, in terms of dollars, of the earning power or of the value of the Debtor's properties either as an entirety or in respect of separate mortgaged segments 21

PAGE

VIII. The argument that the Commission Plan is "the most drastic plan ever proposed for a major property" 23

IX. The argument that the treatment of the Trustees' Certificates and the RFC Notes violates the Reconstruction Finance Corporation Act 26

X. The argument that the relationship between the accommodation pledgors and the accommodation pledgees should be dealt with in the Commission Plan 31

XI. The argument that the new evidence before the District Court respecting Central California Traction and Alameda Belt properties required a change in the allocation of new securities against those properties 33

XII. The argument that the Reorganization Committee contemplated by the Commission Plan should be eliminated and the reorganization carried out solely by the Debtor 34

XIII. The argument that the District Court failed to exercise an informed, independent judgment 36

XIV. The argument that the Commission Plan will be rendered nugatory by its rejection by the James Interests and RCC 37

APPENDIX A i

CASES CITED

PAGE

In re Alabama, Tenn. & Mo. (S. D. Ala., September 15, 1942) 20

Alton R. Co. Reconstruction Loan, 184 I. C. C. 458, 459 (1932) 27

Case v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939) 9, 22

Chicago & E. I. Ry. Co. Reconstruction Loan, 180 I. C. C. 639 (1932) 27

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928) 6

Chicago, R. I. & P. Ry. Co. Reconstruction Loan, 184 I. C. C. 597 (1932) 27

Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510 (1941) 9, 11, 22

Denver & Rio Grande Western Reorganization, 90 I. C. C. 141 (1924) 7

Guaranty Trust Company v. *Missouri Pacific Ry. Co.*, 238 Fed. 812 (E. D. Mo. 1916) 23

Guaranty Trust Co. v. *The Minneapolis & St. Louis R.R.* (D. C. Minn., September 10, 1942, not yet reported) 20

Kansas City Terminal Ry. v. *Central Union Trust Co.*, 271 U. S. 445 (1926) 22

Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 (1935) 15

Missouri Pacific R. Co. Reconstruction Loan, 184 I. C. C. 3 (1932) 27

St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 (1936) 36, 37

United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311 (1931) 6

In re Western Pacific R. R., 38 F. Supp. 877 (N. D. Calif. (1941) 30

MISCELLANEOUS CITATIONS

	PAGE
Consolidations and Combinations of Carriers, 12 I. C. C. 277, 306 (1907)	7
Note (1941) 54 Harv. L. Rev. 655	25
Note (1942) 56 Harv. L. Rev. 100	8
Hearings before House Judiciary Committee on S. 1869 (76th Cong., 2nd Sess., 1939) 552-3	17
Report No. 1897 to Accompany H. R. 14359 (72nd Cong., 2nd Sess., 1933)	4, 5
75 Cong. Rec. 2101-2	28
76 Cong. Rec. 4130	5

STATUTES[1]

	PAGE
Interstate Commerce Act	
Section 19a (49 U. S. C. § 19a)	10, 11, 12
Section 20a (49 U. S. C. § 20a)	7
Reconstruction Finance Corporation Act	
Section 5 (15 U. S. C. § 605), as amended September 18, 1940	26, 28

[1]References to Section 77 of the Bankruptcy Act are too frequent to enumerate. Pertinent portions of Section 77 are printed in Appendix A of the Committee's main brief.

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No. 7

IN THE MATTER

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Respondents.

REPLY BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, PETITIONERS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

Many of the arguments of the James Interests[1] and of RCC[2] were anticipated in the Committee's main brief. The answering briefs of those respondents, however, have raised certain new questions or given new implications to old arguments. The Committee therefore feels it necessary to file this reply brief.

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[1]The James Interests, as shown in the Committee's main brief, p. 50, include A. C. James Co. (ACJ), Western Pacific Railroad Corporation (WP Corp.), and the Debtor.

[2]The Railroad Credit Corporation.

I

The argument that the Commission lacked power to approve the Commission Plan, on the ground that it differs in material respects from any proposal of any of the parties

For the first time in the seven years of this proceeding the James Interests attack the power of the Commission to promulgate and approve the Commission Plan.[1]

They assert "there is no language in Section 77 which * * * gives to the Commission the power and the responsibility of framing plans of reorganization for railroads," and argue that the express power granted to the Commission to "approve a plan, which may be different from any which has been proposed" was intended by Congress to limit the Commission to making "minor changes in the plan, consistent with the general intent and agreement of the parties."[2] Their protest that the Commission has no power "to originate plans by administrative fiat"[3] is sought to be bolstered by the implication that the Commission has not "allowed" the parties "to renegotiate and adjust their contractual relationships * * * relieved from the unreasonable limitations of the unsound economic theories" of the Commission. These arguments are baseless both in fact and in law.

It was no fault of the Commission that "The parties to this proceeding did not agree upon a plan of reorganization."[4] All except the James Interests did agree upon the

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[1] W. Corp. main brief, p. 20; ACJ main brief, pp. 75-81.
[2] ACJ main brief, pp. 77 and 80, respectively.
[3] ACJ main brief, p. 81.
[4] ACJ main brief, p. 99.

RCC Plan.[1] ACJ adhered to its view, still asserted here, that the "public interest" permitted retention of all outstanding debt as new debt and that the "absolute priorities" of the First Mortgage Bondholders could adequately be recognized by turning each $1,000 5% First Mortgage Bond, with its large accumulation of interest, into a $1,000 4% *wholly non-cumulative* Income Bond.[2]

The Committee urged the Commission to mediate. However unwise the Committee may believe the Commission to have been in declining that role, the Committee recognizes the clear discretion of the Commission so to refuse.

The Commission had no alternative but to decide all the disputed issues upon their strict merits. Recognizing this situation, the Committee and RFC (while still expressing willingness to compromise on the RCC Plan) joined in submitting to the Commission a proposed plan, based on their views of the merits, which was the fundamental basis of the Commission Plan.[3] The only substantial change made

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[1]R. 693. That Plan increased the Preferred Stock under the Commission Plan by $18,413,928 and the number of shares of no par value Common Stock by 30,000 primarily in order to allot some of the Common Stock to WP Corp. The RCC Plan was largely the result of a negotiation for compromise in which the then Chairman of the Reconstruction Finance Corporation (RFC), Mr. Jesse Jones, was most helpful.

[2]R. 105. While the ACJ proposal also gave the First Mortgage Bondholders a "bonus" of five shares of new Common Stock, that Common Stock was so far away from earnings as to be wholly worthless. The ACJ proposal also gave the existing junior debt new 4% Income Debentures of equal principal amount (each $1,000 Debenture convertible into $1,500 6% Preferred Stock) and a similar "bonus" of five shares of new Common Stock. The present First Mortgage Bonds mature 1946. The ACJ proposal was that the new Income Bonds mature 1987 and the new Income Debentures 1957 (R. 106, 111).

[3]R. 775, 756, 695-701.

by the Commission was to increase the allotment of new securities to the RCC and ACJ Notes beyond those which the Committee thought justified.

But even were the James Interests correct in their factual assertion, they are wrong as a matter of law in contending that Section 77 gave the Commission no power to make anything but "minor changes" in proposals of the parties. Congress had no intention of creating reorganization machinery under which, to use the language of WP Corp., "It may be that no plan can be devised which will meet both these tests," *i.e.*, be both "compatible with the public interest" and "fair and equitable." "The result is simply that no reorganization can be accomplished."[1]

The James Interests rely upon the fact that in the expression "the Commission * * * shall approve a plan, *which may be different from any which has been proposed*,"[2] the italicized words may, as a matter of composition, be parenthetical. Their argument gives to the form of composition a wholly unnatural and unnecessary effect in construing it as defeating the legislative intent indicated by Congress.

The report of the House Committee on Judiciary, of which Representative Sumners of Texas was Chairman, stated:

> "The section [77 (d)] specifically provides that the plan recommended by the commission may be one of several plans presented, a modification of any, *or an entirely new plan of the commission.*" (72nd Cong.,

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[1]WP Corp. main brief, p. 20.

[2]All italics in quoted matter throughout this brief have been supplied, unless the contrary is indicated.

2nd Sess., Report No. 1897 to accompany H. R. 14359).[1]

II

The argument that in determining whether a plan is "compatible with the public interest" the Commission may limit only the new fixed charge obligations and is powerless to require that any part of the existing debt shall be converted into stock

The James Interests argue that because Section 77(b)(4) expressly provides that a plan shall provide for fixed charges for which "there shall be adequate coverage * * * by the probable earnings available for the payment thereof," the Commission is without power, in the "public interest," to relate contingent charges to "probable earnings reasonably foreseeable for the future"[2] or to concern itself that the new shares of common stock (allotted to senior creditors for part of their claims) shall not "become mere tokens for stock market speculation."[3] The Commission's belief that the "public interest" (let alone the private

[1]Representative La Guardia, also a member of the House Committee on Judiciary, who took an active part in guiding Section 77 through the House, stated:

"Lest there be the slightest doubt as to the wide power and control the new section 76 [77] intends to grant to the Interstate Commerce Commission over railroad reorganization, I will say that it is the intent of the drafters of this section—which was taken from my bills H. R. 13958 and H. R. 14110—and I know the intent of the majority of the Committee on the Judiciary and the House to give the Interstate Commerce Commission *broad and complete powers in the initiation, formulation, and approval of any plan* for the reorganization of a railroad engaged in interstate commerce * * *." (76 Cong. Rec. 4130)

[2]WP Corp. main brief, p. 23. This argument seems to be echoed in the RCC main brief, p. 32.

[3]ACJ main brief, pp. 50, 51, 53-54.

rights of the parties) requires consideration of such problems is dismissed as "an attempt to read into the statute economic and political theories which were not within the contemplation of Congress"[1] and characterized as a seizure by the Commission upon a "catch phrase as an escape from the duties imposed upon it by * * * Section 77."[2]

In the light of the comment of another of the James Interests entities[3] that the intent of Section 77 was to attain "economical reorganizations entirely purged of the evils of the past as exemplified by the 1928 equity reorganization of The Chicago, Milwaukee and St. Paul Railway Company," this argument of the James Interests evidences blindness to the developing attitudes over the last two decades toward corporate reorganization problems, not only in Congress and other public regulatory bodies, but among securityholders themselves. The Debtor's reference to the 1928 *Milwaukee* reorganization doubtless had in mind the controversies as to the Commission's regulation of expenses which arose *after* the consummation of the reorganization.[4] The alleged "evils" in that reorganization against which the Commission protested had to do primarily with an alleged excess of income mortgage debt and an alleged unduly favorable treatment of old stockholders.[5]

Can there be any doubt that both the "public interest" and the "private rights" of the securityholders require that

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[1]ACJ main brief, p. 120.

[2]ACJ main brief, p. 52.

[3]Debtor's main brief, p. 21.

[4]*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U. S. 311 (1931).

[5]*Chicago, Milwaukee & St. Paul Reorganization*, 131 I. C. C. 673 (1928), see particularly Commissioner Eastman's dissenting opinion at p. 701 *et seq.*

a new railroad corporation emerging from a Section 77 reorganization shall not start out as a financial cripple burdened with a debt structure, whether bearing interest fixed or contingent, wholly destructive of its credit and dooming it to early recurrence of bankruptcy?

As early as 1907 the Commission, in *Consolidations and Combinations of Carriers,* 12 I. C. C. 277, 306, said:

> "It is of the utmost importance, also, that railway securities should be safe and conservative investments for the public, and should yield good and ample return for the money invested. Reasonable regulation will tend to make them safer and more secure investments, and thereby benefit not only the railway companies but the public."

Section 20a of the Interstate Commerce Act was the expression of that philosophy.

Long before Section 77 was enacted the Commission, in a 1924 reorganization case, said:

> "The public interests require that, before an issue of securities by a carrier is authorized, the probability of earnings sufficient to pay costs of operation and of fixed charges be reasonably established with some surplus for dividends and other purposes."[1]

As indicated by the cited cases in footnote 1 at page 123 of the Committee's main brief, the Commission has frequently forbidden the issue of railroad securities when prospective earnings were not sufficient to justify their issue.

The necessary conclusion from the argument of the James Interests on this point is that the intent of Section 77 must have been, not to strengthen the Commission's

[1] *Denver & Rio Grande Western Reorganization,* 90 I. C. C. 141, 148.

power to prevent the creation of financial cripples in reorganization, but to weaken that power.[1]

Their argument as to the intent of Congress gains nothing from the fact that subsection (b) (4) of Section 77 expressly requires "in the light of * * * earnings experience * * * adequate coverage of fixed charges by the probable earnings available for the payment thereof," while no standard is set for contingent debt or stock, other than compatibility with the public interest. Out of an abundance of caution, Congress precisely defined the "public interest" standard to be imposed with respect to fixed charges. As to those, it requires not only some reasonable hope that they might be earned at some time in the future, but a requirement that they have "adequate coverage" and that such coverage should be determined "in the light of earnings experience." This, of course, means that Congress requires, as to fixed charges, a *past* earnings experience which demonstrates a margin of earnings reasonably sufficient to insure continuous payment of fixed charges and maintenance of the credit of the reorganized company.

The Commission has suggested no such strict standards in determining the permissible amount of contingent interest-bearing debt and stock. It has, however, sought to relate them at least to the "most optimistic estimates" of future earnings.

The James Interests, however, urge that the "public interest" in the credit of a reorganized railroad will be satisfied if only the interest upon debt, however astronomical in relation to probable earning power, is contingent, and

[1]The Commission's contrary interpretation of Section 77 on this and other questions of statutory construction of its administrative powers, as worked out in practice, is itself entitled to great weight. An illuminating analysis of this point is contained in the September, 1942, Harvard Law Review. Note, 56 Harv. L. Rev. 100, 115.

the debt maturity is postponed to the indefinite future. Quite apart from the destructive effect upon the immediate credit of any railroad so capitalized, such a capital structure would compel financing of all future capital expenditures by new fixed interest debt, for the new stock would be wholly worthless and the new contingent interest obligations wholly unsalable at any reasonable price. The seeds of future insolvency would thus be sown in the reorganization itself.

Also, quite apart from questions of "public interest," observance of the "absolute priorities" of senior creditors prevents the use of debt-overburdened capital structures in reorganization. The lack of comprehension by the James Interests on this score is evidenced by their proposal, above referred to, that the present First Mortgage Bondholders' absolute priorities should be met by the allotment for each $1,000 5% First Mortgage Bond, with accumulated interest, of a $1,000 new 4% *wholly non-cumulative* Income Mortgage Bond of 41 years later maturity. Not only would maximum annual income on the First Mortgage Bondholders' claim thus be reduced 20%, but on the earnings record of the Debtor's properties to date that diminished return would have been received in very few years and, to the extent not received in any year, would lapse. On the other hand, from the hoped for substantial earnings of 1942, and any other prosperous years, all the surplus over the diminished return to the First Mortgage Bondholders would go to junior interests.

This Court's opinions in the *Los Angeles Lumber*[1] and *Consolidated Rock Products*[2] cases negative any such treatment of the Western Pacific First Mortgage Bonds.

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[1] *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939).

[2] *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941).

III

The argument that Section 77 distinguishes "earning power" from "probable prospective earnings"

In determining reorganization value, subsection (e) of Section 77 requires "due consideration to the *earning power* of the property, past, present, and prospective." Subsection (b) requires that "after due consideration of the *probable prospective earnings* of the property in the light of its earnings experience * * *, there shall be adequate coverage of such fixed charges by the *probable earnings* available for the payment thereof." Upon this slight variation of language, the James Interests base an argument that by "earning power" Congress meant something entirely different from "probable prospective earnings," or "probable earnings, reasonably foreseeable."[1]

While the James Interests are ambiguous as to just what they think is the measure of "earning power," their insistence upon the constitutional inviolability of physical value as found under Section 19a of the Interstate Commerce Act gives some slight clue. Apparently they think that the "earning power," or as they put it, "capacity to earn," which determines reorganization value, is dependent solely upon the *maximum* physical capacity of the plant to transport freight and passenger traffic, at current rates and current operating expenses.[2] They would disregard

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[1]This attempted distinction runs throughout their briefs. WP Corp. main brief, pp. 7, 42, 51-53; ACJ main brief, pp. 21, 26, 46, 50, 88, 89.

[2]The argument of Mr. John L. Hall, in his brief as *amicus curiae*, filed in *In the Matter of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, Nos. 11-19, 32, on behalf of Five Railroad Debtors in Section 77 Proceedings, expands the argu-

the absence of traffic requiring that maximum capacity, as well as its effect upon both rates and operating expenses in the hypothetical millenium when such maximum traffic shall have been attained.

It is submitted that the slight differences of wording in subsection (e) and subsection (b) support neither the distinction taken by the James Interests nor the meaning of "earning power" for which they contend.

In their stress of "earning power" or "earning capacity" as something distinguishable from "probable prospective earnings" they cite the language of this Court's opinion in the *Consolidated Rock Products* case:[2]

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ment here made by the James Interests. Mr. Hall asserts that "earning power" means "not what the Commission may expect that the road *will* earn but what the Commission thinks it *can* earn." The context indicates that the word "can" is used, not in any relation to the realities, but as a synonym of "may," indicating the constitutional minimum below which earning power may not be regulated by reduction of rates. Indeed, in this expanded argument even current rates are irrelevant: "It does not depend upon the rates currently in effect. * * * The temporary existence or absence of competitive forms of transportation does not necessarily affect earning power, though it may affect earnings for the time being" (pp. 39-40). Thus put, the argument that "earning power" is not the same as "probable prospective earnings" as a test of reorganization value is nothing but a more involved way of stating the old contention that physical value as determined under Section 19a is reorganization value.

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[1]ACJ main brief, p. 38.

[2]*Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 525 (1941).

> "Findings as to the *earning capacity* of an enterprise are essential to a determination of the feasibility as well as the fairness of the plan of reorganization."

Did this Court intend to express some different standard when, in the sentence immediately succeeding that quoted by the James Interests, it said:

> "Whether or not *the earnings may reasonably be expected* to meet the interest and dividend requirements of the new securities is a *sine qua non* to a determination of the integrity and practicability of the new capital structure. It is also essential for the satisfaction of the absolute priority rule * * *."

IV

The argument that the physical value of the Debtor's properties as determined under Section 19a of the Interstate Commerce Act is constitutionally protected against foreclosure in a Section 77 reorganization

This argument runs through all the briefs, not only of the three James Interests,[1] but also of RCC.[2]

The respondents apparently do not recognize any such thing as "reorganization value," as contrasted with "physical value on the basis of reproduction cost less depreciation." As pointed out in the Committee's main brief,[3] their insistence upon the controlling effect of such physical value in determining both the problems of public interest and the rights of the present securityholders in a reorganization is due to their misconception that the term "value" has the same meaning for all purposes.

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[1]Debtor's main brief, pp. 23-29; ACJ main brief, pp. 9, 69, 88, 101; WP Corp. main brief, pp. 48-50.

[2]RCC main brief, pp. 30, 36.

[3]Pages 35-41.

The defect in the respondents' reasoning is patent from its very expression as found in the RCC main brief,

> "* * * the valuation of a railroad * * * pursuant to the provisions of Section 19a is the value upon which the owners of the railroad property are entitled to earn, *if they can*, a fair return, and * * * this value cannot be taken away from them excepting by judicial decree."[1]

All the respondents quite overlook that significant condition, *"if they can."* In the last twenty years the Western Pacific properties have had sufficient earnings to pay the contractual interest upon the aggregate claims of its secured creditors as of January 1, 1943,[2] in but one year (1926), and then only at the expense of substantial under-maintenance. In the cold light of that fact, it is no solace to the Western Pacific First Mortgage Bondholders that the Western Pacific has a fine plant, capable of handling a volume of traffic even in excess of that being handled in 1942.

Nor does the Committee believe that it is consistent with the recognition of the "absolute priorities" of the First Mortgage Bondholders, that they should be required substantially continuously to forego interest upon their investment in order to prevent foreclosure or cancellation of the equity of stockholders who provided a plant of such maximum capacity that only sporadically, if ever, could that capacity be actually employed. That, however, is the conception which the James Interests express of the relative

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[1]RCC main brief, p. 30.

[2]As of that date, the aggregate secured claims, including accumulated unpaid interest, will exceed $100,000,000.

rights of the Western Pacific First Mortgage Bondholders and the junior interests.[1]

The unsecured debt and stock claim of WP Corp., as well as a substantial part of the claim represented by the ACJ Notes, "have no value," not because of any "administrative *fiat*" of the Commission, but because the Western Pacific properties have failed to evidence any "power" or "capacity," "past, present, or prospective," actually to earn the moneys necessary to service the senior First Mortgage Bonds. After more than nine years of default upon that senior debt, there is no longer any "equity" to delay the "foreclosure and cancellation" of the valueless junior interests.

The accomplishment of that "foreclosure" does not, as RCC insists,[2] require a sale by foreclosure pursuant to a judicial decree *in an equity proceeding;* nor is this, as stated by RCC, "a reorganization of a company not found to be insolvent." This is a proceeding for dealing with a property found by the Commission, in every substantive sense and upon conclusive evidence, to be insolvent by more than $11,000,000.[3] It is also a judicial proceeding which contemplates ultimate foreclosure of valueless interests "by judicial decree." As will later be pointed out in this reply brief (Point XIV), the Commission Plan expressly pro-

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[1]ACJ main brief, pp. 47-48, 52, 69-71; Debtor's main brief, pp. 23, 31; WP Corp. main brief, pp. 7, 24-25, 51-53.

[2]RCC main brief, p. 30.

[3]The difference between the total secured and unsecured debt of the Debtor at January 1, 1939, in the amount of $95,733,029.75 (see the Committee's main brief, p. 5) and the Commission's reorganization value of the Debtor at not more than $84,027,559 (see the Committee's main brief, pp. 55 and 76).

vides for this foreclosure by a conventional sale allowing the foreclosed dissenting interests to realize, if they can, cash proceeds for their interests.

This Court's decision in the *Radford* case[1] not only affords no defense to such a foreclosure,—it establishes the First Mortgage Bondholders' right to such a foreclosure. There this Court was dealing with an attempt "to abridge, *solely in the interests of the mortgagor,* a substantive right of the *mortgagee* in specific property held as security," and this Court denied the effectiveness of the attempt. Here, too, a mortgagor (the James Interests) and a junior creditor (RCC) are again seeking to abridge, solely in their own interests, rights of the senior First Mortgage Bondholders.

V

The argument that the Commission failed to give consideration to the Debtor's system "as it exists today"

The James Interests insist that the Commission dealt only with "the earnings of the property of the debtor as that system existed prior to the changes made from 1927 to 1938."[2] This is perhaps another form of the argument which still continues in the James Interests briefs that the Commission Plan gives weight only to depression earnings.[3]

The Committee wholly agrees that depression earnings are not controlling, and that the Commission Plan must be

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[1] *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935), cited in ACJ main brief, p. 39, and in WP Corp. main brief, p. 16.

[2] ACJ main brief, p. 21.

[3] WP Corp. main brief, pp. 43, 53; Debtor's main brief, p. 31.

tested by the facts of today, not merely by those of 1939, when it was approved by the Commission.

That the capitalization under the Commission Plan cannot be sustained on the basis of depression earnings and that it can be supported only by a most optimistic view of probable prospective earnings, is conclusively established by the charts appearing opposite pages 58 and 59 of the Committee's main brief and by the rates at which the Commission Plan capitalized average earnings for various past periods, including the period from 1939 to 1941, as shown on page 60 of the Committee's main brief.

The James Interests argument, however, now takes the form that the Commission failed to take into consideration, or at least to give any weight to, increased earning power due to the Northern California Extension (completed in 1931), the Dotsero Cut-off (a part of the lines of the Denver & Rio Grande, completed in 1934), or the rehabilitation program (completed in 1938).

Substantial evidence as to all three of the factors mentioned by the James Interests was incorporated in the record.[1] The evidence, as well as the possible effect of all three factors upon the "probable prospective earnings reasonably foreseeable," was fully discussed in the Commission's Report expressing the "reasons for its conclusions."[2]

So impressed was Commissioner Eastman with the weight which the Commission had given to the Northern California Extension in the development of the Commis-

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[1]R. 1942-48, 2094-98, 1939, 2099-2100, 1985-86, 2145-52, 2172-85, 2225-33.

[2]R. 203, 207-8, 212, 214-15.

sion Plan that, testifying as Chairman of the Commission in 1939 before a House subcommittee,[1] he said:

> "I will give as an illustration the case of the Western Pacific. There was evidence in the *Western Pacific* case that the recent opening of the new line to the north in connection with the Great Northern Railway [the Northern California Extension] had increased traffic and revenues, and that this increase was likely to continue for the future. In other words, there was evidence of the introduction at the end or toward the end of the period of 12 years of a new factor consisting of the opening of a new line with an actual demonstration of its traffic possibilities. That would, I think, be evidence tending to rebut the presumption with respect to the average earnings for the 12 years."

The Commission of course gave to the Northern California Extension no such weight as the James Interests seek to deduce from the figures appearing on page 28 of the ACJ main brief. Their conclusion from those figures is that the Northern California Extension has made a 26% additional contribution to the gross revenues of the system and that "if one were to project back to the pre-depression years a 26% contribution to gross from a part of the debtor's system which did not then exist, a quite different historical earnings' picture would be presented."

It will be noted that the figures used to support this claim attribute to the gross revenues of the Northern California Extension *all* gross revenues received by the Debtor

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[1]Transcript of hearings before Judiciary Committee on S. 1869 (76th Cong., 2nd Sess., 1939) 552-3.

from hauling over *any part* of the Debtor's system any freight which originated on or terminated on or passed over the Northern California Extension. In other words, if a ton of freight moved on the Northern California Extension from a point five miles distant from its connection with the Debtor's main line at Keddie, California, and then moved either 647 miles eastward to Salt Lake City or 281 miles westward to San Francisco over the Debtor's main line, *all* gross revenues received by the Debtor from the haul are attributed in the ACJ computation to the Northern California Extension. Undoubtedly a substantial part of such traffic does result from the Extension. On the other hand, undoubtedly a substantial part would be available to the Debtor even if it had not built the Extension.

Admittedly, the Northern California Extension is a valuable addition to the Debtor's properties, as those properties existed prior to *1932*. There is, however, no evidence whatsoever that it has increased, or will ever in the future increase, by 26%, the gross earnings of the Debtor's properties. Whatever may be the probable beneficial effect of the Extension, it was expressly appraised by the Commission, as an expert in such matters, and adequate effect given in the optimistic capitalization provided by the Commission Plan.

VI

The argument that in the twelve months ending July 31, 1942, the Debtor's properties earned "available for interest, a sum sufficient to cover its old fixed charges more than twice"

The ocular demonstration of the optimism of the Commission Plan capitalization, furnished by the charts inserted

opposite pages 58 and 59 of the Committee's main brief, is sought to be answered by the argument:

> "no amount of skillful argument or chart-making can cloud or conceal the fact that during the twelve month period from August 1, 1941 to July 31, 1942, as shown by the earnings statements filed by the Trustees in this proceeding pursuant to the order of the District Court and before this Court by stipulation, the debtor's railroad system earned $7,987,512 *available for interest, a sum sufficient to cover its old fixed charges more than twice.*"[1]

This Court must have been struck with the disparity between the earnings "available for interest" for 1940 and 1941, as stated on page 7 of the Committee's main brief and in the charts already referred to, and the earnings for the same years as stated in the ACJ main brief at page 24, the WP Corp. main brief at page 58 and the Debtor's main brief at page 32.

As explained in the Committee's main brief, the earnings stated by it for the years 1940 and 1941 take into account deductions for Federal income taxes (but not possible excess profits taxes) which would have been imposed had the Commission Plan been effective according to its terms. The footnote on page 7 of the Committee's main brief states the earnings after deduction of Federal income taxes, even on the basis of the Debtor's existing capitalization.

The figures stated in all the James Interests briefs do not make necessary adjustments, even for Federal income taxes under the laws applicable to those years upon a capital structure equal to that of the Debtor's present capital struc-

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[1]ACJ main brief, p. 25.

ture. The earnings, therefore, which the James Interests briefs describe as "available for interest" are in fact earnings available for *Federal income taxes and excess profits taxes* and for fixed charges.

Furthermore, in stating that the $7,987,512 of earnings for the twelve months ending July 31, 1942, constitutes "a sum sufficient to cover its old fixed charges more than twice," the James Interests compute "old fixed charges" in disregard of more than nine years of unpaid interest accumulated upon *all* the Debtor's existing obligations. The principal amount of obligations upon which "fixed charges" are contractually payable by the Debtor today exceeds by nearly 50% the amount upon which the James Interests base their computation.

If, therefore, the figures used by the James Interests are restated so as not to "cloud or conceal the facts" of (1) omission to take into account Federal income and excess profits taxes (of the probability of which this Court will surely take judicial notice), and (2) omission of accrued unpaid interest upon which the Debtor is contractually liable for fixed interest, the "wide margin" by which the James Interests assert that the Debtor's system earned "its interest requirements under its existing capitalization" will vanish.[1]

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[1]Within the last month two additional courts have realistically declined to be swayed by a debtor railroad's "war boom" revenues. *Guaranty Trust Co.* v. *The Minneapolis & St. Louis R.R.* (D. C. Minn., September 10, 1942, not yet reported); *In re Alabama, Tenn. & Mo.* (S. D. Ala., September 15, 1942). For discussion of this subject, see Committee's main brief, pp. 61-68.

VII

The argument that the Commission made no specific finding, in terms of dollars, of the earning power or of the value of the Debtor's properties either as an entirety or in respect of separate mortgaged segments

Admittedly, the Commission made no such precise valuations in formal findings. Nor did the Commission make any formal finding that the Debtor is insolvent. However, as pointed out in the Committee's main brief,[1] the Commission, in every substantive sense, did find that the properties of the Debtor as an aggregate had a reorganization value of less than $84,027,559 and therefore that the Debtor's financial condition was approximately $4,000,000 below the aggregate of its secured debt and more than $11,000,000 below the level of solvency. On the latter question, the Commission also specifically found not only that the Debtor's stock "has no value," but that its unsecured debt "has no value."

In the light of these findings and the Commission's elaborate statement of "its reasons for its conclusions," it is idle pretense for the James Interests to protest that their objections to the Commission's Reports and Orders in connection with the Commission Plan do not go to the form of the Commission's findings.[2]

They argue that "capitalization" is not necessarily synonymous with "valuation."[3] Of course. But the method by which the Commission built up the capitalization contemplated by the Commission Plan and then distributed it among the participating creditors in observance of their

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[1]Pages 55 and 76.

[2]WP Corp. main brief, p. 28.

[3]WP Corp. main brief, pp. 32-34; ACJ main brief, pp. 55-58.

"absolute priorities" did, in every substantive sense, fix a value for reorganization purposes for the Debtor's properties.

In this connection the James Interests[1] purport to find a fatal inconsistency in the fact that the Commission Plan allots to the senior First Mortgage Bonds new no par value Common Stock at $57 a share, whereas, in order to fill out the RCC claim in full, no par value Common Stock allotted to RCC would have to be taken at $62 per share. The inconsistency which the James Interests purport to find does not exist. The RCC claim, being junior to that of the First Mortgage Bonds, must, to the extent which it is allotted the same class of new securities as are allotted for the senior First Mortgage Bonds, take those securities upon terms less favorable than those given the senior First Mortgage Bonds.[2]

To give emphasis to their insistence upon precise dollars and cents valuations, the James Interests assert:

> "That the language of those who have negotiated reorganizations has always been, of necessity, one of dollars and cents, just as is the language of business generally, is brushed aside by counsel for the petitioners."[3]

In no railroad reorganization with which the Committee counsel has had any contact, or of which he has been informed during more than thirty years' experience in the problems of railroad reorganization, has either aggregate capitalization or distribution been based upon con-

[1]WP Corp. main brief, p. 34; ACJ main brief, pp. 57-58.

[2]*Kansas City Terminal Ry.* v. *Central Union Trust Co.*, 271 U. S. 445 (1926); *Case* v. *Los Angeles Lumber Products Co., Ltd., supra; Consolidated Rock Products Co.* v. *Du Bois, supra.*

[3]ACJ supplemental answering brief, dated October 9, 1942, erroneously labeled "Reply Brief," p. 15.

sideration of dollars and cents values of properties, old securities, or new securities. In all such cases, and in every railroad reorganization case before the Commission or the courts which the Committee counsel has been able to find, the factors considered have been those of aggregate earning power, and relative earning power of the various mortgage divisions. Reorganizers, whether in the old equity days or under Section 77, have never deluded themselves by attempting the impossibility of reducing old securities and new securities to a deceptive common denominator, expressed in dollars and cents.[1] The only two exceptions to this practice have been, as indicated in the Committee's main brief,[2] (1) in the case of old securities having security capable of ready liquidation for cash, particularly if in an amount exceeding the amount of the claim, and (2) in the case of a sale of new securities in the reorganization to provide new money.

VIII

The argument that the Commission Plan is "the most drastic plan ever proposed for a major property"

The Debtor's main brief characterizes the Commission Plan for the Western Pacific as with "one exception," the "most drastic plan ever proposed for a major property."[3]

The Commission has formulated plans of reorganization for eleven other major Class I carriers; three of these plans have been consummated, the remainder being in various stages of the procedure prescribed by Section 77.

Applying reported earnings of those carriers for the years 1923 to 1939, inclusive, to the new capitalizations

[1]See particularly the comments of the Court in *Guaranty Trust Company* v. *Missouri Pacific Ry. Co.*, 238 Fed. 812, 818 (E. D. Mo. 1916).

[2]Pages 85-86.

[3]Debtor's main brief, p. 22.

	West. Pac.	C. & E. I.[1]	C. G. W.[1]	C. & N. W.[1]	C. M. St. P. & P.[2]	C. R. I. & P.	Erie[1]	Mo. Pac.[2]	New Haven[2]	Frisco[2]	Cotton Belt
1923.....	$ .85	$ 8.70	$ 1.54	$ 4.54	$ 2.88	$ 3.79	$10.98	$ .12(D)	$ 8.09	$16.80	$18.55
1924.....	.32	2.17(D)	2.07	4.39	2.27	5.61	12.59	5.10	16.48	21.10	13.74
1925.....	3.71	1.83	2.26	6.16	1.34	6.19	9.61	6.52	22.52	23.12	13.90
1926.....	4.19	4.53	3.71	7.50	2.05	8.93	12.64	7.59	22.07	24.37	13.97
1927.....	1.15(D)	3.19	.90	5.97	.09	9.78	6.27	4.06	20.45	24.27	11.95
1928.....	.24(D)	2.96	3.99	8.01	7.24	10.18	12.05	8.49	27.65	26.94	10.29
1929.....	1.60(D)	3.32	5.77	11.20	6.59	10.78	13.57	11.55	34.48	23.81	6.73
1930.....	4.66(D)	44.11(D)	5.84	7.33	1.87	7.50	7.57	7.19	24.32	15.91	.38(D)
1931.....	10.11(D)	20.65(D)	4.08	5.71(D)	2.21(D)	2.78	2.42	3.61	14.75	3.49	1.38
1932.....	8.73(D)	18.91(D)	8.22(D)	9.74(D)	6.64(D)	3.45(D)	.56	5.16(D)	1.19	7.22(D)	13.75(D)
1933.....	7.42(D)	10.66(D)	3.30(D)	4.24(D)	2.48(D)	4.05(D)	4.21	6.00(D)	5.17(D)	7.58(D)	3.26(D)
1934.....	6.13(D)	8.02(D)	3.92(D)	5.72(D)	3.38(D)	4.98(D)	2.70	6.03(D)	6.53(D)	8.63(D)	2.28(D)
1935.....	7.00(D)	7.97(D)	3.38(D)	7.56(D)	4.23(D)	6.67(D)	2.49	9.07(D)	3.63(D)	10.36(D)	1.30
1936.....	8.96(D)	1.59(D)	1.66	6.09(D)	1.97(D)	5.41(D)	5.45	3.11(D)	5.08(D)	4.37(D)	4.70
1937.....	12.35(D)	3.61(D)	5.80(D)	10.83(D)	2.45(D)	3.15(D)	2.72	2.14(D)	11.20(D)	4.83(D)	.78(D)
1938.....	13.42(D)	7.45(D)	7.41(D)	11.29(D)	4.20(D)	4.44(D)	7.55(D)	7.95(D)	17.64(D)	10.74(D)	1.94(D)
1939.....	5.19(D)	5.83(D)	1.25(D)	5.80(D)	2.63(D)	2.49(D)	.80	6.09(D)	5.53(D)	6.46(D)	6.68(D)
Average[3]..	4.47(D)	6.26(D)	.09(D)	.70(D)	.35(D)	1.82	5.83	.50	8.07	7.10	3.97

[1]Plan approved by District Court. The C. & E. I., C. G. W., and Erie Plans have been consummated, and the C. M. St. P. & P. Plan has been rejected by the Circuit Court of Appeals for the Seventh Circuit on the ground of inadequate findings by the Commission. See Committee's main brief, p. 69, note 1, and p. 90, note 1.

[2]Set aside by the District Court on the ground of undue preference to certain classes and inadequate treatment of other classes of securityholders. See Committee's main brief, p. 133, notes 1 and 2.

[3]In this computation averages have been obtained by adding all the earnings, and subtracting all the deficits, for the years 1923 to 1939, inclusive, and dividing the result by 17.

(D) denotes deficit.

proposed in those plans (with one exception for which figures are not available) and to that proposed by the Commission Plan for Western Pacific, the earnings per share on the new common stock of the reorganized companies would be approximately as appears on the opposite page.[1]

It will thus be seen, not only that the Western Pacific Plan is *not* the most drastic of the various railroad reorganization plans formulated by the Commission, but that on the contrary, save for the C. & E. I. Plan, it is the most liberal of such plans. That the Western Pacific Plan errs, if anything, on the side of undue optimism and is out of line in that respect with other plans promulgated by the Commission, has been pointed out in an analysis of the Commission's plans in the Harvard Law Review.[2]

The figures[3] upon which the Debtor relies for its contrary assertion have to do with the relationship of prescribed annual charges through Preferred Stock dividends to the entire authorized capitalization, taking no par value Common Stock at $100 per share. This relationship is wholly irrelevant to the question of liberality or lack of liberality of the aggregate capitalization. The absurdity of the Debtor's argument becomes the more apparent when it is realized that if, as the Debtor urges, the aggregate capitalization were increased by the addition of substantially more no par value Common Stock, the percentage relationship stated by the Debtor would become even lower, and hence, by the Debtor's reasoning, the aggregate capitalization even "more drastic" in comparison with the capitalization under other plans promulgated by the Commission.

[1]In this computation, earnings applicable to sinking funds and capital funds are treated as redounding to the benefit of the Common Stock; which of course they ultimately do, and the Common Stock (if allocated on a basis other than $100 per share) is adjusted to a $100 per share basis.

[2]Note (1941) Harv. L. Rev. 653, 657.

[3]Debtor's main brief, p. 22, note 27.

IX

The argument that the treatment of the Trustees' Certificates and the RFC Notes violates the Reconstruction Finance Corporation Act

All of the arguments on the merits made by the various respondents against the Commission Plan's treatment of the Trustees' Certificates and the RFC Notes have, it is believed, been anticipated by the Committee's main brief[1] and by the RFC main brief.

The James Interests assert two alleged defects in the power of RFC to acquire the new securities provided for it under the Commission Plan, first, because the Commission will be unable to find as a matter of law that funds are not available to the Trustees or the Reorganized Company on reasonable terms through private channels, and, second, because RFC will be receiving an illegal fee or commission by consummating the exchange.[2]

The paragraph of Section 5 of the RFC Act which applies to railroads is reprinted as Appendix A hereto. A reading of that paragraph in its entirety makes it apparent that the requirement that funds be not available on reasonable terms through private channels applies only to *loans* made by RFC and not to the refunding by the RFC, as part of a reorganization plan, of outstanding *obligations* held by it.

Even in the case of a loan, the statute and the decisions of the Commission make it clear that the determination of whether funds are available on reasonable terms through private channels lies exclusively with RFC. The statutory

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[1] Pages 107-13.

[2] ACJ main brief, pp. 117-18.

requirement is that RFC may make loans to railroads "* * * when, *in the opinion of the Corporation,* funds are not available on reasonable terms through private channels * * *." On numerous occasions, the Commission has said:

> "* * * It is our view that the question of the ability of the applicant to obtain funds upon reasonable terms through banking channels or from the general public is committed by Section 5 of the Reconstruction Finance Corporation Act primarily to the corporation."[1]

Even if the Commission were required to go into the question as to whether, in the present case, funds are available on reasonable terms through private channels, it would have to take into account, as one of the factors affecting the problem, all the necessities of the reorganization. That $10,000,000 could not be provided on a long-term basis through private channels on terms as favorable as the provisions of the Commission Plan was conclusively established at the hearing before the District Court on January 22, 1940,[2] and again at the hearing before the District Court on the ACJ motion (see *infra,* pp. 29-30).

Equally untenable is ACJ's second contention that the Commission Plan is illegal in its treatment of RFC because the grant of preferential treatment to the RFC Notes in consideration of the exchange of the Trustees' Certificates for the less valuable new First Mortgage Bonds constitutes an illegal fee or commission. This contention

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[1] *Alton R. Co. Reconstruction Loan,* 184 I. C. C. 458, 459 (1932); *Chicago, R. I. & P. Ry. Co. Reconstruction Loan,* 184 I. C. C. 597, 600 (1932); see also *Chicago & E. I. Ry. Co. Reconstruction Loan,* 180 I. C. C. 639, 643 (1932); *Missouri Pacific R. Co. Reconstruction Loan,* 184 I. C. C. 3 (1932).

[2] R. 1530-1567.

is inspired by the following provision of Section 5 of the RFC Act:

> "* * * Provided, That no fee or commission shall be paid by any applicant for a loan under the provisions hereof in connection with any such application or any loan made or to be made hereunder, and the agreement to pay or payment of any such fee or commission shall be unlawful. * * *"

That proviso is not only by its terms inapplicable here, but the express intent of Congress further demonstrates how far afield the ACJ argument has gone.[1]

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[1]Representative Rayburn, who offered the amendment containing the proviso, explained his amendment on the floor of the House as follows:

> "* * * this amendment means simply this and nothing else, * * *
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> * * * * * * * * * *
>
> "* * * We have a great many ex-Congressmen, a great many ex-Senators, a great many ex-members of boards and commissions who have opened up law offices in Washington. We have many ex-attorneys for these boards and these commissions with offices in Washington. What they do is to go out and, by a campaign, convince these people, who are going to get money from these departments, or these bureaus, or these commissions, that the only way they can get it is to pay them 10 per cent. of the amount or more. * * *
>
> "The Interstate Commerce Commission is called upon in this bill to recommend and approve an application by a railroad for a loan under its provisions. Before the Interstate Commerce Commission, which is supposed to know all about these matters and is supposed to go into them minutely, approves a loan of $1,000,000 or $2,000,000, or any amount, they want to believe that when they approve it and when the money is paid over, the railroad that is in such distress will get all of it and not that some attorney or some ex-commissioner, or some ex-attorney for a board, or something like that will get 10 per cent. or 20 per cent. of the original amount." (75 Cong. Rec. 2101-2)

No elaboration on this explanation seems necessary to demonstrate the complete inapplicability of this provision to the facts of the present case.

A factual misstatement in the RCC main brief with respect to the treatment of the RFC claim should be called to the Court's attention. On page 14 that brief sets forth all the new securities allocated to RFC, RCC and ACJ, including, in the case of those allocated to RFC, the new Income Mortgage Bonds and Preferred Stock *expressly allocated as consideration for the RFC's exchange of Trustees' Certificates* for First Mortgage Bonds. In other words, the RCC table is not confined to the new securities allocated to the Refunding Mortgage Bonds pledged for the RFC, RCC and ACJ Notes.

In the table set forth on its page 13, the RCC main brief allots all these new securities among the RFC, RCC and ACJ Notes (again including those specifically allocable against the discount on the new First Mortgage Bonds accepted for the Trustees' Certificates) as if all these new securities had been allocated by the Commission Plan against the pledged Refunding Mortgage Bonds.

Neither RCC nor ACJ has ever offered to provide any part of the $10,000,000 in substance provided by RFC to refund the Trustees' Certificates. What possible basis, therefore, is there for them to share in the consideration paid to RFC for furnishing the $10,000,000 new money?

Three times the James Interests, sometimes seconded by RCC, have endeavored to render the Commission Plan nugatory by forcing the application of cash in the hands of the Reorganization Trustees to the payment of the Trustees' Certificates. Such use of cash resulting from earnings since the effective date of the Commission Plan might not only destroy the basis for the treatment of the RFC Notes under the Commission Plan, through retirement of the Trustees' Certificates, but it would also denude the estate of the cash necessary to service the new securities since January 1,

1939, the effective date of the Commission Plan. The District Court denied the first two attempts.[1] The latest effort of the James Interests to this end is pending in the District Court and is now set for hearing on November 2, 1942.[2]

The Reorganization Trustees' petition, upon which that hearing is to be had, is before this Court as Appendix A to the RCC main brief. It is quoted by RCC (at p. 19) as stating "that they have $6,000,000 of cash deposited with the RFC and expect to have six million more on hand on December first, at which time they can, *without impairing in anywise the reorganization*, pay off a substantial portion of the Trustees' Certificates."

The Trustees said no such thing. What they said was that they were of opinion "that they would be able, *without impairment of necessary working capital and without prejudice to the conduct of the railroad business of the Debtor*,"[3] to retire a substantial portion of the Trustees' Certificates. In other words, the Trustees said only that if they entirely disregarded all the requirements of the reorganization, they could pay a substantial part of the Trustees' Certificates.

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[1]Orders dated May 13, 1941, and November 26, 1941. See also *In re Western Pacific R. R.*, 38 F. Supp. 877 (N. D. Calif. 1941).

[2]The James Interests have objected to the Reorganization Trustees' acceptance of an offer of RFC to carry the Trustees' Certificates after their maturity December 1, 1942, under an arrangement that default may be declared only upon four months' notice and that the Trustees may continue to reduce the net interest payable in respect of the Trustees' Certificates by increasing their time deposits with RFC (now $6,000,000), on which RFC will allow the same rate of interest as that borne by the Trustees' Certificates (4%). This, of course, means that if the Trustees so deposited an amount equal to the face amount of the outstanding Trustees' Certificates, the latter would entail no interest charge.

[3]RCC main brief, pp. 45-46.

X

The argument that the relationship between the accommodation pledgors and the accommodation pledgees should be dealt with in the Commission Plan

The Debtor makes a new argument[1] for the benefit of the two other James Interests entities who furnished the Debtor, as an accommodation, some of the collateral pledged to secure the RFC and RCC Notes. Its argument is that, because the loan of the accommodation collateral by ACJ and WP Corp. made the accommodation pledgors creditors of the Debtor in respect of the accommodation pledge, the Commission Plan should deal with the entire problem of the accommodation collateral.

This argument, perhaps plausible at first blush, confuses the various relationships created by the accommodation pledges.

Included in the accommodation collateral were $2,000,000 Refunding Mortgage Bonds, pledged by ACJ to secure the RCC Notes. The accommodation pledge of those Bonds created these relationships:

> (1) RCC's right against the Debtor's property as pledgee of the pledged Bonds. This relationship is dealt with by the Commission Plan, which allocates to the RCC Notes the new securities allocated to the pledged Bonds.
>
> (2) ACJ's right against the Debtor for exoneration and indemnification in respect of the accommodation pledge. This relationship created a contingent

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[1]Debtor's main brief, pp. 14-17.

unsecured claim by ACJ against the Debtor, and the relationship is dealt with by the Commission Plan in its finding that the unsecured debt "has no value" and is not entitled to participation under the Commission Plan.

(3) ACJ's right to compel RCC to marshall by going first against the non-accommodation collateral and then against the accommodation collateral to the extent of any remaining deficiency. This is a relationship entirely between ACJ and RCC and cannot be dealt with in the Commission Plan, on the merits.

The latter proposition is not changed by the fact, adverted to by the Debtor,[1] that the Committee, as part of the compromise proposals and in order to secure some reorganization plan acceptable to the James Interests (the accommodation pledgors), suggested that the accommodation pledgees agree to return the accommodation collateral to the accommodation pledgors.

Most of the accommodation collateral, however, consists of securities, the property of WP Corp., which are not claims against the Debtor or its estate. The accommodation pledge of this collateral did not create relationships of the character described in the foregoing subparagraph (1). As a result of the accommodation pledges, WP Corp. has its unsecured claim for exoneration and indemnification against the Debtor, found valueless by the Commission Plan. The existence of that relationship cannot make the relationships between the accommodation pledgees, RFC

[1]Debtor's main brief, pp. 15-16.

and RCC, on the one hand, and the accommodation pledgor, WP Corp., on the other hand, a proper subject matter for the Commission Plan, in the *absence* of a compromise agreement by all the parties concerned.

XI

The argument that the new evidence before the District Court respecting Central California Traction and Alameda Belt properties required a change in the allocation of new securities against those properties

The Refunding Mortgage Trustee is correct in stating that new evidence with respect to the allocations against the Central California Traction and Alameda Belt properties was introduced before the District Court.[1] That evidence had to do largely with additional studies of the traffic contributed by those two properties to the Debtor's directly owned lines.[2]

However, like the James Interests analysis of the contributions of the Northern California Extension,[3] those studies attributed to the two properties all the gross revenues realized by the Debtor from all the haulage on Debtor properties of every ton of freight which originated on or terminated on or was carried over either of the two properties. The result was that the gross revenues from a ton of freight originating on one of the properties and terminating on the other were taken into the so-called contributed traffic studies twice. Of course on any such basis various

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[1]Refunding Mortgage Trustee's answering brief, p. 6.

[2]R. 1098-1106, 1309-17.

[3]ACJ main brief, p. 28. See p. 17, *supra*.

terminal and branch lines would soon pile up gross revenues materially exceeding those of the whole system.

The Refunding Mortgage Trustee's brief concedes that the Debtor has continually been compelled to contribute cash to these properties, both for operating deficits and for capital purposes.[1]

While the Commission found that they had "no material value," the Commission did give them recognition by allotting to the Refunding Mortgage Bonds all the Common Stock remaining after providing for the absolute priorities of the First Mortgage Bondholders.

Only by attributing the Common Stock allotted to the Refunding Mortgage Bonds against such residual values in the Refunding Mortgage property can the allotment of Common Stock to those Bonds under the Commission Plan be sustained.

XII

The argument that the Reorganization Committee contemplated by the Commission Plan should be eliminated and the reorganization carried out solely by the Debtor

We cannot believe that this Court would regard as proper administration any procedure which left the determination of all the problems involved in consummating the reorganization to *this* Debtor. Its interest in its properties the Commission has found to be of "no value," it is controlled by those whose interests conflict with those of the senior creditors, and it has demonstrated throughout this proceeding a consistent hostility to the First Mortgage Bondholders.

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[1]Refunding Mortgage Trustee's answering brief, pp. 9-10.

In any event, this problem is clearly a matter of administration within the discretion of the Commission. Notwithstanding that the Committee expressed, before the Commission, its entire willingness that the representative of the First Mortgage Bonds on the Reorganization Committee be elected by First Mortgage Bondholders, the Commission provided that one of the three Reorganization Managers should be designated by the Committee. The experience of the First Mortgage Bondholders which the Committee represents, it is submitted, justifies the Commission's confidence in it.

The Committee is, as urged by the Debtor, merely a group organized under subsection (p) of Section 77, and does not purport to act for any of the First Mortgage Bondholders who are not members of the group. It therefore does not purport to represent any of the $32,348,700 of First Mortgage Bonds which the Debtor asserts are "wholly unrepresented * * * except as they may be represented either by the mortgage trustees * * * or by the Debtor."[1] Certainly the Committee does not represent any of the $8,000,000 of First Mortgage Bonds held by the James Interests.[2] The Committee, however, has no conflicting interests, and it believes that its views regarding the rights of the First Mortgage Bondholders, with which the First Mortgage Trustees have been in entire accord, more probably represent the views of the holders of the $22,000,000 of First Mortgage Bonds who have not appeared in the proceeding than do the views of the Debtor.

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[1]Debtor's main brief, p. 5.

[2]Committee counsel has been advised by ACJ counsel that these James Interests First Mortgage Bonds, which the Committee clearly does not represent, have, since the taking of the record testimony, been increased to more than $10,000,000.

XIII

The argument that the District Court failed to exercise an informed, independent judgment

The James Interests urge that "as to questions of capitalization the District Court refused to pass judgment," that "because of the District Court's misconception of its functions no adequate review of the Commission's determinations was possible," and that "the opinion of the District Court shows complete surrender to * * * the Commission, and a complete acceptance of its preliminary determination of questions relating to the distribution of the new securities."[1]

Even a superficial reading of the District Court's 31-page opinion disproves this criticism by the James Interests.

Quoting the decision of this Court in *St. Joseph Stock Yards Co.* v. *United States,*[2] the James Interests assert[3] that "the Court must make an independent determination of challenged questions of law which are involved in administrative determinations and, if necessary, must examine the entire record, including the evidence."

This the District Court did. He not only "read the record;" he heard new evidence. He not only "carefully considered all the objections" and "read the briefs of the respective counsel in support of the objections," but he wrote a careful well-reasoned opinion on the main questions raised by the objections to the Commission Plan (alleged insufficiency of capitalization) and gave reasons for his conclusions, which added materially, both by quotations of

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[1]ACJ main brief, pp. 102-3. See also WP Corp. main brief, pp. 14, 18.

[2]298 U. S. 38 (1936).

[3]ACJ main brief, p. 111.

legal authority and by factual analysis, to the reasons given by the Commission.

Does the fact that after this examination of all the record, including participation in the making of a part of it, and this examination and exposition of law, the District Court was "wholly in accord" with all the conclusions reached by the Commission, evidence a lack of either independence or information in the reaching of that judgment?

To be sure the District Court did in a *dictum* discuss the relative functions of the Commission and the Court in language criticized by the Circuit Court of Appeals. That the proper determination of these relationships by this Court is sought by all the parties before this Court cannot change the fact, pointed out in the RFC main brief,[1] that the discussion was only a *dictum*. The District Court did independently determine all the disputed questions.

The following language used in this Court's opinion in the *St. Joseph Stock Yards* case[2] is therefore pertinent:

> "As the District Court, despite its observation as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration * * *."

XIV

The argument that the Commission Plan will be rendered nugatory by its rejection by the James Interests and RCC

The Committee agrees with the James Interests that when the Commission Plan comes before the District Court

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[1] Pages 86-88.
[2] 298 U. S. 38, 54 (1936).

for confirmation the James Interests and RCC will be entitled, as will also be the supporters of the Commission Plan, to make a further record. In the light of that record the District Court will again have to be "satisfied" and find that the Plan "makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it." Undoubtedly the James Interests will endeavor at that hearing to establish their present contention that the present high earnings of the Western Pacific are largely due to factors not related to the war effort,[1] but apparently to the perpetual elimination of such adverse competition as that of the Panama Canal and, presumably, trucks, busses and airplanes. Perhaps, too, if they are overruled they will carry out their threat to vote to reject the Commission Plan.[2]

But, to paraphrase what this Court said in another connection, "there is no necessity for this Court to yield to such pressures" in the proceeding immediately before it. The question now is whether, upon the record before the Court and all additional facts of which the Court may properly take judicial notice, the Court should affirm the District Court's approval of the Commission Plan in order to permit the taking of the next step in the reorganization procedure.

The Court cannot now determine all the issues which the ingenuity of the James Interests counsel will undoubtedly develop when the District Court shall enter its confirmation order. The Court can, however, by its present opinion, eliminate, not only for the *Western Pacific* case but for the other pending railroad reorganizations, a multitude

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[1]ACJ main brief, p. 26; Debtor's main brief, pp. 33-36; WP Corp. main brief, pp. 58-59.

[2]ACJ main brief, p. 6.

of arguments raised by objectors to the Commission plans which, it is believed, the Committee briefs in this proceeding demonstrate are wholly inconsistent with this Court's past decisions.

The Commission Plan itself contains adequate provision for dealing with those classes of creditors who may ultimately reject it, notwithstanding a finding of the District Court that it is fair and equitable.

That the James Interests would never cease their efforts to defeat the Commission Plan was foreseen both by the Committee and by the Commission. The Commission Plan therefore contains a provision which obviates any question as to whether the so-called "cram down" provision of Section 77, permitting the District Court to require dissenting classes to accept new securities found to be fair and equitable, constitutes due process, without a sale to insure a cash alternative. The Commission Plan provides that it may be consummated through the device of a sale at an upset price fixed by the District Court.[1] This provision, as already pointed out,[2] adequately takes care of the contentions of the James Interests and RCC that their rights cannot be foreclosed "without judicial decree" or the conventional foreclosure sale.

Of course such a sale is not a substitute for findings that the plan is "fair and equitable." But the presence of such a provision, under the circumstances of the *Western Pacific* case, should go far toward resolving any lingering doubt as to the fairness and equity of the Commission Plan toward the James Interests and RCC.

It affords in a substantial measure an ultimate pragmatic test of the soundness of the Commission's determina-

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[1] R. 350-52.

[2] *Supra*, pp. 14-15.

tion as to the value of the Debtor's properties for reorganization purposes. It also furnishes a practical test as to the sincerity of the James Interests and RCC in their constant assertions that the Debtor's properties are worth more than the amount of the senior secured claims—indeed, worth more than the full amount of all the secured claims. If the James Interests honestly believe the Debtor's properties to be worth more than the approximately $88,000,000 of secured claims,[1] the provision of the Commission Plan for an offer of the properties at an upset price will give the James Interests, as well as RCC, opportunity to render the Commission Plan nugatory by buying in the properties at such sale and capitalizing them in whatever manner they may determine, with the approval of the Commission.

In the literature dealing with reorganization problems, judicial sales of railroad properties have sometimes been characterized as meaningless fictions on the ground that junior creditors and stockholders are usually large numbers of small investors with small resources, wholly unorganized.

In the *Western Pacific* case the tenacity of the James Interests, and the battery of eminent counsel appearing for the several corporate entities included in the James Interests, evidence both the capacity for organization and the presence of adequate resources among the junior interests. This, therefore, is not the ordinary situation, but is one in which all of the dissenters are large corporations and, except for RCC, under common control. A judicial sale will be no meaningless gesture but, on the contrary, as above pointed out, will afford a practical test of the dissenters' contentions not only as to the value of the Debtor's properties

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[1] As of January 1, 1943, the amount, including accumulated unpaid interest, will exceed $100,000,000.

as an aggregate but as to the value of the properties upon which the Refunding Mortgage is a first lien.

From the legal standpoint such a sale will also clearly constitute "due process" in the elimination of the interests of WP Corp., should it fail to purchase the properties at such sale. As to the ACJ and RCC Notes, the Commission Plan preserves to them, notwithstanding any failure on their part to bid in the Debtor's properties at such a sale, an option to take the new securities allotted to them in the Plan in lieu of their aliquot portion of the proceeds of the sale.

Respectfully submitted,

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Petitioners.

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

Dated October 12, 1942.

APPENDIX A

Reconstruction Finance Corporation Act, Section 5 (15 U. S. C. § 605), as amended September 18, 1940[1]

* * * * * * * * * *

Each such loan may be made for a period not exceeding three years, and the corporation may from time to time extend the time of payment of any such loan, through renewal, substitution of new obligations, or otherwise, but the time for such payment shall not be extended beyond five years from the date upon which such loan was made originally. The corporation may make loans under this section at any time prior to the expiration of one year from January 22, 1932; and the President may from time to time postpone such date of expiration for such additional period or periods as he may deem necessary, not to exceed two years from January 22, 1932. Within the foregoing limitations of this section, the Corporation, notwithstanding any limitation of law as to maturity, *with the approval of the Interstate Commerce Commission, including approval of the price to be paid, may, to aid in* the financing, *reorganization,* consolidation, maintenance, or construction thereof, *purchase* for itself, or for account of a railroad obligated thereon, the *obligations* of railroads engaged in interstate commerce, or of receivers or trustees thereof, including equipment trust certificates, or guarantee the payment of the principal of, and/or interest on, such obligations, including equipment trust certificates, or, *when, in the opinion of the Corporation, funds are not available on reasonable terms through private channels, make loans,* upon full and adequate security, to such railroads or to receivers or trustees thereof for the purposes aforesaid: Provided, That in the case of loans to or the purchase or guarantee of obligations, including equipment trust certificates, of railroads not in receivership or trusteeship, the

[1]Italics in the text of the statute are supplied.

Interstate Commerce Commission shall, in connection with its approval thereof, also certify that such railroad, on the basis of present and prospective earnings, may reasonably be expected to meet its fixed charges, without a reduction thereof through judicial reorganization, except that such certificate shall not be required in case of such loans, purchases, or guaranties made for the maintenance of, or purchase of equipment for, such railroads: Provided further, That for the purpose of determining the general funds of the Corporation available for further loans or commitments, such guaranties shall, to the extent of the principal amount of the obligations guaranteed, be interpreted as loans or commitments for loans: And provided further, That the total amount of loans and commitments to railroads, receivers, and trustees, and purchases and guaranties of obligations of railroads, under this paragraph, as amended, shall not exceed at any one time $500,000,000, in addition to loans and commitments made prior to January 31, 1935, and renewals of loans and commitments so made: *Provided, That no fee or commission shall be paid by any applicant for a loan under the provisions hereof in connection with any such application or any loan made or to be made hereunder, and the agreement to pay or payment of any such fee or commission shall be unlawful.* Any such railroad may obligate itself in such form as shall be prescribed and otherwise comply with the requirements of the Interstate Commerce Commission and the corporation with respect to the deposit or assignment of security hereunder; without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification, other than such as may be imposed by the Interstate Commerce Commission and the corporation under the provisions of this section. The title of any owner, whether as trustee or otherwise, to any property leased or conditionally sold to a railroad, or a receiver or trustee thereof, which the Corporation has financed, or in the financing of which the Corporation has aided, any right of such owner to take possession of such property in

compliance with the provisions of any such lease or conditional sales contract, and the title of any owner of a collateral note evidencing a loan from the Corporation to a railroad not now in receivership or involved in proceedings under section 205 of Title 11, or a receiver or trustee thereof, and the right of any such owner to acquire title to the collateral securing such note, free and clear of any equity of redemption, in compliance with the contract of pledge, and thereafter to deal with the same as the absolute owner thereof, shall not be affected, restricted, or restrained by or pursuant to the provisions of Title 11, as amended, or by or pursuant to any other provision of law applicable to any proceedings thereunder.

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FILED
JAN 16 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~819~~ 820 7-8

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RAILROAD CREDIT CORPORATION IN OPPOSITION TO GRANTING PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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WILLIAM J. KANE

Attorneys for The Railroad Credit Corporation, Respondent.

QUINNIPIACK PRESS, INC., NEW HAVEN, CONN.

In The

Supreme Court of the United States

OCTOBER TERM, 1941

No. 820

In the Matter
of

THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor,

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,

Petitioners,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TABLE OF CONTENTS

PAGE

A. It was necessary to determine the values of the debtor's property in order to determine the value of each of the claims against such property or any part of it 1

B. These values should have been, but were not, determined by the Interstate Commerce Commission and certified by them to the District Court 2

C. Values so determined and certified by the Interstate Commerce Commission in a plan of reorganization may be employed by the District Court in the determination of the fairness of the plan, but such determination should be the result of the exercise by the District Court of its own independent judgment. Lacking the requisite valuation data this independent judgment could not be and was not exercised 3

D. The District Court should have entered an order dismissing the proceeding, or, in its discretion and on motion of any party in interest, have referred the proceeding back to the Commission for further action 4

1. Public Interest 6
2. Cases Relied on by Petitioners for Granting of the Writ 7
3. Interstate Commerce Commission is under Specific Statutory Mandate to Determine Value of Debtor's Property 8
4. No Conflict In Decisions 9
5. Conclusion 10

TABLE OF AUTHORITIES

PAGE

Case v. Los Angeles Lumber Products Co.,
308 U. S. 106, 115 ..... 3, 4, 7, 9

In re Chicago, Milwaukee, St. Paul & Pacific R. R.
(C. C. A. 7th, December 4, 1941, not yet reported) 7

Consolidated Rock Products Co. v. DuBois,
312 U. S. 510, 517, 525 (1941) 1, 2, 3, 4, 5, 7, 9, 10

First National Bank v. Flershem,
290 U. S. 504, 525 ..... 3, 4

Kansas City Terminal R. Co. v. Central Union Trust Co.,
271 U. S. 445 (1926) 9

Louisville Trust Co. v. Louisville, N. A. & C. R. Co.,
174 U. S. 683, 684 10

Magnum Import Co. v. Coty,
262 U. S. 159, 163 6

National Surety Co. v. Coriell,
289 U. S. 426, 436 ..... 3, 4

Northern Pacific Ry. v. Boyd,
228 U. S. 482 (1913) 9

TEXT

American Bar Association Journal, January, 1942 6

The Railroad Credit Corporation, a Respondent in the above entitled action, opposes the granting of either of the above entitled petitions for review on writ of certiorari and urges that the judicial discretion of this Court be exercised to deny such petitions because there is no special or important reason therefor; also, because none of the reasons set forth in paragraph 5 of Rule 38 exists for granting such petitions.

The decision and opinion of the Circuit Court of Appeals are in substance expressed in these statements:

A. It was necessary to determine the values of the debtor's property in order to determine the value of each of the claims against such property or any part of it.

The following is quoted from the opinion of the Circuit Court of Appeals: (unreported)

> "The holding company objected to the plan on the ground that it is not fair and equitable, but is unfair and inequitable, in that it excludes the holding company from participation in the reorganization. The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities.' Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan — January 1, 1939. Consolidated Rock Products Co. v. DuBois, 312 U. S. 510, 517–525."

* * * * *

> "To determine the value of the above mentioned claims, it was necessary to determine the value of (1)

the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. Consolidated Rock Products Co. v. DuBois, *supra*."

B. These values should have been, but were not, determined by the Interstate Commerce Commission and certified by it to the District Court.

The following is quoted from the opinion of the Circuit Court of Appeals:

> "Subsection (e) of § 77 provides: 'If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan.' In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500

of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage, and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed."

C. Values so determined and certified by the Interstate Commerce Commission in a plan of reorganization may be employed by the District Court in the determination of the fairness of the plan, but such determination should be the result of the exercise by the District Court of its own independent judgment. Lacking the requisite valuation data this independent judgment could not be and was not exercised.

The following is quoted from the opinion of the Circuit Court of Appeals:

"Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails. Consolidated Rock Products Co. v. DuBois, supra. See, also, National Surety Co. v. Coriell, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action."

All of the foregoing statements, (A), (B) and (C) were considered and affirmed by this Court in its decision and opinion in *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 517-535, which was a review and affirmation of the decision of this Circuit Court of Appeals. These questions of federal law so answered with finality are the only ones of substance involved in this case.

Lest there be any question as to the pertinency of this Court's opinion in the *Rock Products Case*, the following paragraphs are quoted from that opinion:

(p. 520)

> "We agree with the Circuit Court of Appeals that it was error to confirm this plan of reorganization.
>
> "1. On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' (National Surety Co. v. Coriell, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. Case v. Los Angeles Lumber Products Co., 308 U. S. 106. And see First Nat. Bank v. Flershem, 290 U. S. 504, 525." * * *

(p. 524)

> "We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said, it is apparent that a determination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole."

D. The District Court should have entered an order dismissing the proceeding, or, in its discretion and on motion of any party in interest, have referred

the proceeding back to the Commission for further action.

This last statement (D) is in substance the mandate of a part of Sub-section (e) of Section 77 of the Bankruptcy Act. The Circuit Court of Appeals followed the decision of the *Consolidated Rock Products Co. v. DuBois, supra,* and enforced the mandate of the statute in the case at bar.

From the foregoing this respondent claims that there is no special or important reason for granting the petition for certiorari or for a further review of issues already decided.

No special and important reasons which might be considered applicable to the allegations contained in said petitions are among those outlined in paragraph (5) sub-paragraph (b) of said Rule 38 as the following demonstrates.

Respondent claims: that no Circuit Court of Appeals has rendered a decision in conflict with another Circuit Court of Appeals on the matters embraced in either of said petitions; no decision of an important question of local law is involved; no decision of an important question of federal law has been rendered which has not been, but should be, settled by the Supreme Court of the United States; no decision of a federal question has been rendered which is probably in conflict with applicable decisions of the Supreme Court of the United States; there has been no departure from the accepted and usual course of judicial proceedings by the Circuit Court of Appeals for the Ninth Circuit nor any such sanction of such departure by a lower court as to call for an exercise of the supervision of the Supreme Court of the United States.

1.

PUBLIC INTEREST

Included in the reasons relied on by the petitioners for the allowance of the writ is the question of "public interest." This phrase, so frequently and freely cited by petitioners, is not among the "special and important reasons" scheduled in the rules of this Court as a basis for granting a petition for review. In the absence of those set forth in Rule 38(5), it may be assumed that the Circuit Court of Appeals is competent to be a court of last resort where public interest is involved and where there are no conflicting decisions of other Circuit Courts of Appeal and where the question has already been settled by this Court.

The petitioners are evidently of that class referred to and looked upon with disfavor by this Court in *Magnum Import. Co. v. Coty*, 262 U. S. 159, 163, where it was said that the certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." Inasmuch as none of the reasons advanced and relied on by petitioners for the granting of the writ comes within the rules of this Court, we feel that these petitioners fall clearly within the 80 percent referred to by this Court in the case just cited. It is interesting to note what the present Solicitor General of the United States said with reference to this matter in the January, 1942, issue of the American Bar Association Journal (p. 22), that "to apply for review unless there is very good reason to do so at least unnecessarily burdens the Supreme Court and seeks to make of it a sort of additional and final Circuit Court of Appeals, to the detriment of the proper sphere of influence of both the Circuit Court and the Supreme Court."

2.

CASES RELIED ON BY PETITIONERS FOR GRANTING OF THE WRIT

In support of their grounds for granting of the petitions, petitioners cite many cases decided by this Court, Circuit Courts of Appeal and Federal District Courts, some of which concern proceedings under Section 77B of the Bankruptcy Act, 11 U. S. C. § 207, the remainder involving questions of general law in proceedings other than under the Bankruptcy Act. A careful study of these cases has failed to disclose that the opinion of the Court in any one of them is in conflict with the decision rendered by the United States Circuit Court of Appeals for the Ninth Circuit in the case at bar. Consequently, the grounds may be termed the usual conventional objections.

One of the cases relied on is that of *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, decided by the United States Circuit Court of Appeals for the Seventh Circuit on December 4, 1941, and not yet reported. Petitioners allege that the decision of the Circuit Court of Appeals for the Ninth Circuit is in some respects in conflict with the opinion of that Court. Where the conflict, if any, exists respondent is unable to see. To the contrary, it is squarely in conformity with the findings of the Circuit Court of Appeals for the Ninth Circuit. Proceedings in each of these cases were under Section 77 of the Bankruptcy Act, as amended. Both involved the validity of reorganization plans certified by the Interstate Commerce Commission and approved, in both instances, by orders of the District Courts, each opinion finding an absence in valuation by the Commission of the Debtor's entire property which it is required to determine under Section 77(e) of the statute, the necessity of which this Court held in *Consolidated Rock Products Co., supra*, and *Los Angeles Lumber Co., supra*, was fundamental, without which "the court was in no position to

exercise the 'informed, independent judgment' * * * which appraisal of the fairness of a plan of reorganization entails." The orders of the District Courts were reversed and the proceedings remanded to the Interstate Commerce Commission for further action. It is significant that the opinions of both Courts were predicated upon a lack of finding of values in the plans of all properties involved in the reorganization, the duty of determining which under Section 77(e) rests on the Commission and not on the Court. To assert that the two opinions are inconsistent one with the other, and, therefore, in conflict, is to assume an argument not consonant with the principles upon which those decisions were founded and, consequently, comes within the realm of speculation and conjecture.

3.

INTERSTATE COMMERCE COMMISSION IS UNDER SPECIFIC STATUTORY MANDATE TO DETERMINE VALUE OF DEBTOR'S PROPERTY

Under Section 77B (11 U. S. C. § 207) the duty of determining value of the debtor's estate is left with the District Courts. This determination is a condition precedent to the approval of a plan, without which the Court would be unable "to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails." Likewise, in Section 77, a similar duty is imposed upon the Interstate Commerce Commission "so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity

remaining after the bondholders have been made whole." *Consolidated Rock Products Co. v. DuBois, supra.* By statute (Subsection (e) of Section 77) the Commission is under a specific duty "to determine the value of any property for any purpose under this section." Absent such a determination it is difficult to comprehend how a fair and equitable plan could otherwise be evolved so that the rights and interests of creditors and stockholders would be protected.

4.

NO CONFLICT IN DECISIONS

Petitioners have flooded their petitions with many cases offered for the purpose of establishing a conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit. Suffice it to repeat, not a single opinion in the cases cited as reasons for the granting of the writ of certiorari is in anywise inconsistent with the grounds upon which the case at issue was decided. These very cases upon which petitioners rely to show a conflict respondent relies, in the main, to show there is no conflict. Emphasis is laid upon the decisions of this Court in *Consolidated Rock Products Co. v. DuBois, supra,* and *Case v. Los Angeles Lumber Products Co., supra,* as authorities for supporting some possible grounds for warranting this Court in granting their petitions for the writ. We are satisfied from what has been stated above that the decision of the Circuit Court of Appeals for the Ninth Circuit is in no respects in conflict with these opinions. It is well settled that the decisions of this Court in *Northern Pacific Ry. v. Boyd,* 228 U. S. 482 (1913) and *Kansas City Terminal R. Co. v. Central Union*

Trust Co., 271 U. S. 445 (1926), and cited by the petitioners, established the doctrine and reasoning enunciated by this Court in *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 174 U. S. 683, 684, that "any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." Thus it will be readily apparent to this Court that these cases, rather than conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit, are on all fours with it.

No attempt will be made to burden this Court by a needless reference to the decisions of the several Federal District Courts and the reports of the Interstate Commerce Commission in the many citations offered by the petitioners. Besides being satisfied that there is no conflict of decisions affecting the issues in the case at bar, we respectfully submit that these questions of federal law were considered and affirmed by this Court in its decision and opinion in *Consolidated Rock Products Co. v. DuBois, supra,* which was a review and affirmation of the decision of this Circuit Court of Appeals. These questions of federal law so answered with finality are the only ones of substance involved in this case.

5.

CONCLUSION

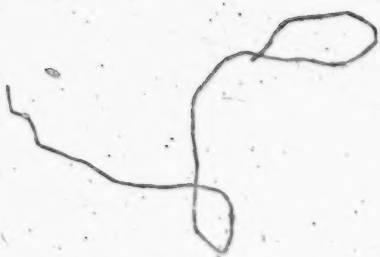
It is respectfully submitted that no grounds for certiorari are presented in the petitions; that the decision of the Court below reversing the Order of the District Court approving the Plan of Reorganization of The Western Pacific Railroad Company, Debtor, was in accordance with the requirements of

Section 77 of the Bankruptcy Act (11 U. S. C. § 205); that there is no special or important reason for granting the petitions for certiorari and that they should be denied.

Respectfully submitted,

EDWARD G. BUCKLAND,
WILLIAM J. KANE,
Attorneys for the Railroad Credit Corporation, Respondent.

Dated: January 16, 1942.



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Supreme Court of the United States

OCTOBER TERM, 1941

NOS. ~~819 AND 820~~ 7-8

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents,

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage, dated June 26, 1916,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents.

BRIEF OF A. C. JAMES CO., RESPONDENT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

ROBERT E. COULSON,
Attorney for
A. C. James Co., Respondent.

HORACE E. WHITESIDE,
Of Counsel.

New York, N. Y.
January 17, 1942.

TABLE OF CONTENTS

	PAGE
Opinions Below	2
Status of Respondent A. C. James Co.	3
Limited Scope of Decision Below	4
Summary of Argument	6
POINT I—The decision below is not in conflict with any decision of another Circuit Court of Appeals, or with decisions of this Court	8
POINT II—The decision below does not raise for the first time any important questions of Federal Law or public importance, but, on the contrary, is well within the principles clearly enunciated by this Court in affirming the Ninth Circuit in *Consolidated Rock Products Co.* v. *Du Bois,* which are, in the respects herein involved, as applicable to a proceeding under Section 77 of the Bankruptcy Act as to a proceeding under Chapter X of the Bankruptcy Act	16
POINT III—A consideration by this Court of the decree below is definitely premature since (a) the proposed plan under consideration by the Commission and District Court has not yet been submitted to the creditors for a vote of acceptance or rejection under Section 77, and may never become effective, and (b) a consideration of all aspects of the plan would require this Court to review a record of 2,677 pages and many questions, including questions of local law which have not yet been passed upon by the courts below	18

PAGE

POINT IV—The assessing of costs of appeal by the Circuit Court of Appeals against the appellees below, stressed by both petitioners herein as a ground for review, is not a matter of public interest, is in harmony with normal appellate procedure and the recoupment of such costs by the petitioners is adequately provided for under the express language of Section 77 of the Bankruptcy Act 20

In Conclusion 22

Appendix i

Bankruptcy Act, §77 (d) i
§77 (e) ii

In the Matter of The Western Pacific Railroad Company (C. C. A. 9, November 28, 1941) vii

TABLE OF AUTHORITIES

CASES.

PAGE

American Construction Company v. Jacksonville, Tampa and Key West Railway Company, 148 U. S. 372 20

Beaumont, Sour Lake & Western Railway Company v. United States, 282 U. S. 74 16
Borden's Co. v. Baldwin, 293 U. S. 194 17

Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106 ..... 8, 9, 11, 15
Chicago, Milwaukee, St. Paul & Pacific R. R. Co., *In the Matter of* (C. C. A. 7, December 4, 1941) (not yet reported) 9, 11, 12, 14
Cohens v. Virginia, 6 Wheat. 264 15
Consolidated Rock Products Co., et al. v. Du Bois, 312 U. S. 510 ..... 5, 6, 7, 8, 9, 11, 13, 16, 17, 18, 19, 23

PAGE

Dickinson Industrial Site, Inc. v. Cowan, 309 U. S. 382 21

Florida v. United States, 282 U. S. 194 ..... 16, 17

Interstate Circuit, Inc. v. United States, 304 U. S. 55 17
Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U. S. 88 16

Kansas City Southern Railway Company v. Guardian Trust Company, 281 U. S. 1 21

Hanover Star Milling Company v. Metcalf, 240 U. S. 403 20

Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310 17

National Labor Relations Board, Petitioner v. West Virginia Electric & Power Company, 62 Sup. Ct. 344 ..... 6, 19
Northern Pacific Railway Company v. Boyd, 228 U. S. 482 11

Public Service Commission of Wisconsin v. Wisconsin Telephone Company, 289 U. S. 67 17

Rathbun v. United States, 295 U. S. 602 15

Smith v. Illinois Bell Telephone Company, 282 U. S. 133 17

United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 282 U. S. 311 21
United States v. Chicago, Milwaukee, St. Paul & Pacific Railway Co., 294 U. S. 499 ..... 16, 17
Universal Battery Company v. United States, 281 U. S. 580 17

PAGE

Western Pacific Railroad Company, *In the Matter of*, (C. C. A. 9, November 28, 1941) (not yet reported) 5, 14
Appendix vii
Western Pacific Railroad Company, *In re*, 34 F. Supp. 493 22

STATUTES.

Bankruptcy Act, Section 77 ..... 2, 4, 7, 8, 9, 12, 14, 15, 16, 18, 19, 20, 21
Chapter X 7, 16
Interstate Commerce Act, Section 20 (a) 3

RULES.

Rule 52, Rules of Civil Procedure 17

Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 819 AND 820

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents,

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage, dated June 26, 1916,

Petitioners,

vs.

A. C. JAMES CO., and others,

Respondents.

BRIEF OF A. C. JAMES CO., RESPONDENT, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

These are separate applications by the Institutional Bondholders Committee and by the Trustees of the First Mortgage of the Debtor for a writ of certiorari to review

a decree of the United States Circuit Court of Appeals for the Ninth Circuit entered November 28, 1941, reversing an order of the United States District Court for the Northern District of California, Southern Division (Tr. 1600).

The District Court in a proceeding under Section 77 of the Bankruptcy Act for the reorganization of The Western Pacific Railroad Company, the Debtor, had approved a plan of reorganization certified to it by the Interstate Commerce Commission. Respondent, A. C. James Co., together with other parties in interest, appealed from the decision of the District Court. Upon such appeal the Circuit Court of Appeals for the Ninth Circuit entered the decree here sought to be reviewed, reversing the action of the District Court and remanding the proceeding to the District Court with directions to dismiss it or, in the Court's discretion, and on motion of any party in interest, to refer it back to the Commission for further action.

Petitions for rehearing as to the decree, here sought to be reviewed by this Court, were filed with the Circuit Court of Appeals for the Ninth Circuit on December 19, 1941, by Irving Trust Company, as Trustee under the General and Refunding Mortgage of the Debtor, and by counsel for the Debtor on December 23, 1941. These petitions for rehearing are, as we are presently advised, still pending before that Court.

Opinions Below

The opinion of the Circuit Court of Appeals, dated November 28, 1941 (Tr. 2663), reversing the District Court, has not yet been officially reported. For the convenience of the Court this opinion is printed in the appendix to this brief. The opinion of the District Court

is reported at 34 F. Supp. 493 and printed at pages 1569 to 1600 of the Transcript.

Status of Respondent, A. C. James Co.

This respondent, A. C. James Co., is a secured creditor of the Debtor in the principal amount of $4,999,800. With accrued and unpaid interest to January 1, 1939, its claim amounted to $6,249,750. The debentures which originally represented the claim were acquired by the respondent at public offerings in 1931 and 1932 and payment was made for such securities in cash at 100 cents on the dollar for the principal amount of the loan. The collateral notes which now represent the claim were received in exchange for the debentures in 1932 and are secured by General and Refunding Mortgage Bonds of the Debtor (Tr. 1084-5). Both the secured notes and the General and Refunding Mortgage Bonds were approved by the Interstate Commerce Commission under Section 20(a) of the Interstate Commerce Act at the time they were acquired by respondent. The funds advanced by this respondent were used by the Debtor for the construction of its Northern California Extension, a line connecting the lines of the Debtor with those of the Great Northern Railway Company. The operation of this Northern California Extension has largely and progressively increased the earning power of the Debtor (Tr. 1077-1078).

Under the plan of reorganization for the Debtor, which was certified by the Commission to the District Court, the secured claim of this respondent was recognized only in part. Taking the value of common stock without par value at $57.00 per share, the basis on which it was allocated to First Mortgage bondholders under the proposed plan,

approximately 58% of the claim of respondent was cancelled and not funded under the proposed plan of reorganization. Even at a value of $100 per share for the common stock without par value (a basis sometimes referred to by the Commission in its Reports) approximately 33% of the claim of respondent was cancelled and not funded.

The Commission found that the securities given the respondent were inadequate to satisfy its claim (Tr. 269) but it did not find the extent of the deficiency and it made no definite finding as to the value of the proposed common stock without par value or of the value of the equity represented by such common stock without par value. The Commission made no finding of value of the Debtor's property as a whole nor of the part of it subject to the lien of the General and Refunding Mortgage. The Commission and the District Court also failed to make findings as to other important matters, without which findings the fairness of the plan cannot be determined.

Limited Scope of Decision Below

The proposed plan of reorganization before the District Court was not a plan agreed upon by the parties in interest. It was formulated by the Bureau of Finance of the Interstate Commerce Commission, and promulgated by the Commission. It has not yet been submitted to the creditors for a vote of acceptance or rejection as required by Section 77 of the Bankruptcy Act.

Moreover, the decree of the Circuit Court of Appeals is, in a basic sense, interlocutory and preliminary only. The appeals from the decision of the District Court, which were filed by this respondent and other parties at interest,

raised a number of substantive and important questions with relation to the proposed plan, including questions as to the respective coverage of the liens of the First Mortgage and of the General and Refunding Mortgage of the Debtor, questions as to discrimination as between classes of secured creditors, and questions as to the preferential treatment of the Reconstruction Finance Corporation under the proposed plan. None of these questions were considered or passed upon by the Circuit Court of Appeals for the Ninth Circuit.

The reports and orders of the Interstate Commerce Commission, and the order of the District Court, approving the proposed plan, had been rendered prior to the issuance by this Court of its opinion in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, enunciating certain general principles applicable to corporate reorganizations, including the requirement that appraisal of the fairness of a plan of reorganization be based upon adequate valuation data and clear and definite findings.

The Circuit Court of Appeals for the Ninth Circuit, in the decree here sought to be reviewed, held that the Commission had failed to make the necessary valuation findings and factual determinations which would enable the Court to properly consider and pass upon the question whether the plan was fair and equitable as against the objections urged before it.

The crux of the decision here sought to be reviewed is set forth in the following language (Appendix, p. xiv):

> "Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails. Consolidated Rock Products Co. v. Du Bois, supra. See, also,

National Surety Co. v. Coreill, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action."

In language and in substance, the decision of the Circuit Court of Appeals, here sought to be reviewed, follows the clear and complete statement of principles laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 520. The decision entered by this Court on December 22, 1941 in *National Labor Relations Board*, v. *West Virginia Electric & Power Co.*, 62 Sup. Ct. 344, remanding a proceeding to an administrative agency for clear and adequate findings as to essential factual elements, is closely analogous.

Summary of Argument.

In this brief we seek to confine ourselves to a statement of the reasons why this Court should deny certiorari. Substantial portions of the petitions for certiorari and briefs, especially that on behalf of the Institutional Bondholders Committee, seem to us irrelevant upon the question whether a writ of certiorari should issue, and we refrain from discussion of such matters.

We do not, for instance, enter into any discussion of the merits or demerits of the proposed plan of reorganization which was certified to the District Court by the Commission. Suffice it to say that, if the Commission had supported the proposed plan by definite determinations, consistent with the proposed plan, of the prospective earn

ing power of the Debtor's property and of its value based on such earning power (which it clearly failed to do), such determinations would already have been proved inaccurate by the demonstrated earning power of the property, and this not solely because of war conditions but, for the most part, because the construction of the Northern California Extension, referred to above, the building of the Dotsero Cut-off, and certain other definite factors, have completely changed the economic status of the property and greatly increased its real earning power.

We shall here discuss primarily the following propositions:

1. The decision below is not in conflict with any decision of another Circuit Court of Appeals, or with decisions of this Court.

2. The decision below does not raise for the first time any important questions of Federal law or public importance, but, on the contrary, is well within the principles clearly enunciated by this Court, in affirming the Ninth Circuit in the *Consolidated Rock Products Co.* case, which are, in respects herein involved, as applicable to a proceeding under Section 77 of the Bankruptcy Act as to a proceeding under Chapter X of the Bankruptcy Act.

3. A consideration by this Court of the decree below is definitely premature since (a) the proposed plan under consideration by the Commission and the District Court has not yet been submitted to the creditors for a vote of acceptance or rejection under Section 77, and may never become effective, and (b) a consideration of all aspects of the plan would require this Court to review a record of 2,677 pages and many questions, including questions of local law, which have not yet been passed upon by the courts below.

4. The assessing of costs of appeal by the Circuit Court of Appeals against the appellees below, stressed by both petitioners herein as a ground for review, is not a matter of public interest, is in harmony with normal appellate procedure and the recoupment of such costs by the petitioners is adequately provided for under Section 77 of the Bankruptcy Act.

POINT I.

The decision below is not in conflict with any decision of another Circuit Court of Appeals, or with decisions of this Court.

At the outset it should be noted that the Commission reports of October 10, 1938 and of June 21, 1939 approving a proposed plan of reorganization for the Debtor were formulated and released before the decision of this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* and before the decision of this Court in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106. Also it should be noted that the order of the District Court approving the proposed plan in this proceeding was made before the decision of this Court in the *Consolidated Rock Products Co.* case.

We have not examined the records in the numerous proceedings under Section 77 of the Bankruptcy Act, referred to in the petition and brief on behalf of the Institutional Bondholders Committee as having been approved by District Courts. We find it difficult, however, to accept the rather dramatic language used in the brief of the First Mortgage Trustees (p. 14) that the decision of the Circuit Court of Appeals in the instant case "fell like a bombshell." It had, we think, been entirely clear to all persons

concerned with railroad reorganizations under Section 77 that those plans which had been certified by the Interstate Commerce Commission prior to the decisions of this Court in *Case* v. *Los Angeles Lumber Products Co., Ltd. supra,* and *Consolidated Rock Products Co.* v. *Du Bois, supra,* failed to meet the standards as to recognition of absolute priorities and definite findings of value required by the above-mentioned decisions of this Court. The decision of the Circuit Court of Appeals in the instant case was not only necessary but was inevitable.

We are advised that the issue of inadequate findings has been passed upon by a Circuit Court of Appeals in connection with only one other proposed plan for the reorganization of a railroad under Section 77 of the Bankruptcy Act. *In the Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co., Debtor,* not yet reported.

The Circuit Court of Appeals for the Seventh Circuit in its opinion of December 4, 1941, in that case arrived at the identical result reached by the Ninth Circuit in the instant case. The plan of reorganization there under consideration was remanded to the District Court and to the Commission for necessary findings.

After pointing out that the Commission did not, at the time of its report, have available for its guidance the decision of the Supreme Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* the Circuit Court of Appeals for the Seventh Circuit said, at pages 19 to 20 of its opinion:

> "As to the necessity and character of the findings, the Court in the Consolidated Rock Products case spoke and the rule it announced applies to the I. C. C. in railroad reorganization as fully as it applies to the District Court in other reorganization cases. Save as

modified by Sec. 77 (e) the Commission should follow the opinion in that case.

"In the report of the Commission there is a discussion of the various factors which were deemed pertinent in its inquiry into values. Absent, however, were clear cut findings or values which are so essential to the intelligent approval of the plan. Our criticism is not directed to the fact that the findings were embodied in the Commission's report (a large part of which is devoted to a discussion and statement of the evidence) rather than stated specifically as findings. But the fault lies in the fact that we are left uncertain, or in the dark, as to the finding of the Commission. The evidence might support a finding of a larger or a smaller amount. Which should we accept? The fact finding body is the I. C. C. It must find. We cannot.

"Somewhat similar was the situation in the case of *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 162, a case which arose from a three judge district court in this circuit. In the absence of specific findings the Supreme Court set aside the decree and remanded the cause to make the necessary and appropriate findings. It refused to accept the conclusions of the District Court as inferential expressions of its fact conclusions. See also, *Public Service Commission* v. *Wisconsin Telephone Co.*, 289 U. S. 67; *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160, and *Universal Battery Co.* v. *U. S.*, 281 U. S. 580.

"The explicit holding of the Consolidated Rock Products case is so mandatory that further discussion is unnecessary. We can not accept the Commission's discussion of the evidence as a finding. Nor may we make findings, save where there is no dispute, or dispute is not serious, in order to sustain the plan."

While the petitioners have sought in their briefs to spell out a conflict between the decision here sought to be re-

viewed and the decision of the Seventh Circuit in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, as well as with the *Consolidated Rock Products Company* case, itself, they are forced in this effort to superimpose some ingenious and extraordinary glosses on the language of the opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case. As a matter of fact, the language used in the Ninth Circuit opinion, here sought to be reviewed, follows almost verbatim the language used as to findings and determinations of value in the opinion rendered by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra.*

As an example of the extent to which the petitioners strained to create an appearance of conflict, note petitioners' attempt (Pet. No. 819 at pp. 30, 33; Pet. No. 820 at pp. 2, 8) to read into the decision of the Ninth Circuit a repudiation of the doctrine of absolute priority, in claimed conflict with the doctrines of *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482, as amplified and applied in *Case* v. *Los Angeles Lumber Products Co., supra*, and *Consolidated Rock Products Co.* v. *Du Bois, supra.* As a matter of fact, the doctrine of absolute priority as laid down by this Court was accepted in its full scope by every party before the Circuit Court in the instant proceeding, and nothing in the opinion questions the rule.

The petitioners seek to characterize the Ninth Circuit requirement of adequate findings of value, both for the purpose of capitalization of the Debtor and for the allocation of new securities, as requiring "a precise mathematical formula based upon exact dollar values" (Pet. No. 820, p. 7) and would hold it inconsistent with the identical requirement of adequate findings in the *Consolidated Rock Products Co.* case. The conflict is illusory. The peti-

tioners establish only that the Commission's doctrine of "equitable equivalent" (Tr. 316; Pet. No. 819, p. 32; Pet. No. 820, p. 5) is wholly inconsistent with the requirement of adequate findings and determinations announced by this Court.

How the Commission can make the valuations which it is expressly empowered to make under Section 77 without expressing such values in dollars, and how, even though earning power be given primary weight, this dispenses with the dollar yardstick, is not clear. Even estimates of earning power must necessarily be expressed in dollars and cents. The fact is, that in financial reorganizations one is necessarily dependent on the dollar yardstick, and no amount of esoteric phrasing will establish that the simple requirement of necessary determinations of value by the Commission involves a disregard of the priorities rule.

An examination of the opinion of the Ninth Circuit, here sought to be reviewed, in comparison with the opinion of the Seventh Circuit in the *Milwaukee* case, discloses only one possible difference of view between the two forums. That difference, if it exists, is not important or material for present purposes, and could not serve as a proper basis for reversing either decree. The Ninth Circuit, in the instant case, states as a reason for requiring a valuation by the Commission of the properties, as a whole, of the Debtor, the need for determining whether the equity may fairly and equitably participate in the reorganization. The Circuit Court of Appeals in the Seventh Circuit, in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, apparently accepts as adequate for its consideration of the plan before it, so far as the equity is concerned, findings by the Commission that such stock

is without value and seeks findings as to valuation of property only for the purpose of determining the interests of the various classes of creditors.

There is no necessary or inherent conflict of view between the two courts, even though the Circuit Court for the Ninth Circuit has asked for findings covering all essential elements of valuation prior to its consideration of any phase of the plan. In the case before the Ninth Circuit, it is obvious that the Commission must value the properties of the Debtor as a whole before the cancellation and rejection of a part of the claim of this respondent, a secured creditor, can be sustained by the courts as fair and equitable under the principles laid down in *Consolidated Rock Products Co.* v. *Du Bois, supra.* This phase of the problem the petitioners studiously ignore. In no event could this Court reverse the Circuit Court of Appeals for the Ninth Circuit as to the necessity for findings of value with reference to the treatment of this secured creditor, without reversing in part the doctrines which it has heretofore laid down clearly and explicitly in the *Consolidated Rock Products Co.* case.

Since each of the Circuit Courts of Appeals have decided that the analogous cases before them must go back to the Commission for lack of essential determinations of the value of the properties of the respective debtors, it matters little what minor differences of view they may have indicated as to the extent of inadequacy of the findings of the Commission shown by the respective records before them. This is not the sort of conflict which would properly invoke discretionary review by this Court.

A further alleged ground of conflict with the decisions of other Circuit Courts of Appeals and with decisions of

this Court is sought to be spelled out from the language used in the opinion of the Circuit Court of Appeals for the Ninth Circuit, as follows (Appendix, p. xvi):

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court."*

The doctrine there laid down by the Circuit Court of Appeals for the Ninth Circuit differs only in phrasing from the doctrine laid down by the Circuit Court of Appeals for the Seventh Circuit in its opinion in the *Chicago, Milwaukee, St. Paul & Pacific Railroad Company* case, as follows (at p. 19):

> "It would be begging the question to assume that findings were necessarily made by the I. C. C. when the allocation was made. We would be delegating to the I. C. C. an obligation which is ours. The Commission must formulate its plan. It must make fact findings supported by the evidence upon which its plan is based. We must independently determine whether the plan is fair and equitable. In reaching our conclusion we must ascertain (a) whether there is evidence sufficient to support the findings and (b) we must be able to say that the findings support the plan, and (c) the plan is fair and equitable."

Under the long-established practice of this Court, such general expressions in an opinion are to be read in con-

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* Each of the petitioners quotes this paragraph in part and omits the last sentence (Pet. No. 819, p. 23; Pet. No. 820, p. 9).

nection with the facts of the case and, except in such connection, are not controlling. *Cohens* v. *Virginia*, 6 Wheat. 264, 299; *Rathbun* v. *United States*, 295 U. S. 602, 627. When read in the light of the facts, the purport of the two statements is clear. Both are directed primarily to the basic requirement that the court, in determining whether a plan is fair and equitable, shall exercise an independent judgment. *Case* v. *Los Angeles Lumber Products Co., supra*; Bankruptcy Act, Sec. 77(e).

Even if the two statements may be taken as representing a difference of emphasis in the two circuits, one can scarcely invoke with propriety a review by this Court of extended records in complicated reorganization proceedings on the theory that two circuits may, at a later stage of each proceeding, when the Commission has made actual determinations as to the value of the properties of the Debtor, differ as to the weight to be given to the administrative findings. The problem is governed by the express provisions of Section 77 and this Court has heretofore expressed itself in numerous cases with complete definiteness and clarity as to the weight to be attributed to a finding of an administrative board as to a factual matter expressly referred to it by Congress. This Court may fairly assume that doctrines it has laid down will be followed by all Circuit Courts of Appeals dealing with proceedings under Section 77 of the Bankruptcy Act.

POINT II.

The decision below does not raise for the first time any important questions of Federal Law or public importance, but, on the contrary, is well within the principles clearly enunciated by this Court in affirming the Ninth Circuit in *Consolidated Rock Products Co.* v. *Du Bois*, which are, in the respects herein involved, as applicable to a proceeding under Section 77 of the Bankruptcy Act as to a proceeding under Chapter X of the Bankruptcy Act.

While it may be conceded that Section 77 of the Bankruptcy Act has not yet been fully construed by this Court in all its aspects, the question specifically decided by the Circuit Court of Appeals for the Ninth Circuit in the decision sought to be reviewed is not a question peculiar to Section 77 of the Bankruptcy Act, nor a question as to which if may fairly be said that there are not clear and definite rules of law laid down in prior decisions of this Court. Incidental to the growth of administrative tribunals during the past few decades, this Court has necessarily laid down at length the procedural requirements which must be met by administrative agencies in exercising fact-finding functions where private rights are fundamentally affected. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 294 U. S. 499; *Florida* v. *United States*, 282 U. S. 194; *Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74; *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Company*, 227 U. S. 88.

Nothing can be clearer than that this Court has repeatedly and emphatically imposed upon administrative agencies, dealing with questions of the type dealt with

by the Interstate Commerce Commission in the instant proceeding, the rule that no amount of discussion or generalization can take the place of definite findings. Neither general conclusions in the language of the statute nor a choice between conflicting inferences will suffice. *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Co., supra*; *Florida* v. *United States, supra*; *Universal Battery Company* v. *United States*, 281 U. S. 580; *Smith* v. *Illinois Bell Telephone Company*, 282 U. S. 133.

District Courts are also required to act upon the basis of explicit findings as to essential facts. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310; *Interstate Circuit, Inc.* v. *United States*, 304 U. S. 55; *Borden's Co.* v. *Baldwin*, 293 U. S. 194; *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Company*, 289 U. S. 67; *Consolidated Rock Products Co.* v. *Du Bois, supra*; Rule 52, Rules of Civil Procedure.

A party to a proceeding, like the respondent here (a secured creditor), who finds a part of his claim confiscated, is entitled to know precisely and definitely the basis upon which this is done.

This Court should not exercise its discretionary right of review to bring before it the question whether a Circuit Court of Appeals may properly send back a proceeding to an administrative body with a request for definite findings upon questions essential to the sound determination of the legal issues presented.

POINT III.

A consideration by this Court of the decree below is definitely premature since (a) the proposed plan under consideration by the Commission and District Court has not yet been submitted to the creditors for a vote of acceptance or rejection under Section 77, and may never become effective, and (b) a consideration of all aspects of the plan would require this Court to review a record of 2,677 pages and many questions, including questions of local law, which have not yet been passed upon by the courts below.

Petitioners urge strongly that a speedy reorganization of the Debtor will be facilitated if this Court now reviews the reorganization proceeding upon the whole record (Pet. No. 819, pp. 40-43). Their contention is buttressed by a claim that the parties whom they characterize as "junior interests" have set up obstacles to a rapid reorganization. It seems unnecessary to make detailed answer to this suggestion of unnecessary delay since the recital of the proceedings contained in the brief of the Institutional Bondholders Committee shows that that Committee participated with other creditors in filing objections to the Commission's plan at each stage before the Commission and in the District Court, and only supported the plan in its entirety when it reached the Circuit Court of Appeals for the Ninth Circuit, where the basic objections of the so-called "junior interests" have been sustained.

Actually the reorganization of the Debtor can be expedited only by an immediate return of the proceeding to the Commission for the findings which are required by the general principles applicable to all reorganizations as laid down by this Court in *Consolidated Rock Products Co.* v.

Du Bois, supra. It is quite true that the Circuit Court of Appeals has failed to consider or pass upon numerous questions involved in the proceeding, including questions of local law. The position of the Circuit Court of Appeals is that, until the Commission has performed the task, expressly imposed upon it by Section 77, of making the requisite determinations as to the valuation of the property in its entirety and in its separate segments, the Court cannot go forward upon the task imposed upon it by Section 77.

As pointed out above, this conclusion of the Circuit Court of Appeals, as set forth in its decision, is entirely in accord with the well established principles enunciated by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* and *National Labor Relations Board* v. *West Virginia Electric & Power Company, supra.*

Many of the questions involved in a final determination of the fairness and equity of a plan require complicated factual determinations and some are questions of purely local law. There are, for instance, real and substantial questions involved in the proceeding as to the coverage of the First Mortgage and the General and Refunding Mortgage, respectively. These questions will, in normal course, be considered and passed upon by the District Court, after determinations and findings of value have been made by the Commission as to the properties in question. Only after the plan of reorganization has had full consideration by the Commission, by the District Court, and by the Circuit Court of Appeals, should a party to the proceeding be given leave to call upon this Court for a determination as to whether or not the Commission and the District Court, to whom primary jurisdiction is given by the statute, have failed in their statutory duties.

There is a further reason why review of this proceeding by this Court is necessarily premature. The plan under consideration in the reorganization proceeding has never been submitted to the creditors for a vote of acceptance or rejection as is specifically required by the express terms of Section 77(e) of the Bankruptcy Act. Under the statutory provisions a plan is necessarily inchoate prior to acceptance by the necessary percentage of creditors.

For this Court to remove from the normal course of orderly procedure and assume the burden of detailed consideration of an extended record as to a reorganization proceeding solely because a Circuit Court of Appeals has required further findings from an administrative agency, would be for this Court to assume, without compelling reason, the functions normally delegated to the inferior courts. *American Construction Company v. Jacksonville, Tampa and Key West Railway Company*, 148 U. S. 372, 384; *Hanover Star Milling Company* v. *Metcalf*, 240 U. S. 403, 408, 409.

POINT IV.

The assessing of costs of appeal by the Circuit Court of Appeals against the appellees below, stressed by both petitioners herein as a ground for review, is not a matter of public interest, is in harmony with normal appellate procedure and the recoupment of such costs by the petitioners is adequately provided for under Section 77 of the Bankruptcy Act.

Each of the petitioners for certiorari in this proceeding stresses the assessment of costs by the Circuit Court of Appeals against the unsuccessful parties in that Court as a ground for review of the proceeding (Brief for In-

stitutional Bondholders, pp. 43-44; Petition of the First Mortgage Trustees, p. 10). It is somewhat difficult to believe that this ground for review is urged with complete seriousness. While the costs and expenses of reorganization proceedings, even prior to the enactment of Section 77, have been matters of concern to the courts (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 282 U. S. 311; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 388), and while the very enactment of Section 77 may well have been motivated in part by problems arising in that field, it is difficult to see how the normal judicial procedure as to the assessment of costs (*Kansas City Southern Railway Company* v. *Guardian Trust Company*, 281 U. S., 1, 9) can be a ground for granting certiorari in this proceeding at this stage.

The Institutional Bondholders Committee is not a committee representing an entire class of security holders. It represents a group of insurance companies and one bank, which hold, in the aggregate, 34% of the Debtor's First Mortgage Bonds. These institutions are seeking to promote, quite properly, their proprietary interests, as holders of First Mortgage Bonds of the Debtor, in opposition to the interests of the secured creditors, who hold General and Refunding Mortgage Bonds as collateral, and other parties at interest. Such a group of litigants, acting in their own special interests, should be assessed normal costs like any other litigant.

Moreover, in view of the stress which the brief for the Institutional Bondholders Committee places upon its public service in "defending Commission proposals" (Pet. No. 819, p. 43), it is of interest to note that the District Court has already allowed to the Institutional Bondholders Committee the sum of $64,190.91 for their expenses up to

November 1, 1939, in connection with these proceedings and with the proposed plan of reorganization, including $50,000 for counsel fees. (*In re. Western Pacific Railroad Company*, 34 F. Supp. 493, at page 508.)

As to the First Mortgage Trustees, they are in a real sense volunteers in the proceeding. They have, throughout this proceeding, cooperated with the Institutional Bondholders Committee and urged the contentions of that Committee. This course has been at all times without any mandate, express or implied, from the remaining 66% of the First Mortgage bondholders, not members of the Institutional Bondholders Committee.

Here again it should be noted, however, that the District Court has already allowed these First Mortgage Trustees the sum of $32,554.11 up to November 1, 1939, to reimburse them for their services and expenses in these proceedings and in connection with the proposed plan of reorganization. (*In re. Western Pacific Railroad Company*, 34 F. Supp. 493, at page 508.)

It cannot be assumed that the Commission and the Court will be less liberal in the future, than in the past, with these petitioners as to the expenses involved in their participation. Certainly it cannot be said that the jurisdiction of this Court may properly be invoked at this stage of the proceeding to protect these petitioners from a present payment of costs in the Circuit Court of Appeals.

IN CONCLUSION.

For the several reasons above stated, it seems clear: (a) That there is no conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit and the decisions of other Circuit Courts of Appeals or decisions of this Court as to any of the issues involved in the

decision here sought to be reviewed; (b) that the decision of the Circuit Court of Appeals is clearly in conformity with established principles of reorganization law, laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra*; and (c) that any consideration by this Court of the entire proceeding would be premature, unduly burdensome, and would postpone rather than accelerate a final reorganization of the Debtor.

We further submit that the Circuit Court of Appeals for the Ninth Circuit has acted with complete propriety in remanding the proceedings to the District Court and to the Commission for consideration under the principles laid down by this Court in *Consolidated Rock Products Co.* v. *Du Bois, supra,* in view of the fact that consideration by the Commission and the District Court of the instant case antedated that decision by this Court and that essential determinations of value were not made by the Commission.

We respectfully urge that the petitions for certiorari should be denied.

Dated, New York, N. Y., January 17, 1942.

Respectfully submitted,

ROBERT E. COULSON,
Attorney for A. C. James Co.,
Respondent.

HORACE E. WHITESIDE,
of Counsel.

APPENDIX

Bankruptcy Act, § 77 (11 U. S. C. § 205).

* * * * * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations

acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceeding under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission there-

on or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: Provided further, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency

or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: 'Provided, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): Provided further, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the

officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: Provided further, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 9714—Nov. 28, 1941

IN THE MATTER OF

THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

THE WESTERN PACIFIC RAILROAD COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

IRVING TRUST COMPANY, Trustee,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

THE WESTERN PACIFIC RAILROAD CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

RAILROAD CREDIT CORPORATION,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

A. C. JAMES COMPANY,
Appellant,
vs.
RECONSTRUCTION FINANCE CORPORATION et al.,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

Before DENMAN, MATHEWS and STEPHENS, Circuit Judges.

MATHEWS, Circuit Judge:

These appeals are from an order of the District Court[1] which, in a proceeding by The Western Pacific Railroad Company, a railroad corporation (hereafter called the debtor), under § 77 of the Bankruptcy Act, 11 U.S.C.A. § 205, approved a plan of reorganization which had been approved and certified to the court by the Interstate Commerce Commission.[2] The debtor has outstanding:

1. Trustees' certificates issued pursuant to paragraph (3) of subsection (c) of § 77 in the principal sum of $10,000,000. These certificates are owned and held by Reconstruction Finance Corporation.[3]

2. First mortgage 5% bonds dated June 26, 1916, due March 1, 1946, in the principal sum of $49,290,100, with accrued and unpaid interest thereon of $13,143,776—a total of $62,433,876—secured by a mortgage (hereafter called the first mortgage) of which Samuel Armstrong and Crocker First National Bank of San Francisco are trustees.

3. General and refunding mortgage 5% bonds (hereafter called refunding bonds) dated January 1, 1932, due January 1, 1957, in the principal sum of $18,999,500, secured by a mortgage (hereafter called the refunding mortgage) of which Irving Trust Company is trustee.[5] These bonds are pledged to secure payment of the notes hereafter mentioned. They have not been issued for any other purpose.

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[1] 34 F. Supp. 493, 505-509.

[2] 233 I.C.C. 409, 441-455.

[3] 122 F. 2d 807.

[4] As of January 1, 1939, the effective date of the plan.

[5] Irving Trust Company succeeded The Chase National Bank as trustee on November 13, 1936.

4. Notes in the principal sum of $2,963,000, with accrued and unpaid interest thereon of $899,870 — a total of $3,862,870—secured by the pledge of refunding bonds in the principal sum of $10,750,000 and other collateral. These notes are owned and held by Reconstruction Finance Corporation.

5. Notes in the principal sum of $2,445,610, with accrued and unpaid interest thereon of $146,503[6] — a total of $2,592,113—secured by the pledge of refunding bonds in the principal sum of $4,000,000 and other collateral. These notes are owned and held by Railroad Credit Corporation.

6. Notes in the principal sum of $4,999,800, with accrued and unpaid interest thereon of $1,249,950—a total of $6,249,750—secured by the pledge of refunding bonds in the principal sum of $4,249,500 and other collateral. These notes are owned and held by A. C. James Company.

7. Unsecured indebtedness to The Western Realty Company in the principal sum of $50,000, with accrued and unpaid interest thereon of $11,667—a total of $61,667.

8. Unsecured indebtedness to The Western Pacific Railroad Corporation (hereafter called the holding company) in the principal sum of $5,768,791, with accrued and unpaid interest thereon of $1,980,429—a total of $7,749,220.

9. Six per cent preferred stock of the par value of $28,300,000 (283,000 shares of the par value of $100 each) owned and held by the holding company.

10. Common stock of the par value of $47,500,000 (475,000 shares of the par value of $100 each) owned and held by the holding company.

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[6] These are the Commission's figures (233 I.C.C. 452). They differ slightly from those mentioned in the court's opinion (34 F. Supp. 497).

The plan provides, in effect, that the above mentioned securities and obligations shall be canceled and that, in lieu thereof, the reorganized company[7] shall issue new first mortgage 4% bonds dated January 1, 1939, due January 1, 1974, in the principal sum of $10,000,000, secured by a new first mortgage; income mortgage 4½% bonds (hereafter called income bonds) dated January 1, 1939, due January 1, 2014, in the principal sum of $21,219,075, secured by a so-called income mortgage; new 5% preferred stock of the par value of $31,850,297 (318,502.97 shares of the par value of $100 each); and 319,441 shares of new common stock without par value. These securities are to be distributed as follows:

To Reconstruction Finance Corporation, $10,000,000 of the new first mortgage bonds,[8] $1,185,200 of income bonds, $1,777,800 of new preferred stock and 15,788 shares of new common stock;[9] to the holders of first mortgage bonds now outstanding, $19,716,040 of income bonds, $29,574,060 of new preferred stock and 230,593 shares of new common stock;[10] to Railroad Credit Corporation, $154,111 of in-

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[7]The reorganized company may be the debtor or a new corporation to which all assets of the debtor shall be transferred.

[8]Thus the $10,000,000 of receivers' certificates now held by Reconstruction Finance Corporation would be exchanged for new first mortgage bonds, dollar for dollar.

[9]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Reconstruction Finance Corporation would receive $306.82 of income bonds, $460.12 of new preferred stock and 4.087 shares of new common stock.

[10]Thus, for each $1,000 of indebtedness evidenced by first mortgage bonds now outstanding, holders thereof would receive $315.79 of income bonds, $473.69 of new preferred stock and 3.693 shares of new common stock.

come bonds, $241,681 of new preferred stock and 35,425 shares of new common stock;[11] to A. C. James Company, $163,724 of income bonds, $256,756 of new preferred stock and 37,635 shares of new common stock.[12] The Western Realty Company and the holding company are excluded from participation in the reorganization.

Objections to the plan were filed by the debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation, A. C. James Company, The Western Realty Company and a bondholders' committee[13] representing holders of some of the first mortgage bonds now outstanding. The objections were overruled and the plan was approved. The debtor, the refunding mortgage trustee, the holding company, Railroad Credit Corporation and A. C. James Company have appealed.

Neither the debtor nor the refunding mortgage trustee was adversely affected by the plan or by the order approving it. Hence neither of them was entitled to appeal. King v. Buttolph, 9 Cir., 30 F. 2d 769; Loomis v. Gila County, 9 Cir., 101 F. 2d 827; In re Western Pacific R. R. Co., 9 Cir., 122 F. 2d 807. Their appeals are therefore dismissed.

The holding company objected to the plan on the ground that it is not fair and equitable,[14] but is unfair and in-

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[11]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, Railroad Credit Corporation would receive $59.45 of income bonds, $93.24 of new preferred stock and 13.666 shares of new common stock.

[12]Thus, for each $1,000 of indebtedness evidenced by notes now held by it, A. C. James Company would receive $26.20 of income bonds, $41.08 of new preferred stock and 6.021 shares of new common stock.

[13]The committee consists of Frederick H. Ecker, John W. Stedman and Reeve Schley.

[14]Bankruptcy Act, § 77(e)(1), 11 U.S.C.A. § 205(e)(1).

equitable, in that it excludes the holding company from participation in the reorganization. The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939. Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, 517-525.

Railroad Credit Corporation objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation and the holders of first mortgage bonds now outstanding [15] A. C. James Company objected to the plan on the ground that it is unfair and inequitable, in that it discriminates unfairly in favor of Reconstruction Finance Corporation, Railroad Credit Corporation and the holders of first mortgage bonds now outstanding.[16]

That Reconstruction Finance Corporation, Railroad Credit Corporation, A. C. James Company and the holders of first mortgage bonds now outstanding should participate in the reorganization is conceded. Fairness requires that their participation should be in proportion to the value of their respective claims. The question raised by the objections of Railroad Credit Corporation and A. C. James Company was whether the plan complies with that requirement. To determine this question, it was necessary to determine, as of the effective date of the plan,

[15] See footnotes 8-11.
[16] See footnotes 8-12.

the value of (1) each of the claims of Reconstruction Finance Corporation,* (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075 of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new common stock which the plan provides shall be distributed to said claimants.

To determine the value of the above mentioned claims, it was necessary to determine the value of (1) the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. Consolidated Rock Products Co. v. Du Bois, supra.

To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

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*Reconstruction Finance Corporation has two claims—one as holder of trustees' certificates, one as holder of the debtor's notes.

Subsection (e) of § 77 provides: "If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan." In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

Lacking the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails. Consolidated Rock Products Co. v. Du Bois, supra. See, also, National Surety Co. v. Coriell, 289 U. S. 426, 436; First National Bank v. Flershem, 290 U. S. 504, 525; Case v. Los Angeles Lumber

Products Co., 308 U. S. 106, 115. Therefore, instead of approving the plan, the court should have entered an order dismissing the proceeding or, in its discretion and on motion of any party in interest, referring the proceeding back to the Commission for further action.[18]

The District Court's opinion states (34 F. Supp. 501): "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned." The statement indicates a possible misconception. Subsection (e) of § 77 provides:

> "Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no

[18] Subsection (e) of § 77 provides: "If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action . . ."

objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge . . ."

In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not on the court.

Order reversed and proceeding remanded with directions to dismiss it or, in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action.

(Endorsed:) Opinion. Filed Nov. 28, 1941. Paul P. O'Brien, Clerk.

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Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 813 & No. 826

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation), Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE, *Petitioners,*

vs.

WESTERN PACIFIC RAILROAD CORPORATION (a corporation), et al. *Respondents.*

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company (a corporation), dated June 26, 1916, *Petitioners,*

vs.

WESTERN PACIFIC RAILROAD CORPORATION (a corporation), et al., *Respondents.*

BRIEF OF THE WESTERN PACIFIC RAILROAD CORPORATION IN OPPOSITION TO PETITIONS OF FREDERICK H. ECKER, ET AL. CONSTITUTING THE INSTITUTIONAL BONDHOLDERS' COMMITTEE, AND OF CROCKER FIRST NATIONAL BANK ET AL., AS TRUSTEES, FOR WRITS OF CERTIORARI.

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Subject Index

Page

Grounds of Petitions for Certiorari 2

I. In every material respect the decision of the Circuit Court of Appeals follows, and is supported by, decisions of this court. It has not decided any important question not settled by this court. It is not in conflict with the decision of another Circuit Court of Appeals..... 3

What did the Circuit Court of Appeals decide?.... 3

Before approving a plan of reorganization the court must exercise an "informed, independent judgment" on the question whether the plan is fair and equitable 5

Findings of value essential to enable court to exercise "informed, independent judgment"..... 8

The record contains no "findings" or "determinations" of value..... 12

The requirement of a finding or determination of the value of the entire property is not satisfied by the Commission's findings that "the equity in the existing stock has no value" and that "the claims of the unsecured creditors have no value"..... 13

The decision of the court below is not in conflict with the requirements of the absolute priority rule or with the necessity for maintaining the relative priorities 17

II. Further reasons assigned by petitioners for the granting of certiorari 19

Costs 19

Other railroad reorganization plans formulated by the Commission 20

General considerations 21

Table of Authorities Cited

Cases

	Pages
Baltimore & O. R. Co. v. U. S., 298 U. S. 347	8
Case v. L. A. Lumber Products Co., 308 U. S. 106	6, 11, 18
Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510	3, 4, 8, 9, 10, 11, 12, 13, 14, 18, 20
Continental etc. B. & T. Co. v. Chicago etc. Ry. Co., 294 U. S. 648	21
First National Bank v. Flershem, 290 U. S. 504	5
In re Chicago Milwaukee etc. R. R., 36 Fed. Supp. 193	17
In re Chicago Milwaukee etc. R. R. (C. C. A. 7th Circ., not yet reported)	11, 12, 14, 15, 16, 17, 20
In re 620 Church Street Bldg. Corp., 299 U. S. 24	14
National Surety Co. v. Coriell, 289 U. S. 426	5
Northern Pacific Railway Co. v. Boyd, 228 U. S. 482	11
Rowley v. Chicago & N. W. R. Co., 293 U. S. 102	10, 13
St. Joseph St. Co. v. U. S., 298 U. S. 38	8
Tennessee Pub. Co. v. American National Bank, 299 U. S. 18	6

Statutes

Bankruptcy Act, Section 77 (11 U. S. C. §205)	5, 6, 21, 22
Bankruptcy Act, Section 77B (11 U. S. C. §207)	5, 6

Rules

Rule 38, 5(b) (U. S. Sup. Ct.)	2
Rule 27 (C. C. A. (9th Circ.))	19

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 819 No. 820

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY
(a corporation), Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION
(a corporation), et al., *Respondents.*

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company (a corporation), dated June 26, 1916, *Petitioners,*

vs.

WESTERN PACIFIC RAILROAD CORPORATION
(a corporation), et al., *Respondents.*

BRIEF OF THE WESTERN PACIFIC RAILROAD CORPORATION IN OPPOSITION TO PETITIONS OF FREDERICK H. ECKER ET AL. CONSTITUTING THE INSTITUTIONAL BONDHOLDERS' COMMITTEE, AND OF CROCKER FIRST NATIONAL BANK ET AL., AS TRUSTEES, FOR WRITS OF CERTIORARI.

Two petitions for certiorari have been filed, one by the Institutional Bondholders' Committee and the other by the Trustees under The Western Pacific Railroad Company's First Mortgage. The two petitions raise substantially the same points, and the second, in large part, refers to, and relies upon, the first. In this brief, therefore, we shall seek to oppose both petitions.

The Western Pacific Railroad Corporation, which presents this brief, is the owner of substantially all the unsecured claims against the debtor, and is the holder of all the stock, preferred and common, of the debtor. By the Plan of Reorganization it is excluded, in each of these capacities, from participation in the reorganized company.

GROUNDS OF THE PETITIONS FOR CERTIORARI.

Both petitions for certiorari claim, as their principal grounds, that the decision (a) is "in conflict with applicable decisions of this court"; or (b) "has decided an important question of federal law which has not been, but should be, settled by this court"; or (c) is "in conflict with the decision of another Circuit Court of Appeals".[1]

We direct our attention, first, to the contentions of the petitioners just outlined.[2]

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1. These grounds are among those listed in the Rules of the Supreme Court as indicating, though not controlling this Court's discretion, reasons which will be considered upon petition for certiorari. Rule 38, 5(b).

2. Other and, we submit, subsidiary reasons advanced for granting the writ will be discussed later.

I.

IN EVERY MATERIAL RESPECT, THE DECISION OF THE CIRCUIT COURT OF APPEALS FOLLOWS, AND IS SUPPORTED BY, DECISIONS OF THIS COURT. IT HAS NOT DECIDED ANY IMPORTANT QUESTION NOT SETTLED BY THIS COURT. IT IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS.

What Did the Circuit Court of Appeals Decide?

Considering the complexity of the facts involved in a proceeding for the reorganization of a railroad, the opinion of the Circuit Court of Appeals[3] is brief and simple. In substance it lays down these propositions:

1. If (as was and is claimed by The Western Pacific Railroad Corporation[4] in its objections to the Plan) the debtor was not insolvent, but had property of a value in excess of its liabilities, the exclusion of that corporation from participation is unfair and inequitable.[5]

2. To determine the question raised by the foregoing objection of WP Corp. it was necessary to determine the value of the debtor's property. In support of this declaration the opinion cites *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 517-525.

3. RFC, RCC, ACJ and the holders of outstanding first mortgage bonds were holders of secured claims. The opinion of the Circuit Court of Appeals, after pointing out that their right to participate in the reorganization is conceded, declares that "fairness requires that their

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3. R. pages 2663-2674.

4. We shall refer to this respondent as "WP Corp." and to other parties by the abbreviations indicated on page 5, note 2, of the petition for certiorari of Ecker et al.

5. This proposition is, we submit, axiomatic. It is not questioned in either petition for certiorari.

participation should be in proportion to the value of their respective claims". To determine whether the Plan met this requirement, it was necessary to determine the value of the debtor's entire property, of each of the claims of each of these creditors, of the new securities to be issued on reorganization, of the property subject to each of the existing mortgages, and of the refunding bonds pledged to secure the claims of ACJ, RCC and RFC. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only; and (2) the property subject to both mortgages. This necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. To this declaration (i. e., of the necessity of determining values) the *Consolidated Rock Products* case is again cited as authority.

4. Subsection (e) of Section 77 provides that "if it shall be necessary to determine the value of any property for any purpose under this section, the Commission[6] shall determine such value and certify the same to the Court in its report on the plan". It being, as already held, necessary to determine the value of various items, it became the duty of the Commission to determine these values and certify them to the Court. That duty was not performed.

5. Lacking the requisite valuation data, the Court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails (citing the *Consolidated Rock Products* case, supra, and other cases).

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6. i. e., the Interstate Commerce Commission.

6. Instead of approving the plan the District Court should have entered an order dismissing the proceeding, or, in its discretion and on motion of any party in interest, referred the proceeding back to the Commission for further action.[7]

7. In determining whether a plan satisfies the requirements of subsection (e) of Section 77, the Court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment, whether the determination relates to value or to some other subject, although the duty of determining value rests initially on the Commission.

The foregoing summary includes substantially everything decided by the Circuit Court of Appeals in its opinion. It is submitted that there is nothing so decided which is not either in clear accord with the provisions of Section 77, or with the applicable decisions of this Court.

Before Approving a Plan of Reorganization, the Court Must Exercise an "Informed, Independent Judgment" on the Question Whether the Plan Is Fair and Equitable.

The rule stated in the foregoing heading is settled by repeated decisions of this Court. It has been applied in equity receiverships, as well as in reorganization proceedings under Section 77B of the Bankruptcy Act.

National Surety Co. v. Coriell, 289 U. S. 426, 436;
First National Bank v. Flershem, 290 U. S. 504, 525;

7. The order suggested as proper was embodied in the remand of the proceeding. It is in accord with subsection (e) of Section 77.

Case v. L. A. Lumber Products Co., 308 U. S. 106, 115;

Consolidated Rock Products Co. v. DuBois, supra.

See, also,

Tennessee Publishing Co. v. American National Bank, 299 U. S. 18, 22.

The provision of Section 77 is at least as strong and direct in this respect as was the provision of Section 77B.[8] Both petitions argue[9] that under subsection (d) of Section 77 the Commission has primary jurisdiction to determine whether a plan "will be compatible with the public interest", and that this includes jurisdiction "to determine total capitalization, the classification thereof, and the financial details of each class of proposed capitalization".[10] If the question were material, we would challenge, as we did in the Court below, the broad scope thus given to the "public interest" provision, as unsupported by any authority. The question does not, however, arise here. There is no reference to it in the opinion of the Circuit Court of Appeals.

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8. Section 77B(f) provided that "the Judge shall confirm the plan if satisfied (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible * * *." Section 77, subsection (e), provides that "the Judge shall approve the plan if satisfied that (1) it * * * is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders * * *."

9. Petition of Ecker et al. (pp. 25, 38-39); petition of Crocker Bank et al., as trustees (p. 5).

10. Petition of Ecker et al., page 25.

At any rate, whatever may be the extent of the Commission's authority over questions of "public interest", it is certainly clear that the Court must exercise its "informed, independent judgment" on every factor bearing on the fairness and equity of the plan. The proposed capitalization, and the details thereof, may be entirely compatible with the "public interest", but the Court must still determine, independently, whether, under such capitalization, the reorganization would be unfair or inequitable, or would discriminate unfairly in favor of any class of creditors or stockholders.

What has just been said indicates, as well, the answer to the criticism directed by the petition of Crocker Bank et al.,[11] and (inferentially perhaps) by the petition of Ecker et al.,[12] against the declaration in the opinion of the Court below[13] that the duty of determining value, where such determination is necessary, rests initially on the Commission, but that the Court must exercise its independent judgment on this, as on any other subject involved in deciding whether the plan satisfies the requirements of subsection (e). (These requirements include fairness and equity, want of unfair discrimination and conformity to the law of the land.) The question seems somewhat remote or abstract in the present case, where the Commission failed to make any determinations of value. But, regardless of this, how can the Court reach an informed, independent judgment that a plan is fair

11. Page 9.
12. Pages 38-39.
13. 7 in foregoing summary under head "What did the Circuit Court of Appeals decide?"

and equitable if it must accept as final the Commission's determinations of value—determinations which lie at the very base of an inquiry into the fairness and equity of the plan. We do not question that great weight and respect should be accorded to the views of an expert administrative body like the Interstate Commerce Commission, but the Court must still be "satisfied" with the findings of value before it can be "satisfied" that the plan is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class, and will conform to the law of the land.[14]

Findings of Value Essential to Enable Court to Exercise "Informed, Independent Judgment".

The findings which the Circuit Court of Appeals held to be necessary (and to be lacking) are set forth under 2 and 3[15] of the foregoing summary entitled "What did the Circuit Court of Appeals decide?".

The necessity for such findings is clearly and definitely decided by this Court in *Consolidated Rock Products* case supra.

We make no point on any verbal or formal definition of the word "finding". All that we claim is that before the District Court can approve a plan as fair and equitable, it must have before it an "ascertainment" or "appraisal"

14. Regardless of the general rules with respect to the force of administrative findings, the Court must weigh the facts independently where there is a claim of confiscation or other invasion of constitutional right. (*St. Joseph Stockyards Co. v. U. S.*, 298 U. S. 38; *Baltimore & O. R. Co. v. U. S.*, 298 U. S. 347.)

15. Ante, pages 3, 4.

or "determination" of the values which underlie the plan. The Circuit Court of Appeals uses the word "determination". This Court, in the *Consolidated Rock Products* case, speaks of "findings".

The petitions for certiorari[16] stress the following language of the opinion of the Circuit Court of Appeals: "Lacking the requisite valuation data, the Court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails". Except for the substitution of the word "Lacking" for the word "Absent", the sentence is an exact quotation from the opinion of this Court in the *Consolidated Rock Products* case.[17] From this language the petitioners, it would seem, seek to draw the inference that determinations or findings of value are not necessary if the record contains the basic data upon which such a finding or determination might have been made. There are two conclusive answers to this proposition:

(1) Unquestionably the record before the Commission contained a mass of data comprising an evidentiary basis upon which the Commission might have determined the value of the property. On this basis any one of a great variety of figures might have been fixed as representing the value. To appraise the value from this mass of data—investment, valuations under Section 19(a), past earnings, financial history, physical condition, and other elements—required the exercise of judgment and

16. Petition of Ecker et al., pages 34-35; petition of Crocker Bank et al., page 2.

17. 312 U. S. at 520.

discretion resulting in a final determination of value[18] Such determination not having been made, either by the Commission or the Court, it is of no consequence that the record contained material upon which it could have been made.

(2) The isolated expression "Absent the requisite valuation data" from the opinion in the *Consolidated Rock Products* case, supra, falls far short of presenting the true holdings of that decision. In further passages the necessity of "findings" of value is repeated and emphasized. At page 520 the Court says: "In the first place there must be a determination of what assets are subject to the payment of the respective claims". Again, at page 524: "We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said it is apparent that a determination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole". And, again, at page 525: "Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization".

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18. "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." (*Rowley v. C. & N. W. R. Co.*, 293 U. S. 102, 109.)

On the necessity for findings on the elements of value discussed above, the decision of the Circuit Court of Appeals for the Seventh Circuit in re *Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*[19] is in harmony, and not in conflict, with the decision of the Court below.

The opinion of the Court below in its holding that findings or determination of value and of elements of value are essential, relied upon and followed the decision of this Court in *Consolidated Rock Products* case. The opinion in the *Chicago, Milwaukee etc.* case takes the same course. The following quotations illustrate the closeness with which the Circuit Court of Appeals of the Seventh Circuit, like the Court below, guided its action by the opinion of this Court in the *Consolidated Rock Products* case.

> "The court in Consolidated Rock Products Co. v. Du Bois, infra, has pointed the way and laid down the applicable rules for our guidance. * * *
>
> "That it must be our text for determining the disposition of this appeal is quite clear.
>
> "The Consolidated Rock Products Company case, the Boyd case, and the Los Angeles Lumber Co. case[20] infra, read together, lay down the rules governing simple, as well as the fact-complicated reorganizations.
>
> "The Consolidated Rock Products case contains a complete statement of the applicable reorganization rules."

19. Decided December 4, 1941—not yet reported.
20. *Northern Pac. R. Co. v. Boyd*, 228 U. S. 482; *Case v. L. A. Lumber Products Co.*, 308 U. S. 106.

The opinion in the *Chicago, Milwaukee etc.* case then goes on to summarize the holdings of the *Consolidated Rock Products* case. One of these is stated as follows:

> "(j) Findings must be made on all vital issues, controverted and uncontroverted, and must include values of properties separately considered *and also of Debtor's property as a whole.* Findings must cover values of liens to be surrendered and values of securities given in exchange. They should specifically cover the ultimate (not evidentiary facts) facts upon which the values are based. They must show that fixed interest charges are included and show that values are based on income-producing factors." (Italics ours.)

The Record Contains No "Findings" or "Determinations" of Value.

The lack of necessary findings of value is admitted in the petitions for certiorari, in the one case directly, and in the other inferentially.[21] The petition of Ecker et al.[22] states "The Commission did not specifically find any certain and absolute value in terms of dollars and cents for all or any part of the Debtor's property, for any of the existing claims against or interests in the Debtor, or for any of the new securities contemplated by the Commission plan".

Both petitions refer repeatedly to "dollars and cents valuations" or "exact dollar valuations", or like expressions,[23] in the effort to show that no such valuations are required.

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21. Petition of Crocker Bank et al., pages 2, 4, 6, 7.
22. Page 19.
23. Petition of Ecker et al., pages 22, 24, 25, 28, 29, 30, 31, 33, 34, 37; petition of Crocker Bank et al., pages 4, 6, 7.

We know of no way in which the "value" of property (whether it be "market value" or "fair value" or "cash value" or value for purposes of taxation, or rate-making or reorganization) is to be measured or expressed otherwise than in terms of money, and that means (in the United States) in terms of dollars. We have already quoted[24] a passage from the opinion of this Court in *Rowley v. C. & N. W. R. Co.*, 293 U. S. 109, where the opinion treats the "actual value" of railroad property as synonymous with its "money equivalent".

What, in the judgment of the Commission, was the value (in dollars) of the debtor's entire property, of the property subject to the first mortgage, of the property, if any, subject to the refunding mortgage, or of the new securities to be issued? What did the Commission find or estimate to be the earning capacity of the railroad?[25] The record furnishes no answer to any of these questions.

The Requirement of a Finding or Determination of the Value of the Entire Property Is Not Satisfied by the Commission's Findings that "the Equity in the Existing Stock Has No Value" and that "the Claims of the Unsecured Creditors Have No Value".[26]

These findings are not specifically mentioned or discussed in the opinion of the Court below. That Court contented itself with declaring, in accord with the ruling of this Court in *Consolidated Rock Products* case, that in the face of a claim by unsecured creditors and stockholders that the value of the property was more than suf-

24. Ante, page 10.
25. See *Consolidated Rock Products Co. v. DuBois*, 312 U. S. at 525.
26. R. 269-270.

ficient to fully provide for all prior claims, the plan could not be approved as fair and equitable in the absence of a determination of the value of the debtor's property. We submit that in this the Court was clearly right.

As we have pointed out, both this Court in the *Consolidated Rock Products* case and the Circuit Court of Appeals for the Seventh Circuit in the *Chicago, Milwaukee, etc.* case held that a determination of the value of the entire property was essential. That requirement is not met by the mere declaration of the legal conclusion that the stock equity or the claims of unsecured creditors are without value. There is no way in which the District Court can measure or test the propriety or soundness of this conclusion in the absence of some basis of knowledge of the value of the property.

In their effort to maintain the adequacy, as support for the exclusion of unsecured claims and stock equity, of the findings that such claims and equity "have no value"[27] the petitions rely on *In re 620 Church Street Building Corp.*, 299 U. S. 24, and on Section 77(e).

(a) In the *Church Street* case (a proceeding under Section 77B) the Court was not confronted with a bare ultimate conclusion of "no value" in the junior mortgages or the stock equity. The findings of the trial Court are set forth in the opinion of this Court. They declare that debtor's property had a fair market value of $245,025 and that the amount of the first mortgage bonds was $445,500. These specific determinations obviously justi-

27. Petition of Ecker et al., pages 23-24, 29; Petition of Crocker et al., pages 6, 15, 16.

fied—indeed, required—the conclusions that the claims of junior mortgages had no value, and that there was no equity above the first mortgage. In the instant case, there was no finding or determination of the value of the debtor's property, and no basis, therefore, upon which the Court could exercise an "informed, independent judgment" on the presence or absence of value in the unsecured claims or the stock.

(b) The provision of subsection (e) relating to findings that the equity of stockholders or the interests of a class of creditors have no value, applies solely to the submission of the plan, after it shall have been approved, to classes of creditors or stockholders for acceptance or rejection. Findings of no value are significant only as justifying the exclusion of classes from the right to vote. They have no relation to the necessary determinations of value which are a prerequisite to the Court's approval of a plan—an approval which precedes the submission for acceptance or rejection.

It is contended by petitioners that in the *Chicago, Milwaukee, etc.* case, supra, the Circuit Court of Appeals for the Seventh Circuit regarded a finding that the equity of the stock had no value as sufficient to authorize the exclusion of the stock interest.[27a] If this be a correct interpretation of the opinion, it is still to be borne in mind that that Court insisted on the necessity for a finding of the value of debtor's property as a whole. Furthermore, in

27a. Press reports show that on January 13, 1942, after this brief had gone to the printer, the Circuit Court of Appeals (7th) filed a "supplementary opinion" in the *Chicago, Milwaukee, etc.* case decided by it on December 8, 1941. The full text is not available to us. Comment on the press report of the supplementary opinion is contained in an appendix to this brief.

the *Milwaukee* case, the "finding" of no value in the stock equity was supported (as it is not here) by findings which the Court regarded as adequate, independent findings of value. The opinion refers to the "substitute finding of capitalization figure which was arrived at by using as a basis the average annual sum available for fixed charges". If (which we do not concede) the total of the authorized capital of the reorganized company may be taken as a finding that the value of the debtor's entire assets is such total amount, the record in this case fails to show any specific amount of total capitalization authorized. The proposed new capital structure includes 319,441 shares of capital stock without par value[28]. In the plan itself, no value was assigned to these shares.[29] They were allocated to first mortgage bondholders and to RFC at $57, to RCC at $62, and to ACJ at no specific rate. The result is there is no way of measuring the amount of total capitalization. The petition of Ecker et al. argues[30] that the designation and allocation of the new capitalization was, in effect, a finding that the property and new securities had a value not in excess of $84,027,599—i.e., the aggregate of the new securities having a principal amount or par value, plus the 319,441 shares of common stock taken at $57 per share. But why $57, rather than $62, or some other amount?

28. Petition of Ecker et al., page 6.

29. There are, however, various passages in the Commission's reports indicating that these shares were "treated • • • at $100 per share" (R. pp. 244-45, 256, 259, 359). If so treated the total capitalization would amount to $97,763,522, or some $10,000,000 more than the aggregate of the secured claims and undisturbed obligations recognized under the plan.

30. Pages 35-36.

On the other hand, the plan in the *Milwaukee* case[31] set forth a total authorized capitalization in the specific sum of $548,533,321, which included no par common stock "shown at $100 per share".

The Decision of the Court Below Is Not in Conflict With the Requirements of the Absolute Priority Rule or With the Necessity For Maintaining the Relative Priorities.

At no time during the progress of this litigation has the WP Corp. questioned or disputed the propositions that creditors holding prior secured claims are entitled to satisfaction out of the assets in preference to holders of junior secured claims, or that the latter are entitled to satisfaction before any recognition can be given to unsecured creditors, or that the latter must receive due recognition before anything can be allotted to stockholders. Nor is the decision of the Court below inconsistent with established rules of priority.

The petitions for certiorari base their claim of conflict entirely upon the statement in the opinion of the Court below that "fairness requires that their (the secured creditors') participation should be in proportion to the value of their respective claims".[32] We confess our inability to understand why this statement in any way conflicts with the rights of secured creditors to either absolute or relative priority. We see no basis for the contention of petitioners that the quoted sentence "if taken literally"[33] means or that it "apparently requires"[34] that

31 See opinion of District Court, 36 Fed. Supp. 193, at 217.
32. Petition of Ecker et al., pages 30-32; Petition of Crocker et al., pages 4-5, 7-8, 16-18.
33. Petition of Ecker et al., page 33.
34. Petition of Crocker Bank et al., page 7.

the new securities are to be allocated to secured creditors in the exact mathematical proportions of the values, in dollars, of their respective claims. Those values are dependent, largely, upon earning power,[35] and the valuation of secured claims, as well as of the new securities to be allocated, must necessarily take into account the "varying levels of venture earnings" at which the assets securing the different claims, as well as the different new securities, "begin to show earning power".[36] To say, as the Court below said, that the participation of secured creditors should be "in proportion to the value of their respective claims" does not mean, therefore, that the allocation of new securities must be based on an exact mathematical formula which regards only the determined dollar values. A distribution which recognizes the earning levels at which existing securities, as well as new securities, "begin to show earning power" would be in proportion to the values of the secured claims.

We submit that the supposed conflict of the decision of the Court below with the *Consolidated Rock Products* case, with *Case v. L. A. Lumber Products Co.*, supra, or with decisions of Circuit Courts of Appeals does not exist, and that the argument that there is such conflict rests upon an attempt to expand and distort the language of the Court below by reading into it something which was neither stated nor intended by the Court.

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35. Under the last paragraph of subsection (e), earning power is not the sole, though perhaps the dominant, element, in determining value of property for any purpose under Section 77.

36. The words quoted are found in the Petition of Ecker et al., page 31.

II.

FURTHER REASONS ASSIGNED BY PETITIONERS FOR THE GRANTING OF CERTIORARI.

Costs.

Complaint is made[37] that costs of appeal were assessed against the appellees.

There is no reference to costs in the opinion of the Court below. The allowance of costs to the appellants followed automatically from Rule 27 of the Rules of the Ninth Circuit which provides: "In cases of reversal of any judgment or decree in this court costs shall be allowed to the appellant, including the cost of the transcript from the court below, unless otherwise ordered by the court." The rules of every other Circuit contain identical or similar provisions, as do the rules of this Court. The most, then, that can be said is that the Court below would have had discretion to relieve the appellees from costs, notwithstanding the reversal. It does not appear that the Court was asked to do so.

Was the failure to make an order varying the consequence which would normally flow from Rule 27 an abuse of discretion? Clearly, we submit, it was not. No good reason is suggested why claimants who attempt, without success, to sustain a plan of reorganization (which, presumably, they deem beneficial to them) should be preferred, in the matter of costs, to claimants who have succeeded in maintaining their objections to the plan.

But beyond this, the determination by the Court below, in its discretion, that costs should or should not be allowed to the prevailing party does not appear to present an

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37. Petition of Ecker et al., pages 26, 43, 44; Petition of Crocker Bank et al., page 10.

"important question of federal law" which would justify the granting of a writ of certiorari.

Other Railroad Reorganization Plans Formulated by the Commission.

The petition of Ecker et al.[38] points out that the Commission has formulated plans of reorganization for fifteen Class I railroads (including the Western Pacific) and claims that in all of these the findings of the Commission were "substantially identical in character" with those found by the Court below to be inadequate.

Some of these plans have been approved by District Courts. If time and space permitted we could show that the plans which have been approved in the District Court cases cited by this petitioner were supported by findings substantially different from those of the present case.[39] But an analysis of the records in other cases would be useless. The only case (other than this one) which has reached a Circuit Court of Appeals is *In re Chicago, Milwaukee, etc. R. R. Co.* already referred to, and in that case, as in this one, the order approving the plan was reversed for want of adequate "findings" or "determinations" of value. The reversal in each case was based upon the holdings of this Court in the *Consolidated Rock Products* case, which was decided on March 3, 1941, long after the Commission had certified its fifteen plans of reorganization to which the petition of Ecker et al. refers, and after the District Courts (including the Court which made the order of approval here involved) had acted in approving various plans of reorganization certified to them.

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38. Pages 26-27.

39. That is not to say that even in those cases the findings could be held adequate under the law laid down in the *Consolidated Rock Products* case.

It is unfortunate that time and labor may have been lost, and that further time and effort may be required to enable the Commission to certify plans which can properly be approved by District Courts, but if this is the necessary result of the law as laid down by this Court, that condition cannot be altered or ameliorated by this Court's ordering up the instant case in order to again decide what it has already decided.

General Considerations.

The petitions for certiorari urge two grounds which appear to us to have little, if any, relation to the considerations which actuate this Court in ordering up cases for its own review.

In the first place, attention is called to the purpose, underlying the enactment of Section 77, of expediting proceedings for the reorganization of railroads.[40] No one can question the desirability of a prompt and speedy disposition of reorganization proceedings. If, however, as we believe, the decision of the Court below is sound and is in accordance with the holdings of this Court in prior cases, the case must in any event be remanded to the District Court for such further proceedings as it may take under the statute. That Court would presumably, on motion of any party in interest, refer the proceedings back to the Commission for further action. We fail to see how an expeditious disposition of the proceeding would be furthered by delaying such reference to the Commission until these appeals may be heard, considered and decided by this Court.

40. *Continental etc. B. & T. Co. v. Chicago, etc. Ry.*, 294 U. S. 648.

Secondly, it is urged that certiorari should be granted because of the importance of a determination of all questions that have been raised or may ultimately be raised in this case, and so that many questions involved in the construction and application of Section 77 may be decided for the guidance of lower Courts, of the Commission, and of parties in other proceedings for reorganization.

It has long been the practice of appellate (and other) Courts to limit their decisions to questions necessarily involved in disposing of the particular matters brought before them. Without going into the cogent reasons for this settled rule, it may be pointed out that Section 77 is a long and involved statute, and that there is a real danger of confusion, and, perhaps, of error, in undertaking to go beyond the necessities of a particular case in the effort to clear up doubts which may arise at a later stage in the same case or in other cases. No one, we think, can foresee all the problems that may be presented in proceedings under Section 77, and it would, we believe, be vain to hope that a decision in any one case can so clarify the situation as to avoid future doubts and future appeals.

Dated, San Francisco, California,
January 16, 1942.

Respectfully submitted,

M. C. Sloss,
Sloss & Turner,
Attorneys for Respondent,
The Western Pacific Railroad Corporation.

(Appendix Follows.)

Appendix

RE SUPPLEMENTARY OPINION TO DECISION OF CIRCUIT COURT OF APPEALS (7th) IN CHICAGO, MILWAUKEE, ETC. R. R. CO. REORGANIZATION.

The full text of the supplementary opinion referred to in Note 27a at p. 15 (ante) will not be available to us within the time allowed for the completion of this brief. Our only information is a press dispatch appearing, under the date line of January 13, 1942, in the Wall Street Journal (Pacific Coast edition) of January 14, 1942. So far as can be determined from this dispatch, the effect of the supplementary opinion is that, with respect to the elimination of the stock equity, the Commission, in its further investigation, is not required to make findings beyond the finding that the equity has no value—*"unless it is convinced that changed conditions in railroad earnings warrant it"*. (Italics ours.) The clear implication is that as further hearing and investigation must be had in any event because of the lack of findings necessary to support other provisions of the plan, changed conditions appearing at the time of such further hearing may be considered. These changed conditions relate to increased earnings since the making of the Commission's report.

In its opinion of December 8, 1941, the court which decided the Milwaukee case made two declarations which sharply differentiate that case from the present one:

(1) It was said that evidence of an increase in earnings of the railroad, relied on by the stockholders, was not in the record. On the contrary, in the instant case, by express order of the District Court, made on the stipulation of all parties, the monthly and yearly statements

showing combined results of the operation of the properties of the debtor and its subsidiaries for the period subsequent to that covered by the evidence before the Commission, were filed and were made a part of the record on appeal (R. 2627-2632). Such statements, down to the end of September, 1941, are included in Volumes VII and VIII of the record (R. 2633-2838; 2641, 2644, 2646, 2649, 2652, 2654, 2656).

(2) That even if this evidence were considered, it would not, with the other evidence in the case, support a finding of value in the stock.

In the present case, the earnings record for the period following the original and the modified report of the Commission shows a striking and continuous increase in the earnings of the debtor's properties—an increase vastly greater, relatively, than that relied on by the stockholders in the Milwaukee case. Briefly stated, the adjusted earnings of the system available for interest in 1939 showed an increase of 563.04% over 1938; for 1940 there was a further increase over 1939 of earnings (unadjusted) of 81.41%; for the nine months of 1941 included in the record the earnings (unadjusted) available for fixed charges (R. 2656) increased from $933,533.00 in the comparable period of 1940 to $2,958,189.00, or an increase of 216.87%.

It is impossible to believe that the Commission, in the further investigation which it must make in any event, would, or properly could, close its eyes to this radical change of conditions affecting earnings, and stand upon the findings made by it several years ago that the unsecured claims and the stock equity are without value.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. ~~819 and 820~~ 7-8

IN THE MATTER
OF
THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

FREDERICK H. ECKER, *et al.*,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Respondents.

CROCKER FIRST NATIONAL BANK
OF SAN FRANCISCO, *et al.*,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Respondents.

ANSWER OF IRVING TRUST COMPANY AS REFUNDING MORTGAGE TRUSTEE, TO PETITIONS FOR WRIT OF CERTIORARI

ORRIN G. JUDD,
Attorney for Irving Trust Company, as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company.

HAROLD C. McCOLLOM,
Of Counsel.

Dated: March 5, 1942.

Appeal Printing Co., Inc., 130 Cedar St., New York - WO 2-3242

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By order of this Court dated February 2, 1942, the time of Irving Trust Company to file a brief in answer to the above-entitled petitions for certiorari was extended until twenty days following the action of the Circuit Court of Appeals for the Ninth Circuit on the petitions for rehearing there pending.

As pointed out in Irving Trust Company's motion in this Court dated January 16, 1942, the Circuit Court of Appeals had dismissed the appeal taken by Irving Trust Company, as Trustee of the Debtor's Refunding Mortgage (R. 2668), and had made no determination of the issues raised by that appeal (R. 1651) respecting the relative liens of the Refunding Mortgage and the Debtor's First Mortgage.

By amended order handed down February 16, 1942, the Circuit Court of Appeals set aside that portion of its former decree which dismissed the appeal of Irving Trust Company as Trustee (R. 2681); but it still made no determination of the questions of conflicting lien presented by such appeal.

In this status of the case the Refunding Mortgage Trustee, after consultation with its bondholders, has determined to take no position on the above-entitled petitions for certiorari. Both petitions relate mainly to the issues respecting capitalization and findings of value, which do not concern the Refunding Mortgage Trustee except to a limited extent; and neither of them can affect

the question of what properties are subject to the lien of the Refunding Mortgage.

Dated: March 5, 1942.

Respectfully submitted,

ORRIN G. JUDD,
Attorney for Irving Trust Company, as Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company.

H. C. MCCOLLOM,
Of Counsel.

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BRIEF FOR RESPONDENT, THE WESTERN PACIFIC RAILROAD CORPORATION.

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Subject Index

	Page
Reference to Opinions Below	2
Jurisdiction of This Court	2
Statement of the Case	2
Argument	4
Summary of the argument	4
Scope of this brief	8
I. The functions of the District Court and of the Interstate Commerce Commission under Section 77	9
All parties entitled to "informed independent" judgment of the court on fairness and equity of plan	9
The "public interest"	13
The meaning of "fair and equitable"	23
II. The court below correctly held that the District Court could not and did not exercise an "informed, independent judgment" on the fairness and equity of the plan for the reason that it did not have before it the necessary findings or appraisals or determinations of value which are essential to passing upon the equity and fairness of a proposed plan	26
Findings of value of debtor's property and of its earning capacity are essential	26
"Dollars and cents valuations"	32
The authorized capitalization is not a determination of the value of debtor's property	32
III. Insufficiency of so-called "findings" of Commission that stock equity and unsecured claims have no value	35
IV. Discussion of earnings as measure of value (without regard to specific provisions of Section 77)	40
Past earnings alone are not a sufficient basis for appraising earning capacity	41
V. Other elements to be considered in valuation under Section 77	44
(a) Elements other than earning capacity	44
(b) Under Section 77 valuation of railroad property is to be based—in addition to "other relevant facts"—on "earning power", not on "prospective" or "probable future" earnings	51
VI. Earnings since Commission's report was certified	54
Conclusion	61

Table of Authorities Cited

Cases	Pages
American Steel Foundries v. Tri-City etc. Council, 257 U. S. 184	57n
Atchison, T. & S. F. R. Co. v. United States, 284 U. S. 248	55, 56
Bluefield W. Works Co. v. Public Service Com., 262 U. S. 679	17n
Case v. Los Angeles Lumber Products Co., 308 U. S. 106	5, 12, 23, 24
Central Hanover B. & T. Co. v. Williams, 95 Fed. (2d) 210	9
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Chicago, Milw., St. P. & Pac. R. R. Co., In re, 36 Fed. Supp. 193	32n
Chicago, Milw., St. P. & Pac. R. R. Co., In re, 124 Fed. (2d) 754	26, 33, 35, 54n
Chicago & N. W. Ry., In re, 35 Fed. Supp. 230	32n
620 Church St. Bldg. Corp., In re, 299 U. S. 24	36
Consolidated Rock Products Co. v. duBois, 312 U. S. 510	5, 13, 26, 27, 28, 29, 35, 38, 40, 43, 44, 51, 53, 61
Continental Ill. N. B. & T. Co. v. Chicago R. I. etc. R. R. Co., 294 U. S. 648	9
Davidson v. New Orleans, 96 U. S. 97	16n
Delaware & Hudson Co. v. United States, 295 Fed. 558	49
Den v. Hoboken L. & I. Co., 18 How. 272	16n
Duncan v. Landis, 106 Fed. 839	23
Duplex Printing Press Co. v. Deering, 254 U. S. 443	57n
Dutch Woodcraft Shops, In re, 14 Fed. Supp. 467	25n
Erie R. Co., In re, 37 Fed. Supp. 237	32n
First National Bank v. Flershem, 290 U. S. 504	27
Florida v. U. S., 282 U. S. 194	29n
Gibson Hotels, Inc., In re, 24 Fed. Supp. 859	23n
Kansas City T. R. Co. v. Central U. T. Co., 271 U. S. 445	25
Klein, In re, 197 Fed. 241	23n

	Pages
Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555	16
Louisville Trust Co. v. Louisville N. & C. R. Co., 174 U. S. 674	24
Nathanson Bros. Co., In re, 64 Fed. (2d) 912	23n
National Food Products Corp., In re, 23 Fed. Supp. 979	25n
National Surety Co. v. Coriell, 289 U. S. 426	13
New York, N. H. & H. etc. Co., In re, 16 Fed. Supp. 504	9
New York, N. H. etc. R. Co. v. I. C. C., 55 Fed. (2d) 1028	49
New York C. S. Corp. v. United States, 287 U. S. 12	21
Northern Pacific Railroad Co. v. Boyd, 228 U. S. 482	5, 24
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287	17n
Palmer v. Massachusetts, 308 U. S. 79	10n
Panama Ref. Co. v. Ryan, 293 U. S. 388	29n
Rowley v. C. & N. W. R. Co., 293 U. S. 102	29n, 32
Southern Pacific Co. v. Bogert, 250 U. S. 483	56n
St. Joseph Stock Yards Co. v. United States, 298 U. S. 38	17n
Tennessee Publishing Co. v. American Nat. Bank, 299 U. S. 18	13
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Warren v. Palmer, 310 U. S. 132	10n
Western Pac. R. R. Co., In re, 230 I. C. C. 61, 233 I. C. C. 409	2
Western Pac. R. R. Co., In re, 34 Fed. Supp. 493	2
Western Pac. R. R. Co., In re, 124 Fed. (2d) 136	2

Constitutional Provisions

Const. of the U. S.:	
Art. I, Sec. 8	9
Fifth Amendment	16
Fourteenth Amendment	16

Statutes

Bankruptcy Act:	Pages
Section 1 (19) (11 U. S. C. Sec. 1 (19))	23
Section 14(d) (11 U. S. C. Sec. 32)	21n
*Section 77 (11 U. S. C. Sec. 205)	4
Section 77B (11 U. S. C. Sec. 207)	9
Section 178 (11 U. S. C. Sec. 578)	21n
Section 212 (11 U. S. C. Sec. 612)	21n
Section 216(11) (11 U. S. C. Sec. 616)	21n
Section 221(5) (11 U. S. C. Sec. 621)	21n
Section 456 (11 U. S. C. Sec. 856)	21n
Interstate Commerce Act, Section 19 (a)	29, 48, 49

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Textbooks

1 Bonbright on Valuation 250	42n
56 C. J. 131	11

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REFERENCE TO OPINIONS BELOW.

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124 Fed. (2d) 136 (R. 2663).

Opinion of District Court:

34 Fed. Supp. 493 (R. 1569).

Original Report and Order of Interstate Commerce Commission on October 10, 1938:

230 I. C. C. 61 (R. 194).

Commission's Modifying Report and Order, June 21, 1939:

233 I. C. C. 409 (R. 300).

JURISDICTION OF THIS COURT.

As we raise no question of the jurisdiction of this Court, we accept the statements in the briefs of petitioners of the grounds upon which they invoke such jurisdiction.

STATEMENT OF THE CASE.

The briefs of the petitioners set forth correctly the present capitalization of the Debtor, and the new capitalization under the Commission Plan, and we beg leave to refer, in this brief, to these portions of the petitioners' statements, without repeating them.

In addition we add the following:

Many of the relevant facts are set forth in a "Stipulation of Facts Not in Dispute" (hereinafter cited as "Stip.") signed by all the parties to the hearing in the District Court and filed in that Court (R. 1017-1272).

This respondent, The Western Pacific Railroad Corporation, is an unsecured creditor of the Debtor in the sum of $5,786,791, together with interest to January 1, 1939 (the effective date of the Commission Plan) amounting to $1,980,429.11 (Stip. Par. 8, R. 1026-27). The only other unsecured claim is that of the Western Realty Company for $50,000 principal and $11,666.67 interest (Stip. Par. 8, R. 1027). The Western Realty Company is a subsidiary of this respondent, so that this respondent is the holder of all the unsecured claims against Debtor. These claims represent advances made upon open account to the Debtor (Stip. Par. 8, R. 1026-7).

The Western Pacific Railroad Corporation is likewise the holder of all the preferred and common stock of the Debtor (Stip. Par. 8, R. 1027; Stip. Par. 3, R. 1044). Substantially all the stock of the Debtor held by this respondent represents actual cash contributed to the construction of the Debtor's railroad enterprise. Most of the stock was issued to this respondent in a former reorganization, in exchange for the First Mortgage Bonds of the Debtor's predecessor in the aggregate principal amount of $50,000,000, the proceeds of these bonds having been used in constructing and equipping the railroad. The remaining $800,000 par value of the Debtor's stock was issued and sold to this respondent in 1929 at par for cash (Stip. Par. 37, R. 1044).

The unsecured claim and stock equity of The Western Pacific Corporation are not, therefore, "watered" securities, but represent a large cash investment in the actual construction of the enterprise.

The beneficial ownership of the rights of this respondent as stockholder and as creditor of the Debtor is in the

stockholders of this respondent, several thousands in number, the great majority of whom hold not more than fifty shares each (Stip. Par. 49, R. 1942). By the Plan of Reorganization approved by the District Judge (whose order of approval was reversed by the Circuit Court of Appeals) this respondent was totally excluded from participation in the reorganization, its unsecured claim and its stock equity being completely wiped out.

One additional fact may be mentioned in this preliminary statement. The petition of the Debtor, by which the reorganization proceeding was initiated (R. 4), did not allege that the Debtor was "insolvent". It set forth the other ground for seeking reorganization under Section 77 of the Bankruptcy Act as amended, i.e., that the petitioning railroad corporation was "unable to meet its debts as they mature". Neither the Commission nor the Court found, as a matter of fact, that the Debtor was insolvent.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

In a railroad reorganization proceeding under Section 77 of the Bankruptcy Act, as amended (11 U.S.C., Sec. 205), it is the duty of the District Court,[1] before approving a Plan of Reorganization certified to it by the Interstate Commerce Commission, to form an informed, independent judgment on the fairness of the Plan and its compliance with other requirements of Section 77 and with the law of

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[1]Throughout this brief, we use the terms "District Court", "Court" and "Judge", interchangeably with respect to proceedings under Section 77. Section 77 itself speaks at times of the Court, and at other times of the judge.

the land. In this connection the amount and character of the capitalization of the reorganized company are not matters relating solely to the public interest, and thus committed to the discretion of the Commission, subject only to constitutional limitations, want of evidence or the like, but are inseparably bound up with the rights of the individual creditors and stockholders which it is the independent duty of the Court to protect. This protection, to which this respondent is entitled, both as the sole unsecured creditor and as the sole stockholder of the Debtor, and which is guaranteed both by the Constitution and by Section 77 itself, the District Court failed to give.

The Interstate Commerce Commission failed to make the "findings" or "determinations" or "appraisals" of value or of earning power which, under the decision of this Court in

Consolidated Rock Products Co. v. DuBois, 312 U. S. 510,

are essential to enable the District Court to reach an informed, independent judgment on the fairness and equity of the proposed Plan.

The Plan which the District Court approved deprives this respondent of any participation whatever and wipes out its investment in the properties of the Debtor. Throughout the proceedings in the Courts below this respondent (and indeed every other opponent of the Commission's Plan) has fully recognized the priority principle, as laid down in

Northern Pacific Railroad Co. v. Boyd, 228 U. S. 482;

Case v. L. A. Products Co., 308 U. S. 106,

and similar cases. The Western Pacific Railroad Corporation has never questioned that the holders of secured claims must be given recognition to the extent of their claims before anything may be allowed to this respondent as unsecured creditor or as stockholder. If the value of the assets of the Debtor had been proved and found to be sufficient only for the payment of such prior claims, this respondent's investment would in fact be worthless, and its destruction in the reorganization would be justified. But the record in this case shows that the value of the Debtor's assets exceeds the amount of the secured claims entitled to priority; that in fact it exceeds the total of all debts, secured and unsecured. This respondent is accordingly entitled to participate in the reorganized company, both as unsecured creditor and as stockholder.

In any event, the record before the Interstate Commerce Commission and before the District Court is totally lacking in the findings essential to support the conclusion that this respondent, in either of its capacities, may be excluded from participation in the reorganized company. There was no finding by Commission or Court of the value of the Debtor's assets. There was no finding of the earning capacity of those assets.

The decision of the Commission and of the District Court denying participation to this respondent appears to be based on the theory that capitalization of past earnings may be used as the sole basis of determining the value of a railroad company's property. Both the terms of Section 77 and the constitutional requirement of due process preclude the adoption of this as the sole basis of valuation. Under Section 77(e), a major (though not

exclusive) factor in valuation is "earning power", not past or prospective earnings. Even if it were conceded that a forecast of probable future earnings is the equivalent of "earning power", the facts of this case show that past earnings are not a reliable guide to the future earnings that may reasonably be expected. Not only were the earnings of the years preceding the Commission's determination unduly depressed by physical factors and economic conditions which no longer exist, but the actual earning record of the Debtor during the period following the Commission's report shows that the Commission's view of the future possibilities of the enterprise was unduly pessimistic. An estimate of future performance (assuming, contrary to the fact, that such an estimate was made in this case), related to conditions not yet known and therefore necessarily unreliable, is not, we submit, a sufficient foundation for the confiscation of a large investment in a productive enterprise.

All that this respondent seeks is the right to retain whatever value may inhere in its unsecured claims and its stock equity. It recognizes that, in any reorganization, those claims and that equity must be properly subordinated to the prior rights of all secured claimants. It demands neither income nor the return of principal until after the full satisfaction of the income and principal demands, respectively, of prior classes of creditors.

We maintain that the unsecured claims and the stock equity have a present value which is entitled to the protection of the Courts. Even if there were no value immediately measurable, the prospective value of these interests should not be irrevocably destroyed, as they would be if

the Plan now before this Court should be carried into effect. As Commissioner Miller said in dissenting, in part, from the Report of the Commission (R. 283-84), the Plan should provide for a larger issue of no par value common stock to "give the present stockholders a chance to participate in the future profits of the reorganized company".

SCOPE OF THIS BRIEF.

The appeal to the Circuit Court of Appeals was from an order approving the Plan of Reorganization. The Circuit Court of Appeals reversed that order. Viewed in its narrowest aspect, the single question to be decided by this Court is whether the order approving the Plan should be affirmed or reversed.

In applying for certiorari, however, the petitioners not only attacked the grounds upon which the Circuit Court of Appeals had reversed the order approving the Plan, but also emphasized the desirability—as a guide to the Commission and to the lower Courts in other railroad reorganization proceedings—of an exposition by this Court of the interpretation, operation and effect of Section 77. The Interstate Commerce Commission, on whose behalf a supporting memorandum was filed, also urged that this Court go into the broader field so suggested.

Assuming that the second consideration had some part, at least, in moving this Court to issue the writs, we do not limit this brief to supporting the decree of the Circuit Court of Appeals on the record in the case, but shall go, in addition, into a discussion, on more general lines, of Section 77.

I.

THE FUNCTIONS OF THE DISTRICT COURT AND OF THE INTERSTATE COMMERCE COMMISSION UNDER SECTION 77.

All Parties Entitled to "Informed Independent" Judgment of the Court on Fairness and Equity of Plan.

The District Court, in considering whether a plan proposed by the Commission is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, fails to discriminate unfairly, and conforms to the requirements of the law of the land (Section 77(e)), exercises an independent jurisdiction. The Court does not sit merely to review the findings and conclusions of an administrative body, whose determinations are ordinarily free from attack in the Courts except for want of jurisdiction, excess of statutory authority, departure from fundamental legal and procedural rules, lack of evidence, or conflict with constitutional rights. This is apparent both from the general scheme of Section 77 and from its specific provisions.

Section 77 is a part of the Bankruptcy Act. It was enacted as an exercise of the power of Congress "to establish * * * uniform laws on the subject of bankruptcies throughout the United States" (*Const. U. S.*, Art. I, Sec. 8; *Continental Ill. N. B. & T. Co. v. Chicago, R. I. etc. R. R. Co.*, 294 U. S. 648; see also *In re New York N. H. etc. Co.*, 16 Fed. Supp. 504; *Central Hanover B. & T. Co. v. Williams*, 95 Fed. (2d) 210). In general, proceedings under the Bankruptcy Act are committed to the jurisdiction of the District Courts of the United States. The entire structure of Section 77 providing for the reorganization of railroads, like that of 77B (now recast as Chapter X of the Bankruptcy Act of 1938) dealing with reorganizations of

other corporations, clearly contemplates a judicial proceeding. It is true that under Section 77 provision is made for action by both the Interstate Commerce Commission and the Court. No plan can finally become effective until it has the approval of the Court as well as the Commission. The functions of the Commission and of the Court are, however, separate and distinct. Their jurisdiction is not concurrent or co-ordinate. It is perhaps better described as a combined jurisdiction, the action of both being necessary to accomplish a reorganization. Mr. Justice Frankfurter has spoken of the authority of the two bodies as being "intertwined",[2] and Mr. Justice Reed emphasizes the "co-operative" nature of the jurisdictions.[3]

As indicating that the final, and, in a certain sense, superior, jurisdiction lies with the Court, it is to be noted that the proceeding is initiated by a petition filed with the Court, that upon the Judge's approval of the petition, the Court has exclusive jurisdiction of the Debtor and its property, that the Judge appoints (subject to ratification by the Commission) a trustee or trustees, fixes the amount of the bond for every trustee, controls the actions of the trustees, fixes the time for filing claims, and determines classification of creditors and stockholders. A plan certified by the Commission does not become binding unless and until it is confirmed by the Court. In addition, in proceedings under Section 77 the powers of the Court and the rights and liabilities of creditors and others with respect to the Debtor and its property are the same as if an adjudication of bankruptcy had been made on voluntary petition on the day the Debtor's petition was filed.

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[2] *Palmer v. Massachusetts*, 308 U. S. 79, 87.
[3] *Warren v. Palmer*, 310 U. S. 132, 138.

It appears, then, that not only is the proceeding instituted in, and jurisdiction of the Debtor and its property conferred on, the Court, but the final act which makes a plan binding upon the Debtor and all other parties is the confirmation of the plan by the Judge.

But, entirely apart from the foregoing general observations regarding the nature and scope of the statutory proceeding, it is clear beyond question that on a hearing like the one which took place before the District Court, i.e., one which calls for a determination whether the Judge will or will not approve a plan certified by the Commission, the express terms of Section 77 require the Judge to exercise an independent judgment upon the essential questions of law and fact involved in his approval or rejection of the plan. Subdivision (e) declares that "the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this Section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders * * *". The word "satisfied" has often been interpreted. It means: convinced; of the conviction; reasonably certain; relieved of all doubt or uncertainty (56 *C. J.* 131 and cases cited). The Judge is to be *satisfied* that the plan meets the requirements of compliance with the provisions of subsection (b); that it is fair and equitable; that it affords due recognition to the rights of each class; that it does not discriminate unfairly and that it will conform to the requirements of the law of the land regarding the participation of the various classes.

It is not enough, as in most cases of attacks upon actions of administrative bodies, that the Judge or Court conclude that the administrative body had jurisdiction to proceed and that it exercised its jurisdiction regularly and reached its findings upon sufficient evidence. The judicial mind must be satisfied of the truth of the ultimate facts and the soundness of the conclusions. In this respect the provision of Section 77 is substantially identical with that of Section 77B which provided that "the Judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible * * * (3) it has been accepted as required by the provisions of subdivision (e), clause (1), of this section * * *".

Considering Section 77B, the Supreme Court of the United States in its decision in

Case v. Los Angeles Lumber Products Co., 308 U. S. 106,

held (p. 114) that:

> "It is clear from a reading of section 77B(f) that the Congress has required both that the required percentages of each class of security holders approve the plan and that the plan be found to be 'fair and equitable'. The former is not a substitute for the latter. The court is not merely a ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the court's protection."

and, at a later point (p. 115), the Court continues:

> "The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the

function and the duty imposed by the Congress on the District Courts under Section 77B. That function and duty are no less here than they are in equity receivership reorganizations, where this court said: 'Every important determination by the court in receivership proceedings calls for an informed, independent judgment.' (National Surety Co. v. Coriell, 289 U. S. 426, 436.)"

See, also,

Tennessee Pub. Co. v. American Nat. Bank, 299 U. S. 18, 22.

In its most recent pronouncement on corporate reorganizations the Supreme Court has again emphasized the necessity for the Court

"to exercise the 'informed, independent judgment' * * * which appraisal of the fairness of a plan of reorganization entails".

Consolidated Rock Products Co. v. duBois, 312 U. S. 510.

In that case, the decision of the Circuit Court of Appeals reversing an order of the District Court confirming a plan of reorganization was affirmed principally upon the ground that such an order, if made without the exercise of the required independent judgment upon the basis of adequate data and findings, cannot be sustained.

The "Public Interest".

In an attempt to define the scope of the respective functions of the Commission and the Judge under Section 77, consideration must be given to subdivision (d) of Section 77, which provides that the "Commission shall render a report and order in which it shall approve a plan, which

may be different from any which has been proposed, and will in its opinion meet with the requirements of subsections (b) and (e) of this section, and *will be compatible with the public interest;* or it shall render a report and order in which it shall refuse to approve any plan". (Italics ours) It becomes necessary, therefore, to inquire what is embraced within the scope of the "public interest", thus initially placed within the authority of the Commission.

The contention of the petitioners has been and is that the exclusive, or at least primary, jurisdiction of the Commission covers the total capitalization of the reorganized company and the classification and details of that capitalization, leaving to the independent judgment of the Court only the question of distribution of the authorized securities among the several claimants. The total capitalization and its details are deemed by the petitioners to be embraced within the field of "public interest", the distribution of the securities to be matters of private right on which alone the parties are entitled to the independent judgment of the Court. This view, which had been advanced below by the proponents of the plan, was accepted by the learned District Judge, who said in his opinion:

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily. The determination of the

> questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court." (34 Fed. Supp. 504; R. 1596-7)

We submit that the distinction so attempted to be made between matters of public interest and matters of private right is not maintainable. It is conceded, on all hands, that the District Judge must, in the exercise of an informed, independent judgment, determine whether the plan is fair and equitable, whether it affords due recognition to the rights of each class of creditors and stockholders, whether it discriminates unfairly in favor of any class, and whether it will conform to the requirements of the law of the land regarding the participation of the various classes (Section 77, subsection (e)). It is impossible to separate the consideration of the amount and character of the authorized capitalization from the question of the fairness and equity of the distribution of the authorized securities and the conformity of the plan to the requirements of the law of the land. The capitalization is so interwoven with the determination of the issues which the Court must determine independently that the Court's function cannot be performed if it is foreclosed by the Commission's fixing of the capitalization to be permitted.

At the risk of undue repetition, we emphasize again that under subsection (e) (as well as under the law settled before Section 77 was enacted) every party is entitled to the informed, independent judgment of the Court on the questions whether the plan is fair and equitable, whether it descriminates unfairly and whether it is in accord with the law of the land. The phrase "the law of

the land" is the equivalent of "due process of law" in the Fifth and Fourteenth Amendments to the Federal Constitution.[4]

Even if Section 77 contained no reference to the "law of the land", it would, of course, still be open to any party in interest to contend that the plan as promulgated by the Commission would result in a confiscation of the party's property or a taking of it without due process of law. Here, however, we find that Section 77 specifically incorporates the protection of the "law of the land". If, as we contend, the effect of the Commission Plan would be to confiscate the property of the stockholders and unsecured creditors and transfer it to secured creditors, no consideration of public interest could justify such an invasion of constitutional rights. As this Court stated in

Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 602,

in holding that the farm mortgage provisions of the Frazier-Lemke Act of June 28, 1934, were an unconstitutional invasion of the rights of holders of farm mortgages:

> "For the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be made to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

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[4] *Den v. Hoboken L. I. Co.*, 18 How. 279; *Davidson v. New Orleans*, 96 U. S. 97; *Twining v. New Jersey*, 211 U. S. 78.

The argument in favor of the controlling power of the Commission over the amount and details of the authorized capitalization is not furthered by the effort to describe the exercise of this power, in the language of the District Judge, as "a legislative function affecting the public interest".[5]

It was argued below that reorganization is a legislative function and that the legislature has delegated to the Commission the legislative power of fixing the limits and character of the capitalization of the reorganized company (which the legislature might have exercised itself), just as it has delegated to the Commission the legislative power of fixing rates for carriers. It is quite true that the power of limiting or fixing rates for public services was originally exercised directly by legislative bodies. But even when so exercised the rates fixed were always subject to judicial inquiry to determine whether constitutional rights had been invaded. In such an inquiry into the validity of a rate structure, whether established directly by the legislature or by an administrative body, the Courts have the power to determine whether the rate is confiscatory.[6] In that connection, in so far as the value of the property used in the public service is an element in passing upon the propriety of the rate structure, the parties affected are entitled to the independent determination of a court.

Granting, for the purpose of argument, that the establishment of the authorized capital of a company to be

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[5]See quotation from opinion of trial judge, supra, pp. 14-15.

[6]*Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 291;
Bluefield W. Wks. Co. v. Public Serv. Com., 262 U. S. 679, 689;
St. Joseph Stockyards Co. v. U. S., 289 U. S. 38.

reorganized is a legislative function, let us suppose that the Congress, instead of enacting Section 77, had passed an Act providing that the Western Pacific Railroad Company shall be reorganized on the basis of capitalization proposed in the plan under consideration, leaving no securities available for the unsecured creditors or stockholders of the present company, and providing further that the unsecured claims and the preferred stock and the common stock of the company should be cancelled. Could it be asserted that the doors of the courts would not be open to the holder of the claims and stock equity so excluded for a hearing upon his complaint that his rights had been destroyed and confiscated, or that he would not be entitled to the fullest inquiry into the basis upon which that confiscation had been attempted and whether it did deprive him of his constitutional rights?

The position of the petitioners, accepted by the trial Judge, assumes that the problems involved in a reorganization plan are divisible into two mutually exclusive classes: (1) the class of "public interest", which includes not only total capitalization, but the character and classification thereof (committed to the Commission); and (2) questions of private right (on which the Court must exercise an independent judgment) and which cover simply the distribution among classes of creditors and stockholders of the securities authorized by the Commission's capitalization. This conception, we respectfully submit, finds no support in the statute (Section 77) or in authority. The statute does not undertake to divide the questions involved in a reorganization into two separate water-tight compartments, one labelled "public interest" and the other

"private right"—one involving purely administrative decisions, the other requiring the exercise of judicial power. Indeed such a differentiation, if it had been attempted, would not be practicable or workable. Under Section 77 the requirement that the plan be "fair and equitable" binds both the Commission and the Court, and the latter must be "satisfied" in the exercise of an "informed, independent judgment" that the requirement has been met. The plan must, in the opinion of the Commission, be "compatible with the public interest". Neither requirement presupposes only one possible plan. Various plans may be "fair and equitable". Various plans may be "compatible with the public interest". Both requirements must be met, if a plan of reorganization is to become effective.

A plan may be "fair and equitable" but not "compatible with the public interest". Such a plan would not be approved or certified by the Commission. On the other hand, a plan might be "compatible with the public interest", but not (in the judicial view) "fair and equitable". (For the sake of brevity, we are here combining the statutory requirements of a plan into the single phrase "fair and equitable". The further standards imposed by subsection (e) prohibit—even if that of fairness and equity does not—the approval of a plan which is confiscatory as to any claim or interest.) If the Commission should certify a plan, deeming that it is compatible with the public interest, and that it is fair and equitable, the Court must still exercise its "informed, independent judgment" on the question of fairness and equity, and this judgment cannot be limited by the Commission's determination of the amount and character of the permissible capitalization. Unless the

Court is satisfied that the plan meets the test of fairness, the Court cannot approve it. In other words, a plan of reorganization to be approved must be (a) compatible with the public interest, in the opinion of the Commission, and (b) fair and equitable in the opinion of the Commission and in the informed, independent judgment of the Court. It may be that no plan can be devised which will meet both these tests. If any plan that is in the opinion of the Commission compatible with the public interest is nevertheless unfair and inequitable, or if any fair or equitable plan is not deemed by the Commission to be compatible with the public interest, the result is simply that no reorganization can be accomplished. In such event the Commission may render a report and order "in which it shall refuse to approve any plan" (Section 77(d)). Or if a plan shall be certified by the Commission to the Court and the Judge does not approve the plan, and does not see fit to refer the proceedings back to the Commission, he may dismiss the proceedings (Section 77(e)).

The statute affords no basis for the contention that the Commission (as guardian of the "public interest") has plenary control over both total capitalization and of the details of that capitalization. Section 77, subsection (d), provides merely that the Commission shall approve a plan that will (in its opinion) be "compatible with the public interest". There is nothing in the section referring to capitalization or details of capitalization (except the provision in subsection (b) that fixed charges shall be adequately covered by probable earnings); nothing about public interest as contrasted with or overriding private rights; nothing to limit the Court's power and duty, before it ap-

proves a plan, to be "satisfied", that it is fair and equitable. The Bankruptcy Act contains many other references to "public interest" or "public policy".[7] Obviously many of these can have no relation to details of capitalization or to capitalization at all. The phrase "public interest" in and of itself is not defined in the statute and certainly is not given a statutory meaning as broad as that attributed to it. As this Court said with reference to the Transportation Act, 1920 (U. S. C. Tit. 49), the criterion of the "public interest" is not "a mere general reference to public welfare without any standard to guide determinations * * *". It "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *" (*New York C. S. Corp. v. U. S.*, 287 U. S. 12, 24, 25). So, with respect to Section 77, the "public interest" to be considered by the Commission must be related to the purpose of the statute, i.e., to provide for the reorganization of railroads.

To avoid misunderstanding it may be said at this point that we are not contending that the capital structure of a reorganized company has no relation to the public interest. Our position is that such structure involves considerations, not only of the public interest, but of the fairness and equity of the plan, and that the duty of the trial Court requires an independent judgment on the capitalization, as well as all other features of the plan, in so far as fairness and equity may be involved.

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[7]Sections 14(d), 77(c)(13), 77(o), 77(p), 178, 212, 216(11), 221(5) and 456.

The Commission itself in its original report and order said (R. 243-4, quoted in opinion of District Judge, R. 1583, 34 Fed. Supp.):

> "It will be observed that so far as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and that the plan as a whole shall be compatible with the public interest. The public interest is not defined, but it would seem obvious that to be compatible with the public interest the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. This requires that the capitalization shall not exceed a conservative appraisal of the assets to be taken over by the reorganized company, and that proposed charges, whether fixed or contingent shall be within its probable earning power."

We have no criticism of the declaration that, to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. We do, however, question the statements in the last sentence of the passage just quoted from the Commission's report. In this sentence the Commission indicates that in framing the plan it was guided by two considerations or bases, neither of which finds any justification or support in Section 77 or in other parts of the Bankruptcy Act. In so far as the value of the assets of the Debtor is to be considered in setting up a new capital structure, the Commission takes the position

that the appraisal of the assets should be a "conservative" one. The statute does not warrant any such limitation. Section 77 does not contemplate a reorganization based upon forced sale or liquidation values. It contemplates the reorganization of a debtor as a going concern.[8]

In determining whether a debtor is insolvent in the bankruptcy sense, the Bankruptcy Act itself provides (Section 1(19)) that the test is whether the aggregate of his property "shall not at a fair valuation be sufficient in amount to pay his debts". The statute, then, in so far as valuation may enter into the capital structure, has reference to a "fair" valuation, not a speculative, a liberal or a "conservative" one (*Duncan v. Landis*, 106 Fed. 839, 859).[9]

The assumed requirement that "proposed charges, whether fixed or contingent, shall be within its probable earning power" also introduces a limitation which is not in accord with the statute. The language of subdivision (d) of Section 77 is that the probable earnings shall be adequate to cover the "fixed charges"; not, as the Commission puts it, charges "whether fixed or contingent".

The Meaning of "Fair and Equitable".

The recent decision of this Court in

Case v. Los Angeles Lumber Products Co., 308 U. S. 106,

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[8]See

In re Gibson Hotels, Inc., 24 Fed. Supp. 859;
In re Nathanson Bros. Co., 64 Fed. 912;
In re Klein, 197 Fed. 241.

[9]In this case we contend, and the Circuit Court of Appeals held, that no appraisal or valuation of the assets of the debtor was made by the Commission. The statement in the report is, however, indicative of an approach which had a bearing on the drastic limitation of capitalization adopted by the Commission.

makes it unnecessary to discuss at any length the requirement that a plan of reorganization shall be "fair and equitable". As stated in the opinion in the *Los Angeles Lumber Products* case (308 U. S. 115), the words "fair and equitable", as applied to reorganization proceedings, are words of art which, prior to the enactment of Section 77B, "had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations". Prior decisions, including the well known case of

Northern Pacific Railroad Co. v. Boyd, 228 U. S. 482,

are cited. The effect of the decisions culminating in the pronouncement in the *Los Angeles Lumber Products* case is that no plan is fair and equitable which does not recognize and protect the rights of creditors according to their respective priorities in the assets of the corporation. In this recent decision, the Court refers to

Louisville Trust Co. v. Louisville N. A. & C. R. Co., 174 U. S. 674,

as one in which the Supreme Court reaffirmed the "former rule" that "the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors".

In the *Los Angeles Lumber Products* case the corporation was insolvent, both in the equity and the bankruptcy sense. Under these circumstances the Court held that a plan which permitted stockholders to participate in the reorganization was not "fair and equitable" to the bondholders who obviously could not be paid more than a fraction of their claims. But in a case where (and we contend this is such a case) the corporation is not found to be insolvent in the bankruptcy sense, there is no justification,

in fairness and equity, for excluding the unsecured claims from participation. Furthermore, where the value of the assets exceeds the amount of all claims, secured and unsecured,—as the respondents claim to be the fact here—there is no justification for denying participation to the holders of the stock. It is conceded by us that the creditors have the first right to resort to the assets of the corporation in the order of their priorities to the extent of those assets, but they are not entitled to take all the assets if their value exceeds the amount of the claims. If it is "fair and equitable" that the prior right of creditors to resort to the assets shall be recognized, it is equally "fair and equitable" that when full recognition has been given to the claims of creditors, any surplus of value shall be made available for the stockholders. This is a necessary corollary of the rule laid down in the *Boyd* case and the other decisions referred to in the *Los Angeles Lumber Products* case.[10] The principle that junior claimants are entitled to participation after full recognition has been given to prior claims is declared in

Kansas City T. & R. Co. v. Central U. T. Co., 271 U. S. 445, 455

(an equity foreclosure case) where the Court said:

> "Unsecured creditors of insolvent corporations are entitled to the benefit of the values which remain after lienholders are satisfied, whether this is present or prospective, for dividends or only for purposes of control."

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[10] See
In re Dutch Woodcraft Shops, 14 Fed. Supp. 467;
In re National Food Products Corp., 23 Fed. Supp. 979;
In re Utilities P. & L. Corp., 29 Fed. Supp. 763.

II.

THE COURT BELOW CORRECTLY HELD THAT THE DISTRICT COURT COULD NOT AND DID NOT EXERCISE AN "INFORMED, INDEPENDENT JUDGMENT" ON THE FAIRNESS AND EQUITY OF THE PLAN FOR THE REASON THAT IT DID NOT HAVE BEFORE IT THE NECESSARY FINDINGS OR APPRAISALS OR DETERMINATIONS OF VALUE WHICH ARE ESSENTIAL TO PASSING UPON THE EQUITY AND FAIRNESS OF A PROPOSED PLAN.

Findings of Value of Debtor's Property and of Its Earning Capacity Are Essential.

The decision here under review was rendered by the Circuit Court of Appeals for the Ninth Circuit on November 28, 1941. Two weeks later the Circuit Court of Appeals for the Seventh Circuit rendered its decision in a similar proceeding for the reorganization of another railroad company (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 Fed. (2d) 754). In each of these cases the order of the District Court approving a plan of reorganization certified to it by the Commission was reversed. The respective Courts of Appeals based their decisions primarily, if not exclusively, upon the law declared by this Court in the *Consolidated Rock Products* case, supra, decided March 3, 1941, after the respective District Courts had passed on the plans of reorganization for the Western Pacific and the Chicago, Milwaukee.

Deeming the holdings in the *Consolidated Rock Products* case to be controlling here, and to require the reversal of the District Court's order approving the plan, we ask leave to recall to this Court a few of its own expressions bearing on the point of the necessity of findings of value:

> "On this record no determination of the fairness of any plan of reorganization could be made. Absent

the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' (National Surety Co. v. Coriell, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. Case v. Los Angeles Lumber Products Co. 308 U. S. 106. And see First Nat. Bank v. Flershem, 290 U. S. 504, 525." (p. 520)

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"We have already noted that no adequate finding was made as to the value of the assets of Consolidated. In view of what we have said, it is apparent that a determination of that value must be made so that criteria will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole." (p. 524)

* * * * * * *

"In the second place, there is the question of the method of valuation. From this record it is apparent that little, if any, effort was made to value the whole enterprise by a capitalization of prospective earnings. The necessity for such an inquiry is emphasized by the poor earnings record of this enterprise in the past. Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization." (p. 525)

The *Consolidated Rock Products* case involved a proceeding under Section 77B. The "findings" or "determinations" which this Court declared to be necessary were findings or determinations of the District Court or Judge. Under Section 77B no administrative body was interposed between the formulation of a plan of reorganization and the Court's action on that plan. But in a railroad reorgani-

zation under Section 77, any finding or determination of value that is necessary is to be made by the Commission and certified to the Court.[11] We must, then, look to the report of the Commission to ascertain whether the requisite findings were made. The District Judge was not called upon to make independent findings of value and did not in fact undertake to do so.[12]

When we contend that the record shows no findings by the Commission of the elements essential to enable the Court to reach a judgment on the fairness of the plan, we are not speaking of "findings" expressed in any technical or formal arrangement of words. Our position is, simply, that to comply with the statute, the Commission must, in its report, disclose that it has made a "determination" or "appraisal" or "finding" of the value of the debtor's assets. We are not, for the present purpose, concerned with the form of words in which the determination of value must be expressed, although it will be noted that this Court, in the *Consolidated Rock Products* case, uses the word "finding". Whatever the mode of expression, there must be something in the report to show what, in the judgment of the Commission, the value of the property was. Lacking this, the District Court did not have the foundation upon which it could exercise an "informed, independent judgment" on the fairness and equity of the plan. Nothing short of this was a compliance with the requirement of subsection (d) of Section 77 that in its report

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[11]Last paragraph of subsection (e): "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan."

[12]34 Fed. Supp. 493.

"the Commission shall state fully the reasons for its conclusions".

Even though there be no express statutory requirement of findings, it is essential to the validity of orders of administrative officers or bodies that they be supported by adequate findings of basic facts.[13] It cannot be open to question, since the decision of the *Consolidated Rock Products* case, that the determination of the value of the Debtor's property is "basic" on a review of a plan of reorganization which extinguishes junior interests against the claim of their owners that the assets are sufficient in value to allow participation by such owners.

It is true, as urged by the petitioners, that the Commission had before it a mass of data—investments, valuations under Section 19(a) of the Interstate Commerce Act, past earnings, financial history, physical condition, and other elements—upon which a finding or determination might have been made. But to appraise the value from these factors is a process requiring the exercise of judgment and discretion resulting in a final figure of value.[14] The record fails to show that the Commission made any one of the varying determinations of value which might have

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[13] *Panama Ref. Co. v. Ryan*, 293 U. S. 388; *U. S. v. Chicago, Milwaukee etc. R. Co.*, 294 U. S. 499; *Florida v. U. S.*, 282 U. S. 194.

[14] "The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rate. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." (*Rowley v. C. & N. W. R. Co.*, 293 U. S. 102, 109.)

been fairly and reasonably made on the basis of these data.

The Court below (124 Fed. Supp. (2d) 139) listed sixteen items, the values of which (as that Court held) the Commission should have, but did not, determine and certify to the Court. The first of these is the value of "the Debtor's entire property".[15]

This respondent is primarily interested in this item, since only if the total value of the Debtor's assets is less than the sum of the prior and secured claims, can the exclusion of the unsecured creditor and the sole stockholder from participation in the reorganization be sustained as "fair and equitable". By virtue of such exclusion, the other fifteen items affect, more directly, the allocation of new securities among the different classes of secured creditors. Two of these (A. C. James Co. and Railroad Credit Corporation) are also respondents opposing the Plan, and we leave to them the argument of the question whether findings on the items listed (other than the first) are requisite.[15a]

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[15]The want of a finding of "earning capacity" is treated separately, infra, page 41.

[15a]The position of the petitioners on this question is, however, significant in its bearing on the underlying problem of the District Court's power and duty to reach an informed, independent judgment. That position (Inst. Bondholders' Br. pp. 21-22, 111, Br. of Crocker etc. Bank, et al., Trustees, pp. 23-24), is, in effect, that for the purpose of determining the allocations of securities among the classes which are allowed to participate, specific determinations of value of the existing claims of these classes, or of the securities allotted to them, are not necessary, but that it is sufficient if the Commission finds, as it did here, that the securities allotted "represent the equitable equivalent of the debtor's assets available for the satisfaction of claims" (R. 316) and, that "Based upon our conclusion as to relative priority, value and equity of the various claims and the value of the new securities available in ex-

The petitioners virtually concede that the Commission made no finding or determination of the value of the Debtor's property. Their position is (a) that a finding of value, expressed in dollars, is not necessary; and (b) that the authorized capitalization under the Plan imports a determination of value, or at least maximum value.

(The argument based on "findings" that the unsecured claims and the stock equity had no value is treated infra, under head III of this brief.)

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change therefor, we find that the new securities should be allotted as follows: • • •" (R. 317).

What the conclusion of the Commission was as to the "value" of the various claims or the "value" of the new securities available in exchange therefor, does not appear in the report, other than by general discussion of the character and amounts of different securities which the Commission deems warranted.

Whether or not, under the plan, any creditor receives the "equitable equivalent" of the value of his claim is, we submit, a matter on which that creditor is entitled to the "informed, independent judgment" of the Court. How can the Court form such a judgment in the absence of a disclosure by the Commission of the basis upon which it reached the conclusion that the securities allotted did constitute such "equitable equivalent"? What the Commission did was to first fix the amount and classification of allowable capitalization, and then, on finding relative priorities, and finding that there were not enough new securities available to fully compensate claimants secured by refunding bonds (R. 271) to distribute the new securities among the secured claimants. If it were, as petitioners claim, a compliance with Section 77 to allot new securities to each class of claimants, on the basis, not of the value of their claims and the value of the new securities, but of the "equitable equivalent of the debtor's assets • • • in terms of the new securities to be issued" (Br. of Inst. Bondholders, p. 79), it is still true that, in order to furnish to the Court a full statement of "the reasons for its conclusions" (Sec. 77, subsec. (d)) the report must contain enough to enable the Court to ascertain how and why the Commission reached the conclusion that the securities allotted did in fact represent such "equitable equivalent" and whether that conclusion was sound.

In effect, the argument of petitioners subordinates the Court's judicial function of determining independently the "fairness and equity" of the plan to the asserted superior administrative power of the Commission, in the "public interest", to so limit total capitalization as to necessarily cut down or prevent the participation of some classes.

"Dollars and Cents Valuations"

The petitioners for certiorari in No. 7 and No. 8 admit the lack of a finding of value, in the one case directly, in the other inferentially.[16] Both petitions (as well as the briefs of these parties) refer repeatedly to "dollars and cents valuations" or "exact dollar valuations" or like expressions[17] in the effort to show that no such valuations are required.

We know of no way in which the "value" of property (whether it be "market value", or "fair value", or "cash value", or value for purposes of taxation, or rate-making or reorganization) can be measured or expressed otherwise than in terms of money, and that means in terms of dollars. We have already quoted[18] a passage from the opinion of this Court in *Rowley v. C. & N. W. R. Co.*, 293 U. S. 109, in which the opinion treats the "actual value" of railroad property as synonymous with its "money equivalent".

The Authorized Capitalization Is Not a Determination of the Value of Debtor's Property.

The petitioners in their briefs in the lower Court relied upon four District Court cases[19] in support of the proposition that the Commission's findings of permissible capital-

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[16] Petition of Ecker et al., No. 7, p. 19; petition of Crocker Bank et al., No. 8, pp. 2, 4, 6, 7.

[17] Petition of Ecker et al., pp. 22, 24, 25, 28, 29, 30, 31, 33, 34, 37; petition of Crocker Bank et al., pp. 4, 6, 7.

[18] Ante, p. 29, note 14.

[19] *In re Akron, Canton & Youngstown Ry.* (unreported), N. D. 1939;
In re Chicago & Northwestern Ry., 35 Fed. Supp. 230, 245;
In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 36 Fed. Supp. 193, 204;
In re Erie R. Co., 37 Fed. Supp. 237.

ization, and findings that various claims and stock interests were without value, were sufficient, and that they were equivalent to a finding that the total capital authorized was equal to (or in excess of) the value of the Debtor's property for purposes of reorganization. All these cases were decided before this Court had rendered its decision in the *Consolidated Rock Products* case. Following that decision the lower Court in the case at bar and the Circuit Court of Appeals for the Seventh Circuit[20] took the contrary view to that which had been declared by the District Courts. It is submitted that the conclusions reached by the two Circuit Courts of Appeals embodied the necessary result of the holding of this Court. Not only did the opinion in the *Consolidated Rock Products* case declare specifically that a finding of the value of the Debtor's property was essential, but that decision, by necessary implication, rejected the idea that the fixing of the authorized total capitalization constitutes a finding of value. The plan before the Court in the *Consolidated Rock Products* case set forth the amount, the character and the details of the capitalization of the reorganized company. If such capitalization had, in itself, been regarded as equivalent to, or comprising, a determination of the value of the Debtor's property, the order of the District Court approving the plan would not have been reversed for want of a finding of such value.

Furthermore, we may point out that the capitalization in this case, unlike any of the others cited, does not fix a total capitalization in any specific or ascertainable

[20] *In re Chicago Milwaukee, St. Paul & Pacific R. R. Co.*, 124 Fed. (2d) 754, reversing the District Court's decision in 36 Fed. Supp. 193.

amount. In each of the cases cited, as well as in the case at bar, the capitalization authorized by the Commission provided for various forms of debt obligations and for preferred stock with a par value, together with no-par common stock. In each of the cases other than the Western Pacific, the report of the Commission treated the no-par common stock at a value of $100 a share, which, when added to the other forms of securities, made up a total capitalization in a specific number of dollars. In the case at bar, the various forms of indebtedness securities and preferred stock of the par value of $100 per share aggregate $65,819,422. No specific value was assigned to the 319,441 shares of no-par common stock.[21] The Plan provides for the distribution of common stock to the first mortgage bondholders and the Reconstruction Finance Corporation at $57 per share, to the Railroad Credit Corporation of like shares of common stock at $62 per share; to the A. C. James Co. of like shares at no specific price (R. 390-92). It is clear that in order to find or fix the amount of total capitalization authorized, it was necessary for the Commission to assign some dollar value to each of the shares of common stock. Since the common stock was assigned to two creditors at $57 a share, to another at $62 and to another at an unstated value, what basis is there for saying that the entire issue of common stock, which embraces the stock assigned to all these creditors, shall be valued at $57 rather than $62 or some other figure?

[21] Unless, as indicated in various passages of the Commission's report (R. 244, 245, 256, 259, 269, 321, 359) the Commission treated the no par stock at $100 per share, in which event the total capitalization would be several million dollars greater than the total of the secured claims recognized under the Plan, together with the unsecured claims.

III.

INSUFFICIENCY OF SO-CALLED "FINDINGS" OF COMMISSION THAT STOCK EQUITY AND UNSECURED CLAIMS HAVE NO VALUE.

As pointed out above, this Court has clearly held in the *Consolidated Rock Products* case that in a reorganization proceeding under Section 77B (and the holding is equally applicable with respect to Section 77) it is impossible to reach an "informed, independent judgment" respecting the fairness and equity of a plan of reorganization in the absence of findings or determinations of the value of property of the Debtor and of the elements of that property entering into the reorganization plan.

This rule was the principal basis upon which the Circuit Court of Appeals for the Ninth Circuit reversed the Order approving the Plan in the Western Pacific case, and upon which the Circuit Court of Appeals for the Seventh Circuit reversed the order of approval in the *Chicago, Milwaukee* case. In each instance the Commission had made a finding that the stock equity was without value. In the Western Pacific case it also made a finding that the unsecured claims were without value.[22] Do these so-called findings (R. 269-270) meet the requirements laid down in the *Consolidated Rock Products* case? It is submitted that they do not, and for several reasons:[23]

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[22]No unsecured claims were involved in the *Chicago, Milwaukee* case.

[23]The findings in question were made under the provisions of subsection (e) of Section 77 which provide that if the Judge shall approve the plan, the plan will then be submitted to the creditors of each class and to the stockholders of each class for acceptance or rejection "provided that submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding (a) that at the time

(a) The finding of the Commission that the stock equity or the unsecured claim has no value is, under the statute, made for a limited purpose only. Its effect is to exclude stockholders or creditors of the respective classes from the right to vote on a submission of a plan for acceptance or rejection. It has no relation to the exercise by the Judge of an "informed, independent judgment" on the fairness of the plan. These findings should not be perverted from their true purpose to that of support for the separate and distinct function of upholding the plan as fair and equitable.

(b) The so-called "findings" express merely conclusions, and not facts. In the absence of determinations of the value of the assets of the Debtor, the District Court is without any basis upon which to form an informed, independent judgment on the question whether there are values sufficient after properly recognizing the priorities of secured claims, to make some provision for unsecured claims, and thereafter for the stock equity, and is hence without a basis for determining independently whether the plan is fair and equitable.

In re 620 Church Street Building Corp., 299 U. S. 24, relied on by petitioners, does not uphold the

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of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value • • • provided further, that submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding • • • that at the time of the finding the interests of such class of creditors have no value". After such submission the results of the vote are to be certified to the Judge who thereupon, if the plan has not been accepted by the requisite majority of each class entitled to vote, may either confirm or refuse to confirm the plan.

sufficiency, of itself alone, of a bare ultimate conclusion of "no value" in junior claims. The findings of the trial Court are set forth in the opinion of this Court. They declare that debtor's property had a fair market value of $245,125 and that the amount of the first mortgage bonds was $445,500. These specific determinations fully justified—indeed required—the conclusions that the claims of junior mortgagees had no value and that there was no equity above the first mortgage. In the instant case there was no finding or determination of the value of the Debtor's property, and no basis therefore upon which the Court could exercise an informed, independent judgment on the presence or absence of value in the unsecured claims or the stock equity.

(c) Subsection (e) authorizes the exclusion from the right to vote if the Commission finds that "at the time of the finding" the stock equity or the interests of a class of creditors has no value. The "finding" therefore relates solely to the time when it is made by the Commission. If, as we endeavor to show later in this brief (p. 54 et seq.), subsequent changes of fact and condition are to be regarded in determining the "fairness and equity" of the plan and the propriety of the Judge's order of approval, such inquiry cannot be foreclosed by the Commission's declaration at an earlier date that the excluded claims and interests had no value.

In the opinion of the Circuit Court of Appeals in the Western Pacific case there was no reference to the question now under discussion. In the Chicago, Milwaukee

case,[24] while the Court, following the decision of this Court in the *Consolidated Rock Products* case, declared with emphasis that "findings must be made on all vital issues, controverted and uncontroverted, and must include values of properties separately considered and also of debtor's property as a whole. Findings must cover values of liens to be surrendered and values of securities given in exchange," its conclusion with reference to the finding that the stock equity was without value was not, we submit, entirely clear. In response to a petition for rehearing the Court, on January 12, 1942, filed a supplemental opinion,[25] in which it declared in effect that the finding that the stock equity had no value was sufficient. It went on to say, however, that the Commission "need not further investigate or make further finding on this issue *unless it is convinced that changed conditions in railroad earnings warrant it.* In other words, the Interstate Commerce Commission has jurisdiction of the matter and may, although it is not required to do so, reexamine the evidence or receive additional evidence. if, in its judgment, justice to the parties requires it." (Italics ours.) Even under this holding, which we venture to question, the so-called findings of no value are not treated as final and conclusive, at least in a case in which, for want of other necessary findings, the order of approval must be reversed. That this is such a case is, we submit, beyond question. Where certain classes of secured creditors do not receive recognition in full, the necessity for findings of value of the property as a whole and of that subject to their liens is clearly essential. As-

[24] 124 Fed. (2d) 754.

[25] Not reported—copy printed as appendix to reply brief of petitioners Frederick H. Ecker et al. for certiorari.

suming, therefore, that the Order of the District Court approving the Plan is to be reversed, and that that Court will then be called on (unless it dismisses the proceeding) to refer the matter back to the Commission, we urge that every practical consideration argues against a ruling that the findings of the Commission that the unsecured claims and the stock equity were without value should be deemed final and conclusive in subsequent proceedings. If, as we believe, the proceeding will again be in the hands of the Commission for further action and consideration, the Commission will undoubtedly reconsider the situation in the light of facts as they may then appear. It will be necessary, in order to frame a new plan and to make proper allocation of new securities as between first mortgage bondholders and creditors secured by pledge of refunding bonds, to determine the value of the property subject to the liens of the respective mortgages. If the sum of the values so found should exceed the total of the secured claims—a result that is more than probable—findings that unsecured claims and stock equity are without value would be in conflict with the specific findings of value of the component parts of the Debtor's property. If the proceedings go back to the Commission for reconsideration there would be no advantage in avoiding a definite finding of the value of the entire assets of the Debtor. Such finding could easily be made and, when made, would afford a proper basis for the final conclusion that the unsecured claims or the stock equity, or both, have, or do not have, value.

Whatever may be the view of this Court on the supposed divergence between the views of the Courts of Appeals for the Seventh and Ninth Circuits, it is submitted

that if a reversal and recommitment be required for want of necessary findings of value in any respect, the Commission should be required to reconsider the entire matter as of the date of its new report and to make findings of value to support, not only its determinations with respect to the secured claims, but also with respect to the unsecured claims and the stock equity. Nothing substantial would be gained by sending the proceeding back to the Commission to make findings of the value of the component parts of the property for the purpose of dealing properly with secured claims, and at the same time requiring the Commission to close its eyes to the effect of such findings on unsecured claims and stock equity. There would be no reason for such action other than that the Commission had once concluded, without the knowledge now available, that at an earlier date the unsecured claims and the stock equity were without value.

IV.

DISCUSSION OF EARNINGS AS MEASURE OF VALUE (WITHOUT REGARD TO SPECIFIC PROVISIONS OF SECTION 77).

In the *Consolidated Rock Products* case, this Court emphasized the controlling importance of the earning capacity of a productive property as the criterion, in reorganization plans, of the value of that property (*312 U. S.* at 312). In the same connection the Court pointed out that "valuations for other purposes are not relevant to, or helpful in, a determination of that issue, except as they may indirectly bear on earning capacity." Assuming, for the moment, that these declarations are as applicable to

a proceeding under Section 77 as to one under 77B, it is, we submit, clear that the Judge's approval of the plan of reorganization in this case cannot stand because of the failure of the Commission to make any finding or determination of the earning capacity of the properties of the Debtor. The report of the Commission contains considerable discussion of past earnings and of the necessity of a realistic relation of the capital structure of the reorganized company to its actual earning power, but nowhere can be found a finding, or determination, or estimate, of what, in terms of money, the prospective earnings are likely to be, or what in the judgment of the Commission the earning capacity of the railroad is. This, as pointed out in the opinion in the *Consolidated Rock Products* case,[26] is essential to a determination of the fairness of a plan of reorganization.

Past Earnings Alone Are Not a Sufficient Basis for Appraising Earning Capacity.

The Commission[27] looked primarily to the past earnings record of the Debtor. The District Judge followed the same line of approach. In his opinion[28] he stated, after tabulating the Debtor's earnings for the years 1922-1939 that "the capitalization permitted by these earnings is a

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[26] "In the second place, there is the question of the method of valuation. From this record it is apparent that little, if any, effort was made to value the whole enterprise by a capitalization of prospective earnings. The necessity for such an inquiry is emphasized by the poor earnings record of this enterprise in the past. Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization." (p. 525.)

[27] R. 244-57.

[28] R. 1592; 34 Fed. Supp. at p. 503.

mere matter of computation". In the accompanying footnote the Court, in endeavoring to show the results of such computation, took averages over a five-year, a ten-year and a seventeen-year period and capitalized them at 5%. These computations are not to be found in the Commission's Report, but, as stated in the footnote, were taken from the brief of the Institutional Bondholders (petitioners here). It is obvious that the results would be different if different periods were taken or if a different rate were used for capitalization. (It must be remembered, however, that the report of the Commission does not disclose that it attempted to capitalize earnings at all, much less at the assumed rate of 5%). In any event, where the inquiry is into the value of property as indicated or determined by its earning *capacity*, the real question is not what the property earned in the past, but what it may fairly be deemed able to earn in the future. The record of past earnings serves no purpose other than to afford a basis upon which one may forecast or estimate what the earnings may be in the future.

> "Value, under any plausible theory of capitalized earning power, is necessarily forward looking • • • The past earnings are therefore beside the point, save as a possible index of future earnings."[29]

More than this, the extent to which past earnings may be indicative of future possibilities depends upon the circumstances and conditions under which the property was operated in the past, which may be very different from those which will govern its performance in the future. In

[29]Bonbright on Valuation, 250.

the *Consolidated Rock Products Company* case[30] the Court says, in speaking of the test of earning capacity:

> "Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance."

In the case at bar the record shows that during the period preceding the Commission's Report the conditions under which the Debtor operated were such that its earnings could not be taken as a satisfactory guide to what it was likely to do thereafter.

It is hardly necessary to point out that the year 1929 inaugurated a period of severe economic and financial depression which reduced the traffic and earnings of railroads as well as the business of other enterprises. Past earnings during a depression period can obviously furnish only a very uncertain guide to even the immediate, to say nothing of the remote, future. Furthermore, the properties of the Debtor had not, in the years preceding 1929, been maintained in proper operating condition. In 1927 an extensive program of rehabilitation was undertaken, upon which approximately $8,000,000 was spent before 1931 (Stip. Par. 50, R. 1052). A similar program was resumed, by the trustees, in the years 1936-1938, and approximately

[30] 312 U. S. at p. 526.

$10,0000,000 additional was so expended during those years (See Exh. "C" to Stip. R. 1214; Stip. Par. 132, R. 1092). As a result of the 1926-1938 rehabilitation program, there is no deferred maintenance in the Debtor's properties and its facilities and equipment are sufficient to handle traffic expeditiously and efficiently (Stip. Par. 73, R. 1063). In giving consideration to past earnings, it is necessary, not only to adjust the figures with reference to the amounts spent for rehabilitation but charged to operations under the Commission's accounting rules (as has been done in the figures presented to the Commission and quoted by the District Court in its opinion), but also to bear in mind the effect on future earnings of the improved condition of the properties and the present ability of the Debtor to handle traffic efficiently.

Another important factor is the construction by the Debtor of its Northern California Extension, connecting the Western Pacific System with that of the Great Northern Railway Company (Stip. Par. 51, R. 1052-53). The additional earning power created by this addition became fully operative only during the latter part of the period preceding the report of the Commission.

V.

OTHER ELEMENTS TO BE CONSIDERED IN VALUATION UNDER SECTION 77.

(a) Elements other than earning capacity.

Up to this point we have assumed that the expressions of this Court, in the *Consolidated Rock Products* case (a 77B case), regarding earning capacity as a criterion of value, are equally applicable to a proceeding under Sec-

tion 77. We venture to suggest, however, that the views so advanced should be qualified when the inquiry arises in a railroad reorganization. One of the amendments of 1935 to Section 77 adds, to subsection (e), a definition of the basis upon which value of property of a railroad corporation shall be determined. The provision reads:

> "The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Notwithstanding the vagueness of the language—a vagueness which was perhaps intentional[31]—the enactment clearly requires that consideration be given to factors other than earning power. No doubt, "earning power of the property, past, present and prospective" is declared to be an important, and perhaps the most important, element in the inquiry, but it cannot, consistently with the language of the statute, be regarded as the sole or exclusive element.

Clearly, we submit, when the Congress provided that consideration should be given to earning power "and all other relevant facts" it did not regard earning power as the sole relevant fact. When it provided that only such

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[31]See statement of Mr. Leslie Craven, draftsman of the provision, quoted in opinion of District Judge (34 Fed. Supp. 500 (R. 1584)).

effect should be given to cost of reproduction, cost and investment, as required under the law of the land in light of its earning power and all other relevant facts, it again made manifest its purpose that some weight ought or should be given to the enumerated factors other than earning power.

In the present case, neither the Commission nor the District Court made any specific determination or finding of the value of the property. It had, however, made valuations of the property and the investment of the Debtor on a number of earlier occasions, and made one or two quite recently. Some of these prior valuations are referred to in the Commission's Report. These valuations are set forth in the Stip. The subject is fully covered in Paragraphs 57-71, inclusive, of the Stip. (R. 1058-63). We tabulate here the different valuations found or referred to by the Commission for various purposes, arranging them in order of amount for convenient comparison with the total of the secured claims—$87,888,660—and the total of all claims, secured and unsecured—$95,699,502.

Value Found	Nature of Finding	Paragraph of Stip.
$139,600,455	Final valuation of Debtor's properties, plus final valuations of properties of subsidiaries, pursuant to Sec. 19(a) of Interstate Commerce Act, plus net costs of additions and retirements between valuation dates and 12/31/35, as stated in Commission's report of 10/10/38 herein	57, 58 & 59
$140,930,391	Final valuation under Sec. 19(a) of Interstate Commerce Act plus in-	

Value Found	Nature of Finding	Paragraph of Stip.
	vestment made by Debtor between valuation date and 12/31/35	70
$144,619,851	Final valuation of Debtor's properties, plus final valuations of properties of subsidiaries, pursuant to Sec. 19(a) of Interstate Commerce Act, plus capital expenditures between valuation dates and 12/31/35, as stated in Proposed Report of Commission's Bureau of Finance herein, dated 8/2/37	60, 61
$144,978,559	Investment in road and equipment less accrued equipment depreciation as of 12/31/38	71
$147,056,283	Total capital assets as of 12/31/31, as found by Commission in its report dated 2/27/32 authorizing issuance of $15,000,000 of general and refunding mortgage bonds	64
$148,796,047	Total capital assets as of 5/31/32, as found by Commission in its report dated 12/9/32 authorizing issuance of $4,000,000 of general and refunding mortgage bonds	65
$150,907,623	Valuations found by Commission under Sec. 19(a) of Interstate Commerce Act, with additions, betterments, etc., since valuation dates as shown on books of trustees as of 12/31/38	68
$166,960,037	Total investment of Debtor as shown on its balance sheet pre-	

Value Found	Nature of Finding	Paragraph of Stip.
	pared in accordance with Commission's accounting rules as of 12/31/35	69
$171,096,992	Book value as of 11/30/36, as stated in Proposed Report of Commission's Bureau of Finance herein, dated 8/2/37	62
$173,650,980	Assets per balance sheet of Debtor's trustees as of 6/30/38, as stated in Commission's report of 10/10/38 herein	63
$174,936,239	Assets per balance sheet of Debtor and trustees as of 8/31/38, as stated in Commission's report dated 11/10/38 authorizing borrowing of $10,000,000 by trustees	66
$175,263,531	Assets per balance sheet of Debtor as of 8/31/39, as stated in Commission's supplemental report dated 11/21/39 authorizing extension of trustees' certificates	67

All of these figures were before the Commission before it made its modifying report and order of June 21, 1939 in this proceeding, except those in connection with the report of the Commission dated November 21, 1939, authorizing an extension of maturity of the trustees' certificates theretofore issued (Stip. Par. 67, R. 1061).

The final valuations of the properties of the Debtor and of its subsidiaries under 19(a), with the addition of the net costs of additions and retirements necessary to bring

them down to the later dates under consideration (Stip. Pars. 57-59, R. 1058-9), and the showing of total assets on the books of the Debtor's trustees (Stip. Par. 63, R. 1060) are referred to without disapproval, question or criticism in the report of October 10, 1938 (R. 224).

The report of October 10, 1938 (R. 224) refers to the Commission's valuation under Section 19(a) of the Interstate Commerce Act, as a report of "the value for rate-making purposes." There is no warrant in the law for any attempt to so limit the purposes for which such a valuation is to be used. The Interstate Commerce Act, of which Section 19(a) is a part, gives the Commission various powers other than that of rate-making, and the value fixed under Section 19(a) is applicable to the exercise of some of these. "It is apparent, therefore, that the establishment of a base for the fixing of rates is merely one of a number of objectives to be attained through this valuation. Nowhere in the Act is there anything that either expressly or by inference can be distorted into the limitation of this valuation for rate-making purposes. The statute, on the contrary, provides that it shall be a valuation of all the property of the railway company." (*New York N. H. etc. R. Co. v. I. C. C.*, 55 Fed. (2d) 1028, 1035). One of the Commission's powers is to control the issuance of securities by railroads. (Section 20(a)). With this in mind, the Court said in

Delaware & Hudson Co. v. U. S., 295 Fed. 558, 560:

> "The evident object of the statute (Sec. 19(a)) is to ascertain for purposes of rate-making and money borrowing the reasonable and probable going value of that property which is devoted to serving the public as a common carrier."

Some of the findings of value of the property of the Debtor, as set forth in the Stip., were made by the Commission in proceedings for the authorization of securities, as when the Commission, in authorizing the issuance of refunding bonds, found the capital assets of the Debtor, as of December 31, 1931, and as of May 31, 1932, respectively, to be something over $147,000,000 and something over $148,000,000 (Stip. Pars. 64 and 65, R. 1060-61).

The same is true of the reports of November 10, 1938 and November 21, 1939, authorizing the issuing and the extension of Trustees' certificates (Stip. Pars. 66, 67, R. 1061). The first of these reports states assets in excess of $174,000,000 and the second in excess of $175,000,000.

Comparing all of these different figures we see that the lowest valuation of the properties of the Debtor is the one referred to in its report of October 10, 1938, which shows a total valuation, as of December 31, 1935, of $139,600,455. The book value of the assets of the Debtor is $171,096,992.80 as of November 30, 1936 (Stip. Par. 62, R. 1060).

Disregarding all but the least of these figures, i. e., $139,600,455, there is a difference between the value of the properties of the Debtor and the total secured claims (i. e., $87,888,660, which alone are given recognition in the Commission Plan) of over $50,000,000. On the same basis there is an excess of asset value of more than $40,000,000 over the total amount of claims secured and unsecured.

(b) Under Section 77 valuation of railroad property is to be based—in addition to "other relevant facts"—on "earning power", not on "prospective" or "probable future" earnings.

In the event that this Court shall deem it proper (even though, perhaps, not necessary to the decision of the appeals before it) to interpret the valuation provision of subsection (e), we submit the following suggestions, based on the language of the legislative enactment.

The ultimate point of inquiry (apart from "other relevant facts") is the *earning power*, i. e., what, as an enterprise dedicated to a public service, and subject to regulation in the public interest, it is capable of earning. As a guide or help in estimating that capacity, regard may be had to past earnings and to earnings which may reasonably be anticipated in the future, but neither of these factors expresses the final test, or measure, or basis of value. Each is merely an indication, which, with others, furnishes an aid to an appraisal or estimate of what the property is capable of earning. That past or present earnings, by themselves, do not afford a sufficient foundation for estimating what the property might, or could, earn in the future, is clearly set forth in the passage already quoted (ante, p. 43) from the opinion in the *Consolidated Rock Products* case.

Nor are the "prospective" or "probable" earnings the equivalent of "earning power". The words "past, present and prospective", in subsection (e), do not refer to actual earnings or an estimate of future earnings. They are used as a qualification of the term "earning power of the property". An estimate of prospective or probable earnings relates to a future period, of greater or shorter dura-

tion, and is necessarily based upon conditions existing at the time of the inquiry or reasonably foreseeable. What a property can earn—what it is capable of earning—is not the same as what, at any given time, it is likely to earn over a future period.

Section 77 itself differentiates between "probable earnings" and "earning power" and applies the terms to different purposes. Under subsection (b)(4) the plan is to provide for fixed charges in such an amount that "there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof". When we come to the valuation provision of subsection (e) the statute departs from the measure of "probable earnings" and makes the basis "earning power" (with other relevant facts). This change of expression would, presumably, not have been adopted if the legislative body regarded the two phrases as synonymous. The Commission seems, however, to have viewed "probable earnings" not only as a limitation on fixed charges, as prescribed in subsection (b)(4), but also as a measure of valuation of the property, or of total capitalization. In its report of October 21, 1938 (R. 244), the Commission states that in fixing the capital structure of the reorganized company "consideration (must be) given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future".

It may be difficult to estimate the earning capacity of a railroad property. But the history of the Western Pacific property, before and after the formulation of the Commission Plan, shows that that capacity is much greater

than was envisaged by the Commission when it made its report. In some predepression years the Debtor's properties earned more than enough to meet all fixed charges under the old capitalization. In the past two and one-half years, it has again demonstrated its capacity to earn substantial amounts beyond the service of its pre-existing fixed charges, and the earnings are advancing steadily and at a rapid rate. The difficulty of estimating earning capacity affords no reason why the Commission should not be required to perform the task to the best of its ability. As this Court said in *Consolidated Rock Products* case (312 U. S. at p. 516): "an estimate as distinguished from mathematical certitude is all that can be made". So much, however, is, we submit, required by the language of subsection (e).

The distinction between "earning power" and "prospective or probable earnings" is not without a sound basis of reason. We are dealing with a statutory scheme for enforcing a reorganization which may result (as, in this case, it will if it becomes effective) in the extinction of interests which were of great value when acquired, and which, as their owners claim, still have substantial value presently, and greater prospective value. It is only fair and just that these interests should not be irrevocably destroyed, unless it appears that the property has not the capacity to earn enough—after full provision for all senior claims—to show a value which will permit a proper provision for the junior claimants.

VI.

EARNINGS SINCE COMMISSION'S REPORT WAS CERTIFIED.

The original Report and Order of the Commission approving a Plan of Reorganization was dated October 21, 1938 (R. 194-299). The modifying Report, under which the Plan here in question was certified to the District Court, was dated July 29, 1939 (R. 300-400). In its modifying and final Report the Commission did not review or reconsider any earnings later in ti... than those before the Commission when it made its original Report of October, 1938.

The monthly income statements showing the combined results of the operation of the properties of the Debtor and its subsidiaries from December, 1938, (shortly after the date of the original Report) up to the argument of the appeals in the Circuit Court of Appeals, were, pursuant to an Order of the District Court, dated April 7, 1942,[32] filed with the Clerks of the District Court and of the Circuit Court of Appeals, and made a part of the record on said appeals. Similar statements for months subsequent to September, 1941, have, by stipulation of the parties, dated July 18, 1942, and filed in this Court, been made a part of the record here. At the time of the preparation of this brief, the statements so filed and transmitted to this Court run to and include the month of June, 1942.

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[32] (R. 2627)—The order recites that it is made pursuant to a stipulation of the parties.

For statements covering period from December, 1938 to May, 1941, see R. 2633-36; from June, 1941 to September, 1941, see R. 2649-57.

In the *Chicago, Milwaukee* case, later earnings were not incorporated in the record on appeal (124 Fed. (2d) 754, 763).

In view of the stipulations referred to, we assume that no party to these appeals will question our right to refer to the earnings record of the Debtor during the period that has elapsed since the Commission's Report. Regardless of the want of any such objection the Court may, however, have some doubt of the propriety of taking into account facts which have developed since the Commission acted, and indeed since the District Court made the order of approval which is the subject of the present appeals.

The holdings of this Court in analogous cases establish, we submit, the propriety, if not the necessity, of a consideration of the state of facts existing when the Court of final appeal renders its decision, even though the actions of the trial Court and of the Commission might be held to have been sustainable on the facts appearing when those earlier actions were taken.

In

Atchison etc. R. Co. v. U. S., 284 U. S. 248,

this Court held, in a suit by carriers to restrain the enforcement of an order of the Interstate Commerce Commission prescribing maximum rates for the transportation of grain, that the petitioner's constitutional rights had been invaded by the action of the Commission in refusing a rehearing sought on the ground that in the three or four years elapsing after the closing of the record before the Commission there had been material and important changes in the operating, traffic and transportation conditions which affected adversely the revenues of the carrier, and that "regardless of the question of the validity and propriety of the order when made, it would no longer be valid and proper in the light of the existing

circumstances."[33] In that case the changes were those incident to the depression beginning after the Commission had concluded its investigation of the facts. The Court took judicial notice of such changes.

Similarly in

Central Ky. N. G. Co. v. Railroad Commission, 290 U. S. 264,

a case involving the validity of a rate prescribed by a State Commission for the sale of natural gas, this Court held that it would take judicial notice of economic changes taking place while the case was pending before the Commission and the Court, and would frame its decree accordingly.[34]

In the instant case, as in the *Atchison* and *Central Kentucky* cases just referred to, the action assailed would, if sustained, operate in the future. In those cases the public utility affected would have been held to a rate which would be confiscatory under conditions existing at the time of the review by the Appellate Court, although not necessarily so at the time of the order of the Commission. Likewise here, the confirmation of the Plan of Reorganization would operate for all time in the future, and, in the case of this respondent, would absolutely destroy its investment and claim without any possibility of recovery or recoupment, no matter how much conditions had changed since the Commission made its report or might change hereafter.[35] Probably the Court would be warranted in

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[33]284 U. S. 256.

[34]See also *Southern Pacific Company v. Bogert*, 250 U. S. 483.

[35]A similar principle has been applied by this Court in its holdings that an injunction properly granted under the law then in force should be set aside on appeal where there has been an intervening change in the law (*American Steel Foundries v. Tri-*

taking judicial notice of the sharp increase in railroad earnings that has taken place during the past two or three years. But it is not necessary here to rely on judicial notice alone, as the actual figures of this Debtor's recent increase of earnings are, under Stipulation and Order, before the Court.

The earnings record of the Debtor for the period since 1938 throws a strong light on the fairness of the Plan, formulated, as it was, when the results of the Debtor's operations for years after 1938 could not be known.[36]

The following is a table showing:

ADJUSTED[37] CONSOLIDATED EARNINGS AVAILABLE FOR INTEREST

For the years 1922 to 1938, inclusive (R. 1065-1066 and Supplemental Record)

1922	$2,204,890
1923	4,412,234
1924	3,241,823
1925	4,557,798
1926	4,868,390
1927	3,470,861
1928	4,376,972

City Central Trades Council, 257 U. S. 184, 201; *Texas Company v. Brown*, 258 U. S. 466; see, also, *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 464; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. (2d) 489, 526-8).

[36] In the figures which follow we deal with the earnings as if the results for the entire year 1938 had been before the Commission, although the original Report was dated October 10, 1938.

[37] In this table the reported earnings are adjusted to take into account (a) rehabilitation expenditures 1927-1931 and 1934-1938; (b) amortization of discount on first mortgage bonds of Debtor; and (c) deductions and credits 1931-34 made by Commission to accord with its accounting rules (Stip., par. 76, R. 1065).

1929	3,718,436	
1930	2,381,529	
1931	220,494	(Deficit)
1932	283,912	
1933	474,365	
1934	1,396,353	
1935	1,377,026	
1936	1,901,423	
1937	1,077,407	
1938	225,431	

The later income statements showing results of the operations of the Debtor's properties for the full years 1939, 1940, 1941 and for the first six months of 1942 disclose the following earnings available for interest:

Year	As Reported	Adjusted
1939	$1,384,515	$1,519,916
1940	2,513,091	2,648,492
1941	4,551,738	4,687,140
1942 (1st 6 months)	4,080,090	4,147,791

The statements for the three and one-half years following 1938 show an enormous increase in the Debtor's earnings since the adoption of the Plan. This increase is no doubt due to a variety of causes. Since the adoption of the Plan business and industry have largely emerged from a period of depression to one of recovery, and, in the case of this Debtor, the efficient condition of its property, and the availability of the Northern California Extension have unquestionably contributed to its increased earnings. The stimulus to production and transportation incident to the war effort since December, 1941 and the lesser impulse created by preparations for defense during earlier months

have certainly played a large part in increasing the traffic and the earnings of railroad companies generally, among them the Western Pacific. We do not undertake to apportion the improved position of the Debtor among these various causes, nor do we pretend to be able to estimate the length of time during which the pressures of war, or of the post-war period to follow, will continue to exert a beneficial effect upon the earnings and earning prospects of the Debtor. At the least, it may be said with assurance that the Commission formulated its Plan at a time when the Debtor's properties had gone through a prolonged period of economic depression, and at a time when its earnings were almost at their lowest point. We believe there can be no doubt that if the Commission were today called upon to formulate a plan, in the light of the history of the three and one-half years that have elapsed since January 1, 1939, the ensuing plan would be very different from the one which was certified to the District Court.

In other words, the "other relevant facts" now appearing go far to demonstrate that the Debtor's property has an earning capacity greatly in excess of any estimate of such earning capacity which the Commission would have had to make (though in fact no estimate was made by it) in order to justify the capitalization provided by the Plan.

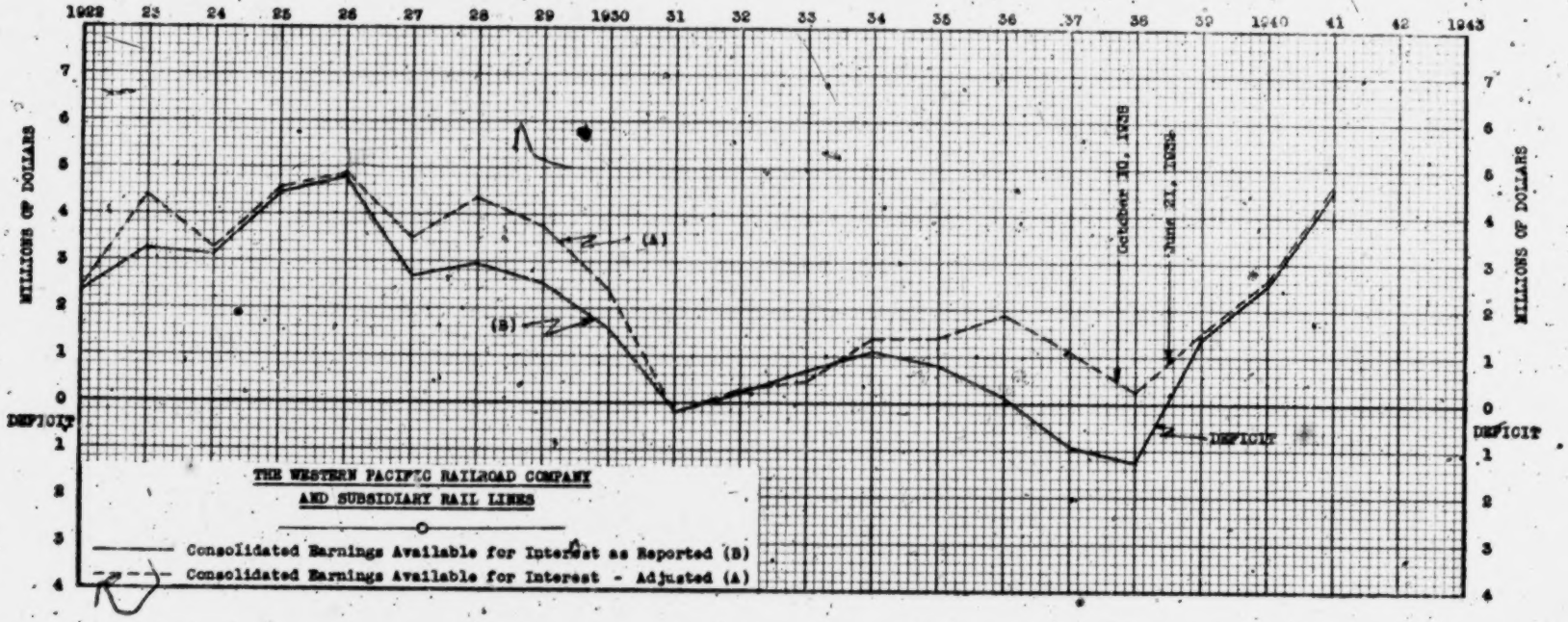
Summarizing the earnings figures tabulated above, we find out that in the year 1939 the adjusted earnings of the system available for interest increased from $229,097.45 (the figure for 1938) to $1,519,915.81, an increase of 563.04%; that in the year 1940 there was a further increase, bringing the adjusted earnings from $1,519,916 to $2,648,492, an increase of 74.25% over the 1939 figure.

The adjusted earnings for 1941 were $4,687,140, an increase of 76.97% over 1940.

(The figures of earnings available for interest for the first six months of 1942 do not lend themselves to an entirely trustworthy comparison, for the reason that probable federal income tax liability for the year 1942 cannot be determined with accuracy at this time. It may, however, be pointed out, as indicating the continuing upward curve of earnings of the Western Pacific system, that for this six months' period total railway operating revenues amounted to $16,235,602 as against $10,111,000.28 in the corresponding period of 1941,—an increase of 60.57%.)

To further illustrate the conditions which we have described we insert a chart showing graphically the earnings of the Western Pacific system from the year 1922 to the year 1941. The solid line on the curve indicates reported consolidated earnings available for interest as filed with the Interstate Commerce Commission. The broken line represents adjusted earnings available for interest.

The graph also indicates the points on the curve at which the Commission's original Report of October 10, 1938 and its final modifying report of June 21, 1939 were made. A glance at the chart is sufficient to show that the Commission Plan was formulated and announced at a time when the earning picture of the Debtor was extraordinarily unfavorable. The unadjusted earnings had reached the lowest point ever attained during the entire period depicted; while the adjusted earnings were at or near a point of decline exceeded only in the depths of the depression and then briefly. The subsequent upswing, which has already brought the earnings virtually up to the


1922
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42
1943
MILLIONS OF DOLLARS
DEFICIT
7
6
5
4
3
2
1
0
1
2
3
4
(A)
(B)
October 31, 1935
June 21, 1938
DEFICIT
THE WESTERN PACIFIC RAILROAD COMPANY
AND SUBSIDIARY RAIL LINES
Consolidated Earnings Available for Interest as Reported (B)
Consolidated Earnings Available for Interest - Adjusted (A)

highest point in the prosperous predepression level, had not yet manifested itself.

It is submitted that both the Commission and the Court failed to take into account the "other relevant facts" mentioned in subsection (e) of Section 77, or the "circumstances which indicate whether or not the (earnings) record is a reliable criterion of future performance", spoken of in the *Consolidated Rock Products* case. Because of their failure to do so the Commission and the District Court concluded (without supporting the conclusion by explicit findings) that the probable future earnings (or, in the words of subsection (e), the "earning power" of the property) would not warrant the inclusion of this respondent.

CONCLUSION.

It is respectfully urged that the decree of the Circuit Court of Appeals, reversing the order of the District Court approving the Commission Plan, should be affirmed, and that this Court give such instructions as it may deem proper for the guidance of the District Court and the Commission in the further steps to be taken in the proceeding.

Dated, San Francisco, California,
October 1, 1942.

Respectfully submitted,
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Sloss & Turner,
Of Counsel.

In the Matter
of
THE WESTERN PACIFIC RAILROAD CO.
a Corporation, *Debtor*

FREDERICK H. ECKER, et al,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, et al,
Respondents.
No. 2

CROCKER FIRST NATIONAL BANK
OF SAN FRANCISCO, et al,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, et al,
Respondents.
No. 3

RECONSTRUCTION FINANCE CORPORATION,
Petitioner,
against
WESTERN PACIFIC RAILROAD CORPORATION, et al,
Respondents.
No. 30

BRIEF OF THE RAILROAD CREDIT CORPORATION, *Respondent*

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Baltimore, Maryland
October 1, 1948

QUINN & BODEN PRESS, INC., NEW HAVEN, CONN.

Supreme Court of the United States

OCTOBER TERM, 1942

In the Matter

of

THE WESTERN PACIFIC RAILROAD CO.,
a Corporation, *Debtor*

FREDERICK H. ECKER, et al, *Petitioners,* against WESTERN PACIFIC RAILROAD CORPORATION, et al, *Respondents.*	No. 7
CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, et al, *Petitioners,* against WESTERN PACIFIC RAILROAD CORPORATION, et al, *Respondents.*	No. 8
RECONSTRUCTION FINANCE CORPORATION, *Petitioner,* against WESTERN PACIFIC RAILROAD CORPORATION, et al, *Respondents.*	No. 33

BRIEF OF THE RAILROAD CREDIT CORPORATION, *Respondent*

Index

	PAGE
Opinions Below	1
Jurisdiction	1
Summary of Argument	2
Argument	3
Point One	3
The District Court has erred in approving a plan of reorganization which treats the claim of the Reconstruction Finance Corporation upon a different basis with respect to the collateral securing that claim than similar claims of The Railroad Credit Corporation and the A. C. James Company to the extent that they are secured by the same or similar collateral	3
Claims of the Collaterally Secured Noteholders	4
1. The Railroad Credit Corporation	4
2. The Reconstruction Finance Corporation	5
3. The A. C. James Company	6
Point Two	21
The limitation on capitalization fixed in the Plan approved by the District Court does not constitute a valuation or appraisal of the Debtor's property including the actual investment therein, such as is required by Section 77 of the Bankruptcy Act, as Amended and the law of the land	21
Valuation Act, 1913, Section 19a	24, 25, 26
Transportation Act, 1920, Section 15a	27
Conclusion	36-A
Appendix A	37

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Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106	13, 33
Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510	13, 33
Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Company, 294 U. S. 648, 684	15

PAGE

Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456 (1924) 28, 32
In Re Mortgage Guarantee Co., C. C. H. 53,093 (Not officially reported in Federal Supplement) 20
Minnesota Rate Cases, 230 U. S. 352, 449 28
New England Divisions Cases, 261 U. S. 184, 189 ..... 30, 32
Northern Pacific Railway v. Boyd, 228 U. S. 482 33
Railroad Commission v. Chicago, B. & Q. R. R. Co., 257 U. S. 563, 585 ..... 29, 30
St. Louis & O'Fallon Railway Co. v. United States, 279 U. S. 461 33
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Section 24(c) 2
Section 77(e), (b) 21, 31
Interstate Commerce Act (49 U. S. C. A., p. 64), Section 19a 24
Judicial Code, Act of Feb. 13, 1925 (28 U. S. C. A., §347a) 2
Transportation Act of 1920 Section 15a; (49 U. S. C. A., p. 443) 27, 28

BRIEF OF THE RAILROAD CREDIT CORPORATION, *Respondent*

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Five petitions for writs of certiorari to revie the decree of the United States Circuit Court of Appeals for the Ninth Circuit entered November 28, 1941, were filed with and allowed by this Court on April 27, 1942. In addition, a Memorandum was also filed by the Interstate Commerce Commission, through the Solicitor General, as *amicus curiae*, urging this Court to grant the petitions for writs of certiorari in these cases in order that the Commission's duties under Section 77 and the procedure to be followed and the findings to be made by it in preparing and certifying future plans of reorganization may be established by a definite decision of this Court.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, from which these several petitions for review on writs of certiorari were filed, was rendered on November 28, 1941, and is officially reported in 124 F. (2d) 136, (R. 2663). This opinion reversed the decree of the District Court which approved *in toto* the plan of reorganization certified to it by the Interstate Commerce Commission pursuant to Section 77(d) of the Bankruptcy Act (11 U. S. C. A. § 205) and is officially reported in 34 F. Supp. 493 (R. 1569 to 1600).

JURISDICTION

The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by Act of Con-

gress of February 13, 1935 (U. S. Code, Title 28, Section 347-a) and §24(c) of the Bankruptcy Act (11 U. S. C. § 47(c)).

SUMMARY OF ARGUMENT

Pursuant to the provisions of Rule 27(d) and subdivision 4 thereof of the Rules of this Court, respondent leaves to counsel for petitioners to include in their briefs a concise statement of the case. For purposes of clarity, however, and to facilitate an immediate understanding of the reasons upon which this respondent based its objections to the treatment recommended for its claim in the Commission's plan and approved by the District Court, a brief statement of the claims of the collaterally secured noteholders, *i.e.*, The Railroad Credit Corporation, the Reconstruction Finance Corporation and the A. C. James Company, is recited.

Before proceeding to a discussion of this matter and a summary of the argument, it is appropriate at the outset to advise the Court that this brief will be confined and limited to a discussion of only two of the Statement of Points upon which it relied on its appeal to the Circuit Court of Appeals. Said two points, Nos. 6 and 7, (R. 1644) are is follows:

> "6. The District Court has erred in approving a plan of reorganization which treats the claim of the Reconstruction Finance Corporation upon a different basis with respect to the collateral securing that claim than similar claims of The Railroad Credit Corporation and the A. C. James Company to the extent that they are secured by the same or similar collateral.
>
> "7. The limitation on capitalization fixed in the Plan approved by the District Court does not constitute a valuation or appraisal of the Debtor's property, including the actual investment therein, such as is required by Section 77 of the Bankruptcy Act, as Amended, and the law of the land."

This limitation of argument is to avoid repetition and because pertinent objections raised by this respondent in the Court below are substantially similar to those of other respondents whose arguments will be adequately presented in their briefs. Therefore, The Railroad Credit Corporation (hereinafter referred to as R. C. C. or Credit Corporation) hereby concurs in and adopts as its own the briefs and arguments presented by the other respondents in support of the other objections to the plan raised in the District Court and argued in the Court below.

ARGUMENT

POINT ONE

The District Court has erred in approving a plan of reorganization which treats the claim of the Reconstruction Finance Corporation upon a different basis with respect to the collateral securing that claim than similar claims of The Railroad Credit Corporation and the A. C. James Company to the extent that they are secured by the same or similar collateral.

It is urged in the brief filed on behalf of A. C. James Co., respondent, that the secured claims of The Railroad Credit Corporation, Reconstruction Finance Corporation and A. C. James Co. should be recognized and refunded in full, and upon the same basis, both because the property of the debtor is sufficient in value to cover fully these three claims and because the property on which the General and Refunding Mortgage of the debtor constitutes a prior lien is sufficient in value to require that the claims of the creditors secured thereby should be refunded in full. The Railroad Credit Corporation expressly adopts and reaffirms this argument. While the Credit Corporation objects herein to the preference accorded to Reconstruction Finance Corporation and

insists that the allocation of securities between the Credit Corporation, Reconstruction Finance Corporation and A. C. James Company, as proposed in the Commission Plan, cannot be justified in law, even upon the assumption that the Commission's capitalization can be sustained, this petitioner again urges that the value of the debtor's property is sufficient to justify capitalization of at least $120,000,000, and it is sufficient in amount to require the refunding in full of all secured claims.

Claims of the Collaterally Secured Noteholders.

1. The Railroad Credit Corporation:

This respondent is a claimant in these reorganization proceedings by reason of two collaterally secured loans made to The Western Pacific Railroad Company—now the Debtor. Said loans were made on June 29, 1932, in the sum of $1,303,000 and on March 25, 1933, in the amount of $1,293,439, being due and payable on February 28, 1934, and March 24, 1935, respectively. Although the two promissory notes evidencing these loans have fixed maturity dates, nevertheless, they are in terms callable on demand, in the absence of which they are due and payable on their respective maturity dates. These notes carry the interest rate of the Federal Reserve Bank in New York City, which is presently 1% and has been such since October 1, 1937. The following items of collateral are pledged as security for both obligations: (R. 1577(b)).

(a) $4,000,000 Debtor's General and Refunding Bonds, Series A and B. ($2,000,000 of these bonds, Series A, were actually pledged with and delivered to the Credit Corporation by the A. C. James Co.).

(b) All right, title and interest of The Western Pacific Railroad Corporation in and to certain open account advances made by it as follows:

(i) $5,494,722.00 to the Debtor.
(ii) 856,260.00 to Sacramento Northern Railway Company.
(iii) 120,000.00 to Standard Realty and Development Company.

(c) Debtor's equity in collateral theretofore and thereafter deposited by it with Reconstruction Finance Corporation.

(d) [1]Debtor's right to distributive shares in the fund administered by The Railroad Credit Corporation under the Marshalling and Distributing Plan, 1931.

(e) [1]Assignment of distributive shares of Deep Creek Railroad Company, Sacramento Northern Railway.

The principal amount of each of R. C. C.'s loans has been reduced from time to time by income from collateral, including application of distributive shares, by way of credits, so that as of the effective date of the Plan, to wit, January 1, 1939, the unpaid balance of principal was $2,445,609.88. Added to this amount the accrued and unpaid interest to the effective date of the Plan of $145,314.25, makes a total claim of $2,590,924.11 (R. 1576).

2. The Reconstruction Finance Corporation:

The claim of the Reconstruction Finance Corporation (hereinafter referred to as Finance Corporation or R. F. C.) is evidenced by five notes representing loans to the Debtor Company in the principal sum of $2,963,000, plus accrued

[1] The net contributions originally made to the Marshalling and Distributing Fund by the Debtor, the Deep Creek and Sacramento Northern Railway Companies, and subsequently pledged or authorized to be applied against the loan obligations of the Debtor, amounted to $200,705.30. As of January 1, 1939, the effective date recommended for the Plan, there had been distributed 77½% of this sum, leaving a net contributed balance of $45,158.66, plus allocated income from the aforementioned Fund amounting to $9,897.70, which, added together, left an undistributed book balance of $55,056.36.

interest to the effective date of the Plan in the amount of $899,869.98, or a total note claim of $3,862,869.98 (R. 1576). These notes are secured by the following collateral: (R. 1577)

$8,750,000 of Debtor's General and Refunding Mortgage bonds, Series A, and

2,000,000 of the same refunding mortgage bonds, Series B,

Voting trust certificates for 150,000 shares of common stock of Denver & Rio Grande Western Railroad Company,

A second lien on $2,000,000 of refunding mortgage bonds, Series A, pledged with the R. C. C.

3. The A. C. James Company:

Debtor's loan obligation to the A. C. James Company (hereinafter referred to as the James Company) is evidenced by notes representing loans in the principal sum of $4,999,800, with accrued interest of $1,249,950 to effective date of the plan, or an aggregate total claim of $6,249,750. The following collateral secures the notes of this creditor: (R. 1577-78)

$6,249,500 principal amount of Debtor's General and Refunding Mortgage Bonds, Series A, of which $2,000,000 were repledged by the James Company with the R. C. C. and on which the R. C. C. has a prior lien.

The above represents all of the collaterally secured note claims filed in this proceeding and as security for which the total issue of Debtor's First and General Mortgage Bonds in the aggregate amount of $18,999,500 has been pledged. Each of these loans was, of course, made to the Debtor *prior* to the bankruptcy proceedings, and in the case of the R. F. C. and the A. C. James Company with the approval of the Commission.

Quite distinct from these three loans made to the debtor before the bankruptcy petition is the loan made by the R. F. C. to the Trustees *after the bankruptcy petition*. This latter loan (R. 696), evidenced by $10,000,000 of Trustees Certificates authorized by the Court, is a first lien on the estate prior to all other liens except taxes and is *pari passu* with other expenses of administration.

Turning now to the plan of reorganization approved by the District Court, the treatment with respect to the allocation of new securities for each of these claims as recommended therein is as follows:

> "O. The $10,000,000 of new first mortgage bonds, series A, to be authenticated and issued in the reorganization shall be sold at par and accrued interest to the Reconstruction Finance Corporation * * *. In consideration of such purchase by the Reconstruction Finance Corporation of the new first-mortgage bonds, series A, and considering the value of the collateral securing its claim, such claim amounting as of January 1, 1939, to $3,862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by general and refunding bonds of the debtor and other collateral, shall be provided for under the plan in like securities and in like proportions as those given holders of the debtor's first mortgage bonds." (R. 389-90).
>
> "3. The Reconstruction Finance Corporation shall receive in respect of the $10,000,000 of new money provided for in subdivision O (or the surrender of trustees'-certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to January 1, 1939, approximately $10,000,000 of new first-mortgage 4-percent bonds, series A (being 100 percent of said new money); $1,185,200 of income-mortgage 4½-percent bonds, series A (being 40 percent of the

principal of said claim); $1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of $57 a share for 100 percent of said accrued and unpaid interest). (R. 391).

"4. The Railroad Credit Corporation shall receive in respect of its claim in the principal amount of $2,455,610, together with $146,503 of interest accrued and unpaid thereon to January 1, 1939 (subject to the reduction of said amounts by the application, prior to the date of issue of new securities under the plan, of any proceeds from the distributive shares of the company or its subsidiaries under the marshaling and distributing plan, 1931), approximately $154,111 of income mortgage 4½-percent bonds, series A; $241,681 of 5-percent preferred stock, series A; and 35,425 shares of common stock (being common stock taken at the price of $62 per share). The Railroad Credit Corporation's equity in the collateral securing the claim of the Reconstruction Finance Corporation is found to be without value. (R. 391-92).

"5. The A. C. James Company shall receive in respect of its claim in the principal amount of $4,999,800, together with $1,249,950 of interest accrued and unpaid thereon to January 1, 1939, $163,724 of income mortgage 4½-percent bonds, series A; $256,756 of 5-percent preferred stock, series A; and 37,635 shares of common stock (being an amount of common stock which bears to the amount of common stock allotted to the claim of the Railroad Credit Corporation the same proportion that the principal amount of general and refunding mortgage bonds of the debtor held by the A. C. James Company as collateral for said claim, bears to the principal amount of such bonds held by the Railroad Credit Corporation as collateral for its claim). (R. 392)."

After commenting generally upon the value of the assets pledged under the General and Refunding Mortgage, the approved Plan of the Commission concludes that—

> "xxx the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955. Applying to these amounts the proportionate amounts of general and refunding mortgage bonds securing the notes of the Finance Corporation, The Credit Corporation, and the James Company, the Finance Corporation would receive $414,175 of income mortgage bonds and $649,518 of new preferred stock, the Credit Corporation $154,111 of income-mortgage bonds and $241,681 of new preferred stock, and the James Company $163,724 of income bonds and $256,756 of new preferred stock for part of their claims. *However, this allocation will apply only to the Credit Corporation and the James Company, for, as appears herein, we approve the allocation of new securities to the Finance Corporation on a different basis, i.e., on the basis upon which securities are allotted to the holders of existing first-mortgage bonds.* In this connection we also find that such allocation of reorganization securities to the Finance Corporation exhausts the value of the collateral pledged by the debtor under the notes held by the Finance Corporation, and that the equity of the Credit Corporation in such collateral has no value." (R. 315–16). [Italics supplied]

The Commission therefore modified its prior report and order of October 10, 1938 (R. 194-299), which allocated as payment of the claims of the R. F. C., R. C. C. and James Company common stock of no-par-value for principal and interest, plus the right to subscribe within a fixed period of time for new first-mortgage bonds to be issued to provide new money (R. 294), and in its modification provided that the

Finance Corporation purchase the bonds at par and accrued interest and that in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the debtor's existing first-mortgage bonds. (R. 312).

It is quite apparent from the above extracts of the plan that the treatment in favor of R. F. C.'s note claim against the Debtor discriminates against the R. C. C. and the James Company, whose claims are similarly secured in part by general and refunding mortgage bonds. Since all three creditors are secured by these bonds (although in different amounts), they would be entitled to receive new securities in proportion to the respective amounts held, if it be assumed that the debtor's property and assets are insufficient in value to cover fully the claims of such creditors. But instead, the plan merges or consolidates R. F. C.'s distinct claim against the Debtor's Trustees for the loan of approximately $10,000,000 and secured by the Trustees' Certificates, with its separate note claim for $3,862,869.98 (R. 1576) against the Debtor Company, and then proceeds to treat both obligations as a single claim in order to accord to the R. F. C. treatment equal to that provided for the holders of Debtor's existing first mortgage bonds. By such action the plan thereby discriminates in favor of the R. F. C. and against the R. C. C. and the James Company. The Commission attempts to justify this preferred and discriminatory treatment on the ground that the raising of new money is necessary in order to secure funds to retire the $10,000,000 of Debtor's Trustees' Certificates held by the R. F. C., and states that the secured notes held by Reconstruction Finance Corporation are advanced to a preferred position and are entitled to receive treatment equal to that

given to First Mortgage bonds, in consideration of the purchase by that Corporation of the new $10,000,000 of first mortgage bonds at par and accrued interest (or the exchange of said certificates for the bonds) and in consideration of the value of the collateral securing the notes held by Reconstruction Finance Corporation. Thus, Reconstruction Finance Corporation would receive in respect of its secured note claim payment or refunding in new securities upon a basis equal to that accorded to First Mortgage bondholders.

Therefore, it is difficult to understand upon what hypothesis the plan attributes great value to the additional collateral pledged for the note claim of the R. F. C. Aside from the general and refunding mortgage bonds (including its second lien on $2,000,000 of the $4,000,000 of said bonds pledged with the R. C. C.) securing its claim against the Debtor, the only additional collateral which R. F. C. holds is 150,000 shares of common stock of the Denver & Rio Grande Western Railroad Company. This Court will take judicial notice of the fact that the Denver Company is presently reorganizing under Section 77 and that in its recent Supplemental Report and Order on a plan of reorganization the Commission found the stock to be of no value. (Finance Docket 11,002, July 13, 1942). In the face of this situation it is not easy to understand how the Commission can justify the following conclusion and treatment of R. F. C.'s note claim against the Debtor:

> "We will modify our prior report and order accordingly, and will also provide that the Finance Corporation purchase the bonds at par and accrued interest and that in consideration of such purchase *and the value of the collateral securing its claim*, the Finance Corporation receive for the secured notes of the debtor held by it, treatment equal to that accorded the holders of the

debtor's existing first-mortgage bonds." (R. 312). [Italics supplied]

Here are two separate and distinct loan obligations, one owed by the Debtor, the other by the Trustees of the Debtor. It is not denied, but willingly conceded, that Trustees' Certificates do enjoy a priority of payment ahead of first mortgage bondholders and secured noteholders because they rank as expenses of administration and therefore, constitute, equally with other expenses of administration, a direct charge and lien on all property of the Debtor held by the Trustees. The Credit Corporation does not dispute the soundness of this principle. On the contrary, it agrees that the Finance Corporation is entitled to cash for the Trustees' certificates or, failing in this, to the best security available to assure it of payment in full of its claim. The R. C. C. does object, however, to the consolidation or merger of the two claims and their treatment as a single unit of obligation in order that one of the claims may be advanced and receive preferred treatment in new securities which it otherwise would not get. General and refunding bonds are of no different value in the hands of the R. F. C. than they are in the hands of R. C. C. or of the A. C. James Company. The R. C. C. is pledgee of the equity in the collateral pledged with the R. F. C. including the $10,750,000 of Debtors General and Refunding Mortgage Bonds. The A. C. James Company holds a first lien on the equity in $2,000,000 of said bonds which it loaned to the Debtor to be pledged with the R. C. C. Were the plan to allocate new securities to these three claimants in an amount proportional to the amount of refunding bonds held by each as against the total of refunding mortgage bonds outstanding (not considering for this purpose the additional collateral securities) the fair and equitable distribution of new securities would be as follows:

The total General and Refunding Mortgage Bonds pledged is the entire issue of $18,999,500. Of these $10,750,000 have been pledged with the R. F. C., $4,000,000 with the R. C. C. and $4,249,500 with the A. C. James Company. Obviously then the proper distribution under the Commission's assumption would be represented in each case by a fraction whose denominator is $18,999,500 and whose numerator is the amount pledged to secure each claim.

The allotted securities for these claims total the following, $1,503,035, 4½% Income Mortgage Bonds, $2,276,237 5% Preferred Stock, 88,848 shares of Common Stock. This distribution applied to allotted securities results in the amounts shown below:

Creditors	4½% *Income Mtg. Bonds*	5% *Preferred Stock*	*Common Stock*
R. F. C. (.5638044)	$850,423.82	$1,287,904.91	50,270.59 shares
R. C. C. (.2105318)	316,436.66	479,220.27	18,705.33 shares
A. C. J. (.2236638)	336,174.52	509,111.82	19,872.08 shares
	$1,503,035.00	$2,276,237.00	88,848 shares

The above distribution assumes, though respondents deny, that the new securities represent the value of the general and refunding mortgage bonds which would be surrendered. Upon this assumption the allocation would be consistent with the principles enunciated by this Court in the [1]*Los Angeles Lumber Products Company* and the [2]*Rock Products Company* cases and should be substituted for the following distributions proposed by the Commission and approved by the District Court:

[1] Case v. Los Angeles Lumber Products Co., 308 U. S. 106.
[2] Consolidated Rock Products Co. v. DuBois, 312 U. S. 510.

Creditors	4½% Income Mtg. Bonds	5% Preferred Stock	Common Stock
R. F. C.	$1,185,200.00	$1,777,800.00	15,788 shares
R. C. C.	154,111.00	241,681.00	35,425 shares
A. C. J.	163,724.00	256,756.00	37,635 shares
	$1,503,035.00	$2,276,237.00	88,848 shares

Additional securities for the remainder of the rights which the R. C. C. now holds would, of course, also be necessary in order to retain its relative secured position in the reorganized company. It cannot be compelled to subordinate its rights in favor of a similarly secured noteholder simply because that claimant will purchase first mortgage bonds under the reorganization plan. The securities to be issued to the R. F. C. for any money to be furnished by it should be in recognition of the priority inherent in that transaction and not in any wise be connected with the treatment covering the loan by it to the Debtor as distinguished from the loan made by it to the Trustees.

In their briefs filed in this Court the R. F. C. and the Institutional Bondholders Committee have sought to justify the favored treatment for the R. F. C.'s claim on the ground among others, that the new first mortgage bonds, upon reorganization of the property, would sell for considerably less than par. This, now, is obviously absurd in view of the Trustees' petition to pay off a substantial portion from its cash on hand and on deposit with the R. F. C. (See Appendix A). Any way, this consideration is not only irrelevant to the grievance of the R. C. C., but offers no justification or support for treatment of another claim entirely foreign and distinct and which by no stretch of the imagination can be considered a part of the R. F. C.'s claim against the Trustees. There are no special equities applicable to the note claim of the R. F. C. which are not at least equally applicable to the claim of the R. C. C. The fact that the R. F. C. makes loans from

public moneys does not entitle it to special consideration. That the R. F. C., like other corporations, is subject to the general laws was so declared by this Court in the [1]*Rock Island* case, wherein this Court said:

> "The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of enforcement of the Bankruptcy Act, including Section 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations."

Unlike the ordinary proceeding in bankruptcy where the assets of the bankrupt are converted into cash for distribution among his creditors, Section 77 "is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised." [1]*Rock Island* case, *supra*. A plan which singles out a claim secured by the same character of bonds as those of other creditors and applies to it treatment *pari passu* with the claims of mortgage bondholders simply because of its willingness to exchange a separate claim against the Debtor Trustees is obviously unfair and *in*equitable. This is the more apparent because the claim against the Trustees based on their certificates is a first lien against the estate, ranking *pari passu* with expenses of administration.

The record shows that on orders of the District Court the Trustees' certificates have been refunded from time to time

[1] Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co., 294 U. S. 648, 684.

by an extension of their respective maturity dates and by the issue of new certificates of indebtedness of equal principal amount. Petitioners refer (R.F.C.'s brief, page 41) to the opinion of the District Court denying this motion to use $3,000,000 of the Trustees' cash to retire an equal amount of Trustees Certificates, and in the Institutional Bondholders brief, (pages 110 and 111), this language occurs

> "The rapidly mounting gross income of the Debtor's properties, before Federal taxes, is resulting in a rapid accumulation of cash by the reorganization trustees. As of September 1, 1942, the cash on hand and on deposit with R. F. C. aggregated $10,493,000, of which a substantial amount, however, must be reserved for taxes and deferred maintenance, as well as for the additions and betterments necessary to meet additional traffic demands. If any of the remaining cash is used to pay down, or possibly pay off, the Trustees' Certificates, so that the R. F. C. Notes will be left to be dealt with solely upon the basis of their pledged Refunding Bonds, the reorganized company will be denuded of the cash necessary to service the new securities from January 1, 1939, the effective date of the Commission Plan. Not only will the First Mortgage Bondholders' realization of any cash income out of the earnings of their properties thus be substantially delayed to their own injury, but if the Commission Plan is thus rendered abortive, at least $10,000,000 more of interest will have accrued upon the First Mortgage since January 1, 1939. This will have to be provided for in any new plan with due recognition of its priority over the pledged Refunding Bonds."

Both the R. F. C. and the Institutional Bondholders Counsel overlooked or failed to comprehend the language of the latest petition duly served on the parties hereto and filed with the District Court under date of September 4, 1942, a petition brought by the Trustees on their own motion and verified by Charles Elsey, the President of the Western Pacific Railroad

Company, and since the appointment of the Trustees of the properties of said company, the agent of said trustees in immediate charge of the railroad and other property of said Company. Said petition is annexed to this brief as Appendix A. The following significant extracts appear in the petition:

"Your petitioners also put up with the Reconstruction Finance Corporation, incidentally to said further extension of said loan to December 1, 1942, and as collateral security therefor, the sum of $5,000,000 from cash in the hands of your petitioners, pursuant to said order. On April 24, 1942, your petitioners put up with Reconstruction Finance Corporation, as further collateral security for said loan and subject to the same terms and conditions, the additional sum of $1,000,000 from cash in the hands of your petitioners. Pursuant to said order of November 26, 1941, and said agreement by your petitioners with the Reconstruction Finance Corporation, your petitioners have curtailed the principal of said loan by the amount of $25,000 on the 15th day of the months of December, 1941, to August, 1942, both inclusive, thereby reducing the said principal of said loan to the total amount of $9,625,000, and the said Certificates of Indebtedness in said reduced principal amount are now outstanding and held by Reconstruction Finance Corporation and mature and are payable on December 1, 1942. Your petitioners have paid to Reconstruction Finance Corporation the interest upon the said outstanding Certificates of Indebtedness to and including the 1st day of September, 1942. Your petitioners will further curtail the principal of said loan by the amount of $25,000 on the 15th day of each of the months of September, October and November, 1942, thereby reducing the said principal of said loan to the total amount of $9,550,000.

* * * *

"Your petitioners had cash on hand as of September 1, 1942, in the total amount of $4,493,000 and they expect to have cash on hand as of December 1, 1942, after meeting all expenses to be incurred in the opera-

tion and maintenance of the properties of the Debtor, in the total amount of not less than $6,000,000. In addition thereto, as hereinbefore set forth, your petitioners have put up with the Reconstruction Finance Corporation the total amount of $6,000,000 incidentally to and as collateral security for said further extension of said loan. Petitioners are of the opinoin that they would be able, without impairment of necessary working capital and without prejudice to the conduct of the railroad business of the Debtor, to retire by redemption out of cash on hand and said cash put up with the Reconstruction Finance Corporation a substantial portion of the principal amount of the indebtedness represented by said outstanding certificates of indebtedness. By reason of said increase in the amount of cash available to your petitioners, including said sums put up with and now held by the Reconstruction Finance Corporation, and said order of this Court made on May 13, 1941, your petitioners desire to receive instructions from this Court with respect to the partial retirement of said indebtedness and, if such partial retirement should be ordered by the Court, the amount thereof."

Pursuant to Order of the Court issued under date of September 4, 1942, hearing on said petition was ordered for September 28, 1942.

The argument presented in these briefs of petitioners seems to carry its own refutation. The money borrowed from the R. F. C. by the Trustees (not the Debtor) under the order of the court constitutes a debt which should be discharged before reorganization if the cash is available with which to discharge it. It is prior to all other claims excepting taxes. It is of equal rank with administration expenses. To say that payment should be deferred because the First Mortgage Bondholders might be delayed in receiving payment on their bonds is to give to those First Mortgage Bondholders the priority and preference which belongs to the Trustees' Certificates. The

statement of the Trustees that they can pay a substantial portion of the debt; that they have $6,000,000 of cash deposited with the R. F. C. and expect to have six million more on hand on December first, at which time they can, without impairing in anywise the reorganization, pay off a substantial portion of the Trustees' Certificates, would seem to be more persuasive than the opinion of counsel for First Mortgage Bondholders that because of such payment the reorganized company will be denuded of the cash necessary for deferred maintenance [of which there is none in evidence] as well as for additions and betterments necessary to meet additional traffic demands and to service the new securities issued to the First Mortgage Bondholders. The responsibility for the future operation of this property is upon these Trustees and upon Mr. Elsey, the President, who has sworn to the statements contained in the petition. These should have a greater probative value than the argument of petitioners counsel in their briefs.

If these certificates are paid off before or at the time of the consummation of a plan which accords to the R. F. C. treatment similar to that now recommended in the Commission's plan, the unfairness of this arrangement becomes increasingly apparent. The remaining note claim of the R. F. C. in this event would then enjoy a larger amount of new securities which it obtained in consideration of its acceptance of $10,000,000 of new first mortgage bonds for the surrender of the said certificates of indebtedness instead of insisting upon cash. In other words, it now seems probable that these certificates will be paid in full before consummation of any plan. In this event the consideration which prompted preferential treatment of R. F. C.'s note claim will disappear. Assume, on the other hand, that the certificates are not paid in cash before consummation of a plan which accords similar treatment to R. F. C., then this claim against the Trustees

will have been paid by the allocation of $10,000,000 of new first mortgage bonds. It is a reasonable prediction, that the principal amount of the certificates will be appreciably less than the $10,000,000 of first mortgage bonds because of the current retirements and the allegations in the petition of the Trustees for authority to pay a "substantial portion of the principal amount of the indebtedness represented by said outstanding certificates of indebtedness."

It is the contention of the Credit Corporation that inasmuch as the three noteholders all hold similar collateral, *i.e.*, general and refunding mortgage bonds, their claim should be refunded, under the Commission's assumption, so far as this collateral is concerned, in new securities of the same grades in proportion to the respective amounts of collateral held by each such noteholder. "Rights of several parties similarly circumstanced should all stand on the same footing." *In re Mortgage Guarantee Co.*, C. C. H. 53,093 (not officially reported in Federal Supplement). Therefore, the claims of the Credit Corporation and the James Company, to the extent that they are secured by similar bonds, or equivalent value, are entitled to comparable treatment, but the Plan does not so provide. Participation in the reorganization by all claimants should be, as the Court below has found, "in proportion to the value of their respective claims." (R. 2669). The effect of the consideration imputed to R. F. C.'s note claim but not valued by the Commission or the District Court, is to place it in the category of an obligation adequately secured and ranking equally with first mortgage bonds upon a basis which discriminates unfairly against R. C. C. and A. C. James Company. In the absence of such a determination the plan fails to meet the purposes of Section 77, which "include the development of a 'fair and equitable' plan of reorganization." [1] *Warren, et al., Trustees vs. Palmer, et al., Trustees.*

[1] Warren, et al., Trustees v. Palmer, et al., Trustees, 310 U. S. 132, 140.

It is respectfully submitted that the securities to be issued to the R. F. C. for any money to be furnished by it, or as an exchange for any securities to be surrendered, should be in recognition of the priority inherent in that transaction and not in any wise connected with the treatment covering the loan by the Reconstruction Finance Corporation to the Debtor as distinguished from the loan made by R. F. C. to the Trustees.

POINT TWO

The limitation on capitalization fixed in the Plan approved by the District Court does not constitute a valuation or appraisal of the Debtor's property including the actual investment therein, such as is required by Section 77 of the Bankruptcy Act, as Amended and the law of the land.

Section 77(e) contains the following provision requiring a valuation of the debtor's properties if a valuation shall be necessary for any purpose:

> "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Section 77(b) also requires that the plan of reorganization

> "* * * (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent

for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; * * * ."

Are additional powers conferred, or additional duties imposed upon the Commission by the above quoted clauses of Section 77?

An accurate or even illuminating answer to this question involves an examination of the "law of the land" at the date of the enactment of Section 77 and a recital of legislative and judicial action up to that date.

Valuation and capitalization of railroads by the Interstate Commerce Commission were originally urged by the Commission in its report to Congress in 1908 in the following language:

> "A second consideration which leads the Commission to urge upon Congress provision for an authoritative valuation of railway property is the importance which the question of capitalization has assumed in recent years. No one at the present time can say whether railways are undercapitalized or overcapitalized; or, should objection be made to that way of putting the question, no one can say, with the information in hand, which of the roads are undercapitalized and which are overcapitalized. A valuation adequate to the problem in hand should not stop with the simple statement of an amount; on the contrary it should analyze the amount ascertained according to the sources from which the value accrues and show the economic character as well as the industrial significance of the several forms of value. In no other way is it possible to arrive at an intelligent understanding of that complex situation suggested by the phrase 'railway capitalization'."
>
> "A third argument in support of the plan of an authoritative valuation of railway property is found in the present unsatisfactory condition of railway balance

sheets. The balance sheet is, perhaps, the most important of the statements that may be drawn from the accounts of corporations, for, if correctly drawn, it contains not only a classified statement of corporate assets and corporate liabilities, but it provides in the balance, that is to say, the 'profit and loss' a quick and trustworthy measure of the success that has attended the operation and management of the property. Every balance sheet begins with 'cost of property' against which is set a figure which purports to stand for the investment. This is no place to enter upon an extended criticism of the practice of American railways in the matter of their property accounts, nor is such a criticism necessary for the purpose in hand. It is sufficient to refer to the well known fact that no court, or commission, or accountant, or financial writer would for a moment consider that the present balance sheet statement purporting to give the 'cost of property' suggests, even in a remote degree, a reliable measure either of money invested or of present value. Thus, at the first touch of critical analysis, the balance sheets published by American railways are found to be inadequate. They are incapable of rendering the service which may rightly be demanded of them. One cure seems possible for such a situation, and one only, and that is for the Government to make an authoritative valuation of railway property, and to provide that the amounts so determined should be entered upon the books of the carriers as the accepted measure of capital assets. Under no other condition can the Commission complete in a satisfactory manner the formulation of a standard system of accounts." Twenty-Second Annual Report of the Interstate Commerce Commission, 1908, pp. 84, 85.

It is significant that the above quotation was no temporary unconsidered conclusion of the Commission, for it used the same language in its annual reports to Congress in 1910 and 1911 and re-affirmed in each case its conclusions.

Twenty-Fourth Annual Report of the Interstate Commerce Commission, 1910, p. 37.

Twenty-Fifth Annual Report of the Interstate Commerce Commission, 1911, pp. 93, 94.

Valuation Act, 1913, Section 19a

On March 1, 1913, Congress enacted what is generally referred to as Section 19a of the Interstate Commerce Act (49 U. S. C. A., p. 64). In Section 19a Congress directed the Interstate Commerce Commission to make a physical valuation of the property of common carriers subject to the provisions of the Interstate Commerce Act. This valuation should begin with an inventory which shall "list the property of every common carrier subject to the provisions of this chapter in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission."

In determining the physical valuation of property, the Commission was required to "ascertain and report in detail as to each piece of property, other than land, owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any." The Commission was required in like manner to "ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values."

"Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals owned or used for the purpose of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same."

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed."

The Commission was further directed to investigate and report upon the history and organization of "the present and of any previous corporation operating such property". The Commission was also required to "ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier." The Commission was required as a result of such investigation to show "the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required."

The Act goes on to require the Commission upon the completion of the valuation to "keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session. (g) To enable the Commission to make such changes and corrections in its valuations of each

class of property, every common carrier subject to the provisions of this chapter shall make such reports and furnish such information as the Commission may require. * * * "

"All final valuations by the Commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under this chapter as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of this chapter, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

"(j) If upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission or additional thereto and substantially affecting said value, the court, before proceeding to render judgment shall transmit a copy of such evidence to the Commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the Commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the Commission in the first instance. If the original order shall not be rescinded or changed by the Commission, judgment shall be rendered upon such original order."

This last citation of paragraph (j) is to bring out the fact that under Section 19a the final valuation found by the

Commission was only prima facie evidence of value; that the actual determination of a final value was a judicial act involving the rendition of judgment upon the findings of the Commission and the evidence introduced at the trial of any action involving a final value fixed by the Commission.

Transportation Act, 1920, Section 15a

On February 28, 1920, Congress enacted the Transportation Act of that date. The following are pertinent quotations from Section 15a of that Act (49 U. S. C. A., p. 443):

"(2) *Rates to permit carriers to earn fair return.* In the exercise of its power to prescribe just and reasonable rates the commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable; and to prescribe different rates for different portions of the country.

"(3) *Determination of percentage constituting fair return.* The commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order

to provide the people of the United States with adequate transportation.

"(4) *Determination of aggregate value of properties.* For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the commission from time to time and as often as may be necessary. The commission may utilize the results of its investigation under Section 19a of this chapter, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to Section 19a of this chapter the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the commission to be the value thereof for the purpose of determining such aggregate value."

This was the "law of the land" as such law had been enacted by Congress at the time of the passage of the enactment of Section 77. Added to that is the constitutional protection of the Fifth Amendment and the decisions of this court in the series of cases beginning with the [1]*Minnesota Rate Cases.*

That it was then the "law of the land" was clearly set forth by the Chief Justice in the unanimous opinion of this Court in the case of [2]*Dayton-Goose Creek Railway Company Case* (decided January 7, 1924) and specifically in the following language on page 478:

Referring to the Transportation Act of 1920, the opinion says:

"The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners

[1] Minnesota Rate Cases, 230 U. S. 352.
[2] Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456.

of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

* * *

"To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety."

Previously this Court on February 19, 1923, had in a unanimous opinion, written by Mr. Justice Brandeis, expressed a similar view of the "law of the land" in the following language:

"Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. *Railroad Commission v. Chicago, B. & Q. R. R. Co.*, 257 U. S. 563, 585, 66 L. ed. 371, 382, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. Prominent among them are those specially designed to

secure a fair return on capital devoted to the transportation service. Upon the Commission new powers were conferred and new duties were imposed."

New England Divisions Cases, 261 U. S. 184, 189. See also *Railroad Commission v. Chicago B. & Q. R. R. Co.*, 257 U. S. 563.

These legislative enactments and the decisions of this Court warrant a presumption of a substantial and conclusive character that the valuation of a railroad ascertained and brought down to any given date pursuant to the provisions of Section 19a is the value upon which the owners of the railroad property are entitled to earn, if they can, a fair return, and that this value cannot be taken away from them excepting by judicial decree. The legislative department of this Government cannot, without judicial sanction, deprive such owners of the value so determined. It is true that in an equity proceeding a sale by foreclosure may eventually establish as the value the price which the property brings at such foreclosure sale, but this is not an equity receivership. This is a reorganization of a company not found to be insolvent under the provisions of the Bankruptcy Act. In the absence of such insolvency there is no warrant for saying that the value of such property upon reorganization, as is necessary or appropriate for the efficient and economical performance of transportation, shall be other than the valuation found under Section 19a and brought down to date by the Commission. If there be any part of the bankrupt estate which the Commission in approving the plan finds to be of not sufficient use to warrant its inclusion in the reorganized estate, it is the Commission's duty so to express itself and to exclude the same from the value placed upon the remaining property. In this case the Commission has made no such finding but has expressly found that the property is not now under-maintained. From this it follows that the entire

property has been found to be used or useful for performing the work of an economical and efficient transportation agency.

What then does Section 77(e) mean by the clause "if it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new, less depreciation, and original cost of the property and the actual investment therein as may be required under the law of the land in the light of its earning power and all other relevant facts."

The "probable prospective earnings" of the property should be the guide to the Commission in performing the duty imposed upon it not by (e), under which the standard is earning power, but by (b) of Section 77 which, as above quoted, requires that the plan of reorganization

> "* * * (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; * * *."

This subsection places upon the Interstate Commerce Commission the responsibility in fixing the capitalization of the reorganized company to provide for the issue of obligations which the reorganization carrier may assume, carry and eventually pay, while continuing to function as a solvent and

prosperous carrier capable of providing for the maximum transportation needs of the territory which it serves. This providing should include funds necessary for maintaining the carrier's facilities, so that under honest, efficient and economical management it will in the future be able to furnish adequate transportation. This is substantially the language of paragraph (3) of Section 15a and sets forth a duty which is clearly within the legislative powers conferred upon the Interstate Commerce Commission. Indeed, it is the standard outlined or expressed by this court in the *New England Divisions Cases* and the *Dayton-Goose Creek Case*, above cited, and it is entirely consistent with the authority given to the Interstate Commerce Commission under Section 20a, (49 U. S. C. A., p. 290), wherein the Commission is authorized to make an order with respect to the issuance of securities and the assumption of obligations only if such issuance or assumption "is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." From this may be deduced the conclusion that the duty of the Interstate Commerce Commission in fixing capitalization for a reorganized corporation is principally to determine what obligations the reorganized corporation should assume, the principal amount and character of those which involve fixed interest payments, and the total amount and character of contingent obligations, only to the extent in the latter case of prescribing principal amounts and maturities which the reorganized corporation will meet and will be able to discharge upon maturity. These obligations are the test of what the reorganized carrier must do in order to function efficiently and economically as a reor-

ganized corporation without danger of being forced again into another reorganization. When these amounts have been determined and have been assigned to claimants in the order of priority, the remaining value of the property should in accordance with the doctrine of [1]*Northern Pacific Railway v. Boyd*, [2]*Case v. Los Angeles Lumber Products Co., Ltd.*, [3]*Consolidated Rock Products Co. v. Du Bois*, be allotted to junior creditors whose claims have not been satisfied and whatever equity is left to the remaining stockholders.

It is this remaining value which is beyond the administrative power of the Commission to tamper with. True, it may as a sort of statutory special master, advise the District Court upon valuation or any other relevant fact and this advice when based upon adequate evidence or proof received at a hearing is entitled to weight. But the Commission cannot by its mere fiat condemn a solvent carrier to insolvency solely because under the provisions of Section 77 the carrier has sought the protection of the Court alleging its temporary inability to pay its debts as they mature. Before such condemnation there must be a hearing and a finding that the capital assets are not, at a fair valuation, sufficient in amount to pay the debts (Bankruptcy Act, Section 1, (19)). This is the valuation which the Commission definitely has failed to find in the current case. This is the valuation necessary to be found by the Commission in obedience to the mandate of Congress expressed in paragraph (e) of Section 77. For this failure the Commission should be dealt with by this Court as it was dealt with for a similar disobedience in [4]*St. Louis & O'Fallon Railway Co. v. United States*, at which latter page the following language is quoted from this opinion:

> "In the exercise of its proper function this Court has declared the law of the land concerning valuations for rate-making purposes. The Commission disregarded

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[1] Northern Pacific Railway v. Boyd, 228 U. S. 482.
[2] Case v. Los Angeles Lumber Products Co., Ltd., 308 U. S. 106.
[3] Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510.
[4] St. Louis & O'Fallon Railway Co. v. United States, 279 U. S. 461, 487.

the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority: 'The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction'. * * * Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid."

The proposed reorganization plan would, if carried out, inflict an unwarranted injustice upon the stockholders of the Debtor to whom it would deny any equity in a property to which on October 10, 1938, the Commission gave a valuation in the following words (R., p. 224):

> "If there be added to the above amounts the net costs of additions and retirements between valuation dates and December 31, 1935, the total would be $139,600,455."

The proposed reorganization plan would fix the capitalization at $97,763,522, treating the no-par-value common stock at $100 per share (R., p. 364). Even under this figure the secured claims against the Debtor in the total amount of $87,922,143 (which includes $10,000,000 of Trustees' Certificates) should be refunded in full, leaving a balance of approximately $10,000,000 for the unsecured debt and the stockholders' interests. In fact, however, the Commission has cut-off entirely the capital stock of the Debtor and the unsecured claims against the Debtor; and, in addition, the Commission has scaled down the secured claims. Aside from the unfair treatment of the stockholders and creditors, however, it should be noted that the capitalization recommended by the Commission would deny any equity to the difference between the above valuation of $139,-

600,455 and the capitalization permitted of $97,763,522 or $41,836,933; would bar unsecured creditors from any realization upon their claims and forever deprive the stockholders who have invested their money in this corporation from any voice in the reorganized corporation and from any chance to recoup their losses. It is submitted that the conclusion of the Commission is without warrant when it says (R., p. 257) "that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation." Herein the Commission would seem to abdicate the control over the issuance of securities and obligations as given to it under Section 20a and assume a defeatist attitude which the value of the property and its current earnings do not warrant. If stockholders making honest and conservative investments were permanently disfranchised because of no dividends during years of depression, then most of the railroads of the United States during the twelve years from 1928 to 1940 would have been without stockholder management.

"The value of a railroad for capitalization purposes should therefore not be based on what it has earned in the past under regulatory restrictions, nor what it might be expected to earn in the future under regulatory restrictions. It should be based on some formula involving a physical valuation of assets used and useful in the public service. Pessimistic forecasts, or even optimistic forecasts, as to what these assets may be expected to earn in the indefinite future have no place in determining capitalizable value. A capitalization that represents prudent investment is based on firm ground. Such a capitalization accurately represents the property on which the railroad should be permitted to

earn a fair return if, under competitive conditions, it can do so. Forecasts as to the chances of its succeeding are not only largely guesswork, but are wholly unnecessary and should be eliminated from the problem, especially when these forecasts are definitely final and extend without limitation in time. Forecasts of a few years ahead, or even months, are often unreliable. Forecasts of the future earnings of a road as a whole with no limit of time, to be used as a base for a recapitalization which permanently wipes out investors are an absurdity." [F. R. Dick, *Railway Age*, September, 1942, p. 489].

Since 1920 the stockholders of the railroads of the United States have made their investments in the properties of those railroads, relying upon the assurance contained in the Transportation Act of 1920 that the Interstate Commerce Commission would so regulate the revenues that they would be entitled, if at all possible, to earn upon the property used or useful in transportation a fair return upon the value of such property. During that period the Interstate Commerce Commission has not only regulated such revenues and practically fixed them, but it has to a very considerable extent regulated the cost of producing such transportation. In these circumstances, good faith requires that the stockholders' share in the value of the property fixed by the Commission under Section 19a should be protected. Unless and until such property or any portion thereof is found to be neither used nor useful for the purpose for which the railroad was created, these stockholders are entitled to the fostering care of the Commission. Only to the extent that any portion of such property has ceased to be used or useful for transportation may its value be written off the balance sheet of the transportation agency. To say that value should now be related to the ability of the railroads to pay dividends during depression periods is an attempt to deprive these stockholders of their property without due process of law.

Conclusion

It is respectfully submitted that the decree of the Court below was proper, and that the plan of reorganization as approved by the District Court was unfair and inequitable and failed to meet the requirements contemplated by Section 77 as to the valuation of the Debtor's property and a proper allocation of new securities based upon the value of the several claims, and more especially the discriminatory treatment of the note claim of the Reconstruction Finance Corporation at the expense of the claims of The Railroad Credit Corporation and the A. C. James Company. Therefore, said decree of the Court below should be affirmed and the proceeding referred back to the Interstate Commerce Commission for further action and a determination of the value of Debtor's assets and properties in accordance with the "law of the land".

Respectfully submitted,

EDWARD G. BUCKLAND
WILLIAM J. KANE
Attorneys for The Railroad Credit Corporation,
Respondent.

Dated: October 1, 1942.

APPENDIX A

ALLAN P. MATTHEW,
Balfour Building,
San Francisco, California

Filed Sept. 4, 1942
WALTER B. MALING, *Clerk*

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE

NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.* } No. 26591–S

PETITION OF TRUSTEES FOR INSTRUCTIONS RESPECTING RETIREMENT BY REDEMPTION OF A PORTION OF THE PRINCIPAL AMOUNT OF INDEBTEDNESS REPRESENTED BY THEIR OUTSTANDING CERTIFICATES OF INDEBTEDNESS AND FOR AN ORDER AUTHORIZING A FURTHER EXTENSION OF EITHER ALL OR A PORTION OF SAID CERTIFICATES

T. M. SCHUMACHER and SIDNEY M. EHRMAN, the duly appointed and qualified Trustees of the properties of the Debtor above named, hereby petition the Court and represent as follows:

I.

Pursuant to authority duly given them by this Court with the approval of the Interstate Commerce Commission, your

petitioners, as such Trustees, heretofore issued their certificates of indebtedness in the principal amount of $10,000,000, maturing and payable on December 1, 1939. The said certificates were later extended as hereinafter shown. The said certificates were issued to evidence and secure a loan in the sum of $10,000,000 from the Reconstruction Finance Corporation. The Trustees borrowed the said sum of $10,000,000 from the Reconstruction Finance Corporation for the purpose of paying at maturity their certificates of indebtedness then outstanding and maturing and payable on December 1, 1938. The proceeds of said loan were used for said purpose. The said certificates then outstanding and maturing and payable on December 1, 1938, represented an indebtedness all of which was authorized and incurred for the purpose of meeting the cost of doing certain work upon and acquiring certain equipment for the railroad of the Debtor which it was necessary should be done and acquired in order that said railroad might be operated with safety and reasonable efficiency, that its physical elements might be conserved and its existing business retained, and that it might furnish to the public service in the way of transportation of persons and property adequately responsive to the reasonable requirements and demands of the public upon said railroad for such service. The proceeds realized by the incurrence of the indebtedness represented by said certificates were expended in the doing of said work and the acquiring of said equipment.

II.

Pursuant to authority duly given them by this Court, with the approval of the Interstate Commerce Commission, your petitioners, as such Trustees, extended said certificates of indebtedness from December 1, 1939, to December 1, 1940, to evidence and secure an extension of said loan from and to the same dates, and further extended said certificates from

December 1, 1940, to December 1, 1941, to evidence and secure a further extension of said loan from and to the same dates. Your petitioners were authorized by the order of this Court made on November 27, 1940, to obtain said further extension of said loan to December 1, 1941, from the Reconstruction Finance Corporation, upon an agreement by your petitioners with the Reconstruction Finance Corporation to curtail the principal of said loan by the amount of $12,500 on December 15, 1940, and by a like amount on the 15th day of each month thereafter during the term of said loan, so long as the said certificates, or any of them, should be held by the Reconstruction Finance Corporation. Pursuant to said order of November 27, 1940, your petitioners obtained from the Reconstruction Finance Corporation said further extension of said outstanding loan to December 1, 1941, and made and entered into said agreement with Reconstruction Finance Corporation. Pursuant to said order of November 27, 1940, and said agreement with the Reconstruction Finance Corporation, your petitioners curtailed the principal of said loan by the amount of $12,500 on the 15th day of the months of December, 1940, to November, 1941, both inclusive, thereby reducing the said principal of said loan to the total amount of $9,850,000, and the said Certificates of Indebtedness in said reduced principal amount were outstanding and held by Reconstruction Finance Corporation on December 1, 1941.

III.

Pursuant to authority duly given them by this Court, with the approval of the Interstate Commerce Commission, your petitioners, as such Trustees, further extended said Certificates of Indebtedness in the total principal amount of $9,850,000 from December 1, 1941, to December 1, 1942, to evidence and secure a further extension of said loan from and to the same dates. Your petitioners were authorized by

the order of this Court made on November 26, 1941, to obtain said further extension of said loan to December 1, 1942, from the Reconstruction Finance Corporation, upon an agreement by your petitioners with the Reconstruction Finance Corporation to curtail the principal of said loan by the amount of $25,000 on December 15, 1941, and by a like amount on the 15th day of each month thereafter during the term of said loan, so long as said Certificates of Indebtedness, or any of them, are held by the Reconstruction Finance Corporation. The said order of November 26, 1941, further authorized your petitioners to extend further to December 1, 1942, their said Certificates of Indebtedness then outstanding in the total principal amount of $9,850,000 as evidence of and security for said further extension of said loan, the said Certificates as further extended to bear interest at the rate of four per cent (4%) per annum, payable monthly, the same rate of interest as was borne by said certificates as previously extended, to be subject to a right of said Trustees, so long as said Certificates are held by the Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice on any interest payment date such other of said certificates as they may desire as are not retired by said curtailment of the principal of said loan, and to be subject to a right of said Trustees, if said Certificates are no longer held by the Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice all but not less than all of said Certificates on any interest payment date, and the said further extension to be effectuated by said Trustees by stamping or writing upon each of said outstanding certificates a legend or endorsement reading substantially as follows:

> "The holder hereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is further extended to December 1, 1942, with interest at the rate of 4% per annum

payable monthly, with the privilege of redemption by the Trustees of the within certificate so long as the same is held by the Reconstruction Finance Corporation and the privilege of redemption by the Trustees, if the within certificate is no longer held by the Reconstruction Finance Corporation, of all but not less than all of the Trustees' Certificates of this issue, in any event on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption.

"The Trustees agree to curtail the principal of the loan evidenced by the within certificate by the amount of $2500 on December 15, 1941, and by a like amount on the 15th day of each month thereafter during the term of this extension, so long as this certificate, or any of the certificates evidencing the loan referred to therein, shall be held by the Reconstruction Finance Corporation."

The Trustees were further authorized by said order of November 26, 1941, (1) to put up with the Reconstruction Finance Corporation, incidentally to the further extension of said loan to December 1, 1942, and as collateral security therefor, the sum of $5,000,000 from cash in the hands of said Trustees, interest upon said loan to be computed upon the outstanding balance of said loan less the amount of said cash collateral, and the said cash collateral to be subject to a right and privilege on the part of said Trustees to withdraw all or any part of said cash collateral at any time (but not less than $250,000 at any one time) upon an order of the Court, made with or without notice or hearing, instructing them to make such withdrawal, provided, however, that the Trustees shall give Reconstruction Finance Corporation at least ten (10) days' written notice of their intention to apply for any such order and, following the making of any such order, at least five (5) days' notice of the date on which withdrawal is to be made, and (2) to

put up with the Reconstruction Finance Corporation from time to time thereafter, as further collateral security aforesaid further extension of said loan and subject to the same terms and conditions, such additional amounts of cash as said Trustees may find and determine to be available for said purpose, and as Reconstruction Finance Corporation may be willing to accept upon such terms and conditions. Pursuant to said order of November 26, 1941, your petitioners, with the prior approval of the Interstate Commerce Commission, obtained from the Reconstruction Finance Corporation a further extension of said outstanding loan to December 1, 1942, and made and entered into an agreement with Reconstruction Finance Corporation to curtail the principal of said loan by the amount of $25,000 on December 15, 1941, and by a like amount on the 15th day of each month thereafter during the term of said loan, so long as the said certificates, or any of them, are held by the Reconstruction Finance Corporation, and effectuated said further extension by stamping upon each of said outstanding certificates a legend or endorsement in the form hereinbefore set forth. Your petitioners also put up with the Reconstruction Finance Corporation, incidentally to said further extension of said loan to December 1, 1942, and as collateral security therefor, the sum of $5,000,000 from cash in the hands of your petitioners, pursuant to said order. On April 24, 1942, your petitioners put up with Reconstruction Finance Corporation, as further collateral security for said loan and subject to the same terms and conditions, the additional sum of $1,000,000 from cash in the hands of your petitioners. Pursuant to said order of November 26, 1941, and said agreement by your petitioners with the Reconstruction Finance Corporation, your petitioners have curtailed the principal of said loan by the amount of $25,000 on the 15th day of the months of December, 1941, to August,

1942, both inclusive, thereby reducing the said principal of said loan to the total amount of $9,625,000, and the said Certificates of Indebtedness in said reduced principal amount are now outstanding and held by Reconstruction Finance Corporation and mature and are payable on December 1, 1942. Your petitioners have paid to Reconstruction Finance Corporation the interest upon the said outstanding Certificates of Indebtedness to and including the 1st day of September, 1942. Your petitioners will further curtail the principal of said loan by the amount of $25,000 on the 15th day of each of the months of September, October and November, 1942, thereby reducing the said principal of said loan to the total amount of $9,550,000.

IV.

A plan of reorganization of the Debtor was approved by order of this Court made on August 15, 1940. On September 20, 1940, appeals from said order to the Circuit Court of Appeals for the Ninth Circuit were filed by certain interested parties. The said appeals were argued before said Circuit Court of Appeals on July 28 and July 29, 1941, and briefs in said appeals were filed prior to said argument. On November 28, 1941, said Circuit Court of Appeals reversed said order of this Court made on August 15, 1940, and remanded said proceeding with directions to dismiss it or, in the Court's discretion and on motion of any party in interest, refer it back to the Interstate Commerce Commission for further action. Thereafter petitions for a writ of certiorari to said Circuit Court of Appeals were filed by certain interested parties with the Supreme Court of the United States. The said petitions were granted on April 27, 1942, and it is expected that said proceedings will be orally argued before the Supreme Court early during the term commencing in October, 1942.

V.

On March 27, 1941, your petitioners filed with this Court their petition that they be instructed whether they should retire, out of funds on hand, a portion of the principal amount of the indebtedness represented by their outstanding Certificates of Indebtedness and, if the Court should determine that such partial retirement of said indebtedness should be made, that your petitioners be instructed with respect to the amount thereof. On April 3, 1941, A. C. James Co., an intervenor in the above entitled reorganization proceeding, filed with this Court a motion for an order directing your petitioners to pay off and discharge out of any available cash of the Debtor in their hands not less than $3,000,000 of the principal indebtedness represented by said certificates, and directing your petitioners to report fully to the Court, for the information of all parties in interest, as to any and all negotiations which they might have had with private bankers or others during the preceding twelve months looking toward a refunding of said certificates. On April 22, 1941, said petition for instructions and said motion were jointly and fully heard before the Court and oral and documentary evidence was introduced, including the testimony of one of your petitioners. On May 13, 1941, the Court rendered its opinion and order upon said petition and motion. By said order of May 13, 1941, the Court instructed your petitioners not to make any payment on account of said Trustees' Certificates and not to make any further effort to refund them by the issue of new Trustees' certificates to others than the Reconstruction Finance Corporation. By said order the said motion of A. C. James Co. was denied. An appeal by A. C. James Co. from said order to the Circuit Court of Appeals for the Ninth Circuit was filed, briefs in said appeal were filed, and on July 29, 1941, the said appeal was submitted to said

Court without oral argument. On September 30, 1941, said Court dismissed said appeal upon the ground that said A. C. James Co. was not entitled to appeal. The said order of this Court made on May 13, 1941, remains in force and effect.

VI.

The orders of this Court authorizing the issuance and the extensions of said certificates of indebtedness now outstanding and, as extended, maturing and payable on December 1, 1942, and the orders of the Interstate Commerce Commission approving the issuance of said certificates expressly provide that said certificates rank as expenses of the administration by the Court of the Debtor's property and as such are payable in due course of administration equally with other expenses of administration out of said property and constitute a charge and direct first lien upon said property prior in right to the debts and obligations of the Debtor and to any lien created by it, and said certificates were issued by your petitioners for value upon the representation that such was their character.

VII.

Your petitioners had cash on hand as of September 1, 1942, in the total amount of $4,493,000 and they expect to have cash on hand as of December 1, 1942, after meeting all expenses to be incurred in the operation and maintenance of the properties of the Debtor, in the total amount of not less than $6,000,000. In addition thereto, as hereinbefore set forth, your petitioners have put up with the Reconstruction Finance Corporation the total amount of $6,000,000 incidentally to and as collateral security for said further extension of said loan. Petitioners are of the opinion that they would be able, without impairment of necessary work-

ing capital and without prejudice to the conduct of the railroad business of the Debtor, to retire by redemption out of cash on hand and said cash put up with the Reconstruction Finance Corporation a substantial portion of the principal amount of the indebtedness represented by said outstanding certificates of indebtedness. By reason of said increase in the amount of cash available to your petitioners, including said sums put up with and now held by the Reconstruction Finance Corporation, and said order of this Court made on May 13, 1941, your petitioners desire to receive instructions from this Court with respect to the partial retirement of said indebtedness and, if such partial retirement should be ordered by the Court, the amount thereof.

VIII.

In the event that the Court should determine that such partial retirement of the principal amount of the indebtedness represented by their outstanding certificates of indebtedness should not be made, it will be necessary for your petitioners to obtain a further extension of said loan and that they again extend said certificates as evidence of and security for said loan, in order to insure against a default upon the said certificates, and if the Court should determine that such partial retirement of said indebtedness should be made, it will likewise be necessary for your petitioners to obtain a further extension of the remaining portion of said loan and that they again extend the remaining portion of said certificates. Your petitioners believe that they can obtain a further extension of said loan or such portion thereof to December 1, 1943, from the Reconstruction Finance Corporation, the said further extension of said loan or such portion thereof to be evidenced and secured by a further extension of the said certificates of indebtedness or such portion thereof by your petitioners to December 1,

1943, with interest at the rate of four per cent (4%) per annum payable monthly, which is the same rate of interest as is borne by said certificates as previously thrice extended, and subject to a right on the part of the Trustees, so long as said certificates are held by the Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice on any interest payment date such of said certificates as they may desire, and to be subject to a right of said Trustees, if said certificates are no longer held by the Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice all but not less than all of the outstanding certificates on any interest payment date, the said further extension of said certificates to be effectuated by stamping or writing upon each of said certificates a legend or endorsement reading substantially as follows:

> "The holder hereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is further extended to December 1, 1943, with interest at the rate of 4% per annum payable monthly, with the privilege of redemption by the Trustees of the within certificate so long as the same is held by the Reconstruction Finance Corporation and the privilege of redemption by the Trustees, if the within certificate is no longer held by the Reconstruction Finance Corporation, of all but not less than all of the outstanding Trustees' Certificates of this issue, in any event on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

If the Court should determine that such partial retirement of said indebtedness should be made, it will be in the interest of the trust estate of your petitioners that they be authorized to obtain a further extension of said loan and to extend again said certificates as evidence of and security for said loan in order to insure against a default upon the said certificates when the principal thereof falls due on

December 1, 1942. If the Court should determine that such partial retirement of said indebtedness should be made, it will likewise be in the interest of the trust estate of your petitioners that they be authorized to obtain a further extension of the remaining portion of said loan and to extend again the remaining portion of said certificates. To consummate and fully authorize the said further extension of said loan or such portion thereof it will be necessary for your petitioners to make formal application for said further extension to the Reconstruction Finance Corporation and to secure the approval thereof by the Interstate Commerce Commission.

IX.

Because of the possibility that your petitioners may not be able to arrange with the Reconstruction Finance Corporation for said further extension of said loan or such portion thereof it is advisable that the Court, in its order granting the authority herein asked for, reserve jurisdiction to authorize, by supplemental order, made with or without notice, the issuance and sale by your petitioners of new certificates of indebtedness in the total amount of $9,550,000 or a portion thereof, dated December 1, 1942, and bearing interest at the rate of four per cent (4%) per annum or a different rate of interest, for the purpose of providing themselves with funds for the payment of said outstanding certificates or such portion thereof at maturity.

X.

For the purpose of meeting the requirements of Section 4 of Public Act No. 35 of the Seventy-Third Congress of the United States, approved June 10, 1933, it will be necessary, if said further extension of said loan or such portion thereof is made, for your petitioners to enter into a fourth

supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit "A".

WHEREFORE, your petitioners pray:

(1) That upon the filing of this petition the Court set the same for hearing and prescribe the notice to be given thereof.

(2) That upon the hearing of said petition your petitioners be instructed whether they should retire by redemption, out of funds on hand and said cash put up with the Reconstruction Finance Corporation, a portion of the principal amount of the indebtedness represented by their outstanding Certificates of Indebtedness and, if the Court should determine that such partial retirement of said indebtedness should be made, that petitioners be instructed with respect to the amount thereof.

(3) That pursuant to and in accordance with said instructions the Court authorize your petitioners to apply forthwith to the Reconstruction Finance Corporation for a further extension of said loan or the remaining portion thereof to December 1, 1943, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental applications to the Interstate Commerce Commission as may be required in respect to said further extension of said outstanding certificates of indebtedness or remaining portion thereof.

(4) That pursuant to and in accordance with said instructions the Court make its order whereby your petitioners will be authorized to extend further to December 1, 1943, their outstanding certificates of indebtedness in the total amount of $9,550,000, or the remaining portion thereof, as evidence of and security for the said further extension of said loan or the remaining portion thereof, the said certificates as again extended to bear interest at the rate of four

per cent (4%) per annum payable monthly, the same rate of interest as is borne by said certificates as previously extended, and to be subject to a right of the Trustees, so long as said certificates are held by the Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice on any interest payment date such of said certificates as they may desire, and to be subject to a right of said Trustees, if said certificates are no longer held by said Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said further extension to be effectuated by the Trustees by stamping or writing upon each of said certificates a legend or endorsement reading substantially as follows:

> "The holder hereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is further extended to December 1, 1943, with interest at the rate of 4% per annum payable monthly, with the privilege of redemption by the Trustees of the within certificate so long as the same is held by the Reconstruction Finance Corporation and the privilege of redemption by the Trustees, if the within certificate is no longer held by the Reconstruction Finance Corporation, of all but not less than all of the outstanding Trustees' Certificates of this issue, in any event on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of $9,550,000 or a portion thereof, dated December 1, 1942, and bearing interest at the rate of four per cent (4%) per

annum or a different rate of interest, for the purpose of meeting the principal of the outstanding certificates or the remaining portion thereof at maturity.

(5) That your petitioners be further authorized by such order to make a fourth supplemental agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit "A".

(6) That your petitioners be authorized (1) to put up with the Reconstruction Finance Corporation, incidentally to the further extension of said loan or the remaining portion thereof to December 1, 1943, and as collateral security therefor, such amount of cash, if any, as your petitioners may find and determine to be available for said purpose and as the Reconstruction Finance Corporation may be willing to accept, interest upon said loan or said portion thereof to be computed upon the outstanding balance of said loan or said portion thereof less the amount of said cash collateral, and the said cash collateral to be subject to a right and privilege on the part of said Trustees to withdraw all or any part of said cash collateral at any time (but not less than $250,000 at any one time) upon an order of the Court, made with or without notice or hearing, instructing them to make such withdrawal, provided, however, that the Trustees shall give Reconstruction Finance Corporation at least ten (10) days' written notice of their intention to apply for any such order and, following the making of any such order, at least five (5) days' notice of the date on which withdrawal is to be made; (2) to put up with the Reconstruction Finance Corporation from time to time thereafter, as further collateral security for said further extension of said loan or such portion thereof and subject to the same terms and conditions, such additional amounts of cash, if any, as said Trustees may find and determine to be available for said purpose, and as Reconstruction Finance

Corporation may be willing to accept upon such terms and conditions; and (3) to enter into an agreement with the Reconstruction Finance Corporation substantially in the form attached hereto and marked Exhibit "B", and to enter into similar agreements in the event that said additional amounts of cash shall be put up with the Reconstruction Finance Corporation.

ALLAN P. MATTHEW,
Counsel for Petitioners.

STATE OF CALIFORNIA }
City and County of San Francisco } *ss.*

CHARLES ELSEY, being first duly sworn, deposes and says:

That for more than ten years last past he has been the President of The Western Pacific Railroad Company and, since the appointment of the Trustees of the properties of said Company, he has been their Agent in immediate charge of the railroad and other property of that Company; that he has read the foregoing petition and knows the contents thereof and the same is true of his own knowledge.

CHARLES ELSEY

Subscribed and sworn to before me
this 4th day of September, 1942.

MARY N. WICKERSHAM [SEAL]
Notary Public
in and for the City and County of
San Francisco, State of California

EXHIBIT "A"

December ....., 1942.

Reconstruction Finance Corporation,
Washington, D. C.

Fourth Supplemental Agreement

Dear Sirs:

The undersigned Trustees of The Western Pacific Railroad Company are indebted to your corporation on account of a certain loan represented by Trustees' Certificates in the principal amount of $....., which, as extended, mature on December 1, 1942.

In consideration of the granting by your corporation of a fourth extension of the maturity date of the above mentioned Trustees' Certificates, authorized by supplemental report and supplemental order of the Interstate Commerce Commission dated ...., 1942, in Finance Docket No....., the undersigned Trustees, as such and not individually, hereby agree with your corporation as follows:

1. The term "compensation" as used in this fourth supplemental agreement shall include all salaries, fees, bonuses, commissions or other payments, direct or indirect, in money or otherwise, for personal services.

2. So long as they are indebted to your corporation the undersigned Trustees will not increase the compensation of any of their officers, directors or employees to any amount not permitted by the terms of the agreement dated November 23, 1938, the supplemental agreement dated December 1, 1939, the second supplemental agreement dated December 2, 1940, and the third supplemental agreement dated December 1, 1941, between your corporation and the undersigned Trustees, and in any written consents given by your corporation pursuant to the provisions of said agreement and supplemental agreements.

3. The undersigned Trustees hereby ratify, confirm and reaffirm the said agreement of November 23, 1938, the said supplemental agreement of December 1, 1939, said second supplemental agreement of December 2, 1940, and said third supplemental agreement dated December 1, 1941, and

each and every covenant contained in said agreement and supplemental agreements.

Respectfully submitted,

.....

.....

As Trustees of
THE WESTERN PACIFIC
RAILROAD COMPANY

Attest:

.....

Agent for the Trustees of
THE WESTERN PACIFIC
RAILROAD COMPANY

EXHIBIT "B"

AGREEMENT

THIS AGREEMENT, made and entered into this ..... day of ....., 1942, by and between T. M. SCHUMACHER and SIDNEY M. EHRMAN, as Trustees in Reorganization of The Western Pacific Railroad Company, and not individually, hereinafter referred to as the Trustees, and RECONSTRUCTION FINANCE CORPORATION,

WITNESSETH:

WHEREAS, the Trustees are indebted, as such Trustees, to Reconstruction Finance Corporation on account of a certain loan represented by Trustees' Certificates in the principal amount of $....., which, as extended, mature on December 1, 1942, and

WHEREAS, pursuant to approval by the Interstate Commerce Commission by its supplemental report and certificate dated ...., 1942, in Finance Docket No....., the Reconstruction Finance Corporation has granted an extension of said loan to December 1, 1943, and

WHEREAS, the Trustees desire to put up, and the Reconstruction Finance Corporation is willing to accept, as col-

lateral security for said loan, the sum of $.....,
subject to the terms and conditions hereinafter set forth;

NOW, THEREFORE, in consideration of the premises, IT IS HEREBY MUTUALLY AGREED AND UNDERSTOOD by and between the Trustees and Reconstruction Finance Corporation as follows:

1. Interest upon said loan shall be computed upon the outstanding balance of said loan less the amount of the said cash collateral.

2. The said cash collateral shall be subject to a right and privilege on the part of the Trustees to withdraw all or any part of said collateral at any time (but not less than $250,000 at any one time) upon an order of the District Court of the United States, for the Northern District of California, Southern Division made with or without notice or hearing, in the proceeding pending in said Court and entitled In the Matter of The Western Pacific Railroad Company, Debtor, No. 26591–S, and instructing the Trustees to make such withdrawal; provided, however, that the Trustees shall give Reconstruction Finance Corporation at least ten days' written notice of their intention to apply for any such order and, following the making of any such order, at least five days' notice of the date on which withdrawal is to be made.

3. The Trustees shall have the right to put up with Reconstruction Finance Corporation from time to time, as further collateral security for said loan and subject to the same terms and conditions, such additional sums as the Trustees may find and determine to be available for said purpose, and as Reconstruction Finance Corporation may be willing to accept upon such terms and conditions.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first above written.

.....

.....

As Trustees in Reorganization of
THE WESTERN PACIFIC RAILROAD COMPANY

RECONSTRUCTION FINANCE CORPORATION
By .....

.....

ALLAN P. MATTHEW,
1500 Balfour Building,
San Francisco, California

Filed Sept. 4, 1942
WALTER B. MALING, *Clerk*

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

In the Matter of
THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.
No. 26591-S

ORDER PROVIDING FOR HEARING UPON PETITION OF TRUSTEES FOR INSTRUCTIONS RESPECTING RETIREMENT BY REDEMPTION OF A PORTION OF THE PRINCIPAL AMOUNT OF INDEBTEDNESS REPRESENTED BY THEIR OUTSTANDING CERTIFICATES OF INDEBTEDNESS AND FOR AN ORDER AUTHORIZING A FURTHER EXTENSION OF EITHER ALL OR A PORTION OF SAID CERTIFICATES

Upon due consideration of the petition of T. M. SCHUMACHER and SIDNEY M. EHRMAN, Trustees of the properties of the Debtor above named, filed herein and praying for instructions with respect to the retirement by redemption of a portion of the principal amount of indebtedness represented by their outstanding certificates of indebtedness in the amount of $9,550,000 and for an order authorizing the further extension of either all or a portion of said

certificates of indebtedness, IT IS HEREBY ORDERED as follows:

1. That said petition shall be and it hereby is set for hearing before this Court on September 28, 1942, at 10:00 o'clock, A.M.

2. That said Trustees be and they hereby are directed to give notice of the said hearing. That said notice be given by (a) publication on or before September 10, 1942, of a notice substantially in the following form in The Wall Street Journal (Pacific Coast Edition) and The Recorder, two newspapers of general circulation published in the City and County of San Francisco, State of California:

LEGAL NOTICE

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE

NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

In the Matter of THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*	No. 26591-S

Notice of Hearing upon Petition of Trustees for Instructions Respecting Retirement by Redemption of a Portion of the Principal Amount of Indebtedness represented by their Outstanding Certificates of Indebtedness and for an Order authorizing a further extension of either all or a portion of said Certificates

NOTICE IS HEREBY GIVEN, pursuant to the order of the above named court, that a hearing will be held before

the Honorable A. F. St. Sure, Judge of the above entitled court, at the court room of the said Judge, in the United States Post Office and Court House Building, Seventh and Mission Streets in the City and County of San Francisco, State of California, on September 28, 1942, at 10 o'clock, A.M., or as soon thereafter as the same may be heard, upon the petition of T. M. Schumacher and Sidney M. Ehrman, Trustees in Reorganization of The Western Pacific Railroad Company, praying:

(1) That they be instructed whether they should retire by redemption, out of funds on hand and cash put up with the Reconstruction Finance Corporation as collateral security for a loan to said Trustees, a portion of the principal amount of the indebtedness represented by their outstanding certificates of indebtedness and, if the Court should determine that such partial retirement of said indebtedness should be made, that petitioners be instructed with respect to the amount thereof.

(2) That pursuant to and in accordance with said instructions the Court authorize said Trustees to apply forthwith to the Reconstruction Finance Corporation for a further extension of said loan or the remaining portion thereof from December 1, 1942, to December 1, 1943, and to the Interstate Commerce Commission for its approval thereof, and to make such other application or supplemental applications to the Interstate Commerce Commission as may be required in respect to said further extension of said outstanding certificates of indebtedness or remaining portion thereof.

(3) That pursuant to and in accordance with said instructions the Court make its order whereby said Trustees will be authorized to extend further from December 1, 1942, to December 1, 1943, their outstanding certificates of indebtedness in the total amount of $9,550,000, or the remaining portion thereof, as evidence of and security for the said further extension of said loan or the remaining portion thereof, the said certificates as again extended to bear interest at the rate of four per cent (4%) per annum payable monthly, the same rate of interest as is borne by said certificates as previously extended, and to be subject to a right of the Trustees, so long as said certificates are held by the

Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice on any interest payment date such of said certificates as they may desire, and to be subject to a right of said Trustees, if said certificates are no longer held by said Reconstruction Finance Corporation, to redeem upon thirty (30) days' notice all but not less than all of said certificates on any interest payment date, and the said further extension to be effectuated by the Trustees by stamping or writing upon each of said certificates a legend or endorsement reading substantially as follows:

> "The holder hereof by acceptance hereof bearing hereon this endorsement hereby agrees that the maturity of the within certificate is further extended to December 1, 1943, with interest at the rate of 4% per annum payable monthly, with the privilege of redemption by the Trustees of the within certificate so long as the same is held by the Reconstruction Finance Corporation and the privilege of redemption by the Trustees, if the within certificate is no longer held by the Reconstruction Finance Corporation, of all but not less than all of the outstanding Trustees' Certificates of this issue, in any event on any interest payment date on thirty days' previous notice at the principal amount and accrued interest to the date fixed for redemption."

provided, however, that the Court reserve jurisdiction to provide by supplemental order, made with or without notice, that with the approval of the Interstate Commerce Commission first had and obtained the Trustees may issue and sell new certificates of indebtedness in the total amount of $9,550,000 or a portion thereof, dated December 1, 1942, and bearing interest at the rate of four per cent (4%) per annum or a different rate of interest, for the purpose of meeting the principal of the outstanding certificates or the remaining portion thereof at maturity.

(4) That said Trustees be further authorized by such order to make a Fourth Supplemental Agreement with Reconstruction Finance Corporation substantially in the form attached to said petition and marked Exhibit "A".

(5) That said Trustees be authorized (1) to put up with the Reconstruction Finance Corporation, incidentally to the further extension of said loan or the remaining portion thereof to December 1, 1943 and as collateral security therefor, such amount of cash, if any, as said Trustees may find and determine to be available for said purpose and as the Reconstruction Finance Corporation may be willing to accept, interest upon said loan or said portion thereof to be computed upon the outstanding balance of said loan or said portion thereof less the amount of said cash collateral, and the said cash collateral to be subject to a right and privilege on the part of said Trustees to withdraw all or any part of said cash collateral at any time (but not less than $250,000 at any one time) upon an order of the court, made with or without notice or hearing, instructing them to make such withdrawal, provided, however, that the Trustees shall give Reconstruction Finance Corporation at least ten (10) days' written notice of their intention to apply for any such order and, following the making of any such order, at least five (5) days' notice of the date on which withdrawal is to be made; (2) to put up with the Reconstruction Finance Corporation from time to time thereafter, as further collateral security for said further extension of said loan or such portion thereof and subject to the same terms and conditions, such additional amounts of cash, if any, as said Trustees may find and determine to be available for said purpose, and as Reconstruction Finance Corporation may be willing to accept upon such terms and conditions; and (3) to enter into an agreement with the Reconstruction Finance Corporation substantially in the form attached to said petition and marked Exhibit "B" and to enter into similar agreements in the event that said additional amounts of cash shall be put up with the Reconstruction Finance Corporation.

T. M. SCHUMACHER
SIDNEY M. EHRMAN
Trustees in Reorganization of The Western Pacific Railroad Company.

and (b) by mailing prior to September 11, 1942, a copy of this order and of said petition to the following parties:

1. Crocker First National Bank of San Francisco and Samuel Armstrong.
2. Irving Trust Company, as Trustee under Indenture securing Debtor's General and Refunding Mortgage Bonds.
3. A. C. James Co.
4. Reconstruction Finance Corporation.
5. The Railroad Credit Corporation.
6. The Chase National Bank of the City of New York, as Trustee under agreement dated May 1, 1929, covering Equipment Trust Certificates.
7. The Western Pacific Railroad Company.
8. The Western Pacific Railroad Corporation.
9. The Western Realty Company.
10. Central Hanover Bank and Trust Company, as Trustee under agreement dated February 1, 1937, covering Equipment Trust Certificates.
11. Central Hanover Bank and Trust Company, as Trustee under agreement dated August 1, 1941, covering Equipment Trust Certificates.

Dated: September 4, 1942.

A. F. St. Sure,
Judge.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 3 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1942

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*

FREDERICK H. ECKER, *et al., Petitioners,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 7
CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, *Petitioners,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 8
THE WESTERN PACIFIC RAILROAD COMPANY, *Cross-Petitioner,* *v.* FREDERICK H. ECKER, *et al., Cross-Respondents.*	No. 20
RECONSTRUCTION FINANCE CORPORATION, *Petitioner,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 33
IRVING TRUST COMPANY, *Petitioner,* *v.* CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, *et al., Respondents.*	No. 61

BRIEF ON BEHALF OF A. C. JAMES CO., RESPONDENT

ROBERT E. COULSON,
Attorney for A. C. James Co.

HORACE E. WHITESIDE,
Of Counsel.

SUBJECT INDEX

	PAGE
Introductory	1
Opinions Below	3
Jurisdiction	4
Scope of Review	4
Chronological summary of proceedings heretofore had	7
Statement of the Case	9
Secured claim of A. C. James Co., this respondent	10
Treatment of A. C. James Co.'s secured claim under Commission Plan	12
The railroad system of the debtor as it exists today	13
Substantial changes between 1927 and 1938, increasing the earning power	13
(a) Northern California Extension	13
(b) Improvement and Rehabilitation Program	14
(c) Dotsero Cut-off	14
Investment and value of the property of the debtor	15
Section 19a valuation	15
Commission's prior determinations of capital assets	16
Secured claims against debtor and their treatment under Commission Plan	17
(a) Summary of secured claims as of January 1, 1939	17
(b) Proposed new securities	18
(c) Distribution of proposed securities	18
Comments	19

PAGE

Revenue and earnings 21

(a) Railway Operating Revenues of the Debtor's System 23

(b) Adjusted Consolidated Earnings Available For Interest 24

Earning power of the property 24

Increase in earning power due to Northern California Extension 27

Significance of earnings history in relation to authorization and treatment of this respondent's secured claim 28

Further required adjustments in past earnings record 31

SUMMARY OF ARGUMENT 32

POINTS

I. THE FINDINGS AND DETERMINATIONS OF THE COMMISSION AND THE DISTRICT COURT AS TO ESSENTIAL FACTS ARE OBVIOUSLY INSUFFICIENT TO JUSTIFY OR SUPPORT THE TREATMENT OF RESPONDENT'S SECURED CLAIM, WHICH TREATMENT IS CLEARLY CONFISCATORY 35-44

II. THE COMMISSION'S CONSTRUCTION OF SECTION 77 OF THE BANKRUPTCY ACT, WHICH WAS ACCEPTED AND ADOPTED BY THE DISTRICT COURT, IS BASICALLY ERRONEOUS, AND CANNOT BE SUSTAINED EITHER UNDER THE LANGUAGE OR INTENT OF SECTION 77 OF THE BANKRUPTCY ACT OR UNDER ANY PRIOR DELEGATION OF AUTHORITY TO THE COMMISSION IN CONNECTION WITH THE ISSUE OF SECURITIES BY RAILROADS 45-71

Provisions of the statute 46

Commission's theory of capitalization in lieu of valuation 47

PAGE

The public's right to transportation facilities for maximum needs 47

Security holders' right to be protected in that investment 48

The Commission's theory and construction of Section 77 49

Basic objections to the substitution of capitalization theories for valuation under Section 77 55

(1) The du Bois decision is against the Commission's theory 55

(2) Commission's theory conflicts with established principles of corporate law and accounting 56

(3) Commission's own plan of capitalization in this case negatives use of capitalization in lieu of valuation 57

Reference to powers of the Commission under Section 20a of the Interstate Commerce Act does not sustain Commission's procedure 59

Three striking examples of the exercise by the Commission of the powers conferred by Section 20a appear upon the record in this proceeding 61

Meaning of "compatible with the public interest" in Section 20a 62

The Commission's interpretation of its powers under Section 20a 64

This is not a case involving accounting entries where properties are actually purchased at a price 67

Summary 69

PAGE

III. The Commission's assumption of a legislative mandate under Section 77 authorizing it to convert valid debt into stock finds no support in the language of Section 77 and carries with it practical consequences seriously prejudicial to the credit of the debtor 71-75

IV. Section 77 of the Bankruptcy Act does not delegate to the Commission authority to originate and impose upon the parties a plan of reorganization and to nullify completely the rights of the parties to propose and negotiate a fair and equitable plan 75-81

V. The groups of security holders represented in this proceeding should be permitted, under supervision by the Commission and the courts as contemplated by Section 77, to renegotiate their contractual relationships, and formulate and agree upon a plan of reorganization, which would (a) observe the rule of priorities of the *Boyd* and *du Bois* cases, (b) provide for fixed charges only to the extent that they shall be adequately covered by "probable earnings", and (c) provide for a total capitalization within the limit established by the value of the property of the debtor used in the public service, after due consideration of its earning power 81-101

Valuation provisions of Section 77 87

"Earning power" as "capacity to produce earnings" 88

The Commission's "realistic" construction of Section 77 97

Rejected by Congress 97

The sound construction of Section 77 98

Practical application of Section 77 to the situation presented in this proceeding 99

PAGE

VI. The District Court in this case failed to exercise an informed and independent judgment in approving the Commission Plan 102-115

The theory of the District Court 102

A reorganization proceeding under Section 77 is a judicial proceeding in bankruptcy 105

Section 77 does not curtail the judicial powers of the bankruptcy court 106

The Commission's determinations are not binding on the District Court 108

Both Court and Commission must perform their functions 112

Review of mere administrative orders distinguished 113

Summary 115

VII. Preferential treatment given the claim of the Reconstruction Finance Corporation under the Commission Plan is unsupported by necessary administrative or judicial findings and cannot be justified under the facts of this case 116-118

VIII. The General and Refunding Mortgage is a first lien upon assets of the debtor sufficient in value to cover fully the claims of the three secured creditors, including this respondent 119

In Conclusion 120-121

INDEX TO APPENDIX

	PAGE
Bankruptcy Act, Section 77, as amended	i
Report of the Interstate Commerce Commission, dated November 20, 1930 (Original Exhibit No. 47)	xxvii
Report of the Interstate Commerce Commission, dated February 27, 1932 (Original Exhibit No. 53)	xxx
Report of the Interstate Commerce Commission, dated March 24, 1932 (Original Exhibit No. 53)	xxxviii
Report of the Interstate Commerce Commission, dated December 9, 1932 (Original Exhibit No. 92)	xlii
Statement of operating results of the debtor and its subsidiaries for December, 1940 and the period January 1 to December 31, 1940, in comparison with the corresponding periods of 1939	l
Statement of operating results of the debtor and its subsidiaries for December, 1941 and the period January 1 to December 31, 1941, in comparison with the corresponding periods of 1940	li
Statement of operating results of the debtor and its subsidiaries for June, 1942 and the period January 1 to June 30, 1942, in comparison with the corresponding periods of 1941	lii
Statement of operating results of the debtor and its subsidiaries for July, 1942 and the period January 1 to July 31, 1942, in comparison with the corresponding periods of 1941	liii
Total operating revenues of The Western Pacific Railroad System and Class I railroads of the United States	liv

TABLE OF CASES

PAGE

Akron, Canton & Youngstown Ry. Co. v. *Hagenbuch, et all.*, 128 F. (2d) 932 (1942), petition for certiorari filed August 31, 1942 56

Atlanta, Birmingham & Coast R. Co. v. *United States*, 296 U. S. 33 ..... 67, 68, 69, 113

Bakelite Corporation, Ex parte, 279 U. S. 438 70

Baltimore & Ohio R. Co. v. *United States*, 298 U. S. 349 ..... 109, 110

Campbell v. *Alleghany Corporation*, 75 F. (2d), 947 (1935); certiorari denied, 296 U. S. 581 105

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 ..... 103, 112, 117

Chicago, Great Western Railroad Co., In re, 29 F. Supp. 149 (1939) 82

Chicago, Milwaukee, St. P. & Pac. R. Co., In re, 36 F. Supp. 193 (1940), 124 F. (2d) 754 (1941) .. 83

Chicago & North Western Ry. Co., In re, 35 F. Supp. 230 (1940), 126 F. (2d) 351 (1942) 83

Consolidated Rock Products Co. v. *du Bois*, 312 U. S. 510 ..... 35; 37, 38, 39, 40, 41, 43, 55, 81, 98, 104

Continental Illinois National Bank and Trust Company v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 ..... 3, 105

Crowell v. *Benson*, 285 U. S. 22 ..... 109, 110

Denver & Rio Grande Western Railroad Co., In re, 38 F. Supp. 106 (1940) 84

Erie R. Co., In re, 37 F. Supp. 237 (1940) 82

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 ..... 5, 111

Federal Power Commission v. *Pacific Co.*, 307 U. S. 156 111

Federal Radio Commission v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 112

Florida v. *United States*, 282 U. S. 194 40

Gross v. *Irving Trust Co.*, 289 U. S. 342 112

Henneford v. *Silas Mason Co.*, 300 U. S. 577 52

Interstate Commerce Commission v. *Illinois Central R. Co.*, 215 U. S. 452 114

PAGE

Kuehner v. *Irving Trust Co.*, 299 U. S. 445 105
Louisiana & North West Railroad, In re, 36 F. Supp. 636 (1938), *ibid* 639 83
Louisville Joint Stock Land Bank v. *Radford*, 295 U. S. 555 39
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457 113
Meyer v. *Kenmore Hotel Co.*, 297 U. S. 160 105
Missouri Pacific Railroad Co., In re, 39 F. Supp. 436 (1941) 84
N. L. R. B. v. *Virginia Electric and Power Co.*, 314 U. S. 469 40
New York & Queens Gas Co. v. *McCall*, 245 U. S. 345 48
New York Central Securities Co. v. *United States*, 287 U. S. 12 ..... 62, 63, 64, 67
New York, N. H. & H. R. Co., In re, 16 F. Supp. 504 (1936) 70, 84, 106, 107
Northern Pacific Ry. v. *Boyd*, 228 U. S. 482 ..... 35, 41, 81, 98
Palmer v. *Massachusetts*, 308 U. S. 79 ..... 63, 105, 114, 115
Ray Consolidated Copper Company v. *United States*, 268 U. S. 373 57
St. Joseph Stock Yards Co. v. *United States*, 298 U. S. 38 ..... 109, 111
Savannah & Atlanta Railway, In re (S. Dist. Ga., 1938, unreported, C. C. H. Bankr. par. 51,448) 83
Southwestern Bell Telegraph Co. v. *Public Service Comm.*, 262 U. S. 276 89
Spokane International Railway, In re (E. Dist. Wash., 1940, unreported, C. C. H. Bankr. par. 52,567) 83
Terminal R. R. Assn. v. *United States*, 266 U. S. 17 113
Texas v. *United States*, 292 U. S. 522 64
United States v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499 40
United States v. *Illinois Central R. Co.*, 291 U. S. 457 113
United States v. *Louisiana*, 290 U. S. 70 113
United States v. *Lowden*, 308 U. S. 225 ..... 63, 64
Warren v. *Palmer*, 310 U. S. 132 112

INTERSTATE COMMERCE COMMISSION REPORTS

PAGE

Chicago & Eastern Illinois Railway Company Reorganization, 230 I. C. C. 199 (1938), *ibid* 571 (1939) 82

Chicago, Great Western Railroad Company Reorganization, 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939) 82

Chicago, Milwaukee, St. P. & Pac. R. Co. Bonds, 193 I. C. C. 725 (1933) 66

Chicago, Milwaukee, St. Paul & Pacific Railroad Company Reorganization, 239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940) 83

Chicago & North Western Railway Reorganization, 236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940) 83

Chicago, Rock Island & Pacific Railway Company Reorganization, 242 I. C. C. 298 (1940), 247 I. C. C. 533 (1941) 84

Chicago, South Shore & South Bend Railroad Reorganization, 212 I. C. C. 547 (1936), 217 I. C. C. 423 (1936) 83

Copper Range Railroad Company Reorganization, 212 I. C. C. 479 (1936) 83

Delaware, L. & W. R. Co. Stock, 67 I. C. C. 426 (1921) 67

Denver & Rio Grande Western Railroad Company Reorganization, 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940) 43, 84

Erie Railroad Company Reorganization, 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940) 82

Florida East Coast Railway, Finance Docket No. 13170, April 6 and August 10, 1940, unreported 84

Great Northern Railway Company Construction, 166 I. C. C. 3 (1930) 11

Greyhound Corporation Issuance of Preference Stock, 1 M. C. C. 357 (1936) 66

Iowa Electric Light & Power Co. Securities, 247 I. C. C. 17 (1941) 67

Louisiana & North West Railroad Company Reorganization, 224 I. C. C. 58 (1937) 83

PAGE

Minneapolis, St. Paul & Sault Ste. Marie Railway, Finance Docket No. 11897, March 17 and June 17, 1942, unreported 84
Missouri Pacific R. Co. Bonds, 180 I. C. C. 352 (1932) 66
Missouri Pacific Railroad Company Reorganization, 239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940) 84

New York, N. H. & H. R. Co. Reorganization, 239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941) 84

Reader Railroad Reorganization, 221 I. C. C. 190 (1937) 83
Richmond, Fredericksburg & Potomac Dividend Obligations, 79 I. C. C. 465 (1923) 67
Roscoe, Snyder & Pac. Ry. Co. Securities, 170 I. C. C. 403 (1931) 66

St. Louis-San Francisco Railway Company Reorganization, 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940) 84
St. Louis Southwestern Railway Company Reorganization, 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942) 84
Savannah & Atlanta Railway Reorganization, 224 I. C. C. 197 (1937) 83
Securities of Louisiana Ry. & Nav. Co. of Texas, 99 I. C. C. 357 (1925) 67
Securities of Louisville & Nashville R. R., 76 I. C. C. 718 (1923) 65, 86
Securities of Yankton, Norfolk & Southern R. Co., 154 I. C. C. 669 (1929) 66
Spokane International Railway Company Reorganization, 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939) 83
Stock of Missouri-Illinois R. R., 131 I. C. C. 467 (1927) 66

Western Pacific Ry. Co., 29 I. C. C. Val. Rep. 239 101

TEXT BOOKS AND PERIODICALS

	PAGE
Cushman, The Constitutional Status of the Independent Regulatory Commissions, 24 Cornell Law Quarterly, 13, 47, 49	114
Katz and Frankfurter, Federal Legislative Courts, 43 Harvard Law Review 894	70
Remington on Bankruptcy, Section 4326	114
Report of Hearing before Committee on the Judiciary of the House of Representatives, June 21, 1939	13, 21, 32, 36, 53, 54, 55, 58
Reports of Interstate Commerce Committee of the Senate dealing with the proposed amendment to Section 77 of the Bankruptcy Act (Wheeler Bill, S. 1869)	48, 52, 97
Sharfman, The Interstate Commerce Commission	
Vol. I, page 7	113
Vol. I, page 191	113
Vol. II, page 357	109, 113
Vol. IIIA, pages 506-514	67
Third Annual Report of Interstate Commerce Commission to Congress	71

STATUTES[1]

PAGE

Bankruptcy Act:
- Chapter X (Chandler Act) 37, 56, 103, 104, 105
- Section 24 (11 U. S. C. A. § 47) 114
- Section 24(c) (11 U. S. C. A. § 47(c)) 4

Frazier-Lemke Act (48 Stat. 1289) 39

Interstate Commerce Act:
- Section 5(4)(b) 63
- Section 19a (49 U. S. C. A. § 19a) ... 9, 15, 16, 26, 33, 36, 39, 43, 44, 45, 50, 66, 68, 69, 73, 88, 89, 95, 96, 100, 101
- Section 20a (49 U. S. C. A. § 20a) .. 10, 30, 59, 60, 61, 62, 64, 65, 67, 78, 86, 99, 113, 114
- Section 20a(2) 60, 62, 63
- Section 20a(7) 60, 63

Judicial Code:
- Section 210 (28 U. S. C. A. § 47a) 114
- Section 240(a) (28 U. S. C. A. § 347(a)) 4

Reconstruction Finance Corporation Act and Emergency Relief and Construction Act of 1932 (15 U. S. C. A. Chap. 14, § 605) 118

Urgent Deficiences Act of October 22, 1913 (38 Stat. 208, 220; 28 U. S. C. A. § 47a) 114

[1]Citations to Section 77 of the Bankruptcy Act are too frequent for enumeration. Substantially all of the statute is reprinted in the appendix to this brief at pages i to xxvi.

Supreme Court of the United States

OCTOBER TERM, 1942

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*

FREDERICK H. ECKER, *et al., Petitioners,* v. WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 7
CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, *Petitioners,* v. WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 8
THE WESTERN PACIFIC RAILROAD COMPANY, *Cross-Petitioner,* v. FREDERICK H. ECKER, *et al., Cross-Respondents.*	No. 20
RECONSTRUCTION FINANCE CORPORATION, *Petitioner,* v. WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 33
IRVING TRUST COMPANY, *Petitioner,* v. CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, *et al., Respondents.*	No. 61

BRIEF ON BEHALF OF A. C. JAMES CO., RESPONDENT

Introductory

A. C. James Co. has a secured claim against the debtor railroad in the principal amount of $4,999.80, which claim is described more fully at page 10 of this brief. This

Note: All emphasis in quoted matter has been supplied throughout this brief unless otherwise indicated.

claim was classified as a separate class of creditor, under subsection (c)(7) of Section 77 of the Bankruptcy Act, by order of the District Court dated August 20, 1935 (R. 1023).

In the pending proceeding under Section 77 of the Bankruptcy Act the Interstate Commerce Commission rejected three plans of reorganization filed by parties to the proceeding, and several amended plans, in all of which provision was made for refunding in full the secured claim of this respondent. The Commission then formulated, and in this proceeding seeks to impose upon the creditors, under claimed authority of Section 77, its own plan of reorganization, which is here in issue. This Commission Plan has the effect of disregarding, cancelling, and refusing to refund more than half of the secured claim of A. C. James Co.

A. C. James Co. has contended below, and will urge in this Court, that nothing in the facts, or in Section 77 of the Bankruptcy Act, or in the law of the land, warrants or supports this confiscatory treatment of its secured claim.

This case brings before this Court something more than matters of procedural due process. It necessarily involves questions as to basic principles of administrative law, the relative functions of the courts and administrative agencies and the essential judicial function of construing the scope of powers delegated by Congressional act. The sound development of administrative law requires that an administrative agency shall function within the legislative mandate and seek to attain the legislative objectives. When an administrative agency—no matter how well-intentioned—goes outside the four corners of the statute, even as it may be clarified by any extrinsic indication of Congressional intent, and seeks to accomplish objectives not within the declared legislative purposes, those purposes are defeated. We maintain that the plainly indicated objects of the statute would be nullified by the Interstate Commerce Commission's interpretation of Section 77 of the Bankruptcy Act in this proceeding, and a

soundly conceived statute rendered in large part ineffective.

This is a case of novel impression in this Court. It involves the interpretation and application of Section 77 of the Bankruptcy Act (47 Stat. 1474, as amended; 11 U. S. C. A., § 205; all pertinent portions printed in full at pages i to xxvi of the appendix to this brief). Although Section 77 of the Bankruptcy Act was enacted in 1933 and substantially amended in 1935 to its present form (49 Stat. 1969), this is the first case in which the broad questions of the construction of Section 77 and its application to the reorganization of railroads has come before this Court.

In *Continental Illinois National Bank and Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, this Court sustained Section 77 of the Bankruptcy Act, in its general scope and aim, as within the power conferred on Congress by the bankruptcy clause of the Constitution. That case raised specifically the question of the jurisdiction of the bankruptcy court to enjoin creditors from selling their collateral during the pendency of a reorganization proceeding under Section 77, and this Court had no occasion to consider the questions of construction of the Section and its application which are raised in the present proceeding.

Opinions below

Opinion of Circuit Court of Appeals, 9th Circuit, 124 F. (2d) 136 (R. 2663);

Opinion of District Court, Northern District of California, Southern Division, 34 F. Supp. 493 (R. 1569);

Original Report and Order of Interstate Commerce Commission on October 10, 1938, 230 I. C. C. 61 (R. 194);

Commission's Modifying Report and Order, June 21, 1939, 233 I. C. C. 409 (R. 300).

Jurisdiction

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. A., § 347 (a)] and § 24(c) of the Bankruptcy Act [11 U. S. C. A., § 47(c)]. The decree of the Circuit Court of Appeals for the Ninth Circuit was entered November 28, 1941 (R. 2675-6).

Scope of Review

The decision of the Circuit Court of Appeals for the Ninth Circuit, here under review, reversed an order entered by the District Court for the Northern District of California, Southern Division, on August 15, 1940. The order of the District Court had approved a plan of reorganization for the debtor railroad which had been promulgated by the Commission and certified to the District Court. The decision of the Circuit Court of Appeals was based substantially upon two grounds: (a) that the Commission and the District Court had failed to make the necessary findings of fact upon which the fairness and equity of the plan of reorganization could be judicially determined; and (b) that the District Court had misconstrued and improperly limited its judicial functions and duties under Section 77 of the Bankruptcy Act.

In this brief, this respondent will present for this Court's consideration, not merely the defects of procedural due process which the Circuit Court of Appeals quite properly found in the proceedings before the Commission and in the District Court, but substantial questions at issue in this proceeding involving the basic construction of Section 77 of the Bankruptcy Act.

It has seemed to us that in giving consideration to the matters specifically decided by the Circuit Court of Ap-

peals for the Ninth Circuit, this Court will also have to review at this time basic questions as to the construction and application of Section 77 of the Bankruptcy Act. The procedural defects found by the Circuit Court of Appeals in the proceedings below are rooted deep in basic misconstructions of Section 77 which were adopted by the Commission and by the District Court.

It should be noted in this connection that this Court has granted in this proceeding four petitions for certiorari and a cross-petition, without express limitation, which on their face raise issues which go considerably beyond the somewhat narrow bases of decision set out in the opinion of the Circuit Court of Appeals.

Moreover, the Commission has filed in this proceeding a memorandum *amicus curiae* in which it states that:

> "* * * it is important to the efficient performance of the Commission's duties under Section 77 that the procedure to be followed and the findings to be made by the Commission should be established by a definitive decision of this Court."

The Commission has thus expressed formally its desire that this Court indicate in its decision in this proceeding any basic errors in the construction and application of Section 77 which may appear from the Court's review of the proceeding, in order that the Commission may perform effectively the duties imposed upon it by Section 77, in the light of conditions then existing, when this case is returned to it for further consideration. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

It must be admitted that under the procedure provided by Section 77 of the Bankruptcy Act the parties will have a later opportunity to bring up for review substantial questions of the construction of Section 77 which affect their interests. The plan of reorganiza-

tion which the Commission seeks to impose upon the creditors in this proceeding has not yet been submitted to the creditors for the required vote of approval under subsection (e) of Section 77. The only creditors (excluding the First Mortgage Trustees,[1] who have definitely aligned themselves with the insurance company bondholders, although they represent a minority of the outstanding bonds) now supporting the Commission Plan are (a) a group of insurance companies and one bank, functioning under the exception proviso of subsection (p) of Section 77, holding a little more than one-third of the First Mortgage Bonds of the debtor, and (b) the Reconstruction Finance Corporation, which is given under the Commission Plan a substantial and unwarranted preference as against other secured creditors. It may fairly be assumed that any plan formulated by the Commission, under what we deem to be its erroneous construction of Section 77, would not receive an affirmative vote of acceptance by all classes of secured creditors.

Under the express provisions of subsection (e) of Section 77 such plan might be confirmed by the District Court after an adverse vote by one or more classes of creditors, "if he [the District Judge] is satisfied and finds, after hearing, that it [the plan] makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; **that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts;** and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e)." Any such confirmation by the District Judge (assuming that any judge would make the required findings in the face of the demonstrated present day earning power of the debtor's railroad system) would be the subject of

[1] Subsection (c)(7) of Section 77, which permits mortgage trustees to file claims, expressly provides:

> "* * * nothing herein shall constitute such trustee or trustees the representative or representatives of such holders (bondholders) for the purpose of accepting or rejecting any plan of reorganization."

judicial review under the express provisions of subsection (f) of Section 77.

However, despite the existence under the procedure provided by the statute of a later opportunity to bring up additional questions for review, the time elements are such that all parties to this proceeding have a vital interest in a final determination, at this time, of these basic problems of construction and interpretation of Section 77.

Unless this Court does consider broadly the questions as to the proper construction of Section 77 of the Bankruptcy Act raised in this proceeding and hand down a final and definitive interpretation of that statute, it may be years before the reorganization of the debtor railroad can be completed. This may be sufficiently indicated by reference to the condensed chronological summary of the prior proceedings herein set forth below.

Chronological Summary of Proceedings Heretofore Had

August 2, 1935	Debtor's petition for reorganization filed with District Court and Commission and approved by District Court (R. 4, 1019).
August 20, 1935	Claims of creditors and stockholders classified by order of District Court (R. 1022).
February 8, 1936	Plan of reorganization filed by debtor with Court and Commission (R. 19).
March 23, 1936	Hearings before examiners of Commission commenced.
September 28, 1936	Plan of reorganization filed with Commission by Institutional Bondholders Committee (R. 48).
October 26, 1936	Plan of reorganization filed with Commission by A. C. James Co. (R. 101).

August 1, 1937	Proposed report issued by Bureau of Finance of Commission, rejecting plans submitted by the parties and promulgating Commission Plan (R. 116).
November 17, 1937	Hearing before Commission on exceptions to proposed plan filed by all parties to proceeding.
October 10, 1938	Commission issued original report and order approving Bureau of Finance Plan with some modification (R. 194, 281).
January 20, 1939	Hearing held before Commission on petitions of all parties for rehearing and modification.
June 21, 1939	Commission issued its "report and order on further consideration" approving modified plan of reorganization, modifying its report of October 10, 1938, and revoking order of that date (R. 300, 382).
September 28, 1939	Proceedings before Commission certified to District Court.
December 8, 1939	Objections to Commission Plan filed by this respondent and others in District Court (R. 892, et seq.).
January 22-25, 1940	Hearings before District Court.
August 15, 1940	Order entered by District Court overruling objections and approving Commission Plan (R. 1600).
July 28-29, 1941	Hearing on appeals in Circuit Court of Appeals.
November 28, 1941	Decree of Circuit Court of Appeals entered.
April 27, 1942	Petitions for certiorari and cross-petition granted by this Court.

For the reasons indicated above and in the interest of substantial justice, it therefore appears that the basic questions of the construction and application of the statute to the facts of this case, as well as the particular points of administrative and judicial procedure, are properly to be considered for decision by the Court at this time.

This brief is therefore directed, in substantial part, to the basic questions as to the construction of Section 77 and its application to the facts here before the Court. This respondent will file, prior to the argument, pursuant to the stipulation of the parties of August 15, 1942, a reply brief dealing specifically with such contentions of the petitioners as do not fall within the scope of the affirmative presentation adopted in this brief.

Statement of the Case

This respondent has contended throughout this proceeding that the claim of a secured creditor cannot, under Section 77 of the Bankruptcy Act lawfully be refused refunding in whole or part, and thus foreclosed, on the basis of a bald limitation of capitalization, utterly unrelated to the value as previously found by the Commission, of the properties of the debtor upon which the secured creditor holds a lien. The Commission and the District Court rejected this contention; the Circuit Court of Appeals has sustained it.

This respondent has also contended throughout this proceeding that the value of the debtor's railroad system, as it exists today, provides ample margin for the full recognition and refunding of respondent's secured claim; and that the Commission's prior valuation (under Section 19a of the Interstate Commerce Act, 49 U. S. C. A. Section 19a), as previously determined and reported in this proceeding, should not be materially diminished or otherwise modified

under the valuation provisions of subsection (e) of Section 77, if soundly construed.

In order that the factual background against which the legal questions arise may be clear to the Court, and in order to correct some possible misapprehensions which might flow from the manner of presentation of this factual background in the briefs of the petitioners, it seems desirable to present at this point a brief summary of the facts as to the claim of this respondent and as to the debtor's status.

Secured claim of A. C. James Co., this respondent

A. C. James Co. is a secured creditor of the debtor in the principal amount of $4,999,800, with unpaid accrued interest thereon at 5% per annum, from January 1, 1934. The aggregate debt, principal and interest, owing to A. C. James Co. on January 1, 1939, the effective date of the Commission Plan, was $6,249,750 (R. 1023).

This indebtedness arose from the purchase in 1931 and 1932 by A. C. James Co., at public sale, for cash, at full face value, of debentures of the debtor, authorized by the Interstate Commerce Commission in proceedings under Section 20a of the Interstate Commerce Act, to enable the debtor to complete its Northern California Extension, a connection with the Great Northern Railway, which Extension is now a substantial and highly important part of the debtor's railway system. In the indenture under which these debentures were issued, the debtor agreed that no new mortgage or pledge of the properties of the debtor would be created without calling these debentures for payment (I. C. C. Exhibit No. 50, p. 32).[1]

The report of the Commission dated November 20, 1930, approving the issue of these debentures, is printed in full in the appendix to this brief at pages xxvii to xxix (R. 2324).

[1] Admitted at R. 2335. Not printed in the Record by stipulation (R. 2616); original exhibit before this Court pursuant to stipulation filed July 23, 1942.

Subsequently in March and May, 1932, the debentures held by this respondent were exchanged for promissory notes of the debtor secured by its General and Refunding Mortgage bonds (R. 1084-6). The reports of the Commission providing for this exchange are a part of the unprinted record before the Court under stipulation, and are printed at pages xxx to xli of the appendix to this brief (R. 2341).

It should be noted at this point that these reports of the Commission, which approved and authorized the securities originally held by this respondent and the securities received in exchange therefor, and now held, contain in each case an express finding that the issue by the debtor Company of the obligations in question "is for lawful objects within its corporate purposes, and compatible with the public interest" and "necessary and appropriate for * * * the proper performance by it of service to the public as a common carrier". There will be occasion to make further reference to this fact later in this brief. (See Point II.)

The Commission had on June 9, 1930, after hearing and investigation, issued a complete and detailed report upon the applications of The Great Northern Railway Company and The Western Pacific Railroad Company for authority to construct the proposed Northern California Extension and lines connecting with the Great Northern System, and had certified

> "* * * That the present and future public convenience and necessity require the construction and operation by the Western Pacific Railroad Company of the [proposed] line of railroad * * *." (*Great Northern Railway Company Construction*, 166 I. C. C. 3, 41.)

The three notes now held by A. C. James Co. are secured by $6,249,500 principal amount of the debtor's General and Refunding Mortgage bonds, issued under its Indenture dated as of January 1, 1932, which General and

Refunding Mortgage bonds were deposited with and are now held by A. C. James Co., except that $2,000,000 principal amount of such bonds were, at the request of the debtor, delivered to The Railroad Credit Corporation, to be held by that corporation as additional collateral against advances made by it. A. C. James Co. retains all its rights as lienor in and to such $2,000,000 worth of bonds, subject only to the prior rights accruing to The Railroad Credit Corporation as a result of the delivery of such bonds, as stated above (R. 1023).

Treatment of A. C. James Co.'s secured claim under Commission Plan

In the Commission Plan, this respondent is allotted for its secured claim (principal plus interest in the aggregate amount of $6,249,750) $163,724 principal amount of Income Mortgage 4½% bonds, Series A, $256,756 of 5% Preferred Stock, Series A, and 37,635 shares of common stock of the proposed reorganized company (R. 392). Such common stock is no par value stock and in the Commission Plan it is allotted to other secured creditors at prices varying from $57 to $62 per share (R. 391-2). Using the highest price assigned by the Commission to such common stock, in allotting it to other secured creditors, the total allotment of securities to this respondent amounts to $2,753,850, against an aggregate claim of $6,249,750, or approximately 44% of the face of said claim. Using the same valuation, no other secured creditor is allotted less than 100% of its claim.

The brief for the Institutional Bondholders (p. 55) in an ingenious effort to spell out a new valuation of the debtor's properties for reorganization purposes, by assigning to the Commission's proposed capital structure a dollar total, takes the no par value common stock, which is included in the capital structure, at $57 per share. On this basis, only about 40% of this respondent's secured claim would be recognized and refunded.

Even if the common stock were to be taken at a value of $100 per share (a value used by the Commission in its reports of October 10, 1938 and June 21, 1939, in discussing capitalization,—R. 244, 245, 321) the securities allotted would fall short of a refunding of this respondent's claim, to the extent of approximately one-third.

The Commission found (R. 269) that the securities allotted to A. C. James Co., as a secured creditor, would be inadequate to satisfy its claim but did not determine or discuss the amount of the inadequacy.

The railroad system of the debtor as it exists today

For a more complete statement as to the property of the debtor and its subsidiaries and the properties operated by the debtor, the Court is referred to the printed record at pages 1037-1043.

The original line of railroad operated by the debtor ran from Oakland, California, to Salt Lake City, a distance of 924 miles.

Between 1927 and 1938 substantial additions to the railroad system of the debtor were made which have basically changed its significance as a part of our national transportation system, and have greatly increased its earning power.

The most important of these changes and additions was the construction in 1931 and 1932 of an additional line of railroad called the Northern California Extension, extending from a point on the original main line at Keddie, California, northward to connect with the Great Northern Railway Company's lines at Bieber, California. This line of railroad covers a distance of only approximately 112 miles, but because of the difficulty of the terrain through which it was built, it cost more than $10,000,000 to construct. This northward extension of the Western Pacific has opened to the debtor's railroad system en-

tirely new traffic fields and, as will hereinafter be indicated, has added greatly to the earning power of the debtor's railroad system as a whole.

In addition to the construction of the Northern California Extension, the original main line of the debtor was substantially improved and increased in efficiency by the so-called Improvement and Rehabilitation Program which was initiated in 1927 and involved the expenditure of approximately $18,000,000 between 1927 and 1938 in basic improvements of the physical property to increase operating efficiency and earning power. Of the total of $18,000,000 expended on the improvement program $8,000,000 was expended by the debtor during the period from 1927 to 1931 (R. 1052). The program was necessarily suspended at that time because of the impact of the 1929 depression. After the property was taken over by the Trustees of the Court in this proceeding, work on the program was resumed and completed during the period from 1936 to 1938 (R. 203, 1214). It was for the purpose of carrying on and completing this program that the Trustees borrowed $10,000,000 on Trustees' Certificates, to which reference will hereinafter be made in connection with the discussion of the capitalization of the debtor.

At the present time the debtor owns or operates 1,207.51 miles of standard gauge railroad (R. 1037).

One other factor of major importance should be mentioned as having a substantial effect on the economic efficiency and earning power of the debtor's railroad system. This factor was the opening in June, 1934, of the Dotsero Cut-off as part of the Denver and Rio Grande Western Railroad System. Prior to 1934 the volume of traffic received by the debtor from its important eastern connections over the Denver and Rio Grande Western Railroad Company lines, was limited, as to traffic moving to and from Chicago, by the existence of the so-called Pueblo Loop,

which so delayed traffic as to make it impossible to maintain competitive freight schedules as to freight moving between Chicago and California points. The building of the Moffatt Tunnel and the construction of the Dotsero Cut-off shortened the through route so far as Denver and Rio Grande Western movement was concerned by approximately 175 miles. This has increased and is now increasing substantially the volume of traffic received by the debtor from its important connections, the Burlington and Rock Island railroads, by way of the Denver and Rio Grande Western and the volume of traffic delivered by it to its connections, the Burlington and Rock Island railroads, by way of the Denver and Rio Grande Western (R. 215, 2099, 2100).

Investment and value of the property of the debtor

In its report of October 10, 1938, the Commission stated that the balance sheet of the debtor's Trustees as of June 30, 1938, showed total assets of $173,650,980.19 (R. 203, 1060, par. 63).

Section 19a valuation

The Commission has determined, and has stated in its report in this proceeding, the value of the property of its debtor and its wholly owned subsidiaries, pursuant to Section 19a of the Interstate Commerce Act (R. 1058-63). In its report of October 10, 1938, the Commission summarized total former valuations and concluded (R. 224):

> "* * * If there be added to the above amounts [the Commission's valuations of the properties of The Western Pacific Railroad Company and its wholly owned subsidiaries] the net cost of additions and retirements between valuation dates and December 31, 1935, the total would be $139,600,455."

The valuation of the properties of the debtor and its subsidiaries (excluding Deep Creek Railroad Company which was abandoned in 1939), as found by the Interstate Commerce Commission under Section 19a of the Interstate Commerce Act, with additions and betterments, new lines and extensions, subsequent to the dates of valuations, plus non-operating properties, (all as shown by the books of the debtor's Trustees) was in the total amount of $150,907,623.49 as of December 31, 1938 (R. 1061-2, par. 68).

Commission's prior determinations of capital assets

On February 27, 1932, the Commission, in its report authorizing the issue of $15,000,000 principal amount of General and Refunding Mortgage Gold bonds, Series A, of the debtor, found that the total capital assets of the debtor in road, equipment and affiliated companies, as of December 31, 1931 was $147,056,283.31 (R. 1060, par. 64). Again, on December 9, 1932, the Commission, in its report authorizing the issue of $4,000,000 principal amount of General and Refunding Mortgage Gold bonds, Series B, of the debtor, found the "total capital assets [to be] $148,796,047.60," as of May 31, 1932 (R. 1060, par. 65). Part of each issue of bonds was authorized to secure the notes of the debtor which were issued to A. C. James Co. in 1932 in exchange for the debentures theretofore held by it.

The Commission's valuation under Section 19a and its prior determinations of capital assets in authorizing the issue of securities to A. C. James Co. in 1932 were referred to by the Commission in its reports. But when the Commission dealt with its proposed allowable capital structure, it blandly waved aside these data, as irrelevant, under the construction which it read into Section 77 (Point II).

Secured claims against debtor and their treatment under Commission Plan

There is printed below (a) a table which shows the secured claims against the debtor, with accrued interest to January 1, 1939, the effective date used in the Commission Plan; (b) a table showing the securities which it is proposed should be issued by the reorganized company under the Commission Plan; and (c) a table showing the distribution of such proposed securities among the secured creditors. A complete list of the claims against the debtor appears at pages 1022-28 of the printed record, while the securities proposed to be authorized under the Commission Plan appear at page 364 of the record and the proposed distribution, at pages 390-2.

(a) Summary of secured claims as of January 1, 1939

Claim or Interest	Principal of claim or interest	Accrued interest at contract rate to effective date of plan	Total claim including interest at contract rate to effective date of plan
Trustees' Certificates (held by Reconstruction Finance Corporation)	$10,000,000.00	$	$10,000,000.00
Equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Collateral Notes (secured by General and Refunding Mortgage bonds and other collateral)	2,963,000.00	899,869.98	3,862,869.98
The Railroad Credit Corporation Collateral Notes (secured by General and Refunding Mortgage bonds and other collateral)	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Collateral Notes (secured by General and Refunding Mortgage bonds)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured Debt	$72,448,559.88	$15,533,112.87	$87,981,672.75

(b) Proposed new securities

Undisturbed equipment obligations	$ 2,750,050
New First Mortgage 4% Bonds	10,000,000
Income Mortgage 4½% Bonds	21,219,075
Five Per Cent Preferred Stock, par value $100 per share	31,850,297
Total of dollar value securities	$65,819,422
No par common stock	319,441 shares

(c) Distribution of proposed securities

(Exclusive of undisturbed equipment trust obligations and First Mortgage 4% Bonds, to be issued for new money)

Secured Creditors		Income Mortgage 4½% Bonds	5% Preferred Stock, $100 par value	No par Common Stock
First Mortgage 5% Bonds				
Principal	$49,290,100.00			
Interest to Jan. 1, 1939	13,143,766.66			
Total	$62,433,876.66	$19,716,040	$29,574,060	230,593 shares
Reconstruction Finance Corporation Collateral Notes (secured by General and Refunding Mortgage Bonds and other collateral)				
Principal	$ 2,963,000.00			
Accrued interest to Jan. 1, 1939	899,869.98			
Total	$ 3,862,869.98	1,185,200	1,777,800	15,788 shares
The Railroad Credit Corporation Collateral Notes (secured by General and Refunding Mortgage Bonds and other collateral)				
Principal	$ 2,445,609.88			
Accrued interest to Jan. 1, 1939	145,314.23			
Total	$ 2,590,924.11	154,111	241,681	35,425 shares
A. C. James Co. Collateral Notes (secured by General and Refunding Mortgage Bonds)				
Principal	$ 4,999,800.00			
Accrued interest to Jan. 1, 1939	1,249,950.00			
Total	$ 6,249,750.00	163,724	256,756	37,635 shares

Comments

With reference to the above summary statement of the situation as to the debtor's secured obligations and the provision made for them, certain points should be noted for their bearing upon the subsequent discussion in this brief.

The Trustees' Certificates of Indebtedness do not represent the refunding of any obligation of the debtor existing on August 2, 1935, when the debtor's petition under Section 77 was filed. They were originally issued in the aggregate principal amount of $10,000,000 pursuant to orders of the District Court made October 5, 1938 and November 7, 1938 (R. 1028). They were authorized by the Commission and by the District Court upon petition of the Trustees in order to provide the Trustees with the necessary funds to complete a program of rehabilitation and improvement of the debtor's railroad system, which program had been initiated in 1927 and suspended in 1930, after approximately $8,000,000 had been expended. On January 1, 1939, the effective date of the proposed Commission Plan, these Trustees' Certificates of Indebtedness were outstanding in the principal amount of $10,000,000, bearing interest at the rate of 4% and were all held by Reconstruction Finance Corporation (R. 1028). The Certificates have been renewed from time to time since January 1, 1939, and the principal amount has been somewhat reduced by amortization payments subsequently required by the Commission in connection with renewal authorizations. From their nature they constitute a first lien upon all property in the hands of the Court, and at the present time are specifically secured by $6,000,000 in cash (see p. Liii of appendix), which has been deposited from time to time with the Reconstruction Finance Corporation by the Trustees pursuant to an order of the District Court, dated November 26, 1941.

The collateral notes held by Reconstruction Finance Corporation, as shown in the above tables, are an obligation of the debtor in the principal amount of $2,963,000, secured by $10,750,000 principal amount of the debtor's General and Refunding Mortgage bonds and also by additional collateral pledged by parties other than the debtor (R. 1023-4).

The secured notes held by The Railroad Credit Corporation in the principal amount of $2,445,609.88 are secured by $4,000,000 principal amount of the debtor's General and Refunding Mortgage bonds and by other collateral, including a subordinate lien upon all collateral pledged by the debtor with the Reconstruction Finance Corporation (R. 1024-5). The General and Refunding Mortgage bonds held by The Railroad Credit Corporation include $2,000,000 principal amount, which were originally deposited with and held by the A. C. James Co. A. C. James Co. retains all its rights as lienor in and to such $2,000,000 worth of bonds, subject only to the prior rights accruing to The Railroad Credit Corporation as a result of the delivery of such bonds, as stated above (R. 1023).

In addition to the secured claims shown by the above tables, the debtor owed to Western Pacific Railroad Corporation and The Western Realty Company $5,818,791 principal indebtedness upon open account which, with interest at the contract rate to the effective date of the plan, amounted to a total unsecured debt of $7,810,887 (R. 1026-7).

Further, the tables set out above do not show the stock of the debtor, all of which is held by Western Pacific Railroad Corporation, being $28,300,000 par value of preferred stock and $47,500,000 par value of common stock (R. 1027).

Revenue and earnings

In the report of the Commission of October 10, 1938, there appears a somewhat extended discussion of the past earnings history of the debtor's system and there is subsequent discussion of this earnings record in the Commission's later report of June 21, 1939 (R. 218, 308).

This discussion of earnings in the Commission's reports is of little value because of the almost complete failure to distinguish between the earnings of the property of the debtor as that system existed prior to the changes made from 1927 to 1938, and the earning power of the debtor's railroad system as it now exists after the substantial changes made between 1927 and 1938, including (a) the construction and operation of the Northern California Extension; (b) the completion in 1938 of the Improvement and Rehabilitation Program; and (c) the beneficial effects of the building of the Dotsero Cut-off on the amount of traffic received from and delivered to the Burlington and Rock Island railroads by way of the Denver and Rio Grande Western.

The entire discussion by the Commission in its reports of the earnings history of the debtor is further colored by its misconception of its task under Section 77 of the Bankruptcy Act. As will be pointed out later in this brief, the Commission has assumed under purported authority of Section 77 to deal with property rights of secured creditors and other parties in interest on the basis of the supposed necessity of limiting total capitalization solely in the public interest. It has, therefore, not concerned itself primarily with the basic question of "earning power" which it would necessarily have faced if it had felt constrained to revalue the existing properties of the debtor under subsection (e) of Section 77 of the Bankruptcy Act, where "earning power" as distinct from "earnings" and "probable earnings" is expressly made the primary determinative factor.

When the Commission Plan came before the District Court, the parties to the proceeding entered into a stipulation for the convenience of the Court, which included a statement of the railroad operating revenues of the debtor's system from 1922 (the end of Federal control) to the latest available date (R. 1064), and a statement of adjusted consolidated earnings available for interest (R. 1065-6) for the same period.

The earnings data shown in the stipulation of the parties, referred to above, has been supplemented as to the subsequent periods by monthly statements prepared by the Trustees in charge of the operation of the debtor's property and filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, and duly certified to the Circuit Court of Appeals for the Ninth Circuit pursuant to order of the District Court (R. 2627). These statements appear for the period from December, 1939 to September 1941, in Volumes VII and VIII of the printed record. Subsequent statements covering the periods since September, 1941, have been submitted to this Court and are a part of the unprinted record available, under stipulation of the parties filed with this Court, for use in brief or in argument. For the convenience of the Court these statements for the months, December, 1940 (which includes operating results for the calendar year 1940), December, 1941 (which includes operating results for the calendar year 1941), June, 1942 (which includes operating results for the first six months of 1942) and July, 1942 are printed in the appendix of this brief at pages L to Liii.

The two tables set forth below show in summary form (a) railway operating revenues of the debtor's system and (b) adjusted consolidated earnings available for interest:

(a)

Railway Operating Revenues of the Debtor's System

Year	Freight	Passenger	Other	Total
1922	$ 9,667,960	$2,184,093	$ 884,511	$12,736,564
1923	10,751,276	2,455,420	1,208,116	14,414,812
1924	11,241,579	2,106,656	1,321,078	14,669,313
1925	12,634,074	2,000,817	1,263,657	15,898,548
1926	14,259,651	2,319,151	1,372,666	17,951,468
1927	14,764,690	2,090,480	1,451,505	18,306,675
1928	15,974,137	1,870,790	1,576,924	19,421,851
1929	16,358,041	2,187,700	1,550,816	20,096,557
1930	15,450,051	1,795,834	1,573,177	18,819,062
1931	12,342,041	1,315,283	1,195,614	14,852,938
1932	10,662,430	764,977	823,664	12,251,071
1933	10,950,948	595,268	656,273	12,202,489
1934	12,338,085	629,720	811,433	13,779,238
1935	13,254,572	730,957	421,929	14,407,458
1936	15,264,675	805,673	476,996	16,547,344
1937	16,588,843	814,632	515,010	17,918,485
1938	14,934,497	680,382	442,572	16,057,451
1939	16,819,157	1,014,887	473,477	18,307,521
1940	18,701,678	860,047	436,617	19,998,342
1941	24,119,568	873,174	553,741	25,546,483

1942: Total for first six months, $16,235,602 (representing an increase of $6,124,602 or 60.57% over the corresponding total for first six months of 1941).

(b)

Adjusted Consolidated Earnings Available For Interest

1922	$2,040,890
1923	4,412,234
1924	3,241,823
1925	4,557,798
1926	4,868,390
1927	3,470,861
1928	4,376,972
1929	3,718,436
1930	2,381,529
1931	220,494 (deficit)
1932	283,912
1933	474,365
1934	1,396,353
1935	1,377,026
1936	1,901,423
1937	1,077,407
1938	225,431
1939	1,519,916
1940	2,649,797
1941	4,548,138

1942: First six months, $4,080,090 (representing an increase of $2,996,563, or 276.56% over the corresponding period of 1941).

Earning Power of the Property

The discussion of earnings in the briefs of the petitioners is essentially misleading in several respects.

In the first place, they find it necessary to deduct from the actual earnings available for interest in recent years substantial sums of theoretical Federal taxes, not actually paid or payable, on the theory that *if* the Commission Plan had been in effect, it would have converted 60% of the First Mortgage debt into equity holdings and so would

result in moneys that would be deductible from income as interest, under the old capital structure, becoming subject to tax as equity earnings under the Commission Plan.

In the second place, the petitioners give only lip service (see note, p. 7 and p. 14, Institutional Bondholders' brief) to the substantial changes which occurred in the debtor's railroad system between 1927 and 1938, inclusive, and completely fail to give due weight to the fact that the railroad system of the debtor, as it has existed since 1938, is a substantially different property from the original railroad system as it existed during the prior years of the period which they discuss.

It may fairly be said, however, as to the property to be reorganized, that no amount of parading of historical earnings, no matter how skillful, can disguise the fact that in the calendar year 1941 the debtor's railroad system earned by a wide margin its interest requirements under its existing capitalization (prior to the drastic and unsupported changes proposed in the Commission Plan). In other words, during the calendar year 1941, after the debtor's railroad system had earned all interest requirements on its equipment obligations, the Trustees' Certificates, its outstanding First Mortgage bonds and its secured debts (including the claim of this respondent) there were left excess earnings of approximately $1,218,000.

Further, no amount of skillful argument or chart-making can cloud or conceal the fact that during the twelve month period from August 1, 1941 to July 31, 1942, as shown by the earnings statements filed by the Trustees in this proceeding pursuant to order of the District Court and before this Court, by stipulation, the debtor's railroad system earned $7,987,512 available for interest, a sum sufficient to cover its old fixed charges more than twice.

Obviously the current earnings of the debtor's railroad system, as it exists today, constitute a fair return on the

fully depreciated investment of the debtor in property used in the service of the public, as disclosed by the record in this proceeding (R. 1063, 283, 357).

If "earning power" is to be construed, as this respondent contends it should be, as "*capacity* to produce earnings," then it must be conceded that the Section 19a valuation of the properties of the debtor of approximately $150,000,000 as previously found by the Commission and reported in this proceeding, cannot fairly or soundly be whittled down or reduced on the basis of lack of "capacity to earn," under any reasonable construction of the valuation provisions of subsection (e) of Section 77. And it must equally be conceded that any reasonable valuation, giving full weight to demonstrated earning power, would exceed by a substantial margin the amount required to make provision for all of the debtor's secured debts, including the claim of this respondent.

Nor can it soundly be urged that these increased recent earnings are solely, or even in principal part, due to war conditions. It is, of course, admitted that the gross and net earnings of all railroad carriers, and especially of those vital carriers which are essential links in our transcontinental movement to the Pacific coast, have been increased by the pressure of war transportation.

In the case of the debtor's railroad system, however, other and vital factors exist which necessarily tend to raise the level of earnings substantially above the level which would have existed for the original property. These factors include, as pointed out above, (a) the construction and operation of the Northern California Extension; (b) the completion in 1938 of the Improvement and Rehabilitation Program; and (c) the substantial, though indirect, benefits of increase in traffic volume due to the functioning of the Dotsero Cut-off on the Denver & Rio Grande Western Railroad System. As to "b" and "c", it is diffi-

cult to establish, from the record before this Court, any measure of the extent of improvement in gross and net earnings which may be attributed to those factors. As to the Northern California Extension, however, there is available data in the record which permits some rough measurement of the substantial change in the earning power of the debtor's railroad system, which flowed from the construction and operation of this line of railroad.

Increase in Earning Power Due to Northern California Extension

The Northern California Extension was built in 1931 and 1932 and was opened to traffic in the latter year. There was, of course, a necessary lag in the full utilization of this line of track as an income producer during a seasoning period, which may fairly be deemed to have extended from 1932 to 1936. During that period traffic exchange arrangements were being worked out with other carriers, and other carriers and shippers were being educated to the use of the alternative routings of traffic made possible by the construction of this line. The fact that the Commission had authorized the construction of this line because the "public convenience and necessity" required it, did not mean that its full economic usefulness would be immediately evident to other carriers and to shippers. A period of education and seasoning was necessary.

In the stipulation submitted by the parties to the District Court the increase in gross traffic attributable to the Northern California Extension is set forth (R. 1078). Complete data are available only for the years 1932 to 1938, inclusive. The following table has been prepared to show the relation of revenues attributable to the Northern California Extension to other revenues of the property:

CONSOLIDATED GROSS REVENUES FROM FREIGHT

Year	Originated and terminated on and passing over Northern California Extension	Other	Total	Ratio of Northern California Extension revenue to other revenue
	(1)	(2)	(3)	(4)
1932	$1,098,016	$ 9,564,414	$10,662,430	11.48%
1933	1,491,466	9,459,482	10,950,948	15.77%
1934	2,119,427	10,218,658	12,338,085	20.74%
1935	2,289,858	10,964,714	13,254,572	20.88%
1936	3,151,734	12,112,941	15,264,675	26.02%
1937	3,425,601	13,163,242	16,588,843	26.02%
1938	3,093,674	11,840,823	14,934,497	26.13%
1939 (9 mos.)	2,463,489	9,221,006	11,684,495	26.72%

(1) Record, p. 1078.
(2) Derived; (3)—(1).
(3) Record, p. 1064.
(4) Derived; (1)÷(2).

It will be noted that beginning with 1936, after the Northern California Extension became seasoned as an artery of traffic, it increased, for the period covered, the gross revenue from the debtor's other lines by approximately 26%. While the record before the Court does not include the necessary data for completion of the table to date, the facts are known to all parties to the proceeding and shown by the records kept by the Trustees appointed by the District Court, who are operating the property, and it may be stated without fear of contradiction that this ratio of a 26% contribution of the Northern California Extension has been maintained with substantial consistency in the years subsequent to the period covered by the table above.

If one were to project back to the pre-depression years a 26% contribution to gross from a part of the debtor's system which did not then exist, a quite different historical earnings' picture would be presented. This is especially so when one takes into account that a much larger part of this additional gross would necessarily be carried to earnings available for interest, owing to the more economical use of motive power and the better balancing of the flow of traffic which has been made possible by the new sources of traffic coming from the Northern California Extension.

Obviously it is the debtor's railroad system, as it exists today, and not as it existed in the pre-depression years, which is to be reorganized. It is the "earning power" of the debtor's present railroad system and not the earning power of the system as it existed prior to 1938 that must be given consideration.

While it is not possible to measure as definitely the effects of the other factors mentioned (Improvement and Rehabilitation Program and the Dotsero Cut-off), as one can the effect of the Northern California Extension, this Court cannot properly close its eyes to the fact that the present railroad system of the debtor is quite a different railroad system from that whose earnings are largely discussed by the Commission and by the petitioners.

Significance of earnings history in relation to authorization and treatment of this respondent's secured claim

By way of further comment on the earnings statements set out above, attention should be called to the significance of these earnings statements with reference to the secured claim of this respondent and its proposed treatment in the Commission Plan.

The securities which the A. C. James Co. holds were authorized by the Commission in 1932 as "compatible with

the public interest" (pp. 11, 12, above). In 1938 and 1939 the Commission (ostensibly proceeding on the same theory as to public interest in capitalization as in 1932) by its Plan asserted the proposition that with reference to the earnings of debtor, the securities held by the A. C. James Co. could no longer continue to remain in existence, except as to 44% of the amount authorized in 1932 when this respondent purchased those securities for cash at their full face value. And yet, if the Court will look at the adjusted consolidated earnings available for interest, as set out above (p. 24), it will note that the average earnings of the debtor for the three-year period from 1930 to 1932 were $814,982. Comparing that period with the three-year period from 1937 to 1939, inclusive, the average earnings for the latter period were $941,752 and so in excess of the earnings for the three-year period prior to the authorization by the Commission "as compatible with the public interest" of the securities held by the A. C. James Co.

If the "earning power" of the debtor supported the creation, "in the public interest" of this respondent's secured claim in 1932, the "earning power" of the debtor supported the full recognition and refunding of that claim in 1939, and did not give a basis for the foreclosure and cancellation of more than half of the claim. Any such doctrine of foreclosure and cancellation as is here asserted by the Commission, if sustained under these circumstances, would be an overwhelming deterrent to any fufure participation by private investors in the transportation field.

Some reference will hereafter be made to this phase of the earnings history of the debtor in the discussion of the attempt of the petitioners to justify the theory upon which the Commission has proceeded in foreclosing the interest of creditors, by reference to an alleged continuity of functioning by the Commission under Section 20a of the Interstate Commerce Act (as it was functioning when it authorized the securities acquired by the A. C. James

Co. in 1931 and 1932) and its functioning under Section 77 of the Bankruptcy Act, under which it claims to exercise a legislative grant of power to foreclose the rights of the A. C. James Co. as a secured creditor.

Further required adjustments in past earnings record

While the table of earnings, which appears on page 24 above, is designated as a table of "adjusted consolidated earnings available for interest" it should also be remembered that the adjustments consisted in mere accounting corrections which took out of the operating expenses, expenditures in connection with the Improvement and Rehabilitation Program, which had, under Commission rules, been charged in part as operating expenses. There is, of course, no attempt to make any adjustment for the necessarily high level of operating expense which arose from the characteristics of the operating property and made it necessary that there be spent during the period from 1927 to 1938 $18,000,000 in the Improvement and Rehabilitation Program. The operating expenses of the period prior to 1938 were necessarily higher than they are currently, or will be in the future, now that the program has been completed.

It is also obvious that the continued necessity during the period from 1927 to 1938 to carry on construction work at various points on the property in connection with the Improvement and Rehabilitation Program and the construction of the Northern California Extension, involved delays and interference with normal traffic movements during the period, which resulted in substantially increased transportation costs.

Nor do the adjustments proposed take into account the known fact, of which the Court may properly take judicial notice, that the railroads, generally, during the depression years, made enormous progress in the efficiency

of operation, which permits them to retain a larger proportion of gross as net, despite increases in labor cost.

It is also of some interest to note that the original railroad system of the debtor, before the construction of the Northern California Extension, before the completion of the Improvement and Rehabilitation Program and before the opening of the Dotsero Cut-off on the Denver and Rio Grande Western, showed earnings for the eight-year pre-depression period, from 1922 to 1929, inclusive, considerably in excess of the earnings which the Commission apparently anticipated in its reports of October 10, 1938 and June 21, 1939, from the property as it is today with its greatly increased earning power. In the years 1922 to 1929 the old main line property showed earnings available for interest averaging $3,878,426 per year (R. 1065). If one were to give effect only to the increase of earnings which would be reasonably attributable to the increased gross from the Northern California Extension, one might fairly say that the average earnings available for interest for that period would have been increased by at least 26% and bring the earnings for the period to approximately $5,000,000 per annum.

This, however, is not the only necessary adjustment upwards of historical earnings because the other changes in earning power of the present property, as compared with the old property, to which reference has been made, cannot fairly be disregarded.

Summary of Argument

This respondent contends that no plan of reorganization under Section 77 of the Bankruptcy Act can be fair and equitable, which forecloses more than half of the claim of a secured creditor except on the basis of a clear showing and definite findings or determinations that the value of the property of the debtor is less than the amount of the secured claims with accrued interest.

The Commission has found specifically (R. 269) that under its Plan the claim of this respondent is not fully recognized or refunded. The Commission reports (R. 224) its Section 19a valuation of the debtor's railroad system as of December 31, 1935, as approximately $139,000,000. With additions and betterments to the effective date of the Commission Plan, this Section 19a valuation amounts to approximately $150,000,000 (R. 1061-2). This is an amount far in excess of that needed to permit full recognition and refunding of respondent's secured claim. The Commission has made no finding or determination that this previously found value of $150,000,000 should be reduced to some other and lesser amount based on lack of "earning power," nor has it even made a specific finding or determination as to the "earning power" of the debtor as a required element for consideration in determining the value of the properties of the debtor under subsection (e) of Section 77 of the Bankruptcy Act.

This respondent contends that the Commission erred in formulating and certifying its plan of reorganization and that the District Court clearly erred in approving such plan. It maintains that the Circuit Court of Appeals acted properly in reversing the judgment of the District Court and should be affirmed.

This respondent further contends that the errors into which the Commission and the District Court fell were due to basic errors in their construction of the legislative mandate imposed by Section 77 of the Bankruptcy Act, and urges this Court that it hand down, for the benefit of the Commission and of the inferior courts, a definitive and final interpretation of Section 77, as applicable to the facts herein involved, in order that the reorganization of the debtor railroad may be effectuated expeditiously and without substantial injustice to this respondent and other interested parties.

The argument of this respondent in support of its basic contentions is set forth in the following points:

Point I

The findings and determinations of the Commission and the District Court as to essential facts are obviously insufficient to justify or support the treatment of respondent's secured claim, which treatment is clearly confiscatory.

Point II

The Commission's construction of Section 77 of the Bankruptcy Act, which was accepted and adopted by the District Court, is basically erroneous and cannot be sustained either under the language or intent of Section 77 of the Bankruptcy Act or under any prior delegation of authority to the Commission in connection with the issue of securities by railroads.

Point III

The Commission's assumption of a legislative mandate under Section 77 authorizing it to convert valid debt into stock finds no support in the language of Section 77 and carries with it practical consequences seriously prejudicial to the credit of the debtor.

Point IV

Section 77 of the Bankruptcy Act does not delegate to the Commission authority to originate and impose upon the parties a plan of reorganization and to nullify completely the rights of the parties to propose and negotiate a fair and equitable plan.

Point V

The groups of security holders represented in this proceeding should be permitted, under supervision by the Commission and the courts as contemplated by Section 77, to renegotiate their contractual relationships, and formulate and agree upon a plan of reorganization, which would (a) observe the rule of

priorities of the *Boyd* and *du Bois* cases, (b) provide for fixed charges only to the extent that they shall be adequately covered by "probable earnings", and (c) provide for a total capitalization within the limit established by the value of the property of the debtor used in the public service, after due consideration of its earning power.

POINT VI

The District Court in this case failed to exercise an informed and independent judgment in approving the Commission Plan.

POINT VII

Preferential treatment given the claim of the Reconstruction Finance Corporation under the Commission Plan is unsupported by necessary administrative or judicial findings and cannot be justified under the facts of this case.

POINT VIII

The General and Refunding Mortgage is a first lien upon assets of the debtor sufficient in value to cover fully the claims of the three secured creditors, including this respondent.

POINT I

The findings and determinations of the Commission and the District Court as to essential facts are obviously insufficient to justify or support the treatment of respondent's secured claim, which treatment is clearly confiscatory.

The claim of this respondent was classified by the District Court as a separate class of claim by its order of August 20, 1935 (R. 1022-3). The Commission itself has expressly found that the securities proposed to be given to this respondent under the Commission Plan will be inadequate to satisfy its claim (R. 269, 317).

Nowhere in the report of the Commission of October 10, 1938, or in its report of June 21, 1939, can there be found any valuation of the property of the debtor, other than the Commission's valuation under Section 19a of the Interstate Commerce Act, which it expressly finds in its report of October 10, 1938, to have been $139,600,455 as of December 31, 1935 (R. 224) and which, with additions and betterments to the effective date of the Commission Plan, amounted to approximately $150,000,000 (R. 1061-2).

This Section 19a valuation, as determined and reported by the Commission was, of course, largely in excess of the total of secured claims, principal and interest, which as shown above (p. 17) amounted, as of January 1, 1939, to only $87,981,672.75.

It is of some significance also in this connection to refer to the fact that the original cost of the properties of the debtor, less full depreciation amounted to upwards of $120,000,000. This figure is net, after full accrued depreciation not only on equipment but also on ways and structures which latter, in accordance with Commission accounting rules, does not appear in the debtor's property accounts as an accrued item, as shown by the record and as stated by Commissioner Miller in his opinion in connection with the report of the Commission of October 10, 1938 (R. 283, 357, 1063).

The Commission rejected three plans submitted by the parties to this proceeding, each of which proposed a limit of capitalization well within the Commission's 19a valuation and well within the fully depreciated investment of the debtor in its railroad system, and each of which contemplated refunding the claim of this respondent in full. The Commission, in its Plan, confiscates and refuses to refund more than half of this respondent's secured claim, yet deliberately refrains from making any modified valuation of the debtor's property under subsection (e) of Section 77 of the Bankruptcy Act.

This Court has had occasion in the recent past to reiterate and emphasize the established doctrines of law which support the contention of this respondent, that the property interest of a secured creditor cannot lawfully be foreclosed and confiscated under the bankruptcy powers except on the basis of a valuation of the assets of the debtor which would support such treatment.

In dealing with a somewhat analogous statute (Section 77B, now Chapter X of the Bankruptcy Act), this Court held squarely in *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, that a valuation of the assets of the debtor was a condition precedent to any determination by the Court as to the fairness of a plan of reorganization.

It should be noted that in the *du Bois* case there was an agreement of a large majority of each class of creditor and stockholder upon a plan of reorganization. That is a situation which does not exist in the instant case, where the Commission has rejected all plans submitted by the parties and seeks to impose upon the parties a plan of its own formulation which is supported in this Court by only two classes of creditors.

In the *du Bois* case, *supra*, the District Court had approved the proposed plan of recapitalization for the reorganized company without ascertaining either the value of the property as a whole or the value of the assets securing the respective claims. This Court held that the interests of a secured creditor, a small minority of his class, could not be foreclosed without determination of the value of the property of the debtor and the assets subject to secured claims and appropriate findings as to earning power. As to the need of adequate valuation data, the Court said, at page 520:

> "We agree with the Circuit Court of Appeals that it was error to confirm this plan of reorganization.

"I. On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. And see *First National Bank* v. *Flershem*, 290 U. S. 504, 525. There are two aspects of that valuation problem.

"In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met. The status of the Union and Consumers bondholders emphasizes its necessity and importance. According to the District Court the mortgaged assets are insufficient to pay the mortgage debt. There is no finding, however, as to the extent of the deficiency or the amount of unmortgaged assets and their value. * * *"

Again, at page 525:

"* * * Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization. * * *"

In dealing with the rights of secured creditors in the *du Bois* case, this Court merely enunciated well established and well defined principles as to fairness and equity in dealing with the rights of secured creditors. It did not have before it there, as it does here, a statute which contained express provision for the making of valuations by an administrative agency such as are contained in subsection (e) of Section 77 of the Bankruptcy Act. The principles which this Court has laid down in the *du Bois* case should, therefore, be applied with full and undiminished force to the situation presented by the confiscatory treatment of the secured claim of this respondent on the basis of a record which contains no findings of any valuation which would support such treatment.

There can be no advantage in referring to decisions of this Court, other than those cited in the *du Bois* case, which support by analogy the clear cut principle laid down in that decision. It is, however, of some importance to emphasize at this point the attitude which this Court has previously taken as to any attempt to foreclose substantial rights of a secured creditor in the operation of the Bankruptcy Act.

In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, this Court held the first Frazier-Lemke Act unconstitutional. In rejecting the argument that the statute was valid by analogy to the validity of compositions under the Bankruptcy Act, the Court said (pp. 585-6):

> "* * * In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court. Never, so far as appears, has any composition affected a secured claim held by a single creditor. * * *"

At pages 588-9:

> "It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. * * *"

Nowhere in the reports of the Commission or in the opinion of the District Court, can be found a determination or finding as to the value of the properties of the debtor on which the treatment of this respondent's secured claim could properly be held to be not confiscatory. The Commission's valuation under Section 19a of the Interstate Commerce Act (R. 224) was far in excess of the total of all secured claims.

The Commission's discussion and general conclusions (R. 220, 245, 253) as to the debtor's revenues and earnings, its limitation upon total capitalization which includes no par common stock (R. 310, 341), its conclusion that "the securities remaining available for distribution * * * to the other secured creditors [including A. C. James Co.] * * *, will be inadequate in value to satisfy their claims" (R. 269, 271) are wholly inadequate as substitutes for the determinations of value required by this Court (*du Bois* case, *supra*).

The blanket adoption of the Commission's "findings" by the District Court and its approval of the plan in the language of the statute, cannot clarify or remedy the obscurity and inadequacy of the Commission's conclusions.

This Court should not be required "to spell out, to argue, to choose between conflicting inferences" from obscure phrases and suggestions in the Commission's report (*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U. S. 499, 511; cf. *N. L. R. B.* v. *Virginia Electric and Power Co.*, 314 U. S. 469). The lack of essential findings cannot be supplied by general conclusions in the language of the statute (*Florida* v. *United States*, 282 U. S. 194, 213, 215).

Nor can the supposed doctrine of "equitable equivalent", advanced by the petitioners as an eleventh hour substitute for the determinations of value and earning power which are required by the decision of this Court in the *du Bois* case, *supra*, relieve the Commission and the District Court of the duty of making necessary findings. The phrase itself "equitable equivalent" is taken by the petitioners from the report of the Commission (R. 316) where the Commission said (speaking of the securities approved in its Plan):

> "* * * These securities represent the equitable equivalent of the debtor's assets available for the satisfaction of claims. * * *"

This language can mean only that the securities to be issued in the reorganization represent the assets of the debtor which are available for the satisfaction of all claims. It assumes an answer to the very question in issue,—the total value of the property represented by the securities to be issued in the reorganization. It does not and cannot tell us why more securities may not be authorized, or why less securities are not authorized,—questions which must be answered from a consideration of earning power and values. The all-concealing phrase "equitable equivalent" does not tell us why the claims of some creditors are not to be recognized at all or why A. C. James Co. is to receive only 44% of its secured claim, while the "equitable equivalent" for First Mortgage bondholders and Reconstruction Finance Corporation is full compensation for their respective "bundles of rights."

In the hands of the petitioners the Commission's casual phrase is expanded and translated into a doctrine that each creditor is entitled to receive only its "equitable equivalent of the debtor's assets available for the satisfaction" of its claim in new securities (Institutional Bondholders' brief, p. 79). From this premise, which apparently represents an attempt to alter by restatement the doctrine of the *Boyd*[1] and *du Bois* cases, petitioners would conclude that valuation data and determinations of all relevant facts as to liens are unnecessary and that each secured creditor has received its "equitable equivalent" under the Commission Plan. But after this juggling of phrases A. C. James Co. is told that more than half of its secured claim must be refused recognition and confiscated because (for undisclosed reasons) its claim is not entitled to receive an "equitable equivalent."

The requirement of Section 77(d) that "the Commission shall state fully the reasons for its conclusions" certainly is not satisfied by the use of a phrase which is designed

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[1] *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482.

to conceal rather than to reveal reasons for conclusions. A secured creditor, we submit, is entitled to reasons in the form of facts and findings rather than evasion. The absence of findings or determinations as to the value of the debtor's property and as to the value of the assets securing respondent's claim constitutes, without more, a basic and fatal defect in procedural due process in view of the attempt under the Commission Plan, to wipe out more than half of respondent's claim.

While, as suggested above, a detailed reply to some of the ingenious arguments advanced by the petitioners in support of the action by the Commission and the District Court will be presented in a reply brief, which will be filed on behalf of this respondent prior to the date of the argument, there is one contention advanced in the Institutional Bondholders' brief (pp. 76-77) which should be discussed at this point.

This contention is that it requires only the mathematical process of adding the par value securities to the sum obtained by multiplying the no par value common stock authorized under the Commission Plan by $57 a share to arrive at what the brief terms a "*maximum* 'reorganization value'" in the amount of $84,027,559. Apparently, the argument is that the action of the Commission in fixing the capitalization should be regarded as what might fairly be termed the "equitable equivalent" of a finding of "reorganization value", or "a precise dollars and cents value", to be spelled out by mathematical process from the Commission's careful avoidance of specific findings.

On page 77 of the Institutional Bondholders' brief the argument continues with the following statement:

> "The complete lack of realism in the decision of the Court below upon this point is evidenced by what the Commission has tried to do to bring its more recent reports and orders into **colorable compliance** with that decision. In those cases the Commission,

after making exactly the same type of findings with respect to earning power and permitted capitalization that were made in the *Western Pacific* case, has added a final finding of which that in the *Denver & Rio Grande Western* case is typical:

> 'Considering the entire record, and taking into account the elements of value of the properties involved, their past and present earnings and prospects for future earnings, as well as other pertinent factors, we conclude and find *that the value of the properties for the purposes of this proceeding* is $154,521,612, and that the total capitalization upon consummation of the plan should not exceed approximately that amount.'

"It is submitted that the addition of the italicized words, which are not to be found in *haec verbes* in the Commission's *Western Pacific* Report, would add absolutely nothing of substance for the information either of the court or of the securityholders beyond what the Commission provided in the findings summarized at pages 14 to 18, *supra*, and the voluminous 'valuation data' discussed by the Commission in 'stating fully the reasons for its conclusions.'"

The argument that it would be a futile thing for this Court to affirm the requirement of the Circuit Court of Appeals that a finding of value should be made because the Commission could make a *pro forma* compliance without disturbing its plan loses considerable force in the light of the relative facts.

The Commission, in compliance with the requirement of the *du Bois* case and of the decision of the Circuit Court of Appeals for the Ninth Circuit in this proceeding, did find in Finance Docket No. 11002 a value of the assets of the Denver & Rio Grande Western, as debtor, in the amount of $154,521,612. In the same report (p. 9, mimeo.) the Commission stated that its prior Section 19a valuation of the properties of the Denver & Rio Grande Western System, fully depreciated to January 1, 1941, amounted to approximately $155,900,000. **In other words, there was**

a discrepancy between the Commission's prior valuation of physical properties found under Section 19a and its valuation for the purpose of reorganization of less than one per cent.

If, however, the Commission should attempt to bolster the plan which it has formulated and promulgated for the Western Pacific by any finding of value in the amount of $84,027,559, as suggested by the Institutional Bondholders' brief upon the basis of their mathematical computation of what the proposed capitalization may have meant, the Commission would need in common fairness to give some detailed and specific explanation of a discrepancy between its prior Section 19a valuation of approximately $150,000,000 (pp. 15-16, above) and a valuation for the purpose of reorganization of $84,027,559.

The difficulties of any such explanation would be accentuated by the fact that the Western Pacific Railroad System, as shown by the record before the Court in this proceeding, is a completely rehabilitated, modernized and effective transportation system, while the Court may well take judicial notice of the fact that the properties of the Denver & Rio Grande Western include a substantial mileage of narrow gauge railroad built originally to serve limited industrial areas and the well-known Pueblo Loop, the earning power of which has been largely reduced by the construction of the Dotsero Cut-off.

This further comment may fairly be made: this respondent earnestly and adversely criticizes in this brief the construction which the Commission, unaided by prior judicial construction, has given to Section 77; this respondent cannot, however, accept without protest any suggestion, such as is made in the Institutional Bondholders' brief, that the Commission has, or would, attempt a mere "colorable compliance" with a binding judicial interpretation of Section 77. The long and honorable record of the Commission as an administrative agency forbids any such implication of bad faith.

POINT II

The Commission's construction of Section 77 of the Bankruptcy Act, which was accepted and adopted by the District Court, is basically erroneous and cannot be sustained either under the language or intent of Section 77 of the Bankruptcy Act or under any prior delegation of authority to the Commission in connection with the issue of securities by railroads.

When Congress enacted Section 77 of the Bankruptcy Act, it was fully aware that the Commission, functioning under authority of Section 19a of the Interstate Commerce Act (49 U. S. C. A. §19a) had completed, at great expense to the public as well as to the carriers, valuations of the properties used by the various railroads in the service of the public. Congress further knew that these valuations were kept up to date by the Commission through its accounting supervision of additions and betterments. Congress knew that the Commission was in a position to approve or disapprove any capital structure submitted to it in a plan of reorganization under Section 77, with full and complete knowledge already available to it of the value of the capitalizable assets which would support the proposed capital structure.

By its 1935 amendment to Section 77 Congress went further. It provided that if it should be necessary to determine the value of any property for any purpose under the Section, that such valuation should give due consideration to "earning power." The legislative intention, which is discussed more fully later in this brief, seems entirely clear. Congress did not direct the Commission to disregard its extended and expensive labors in arriving at the true investment in and value of railroad properties. It merely gave the Commission power, for the purposes of Section 77, to modify such values in the light of any basic changes in earning power.

Provisions of the Statute

Section 77(e) contains the following provision requiring a valuation of the debtor's properties if a valuation shall be necessary for any purpose (appendix, p. xvii):

> "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Section 77(b) also requires that the plan of reorganization

> "* * * (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; * * *."

It should be noted that this provision speaks of "probable prospective earnings" while the valuation paragraph of subsection (e) speaks of "earning power." The importance of this difference in phrasing will be more fully discussed in Point V of this brief, dealing with the construction of Section 77 of the Bankruptcy Act which this respondent urges upon this Court.

Commission's Theory of Capitalization in Lieu of Valuation

The Commission, however, has deliberately refused in this proceeding to make a modified valuation of the properties of the debtor based on actual "earning power".

Instead, the Commission has adopted a gloss on Section 77, which finds no support in the language of the Section, which it regards as justifying its confiscatory treatment of private rights without reference to the value of the assets of the debtor.

The entire theory and approach of the Commission, as applied in this reorganization proceeding, is not only without support under the language of the statute, but is also without practical justification. The Commission seeks to cure the depression ills of the railroad industry by disregarding and confiscating the property interests of investors, used and useful in the public interest. Reducing capitalization below the actual depreciated investment on the basis of depression earnings is the twin brother of the write-up of investment, in terms of capitalization, which occurred in the public utility field in the golden era of 1920 to 1929, on the basis of expanded earnings of that period. That practice now receives universal condemnation. The theory of the Commission, as set out in its reports in this case, is equally unsound and should equally be condemned.

The Commission's theory and construction of Section 77 disregard a basic feature characterizing private investment in the transportation field. The public is entitled to have available a transportation plant which will meet not merely its needs during subnormal periods, nor even its needs during normal periods, but a transportation plant capable of handling the peak traffic of periods of industrial expansion. The Court has given expression to this

basic characteristic of property devoted to a public use in analogous situations. Reference is here made to the decision of the Court in *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, where, at page 351, the Court said:

> "Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not, is one of the important purposes for which these administrative commissions, with large powers, were called into existence, * * *."

There is a necessary corollary of the proposition that the public is entitled to a transportation plant which will meet maximum demands, that is, that the investor who places property in public use, as part of the railroad transportation system, while necessarily assuming the risk that in subnormal years he may not receive dividends, or even interest, and even under some circumstances not receive dividends during normal years, is entitled to protection against the confiscation and foreclosure for all time of his interest in property used and useful for the public on the basis of depression earnings.

When in 1939 the theory that the rights of investors in the railroads of the country should be cancelled and foreclosed for all time on the basis of past earnings was framed as an amendment of Section 77 in the so-called Wheeler Bill (S. 1869) and passed by the Senate, it was, after extended hearings before the Committee on the Judiciary of the House of Representatives, squarely rejected and the bill did not pass.

The Commission's Theory and Construction of Section 77

The Commission spells out its theory and construction of Section 77 in some detail in its reports in this proceeding. In its report of October 10, 1938, the Commission stated (R. 243):

> "It will be observed that **insofar as the capitalization of a reorganized company is concerned, section 77 contains no limitations other than that the fixed charges of the company shall be adequately covered by the probable earnings available therefor, and the plan as a whole shall be compatible with the public interest.** The public interest is not defined, but it would seem obvious that to be compatible with the public interest, the plan must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently and continuously as a going concern. **This requires that the capitalization should not exceed a conservative appraisal of the assets to be taken over by the reorganized company,** and that proposed charges, whether fixed or contingent, be within its probable earning power."

The above statement is interesting in several respects. It gives frank recognition to the fact that the only express mandate of Congress as to capitalization is that fixed charges "shall be adequately covered by the probable earnings available therefor." It concedes that the Act does not further define, in express terms, its requirement that the plan as a whole "shall be compatible with the public interest." The Commission interprets the legislative requirement as to public interest to mean that a plan of reorganization must provide a capital structure for the reorganized company which will give it a reasonable opportunity to function efficiently as a going concern. From this the Commission spells out the two requirements that the capitalization shall not exceed a conservative appraisal of the assets to be taken over and that proposed charges,

whether fixed or contingent, be within its probable earning power. The Commission does not set forth the basis for its conclusion that contingent charges should be fully earned if the reorganized company is to function efficiently.

This statement by the Commission recognizes that a valuation of the property is essential. But in this case, the Commission made no revaluation; it proceeded to determine and limit the capitalization of the reorganized company without any reference to investment or to its Section 19a valuation of the property or any finding as to the earning power of the property.

After referring to the previous reorganization of the debtor, the Commission states (R. 244):

> "* * * If this reorganization is to be successful, the capital structure of the reorganized company must be realistically related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future."

With the first part of this statement there would be little quarrel if the Commission were using "earning power" in the sense of the true legislative intent, as hereafter discussed in Point V of this brief. Unfortunately, the later part of this statement seems to indicate that the Commission means something far different from a willingness to consider investment where such investment is justified by earning power, in the sense of "capacity to earn." And throughout its reports the Commission discloses that it means something quite different in its use of "actual earning power" and "probable earnings reasonably foreseeable" from the meaning that may fairly be assigned to the phrase "earning power" as it appears in Section 77.

As will appear more fully from the pages which follow, the Commission completely abandoned the principles first

stated by it, that capitalization should be based upon a "conservative appraisal of the assets to be taken over by the reorganized company" and "related to its actual earning power," and proceeded to frame a plan of reorganization for the debtor on the revolutionary theory that the capital structure must be determined solely from a consideration of "probable earnings reasonably foreseeable for the future" and that total capitalization must be strictly limited in order to assure a material return upon the capital stock of the reorganized company from such probable earnings.

In its report of October 10, 1938, the Commission argues that the capitalization proposed by the parties is unsound, on the ground that the reorganized company could not earn enough to pay a dividend of five dollars annually upon its common stock (R. 256, 257; a dividend of three dollars annually is suggested at R. 269); and at a later point in its report the Commission states (R. 257):

> "* * * It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected **and the shares of its stock are not to become mere tokens for stock market speculation.** It is true that considered alone, the data pertaining to the rate-making value of the debtor's property and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company. * * *"

The emphasized phrase "mere tokens for stock market speculation" which appears in the above statement of the Commission's position has an interesting history. It first emerged in the Wheeler-Lowenthal investigation of railroad holding companies. It later appeared in reports of the Interstate Commerce Committee of the Senate dealing

with the proposed amendment to Section 77 of the Bankruptcy Act which was passed by the Senate in 1939 and was rejected, after extended hearings, by the Committee on the Judiciary of the House. This proposed and rejected legislation, it should be noted, sought to amend Section 77 by substituting a determination of capital structure on the basis of earnings experience, for the valuation on the basis of "earning power" as it still appears in the Act. The phrase "mere tokens for stock market speculation" is a catch phrase, and, as used in the railroad holding company investigation reports, has some significance. The error here is that the Commission seized upon this catch phrase as an escape from the duties imposed upon it by a sound interpretation of Section 77 of the Bankruptcy Act. It has failed to regard the warning that this Court has given on several occasions in the past. In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, at page 586, this Court said:

> "* * * Catch words and labels * * * are subject to the dangers that lurk in metaphors and symbols and must be watched with circumspection lest they put us off our guard. * * *"

The Commission has never tried to explain further why its theory that a material return should be assured or expected on the capital stock of the reorganized company should, "in the public interest," take the place of "a conservative appraisal of the assets to be taken over by the reorganized company," to which the Commission refers in its report of October 10, 1938 (R. 243).

Any justification based on the argument that, if common stock of the reorganized company pays immediate dividends, it may prove a channel for future financing is completely negatived by the fact that the operation of the Commission theory at the present time is to foreclose the substantial rights of secured creditors, general creditors and stockholders in the property and, in effect, to confiscate

these rights on the basis of a mere theory of capitalization. No one thing could more clearly and certainly destroy common stock (or indeed, any railroad security) as a vehicle for future financing of railroad properties than this proposed action of the Commission.

At a hearing before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary of the House of Representatives, on June 21, 1939, Chairman Eastman of the Interstate Commerce Commission stated (Report of Hearing, p. 553):

> "* * * To deprive thousands of investors who in the past have put their savings into railroad securities of all hope of recoupment is a very serious step, for if our capitalistic society is to succeed, it demands as scrupulously fair treatment of investors as of labor."

As a matter of fact, Congress in the enactment of Section 77 of the Bankruptcy Act was not dealing with problems relating to stock speculation. It was seeking to set up a legislative framework within which the existing investors in a railroad property, which had found itself unable to meet its fixed charges, could readjust its capital structure under supervision of the Commission and the courts. Congress, as will hereinafter be more fully stated, dealt with the public interest in relation to capitalization by expressly providing that the fixed charges under any plan of reorganization should be held within such limits that there would be adequate coverage for such fixed charges by the "*probable prospective earnings*" available for their payment. It did not charge the Commission with any mandate to so limit the capitalization proposed in the plan of reorganization that dividends on the stock of the reorganized company could be paid from probable earnings.

If Congress had remained silent as to the public interest in capitalization, the error of the Commission in its construction of the Act might seem to be a less clear

violation of the legislative mandate. But the mandate of Congress, that fixed charges only should be limited in the public interest by probable prospective earnings, appears clearly from the express language of the statute. Lured by a catch phrase, the Commission has sought to limit total capitalization arbitrarily and to deal with private interests in a confiscatory manner, and on a basis which finds no support in the language of Section 77 of the Bankruptcy Act.

In its supplemental report of June 21, 1939, in this proceeding the Commission expressly reaffirmed the position taken by it upon the question of capitalization in its prior report (R. 310):

> "In our prior report we stated that the entire capital structure of the reorganized company must be realistically related to its actual earning power, and in determining such capital structure consideration should be given to the investment in the property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future if the reorganization was to be successful. With these considerations in mind, and for the reasons there set forth, and upon consideration of the investment of the debtor in its property, the probable rate-making value thereof, and its traffic and earnings, we conclude that we cannot approve the total capital structure under the Credit Corporation's proposed modification. * * *".

Thus, it appears that the Commission has abandoned completely the standard first stated above, that capitalization must be related to a "conservative appraisal of the assets to be taken over by the reorganized company," and has taken the position that the investment in the property is to be considered, in determining a proposed capital structure, only to the extent that it is "justified by the probable earnings reasonably foreseeable for the future." This is apparently intended as a reaffirmation of the Commission's basic theory, expressed in their October 10, 1938

report, that the capitalization must be kept within strict bounds in order to assure a material return upon the capital stock of the reorganized company.

In this connection, and especially as to the Commission's expressed desire to make "probable earnings reasonably foreseeable" the sole basis of the determination of a capital structure which will assure a material return on the stock, it is pertinent to quote further from the testimony of Mr. Eastman before the Committee on the Judiciary of the House on June 21, 1939, when he stated (Report of Hearing, p. 551):

> "Any estimate of the future earnings of a railroad can at best be no more than an 'educated guess,' but there has never been a time in the history of the country when it has been more difficult to make such a guess than now. Anything remotely approaching accuracy is impossible. * * *"

Basic objections to the substitution of capitalization theories for valuation under Section 77

At the outset the theory of the Commission that private property interests can be cancelled and foreclosed solely on the basis of an administrative finding of a desirable capital structure and without any finding or determination as to the value of the property interests or as to the value of the property of the debtor meets three obvious objections:

(1) The *du Bois* decision is against the Commission's theory:

This Court has unquestionably considered and rejected a contention that an approved capital structure may be substituted for findings or determinations of value in dealing with the rights of secured creditors. While *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, arose

under Section 77B (now Chapter X of the Bankruptcy Act) and not under Section 77, it may fairly be urged as a square authority on the point here under consideration. In that case this Court had before it a plan of reorganization, which set up a definite capital structure, and which had been approved by the District Court as fair and equitable. This Court, after full consideration, clearly and definitely rejected the contention that an approved capitalization was an adequate substitute for findings as to the value of the property of the debtor when confiscatory treatment of private property interests was involved. It would be an anomalous situation if this Court should hold in this proceeding that the mere finding by the Commission that a certain capital structure was in the public interest justified the Commission in disregarding the clearly established value of the properties of the debtor, when the confiscatory treatment of a secured claim is at issue.

(2) Commission's theory conflicts with established principles of corporate law and accounting.

Any theory that the approval of a capital structure may be made a substitute for valuation of assets in dealing with private rights of security holders may also be said to fly in the face of the history and practice of corporate accounting. Surpluses and deficits are a commonplace of corporate accounting. Nowhere will one find a basis in established corporate and accounting practice for an assumption that capitalization may properly be taken as a measure of the value of the assets represented by the securities issued by a corporation. While the Circuit Court of Appeals for the Sixth Circuit has recently held in a case arising under Section 77 of the Bankruptcy Act (*Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch, et al.*, 128 F. (2d) 932, petition for certiorari filed August 31, 1942), that a finding by the Commission of capitalization may be accepted as the equivalent of a finding of value of

the debtor's properties, the opinion in the case does not attempt to support that conclusion by any reference to authority, logic or common sense.

This basis principle, that capitalization is a matter quite distinct from the value of the assets of a corporation, has been clearly recognized by this Court in other connections. In *Ray Consolidated Copper Company* v. *United States*, 268 U. S. 373, at page 377 this Court said:

> "The capital stock of a corporation, its net assets, and its shares of stock are entirely different things. Compare *Farrington* v. *Tennessee*, 95 U. S. 679, 686; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136-137; *Wright* v. *Georgia R.R. & Banking Co.*, 216 U. S. 420, 425; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 111. The value of one bears no fixed or necessary relation to the value of the other. * * *"

(3) Commission's own plan of capitalization in this case negatives use of capitalization in lieu of valuation.

It is of considerable significance, and a basic objection to any use of capitalization as a substitute for valuation in dealing with private property rights in these proceedings, that the Commission has itself, apparently by deliberate intent, made it difficult or impossible to determine the dollars and cents limits of the capital structure for the debtor which it proposes in this proceeding. The Commission recommends that common stock without par value be used. The essence of stock without par value is that each share shall represent an aliquot interest in the assets of the debtor, subject to the claims of securities with priority. The Commission has, with apparent deliberation, refrained from putting upon this common stock without par value, any fixed value as of the time of issue. It has assigned a value of $57 a share to such stock in allocating shares to the First Mortgage bondholders and the Reconstruction Finance Corporation, one

of the secured creditors (R. 317). It has assigned a value of $62 a share to this stock in allocating shares to The Railroad Credit Corporation, also a secured creditor (R. 317). It has assigned no value to the common stock without par value which it has allocated to this respondent and the only guide as to the value of such stock is the express finding of the Commission that the stock so allocated is inadequate to satisfy in full the claim of this respondent (R. 269).

In addition, the Commission has at several points (R. 244, 245, 256, 259, 269, 321) in its somewhat discursive discussion in its reports of October 10, 1938 and June 21, 1939, referred to the common stock without par value as if it were to be assumed to have a value of $100 a share. Obviously, however, the Commission did not intend to have this regarded as an express finding of value for the common stock without par value. If it had made such a specific finding, then the aggregate value of the securities authorized would have exceeded by approximately $10,000,000 the total of the secured claims against the debtor (see tables on pp. 17 and 18). There could then have been no claim of justification for the failure of the Commission to refund the claim of this respondent in full.

The obvious difficulty in substituting a capital structure (including no par value stock) for a valuation in dealing with private rights is illustrated by the failure of the petitioners to agree on what the total capitalization does mean (Institutional Bondholders' brief, p. 55; Reconstruction Finance Corporation brief, p. 41).

There is no doubt that the Commission has interpreted Section 77 of the Bankruptcy Act as authorizing it to set up a scheme of capitalization solely with reference to "probable prospective earnings" and without any reference to a valuation of the property of the debtor on the basis of earning power, or to the investment in property dedicated to the public service, or to other relevant factors.

Reference to Powers of the Commission Under Section 20a of the Interstate Commerce Act Does Not Sustain Commission's Procedure

The petitioners have sought by an ingenious theory to justify and support the theory of the Commission that its determination fixing the total amount and character of the capitalization should take the place of findings of value for the properties of the debtor in dealing with private rights. By reference to the powers exercised by the Commission since 1920 under Section 20a of the Interstate Commerce Act, the petitioners contend that the Commission was vested with exclusive and plenary jurisdiction over the issues of securities of common carriers under Section 20a of the Interstate Commerce Act (49 U. S. C. A. § 20a) and that this jurisdiction has, by the provisions of Section 77 of the Bankruptcy Act, been extended so as to give the Commission exclusive and plenary jurisdiction to determine total capitalization and the classification thereof.

In substance, the contention of the petitioners is that the Commission is vested by Section 20a of the Interstate Commerce Act and Section 77 of the Bankruptcy Act with the same sort of exclusive jurisdiction to authorize security issues and determine total capitalization and classification thereof, and by inference, that its procedure here, under Section 77, is consistent with the long course of administrative procedure under Section 20a.

The contention of the petitioners amounts to a skillful translation of the power given to the Commission under Section 77, subsection (d) to approve a plan of reorganization which will, in its opinion, meet the express requirements of Section 77 (b) and (e) "and will be compatible with the public interest", into the assumed power to determine "total capitalization and the classification thereof" in the "public interest". In their contention they characterize the power of the Commission to regulate and con-

trol the issue of railroad securities as "exclusive and plenary"; and it was on this basis that the District Court in this proceeding refrained from any substantial exercise of its constitutional jurisdiction to protect private rights (Point VI below).

What are the facts as to the Commission's exercise of its powers over railroad securities and capitalization under Section 20a of the Interstate Commerce Act?

Section 20a (2) makes it unlawful for any railroad carrier subject to the jurisdiction of the Commission to issue securities or assume any obligation as lessor, guarantor, etc., unless the Commission authorizes such issue or assumption, and:

> "* * * The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Subsection (7) of Section 20a provides:

> "(7) Jurisdiction of commission as exclusive and plenary. The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

Thus, by Section 20a(2) Congress granted to the Commission power to supervise and control the issue of securities by an interstate carrier, so that such issues would be for lawful objects which are within the corporate purposes of the carrier and "compatible with the public interest"; and by the terms of subsection (7) the jurisdic-

tion of the Commission is "exclusive and plenary" in so far as it comes in conflict with state regulations or legislation.

Three striking examples of the exercise by the Commission of the powers conferred by Section 20a appear upon the record in this proceeding:

(a) On November 20, 1930, upon application by The Western Pacific Railroad Company, the Commission granted to the Company authority to issue $5,000,000 of 5% Gold Debentures to be sold to the highest bidder at par, for the purpose of providing funds with which to complete construction of the Northern California Extension. The opinion of the Commission is set forth in the appendix in this brief at page xxvii. The Commission found (in the language of the statute):

> "We find that the proposed issue * * * (a) is for a lawful object within its [the Company's] corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

At public sale, these debentures were sold to A. C. James Co. for cash at par and represent the original indebtedness upon which the secured claim of A. C. James Co. is based.

(b) On February 27, 1932, the Commission, again acting under the provisions of Section 20a, found that the value of the capital assets of The Western Pacific Railroad Company was $147,056,283, and that the excess of capital assets over liabilities was sufficient to justify, as compatible with the public interest, the proposed issue of $15,000,000 of General and Refunding Mortgage bonds and notes in the aggregate amount of $5,000,000 (R. 1060; appendix to brief, pp. xxxv-xxxvii).

(c) On December 9, 1932, the Commission granted authority to The Western Pacific Railroad Company to issue $4,000,000 additional General and Refunding Mortgage bonds, upon the basis of similar findings as to the capital assets of the company (R. 1060; appendix to brief, p. xlii).

These three examples of the Commission's exercise of its powers under Section 20a are typical of the Commission's action in exercising, or purporting to exercise, the powers granted to it under Section 20a of the Interstate Commerce Act.

Meaning of "compatible with the public interest" in Section 20a

The jurisdiction and powers of the Commission over security issues are clearly defined both in the reports of the Commission and in the decisions of the courts. The phrase "compatible with the public interest" acquired, long before the enactment of Section 77, a definite meaning.

This Court has held that this phrase, as used in Section 20a (2) of the Interstate Commerce Act, is related to the adequacy and quality of the public service, the economy and efficiency of the transportation service and facilities, and the protection of private property interests in relation to the issue of securities by public carriers.

In *New York Central Securities Co. v. United States*, 287 U. S. 12, the Court had before it an order of the Commission under Section 20a permitting the New York Central to assume obligations and liability in respect of the securities of certain leased companies. The opinion of the Court, by Mr. Chief Justice HUGHES, states that the term "public interest" used in Section 20a (2) (p. 25):

> "* * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of econ-

omy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity. * * *"

The holding of this Court in the *New York Central Securities Co.* case, that the jurisdiction of the Commission was "exclusive and plenary," was made only in connection with a contention that the lease authorized by the Commission was beyond the corporate powers of the railroads under the laws of the state in which they were incorporated. The Court rejected this contention and held that the power delegated to the Commission by Congress excluded the exercise by the several states of control in this field of interstate commerce (287 U. S. at 27, 28).

There is no relation or connection between "compatible with the public interest" and "exclusive and plenary" other than the fact that the first phrase appears in subdivision (2) of Section 20a, and the latter, in subdivision (7). While Section 20a (7) excludes the exercise by the several states of control over security issues of interstate carriers, Section 77 does not exclude the exercise of their proper functions by state agencies (*Palmer* v. *Massachusetts*, 308 U. S. 79) and expressly preserves to the District Court its bankruptcy powers.

In *United States* v. *Lowden*, 308 U. S. 225, the Court again points out that the "public interest" in the consolidation or lease of carrier properties (under Section 5(4)(b) of the Interstate Commerce Act) "does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system" but is "to secure a more adequate and efficient transportation system."

And yet by some strained logic, the petitioners appear to find in the *New York Central Securities* case and in *United States* v. *Lowden, supra,* support for the contention that the well defined and well understood requirement of the "public interest" in the Interstate Commerce Act justified and supports their assumed standard of a capitalization in reorganization based in some undisclosed manner upon an unreported guess as to probable future earnings without basic findings of value, earning power, or other relevant facts, and without reference to the Court's constitutional power and duty to protect private rights.

There is no mystery as to the requirement of Section 77, subsection (d), that the Commission shall approve a plan which is "compatible with the public interest." This means that the plan as a whole must not be inconsistent with "the public interest in the maintenance of an adequate rail transportation system" (*New York Central Securities Co.* v. *United States*, 287 U. S. 12) or with "conditions of economy and efficiency" or with "appropriate provision and best use of transportation facilities" (*Texas* v. *United States*, 292 U. S. 522, 531; *United States* v. *Lowden*, 308 U. S. 225, 230).

It is obvious that the adequacy, efficiency or economy of a rail transportation system, or the best use of its facilities, will not be impaired by insistence upon determinations of earning power and value as a basis for the capital structure of a railroad in reorganization, or by giving full effect to the requirement of Section 77, that the District Court shall in passing upon the plan of reorganization exercise an informed, independent judgment.

The Commission's interpretation of its powers under Section 20a

In the practical interpretation of its powers under Section 20a the Commission has consistently adhered to the general standard stated in *New York Central Securities*

Co. v. *United States, supra.* In authorizing or withholding authorization for the issue of securities by railroad companies, the Commission has concerned itself primarily with preventing over-capitalization in relation to the actual investment in and value of the property of the carrier seeking authority to issue securities.

The basic principles under which the Commission, exercising its powers under Section 20a, has functioned in capitalization cases were announced in *Securities of Louisville & Nashville R. R.*, 76 I. C. C. 718 (1923). After stating that it would not permit full capitalization of all the assets of the carrier but would insist upon a reasonable cushion of uncapitalized assets, the Commission proceeded to indicate the assets which would be capitalized.

At page 720 it stated:

> "* * * We should authorize the capitalization of those assets of the carrier only which have been provided and which are intended for continuing productive use in the service of transportation. Such assets will be hereinafter referred to as 'capitalizable assets.'"

The Commission then discussed the capitalizable assets of the railroad, including working capital, materials and supplies, stocks of subsidiaries and other items and concluded (76 I. C. C. 726, 727):

> "The evidence establishes (1) that the applicant has a large uncapitalized surplus; (2) that its present capitalization is much less than its actual investment in property held for and used in the service of transportation, or any fair value of such property for rate-making purposes which we may hereafter fix under section 19a of the interstate commerce act; (3) that the increase in capitalization, which would result from the exercise of the authority to be granted herein, would still leave its capitalization below its actual investment in, and the probable fair value of, such property; (4) that its remaining uncapitalized surplus would be sufficient to serve the purposes for which a

surplus should be accumulated; and (5) that a larger stock base is necessary to enable it to issue sufficient bonds under its first and refunding mortgage to meet its future needs and at the same time comply with the requirements of the various State statutes referred to in our original report in this proceeding governing investments by savings banks and other investors."

Thus, it appears that the Commission squarely rests its determination of capitalizable assets, and the limitation on security issues in the public interest, on actual investment in property used in the public service and the fair value of such property as determined by the Commission's valuation proceedings under Section 19a of the Interstate Commere Act. The Commission requires, *first*, that the proposed issue of securities be adequately covered by the actual investment in the property of the carrier and, *secondly*, that it shall not be prejudicial to the adequacy, efficiency and general economy of the carrier's transportation services.

In subsequent cases the Commission has consistently adhered to this basis of capitalization and has permitted the issue of securities against the investment in carrier property, equipment, working capital, material and supplies, excepting certain types of assets which it has held not capitalizable.

Stock of Missouri-Illinois R. R., 131 I. C. C. 467 (1927);

Securities of Yankton, Norfolk & Southern R. Co., 154 I. C. C. 669 (1929);

Roscoe, Snyder & Pac. Ry. Co. Securities, 170 I. C. C. 403 (1931);

Missouri Pacific R. Co. Bonds, 180 I. C. C. 352 (1932);

Chicago, Milwaukee, St. P. & Pac. R. Co. Bonds, 193 I. C. C. 725 (1933);

Greyhound Corporation Issuance of Preference Stock, 1 M. C. C. 357 (1936);

Iowa Electric Light & Power Co. Securities, 247 I. C. C. 17 (1941);
Richmond, Fredericksburg & Potomac Dividend Obligations, 79 I. C. C. 465 (1923).

See also:

Delaware, L. & W. R. Co. Stock, 67 I. C. C. 426 (1921);
SHARFMAN, *The Interstate Commerce Commission*, III A, pages 506-514.

The meaning of "compatible with the public interest" as incorporated in Section 77, when enacted in 1933, must be construed to be the same as its meaning in 1932 when the *New York Central Securities* case was decided under Section 20a. There is clearly no language in Section 77 which would tend to expand the administrative construction given to the phrase under Section 20a in 1931 and 1932, when the issuance of securities to A. C. James Co. was approved by the Commission (p. 61, above).

This is not a case involving accounting entries where properties are actually purchased at a price

In cases where railroad properties have been actually purchased at a price, the Commission has limited the capitalization to the actual investment or price paid. It may be stated, therefore, that the authorized capitalization may not exceed either (a) the actual investment in the property, or (b) the value of the property as determined by an actual commercial transaction.

Atlanta, Birmingham & Coast R. Co. v. *United States*, 296 U. S. 33;
Securities of Louisiana Ry. & Nav. Co. of Texas, 99 I. C. C. 357 (1925).

These cases, and other similar cases cited by the petitioners, lend no support to the broad proposition that the

Commission's power over capitalization is "exclusive and plenary" in the "public interest".

In *Atlanta, Birmingham & Coast R. Co.* v. *United States, supra,* it appeared that the Atlantic Coast Line had acquired through a subsidiary (Atlanta, Birmingham & Coast Railroad) the assets of a small railroad in Georgia. The Atlantic Coast Line guaranteed the dividends on the preferred stock of the new company and agreed to pay approximately $4,248,000 in discharge of prior liens on the property, in consideration of the transfer to it of all the common stock. The Interstate Commerce Commission ruled that the common stock should be set up on the books of account of the new company at $4,248,000, which represented the "actual money cost" to the "accounting carrier". This ruling was pursuant to the accounting rules of the Commission. The railroad contended that it was entitled to use the 19a valuation by the Commission of the assets of the predecessor company in setting up such assets upon its books. The Commission then made an actual valuation of the properties and found the value equal to the par value of the preferred stock and $4,248,000 for the common stock, which in the aggregate was the "actual money cost", and required the new company to state its accounts accordingly.

This action was sustained by the Supreme Court, opinion by Mr. Justice Brandeis, on the grounds that (a) the accounting order was an administrative matter as to which the Court had no power to weigh the evidence; (b) that the report of the Commission showed ample evidence to support its valuation; and (c) that the actual money cost to the company provided an immediate and proper measure of value of the no par common stock.

It has been urged in this proceeding that the Supreme Court in that case upheld the Commission's rule that the value at which the property of the carrier should be entered on its books was the "market or fair cash value"

or the value for the purposes of sale and exchange. It is not stated by the petitioners that the properties of the carriers had been actually sold to the plaintiff on the dollars and cents basis required to be set up on its books of account, and that the Commission had actually found the value of the properties transferred to be equal to the par value of the preferred stock and the common stock authorized to be issued. In case of an actual sale as appeared in this case, it is not unreasonable that the property actually purchased should be capitalized at the purchase price, that securities should be issued only to the extent of the purchase price and that the property should be set up on the books of the purchasing company at the purchase price. This is the holding of the Court in the *Atlanta, Birmingham & Coast R. Co.* case.

The second point which the petitioners failed to state is that neither the determination of the Commission, nor the application of its accounting rules, nor the decision of the Court affected private rights or resulted in the destruction or confiscation of even one dollar of credit or claims or equity interest.

Summary

There would seem to be no escape from the conclusion that there has been a basic misconstruction of Section 77 by the Commission. It has sought to deal with private rights in a confiscatory manner, without reference to its prior determinations of the investment in the debtor's railroad system and its Section 19a valuation of such property, and without basing its decision on a proper exercise of its delegated function of redetermining the value of the debtor's properties on the basis of earning power and other relevant factors. It has been led astray from the clear path of sound statutory construction by a political catch phrase to the effect that stock, on which dividends cannot be paid, may become "mere tokens for

stock market speculation." On this basis it has sought to substitute a finding as to the amount and character of capitalization of the debtor for a finding as to the value of the properties of the debtor represented by that capitalization. On this basis the supporters of the Commission Plan have even urged that the Courts have no power to protect the property rights of this respondent and others, on the theory that the power of the Commission as to capitalization must be deemed to be "plenary and exclusive" and "in the public interest."

It may indeed be doubted that Congress itself could constitutionally enact a statute which purported to cut off a substantial part of the secured claim of this creditor by prescribing, in an alleged public interest, an amount and character of capitalization for the debtor.

The determination of the amount and character of capitalization has inescapable judicial aspects, affecting directly the property rights of this respondent with the result that the jurisdiction of the bankruptcy court cannot be completely ousted, either by the Congress itself or by any agency or authority of the legislature (*Ex parte Bakelite Corporation*, 279 U. S. 438; *In re N. Y., N. H. & H. R. Co.*, 16 F. Supp. 504; KATZ AND FRANKFURTER, *Federal Legislative Courts*, 43 Harvard Law Review 894).

One thing is clear, however: Congress did not give to the Commission a mandate under Section 77 to so proceed. Section 77 of the Bankruptcy Act was not enacted for the purposes of regulating security issues and insuring the payment of dividends on common stock, but for quite different purposes. It is the duty of the Commission to interpret and apply the statute according to the clearly disclosed legislative intent.

In its construction of Section 77 of the Bankruptcy Act it may fairly be said that the Commission has drifted away from the salutary principle set out by Judge Cooley in the third annual report of the Interstate Com-

merce Commission to Congress more than fifty years ago (p. 104):

> "* * * Undoubtedly the first duty of an administrative officer is to give effect to the law under which he acts. Much depends, however, on the manner in which this is done, and misdirected energy may render a law nugatory. * * *"

POINT III

The Commission's assumption of a legislative mandate under Section 77 authorizing it to convert valid debt into stock finds no support in the language of Section 77 and carries with it practical consequences seriously prejudicial to the credit of the debtor.

As is pointed out under Point II above, the Commission, in its report of October 10, 1938, in discussing the legislative mandate embodied in Section 77 of the Bankruptcy Act, clearly recognized that the only express provision as to capitalization was the clear-cut requirement of the Act that fixed charges should be limited so that they would be adequately covered by the "probable earnings available therefor." The Commission proceeded, however, to conclude, from the requirement that the plan as a whole must be compatible with the public interest, that this required "that proposed charges, whether fixed or contingent, be within its probable earning power."

It would seem obvious that the mere fact that Section 77 expressly provides, as a standard of public policy, that "fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads)" must be related to "probable prospective earnings" and adequately covered by the "probable earnings available for the payment thereof", shows beyond question that Congress did not intend that the same standard of public policy should be applied to contingent charges.

It would have been simple for the draftsmen to expand the phrase "fixed charges" to the phrase "fixed and contingent charges." The reason that Congress did not set up in Section 77 any such standard is obvious. The failure to earn fixed charges may lead to financial difficulties for a carrier and hence to a possible interruption of service to the public. A failure to earn contingent charges carries with it no such prejudice to the public.

In the Commission Plan, which is before the Court in this proceeding, the Commission, under the exercise of clear statutory power and authority, drastically limited fixed charges. It provided that the new company should issue no fixed interest obligations except a contemplated $10,000,000 of First Mortgage bonds to be issued to provide such new money as might be necessary in connection with the reorganization. No class of the existing secured creditors of the debtor, either First Mortgage bondholders or creditors holding obligations secured by General and Refunding Mortgage bonds, are to receive fixed interest obligations. It is interesting to note that no secured creditor in this proceeding has protested this drastic limitation upon the issue of fixed interest obligations. There was a clear public interest and a clear legislative mandate and it met with complete and unprotesting acceptance by all the parties to the proceeding.

The Commission, however, proceeding under its extension of the mandate of Section 77, to which reference is made above, drastically limited the issue of contingent or income bonds by the reorganized company. The existing First Mortgage bondholders, for instance, who now hold fixed interest obligations, are to receive under the Commission Plan only 40% of the face of their obligations in income bonds and the balance in preferred stock.

In a memorandum filed by this respondent with the Commission under date of January 11, 1937, it was pointed out to the Commission that its valuation of the physical

properties of the debtor's railroad system, made under Section 19a of the Interstate Commerce Act, with additions at cost to that time, amounted to approximately $145,000,000 and that the total funded debt of the debtor (exclusive of affiliated company open account advances and accrued interest) amounted to approximately $63,000,000, or less than 44% of the property valuation. It was urged upon the Commission that the relation of assets to total liabilities in the case of the debtor here concerned furnished no necessary basis for a change of any substantial part of the debt to equity. The memorandum referred to went on to state:

> "* * * Provided that the creditors are willing to surrender their demand for fixed interest on funded debt, as is essential in compliance with Subdivision (b)(4) of Section 77 of the Bankruptcy Law, there is no reason why their debt should not retain the character of debt upon the reorganization of the property.
>
> "The average investor who buys a bond wants to be a creditor and not the owner of an equity. Sometimes the preference is one of necessity because of the limitations of a trust instrument, or the limitations of law as to the character of the investments which certain institutions and individual fiduciaries may make. Sometimes it is mere personal preference. Whatever the basis, however, it seems clear that the investor should not be asked to change the character of his interest, unless the necessities of a sound financial reorganization make this essential.
>
> "It is respectfully submitted that there is nothing in the record here before the Commission which justifies the change in the character of the securities, held either by First Mortgage bondholders, or by secured creditors, from debt to equity."

The soundness of the contention in opposition to unnecessary changes of debt to equity, as urged upon the Commission, has been dramatically supported by recent developments in the field of taxation. The Commission, proceeding under an express desire to improve the credit of

a debtor railroad by a mandate that a secured creditor must accept for his interest bearing obligations, as here in the case of the First Mortgage bondholders, 40% of principal amount in debt and 60% in equity certificates, has created a situation where a large part of the money which the reorganized company will receive and which should be used in fairness and equity to pay interest on its obligations is siphoned off under the obligation of our Federal tax laws and becomes unavailable for the payment of interest justly owed.

Take the situation as to the debtor here. Neither in the calendar year 1940 nor in the calendar year 1941 did the debtor actually pay any Federal income taxes. Yet the brief for the Institutional Bondholders, at page viii of its appendix sets out a computation showing that, if in 1940 and 1941 the revised plan of capitalization proposed under the Commission Plan had been in effect, the debtor, on the same earnings basis, would have paid to the Federal Government taxes on a theoretical income after interest, exclusive of excess profits taxes, amounting to $1,248,641. This sum of almost a million and a quarter dollars should in fairness and equity be available to the debtor to discharge its obligations to its secured creditors for unpaid interest of prior years. But the Commission has said that sixty per cent of the debtor's bonds should be changed to stock "in the public interest", and this mere change in the form of security which they are to hold automatically prevents the debtor, to a substantial extent, from carrying out its obligation to pay its creditors interest lawfully payable.

If excess profits taxes are taken into account, the unjust effect of the Commission's theoretical extension of the public interest becomes more marked, and is a matter of general knowledge and concern among investors. Strangely enough, the petitioners purport to find in the increased taxes that would result from the Commission's capital

structure, to the injury of creditors, an argument in support of the Commission Plan.

There is probably no one influence which has been more potent in bringing railroad securities into general public disrepute and more effective in destroying the credit of railroads generally than the realization that the Commission is asserting a right under Section 77 of the Bankruptcy Act to prevent a debtor from having available the funds to pay the interest which it has contracted to pay to its security holders, by renaming a bond a stock in an alleged public interest.

POINT IV

Section 77 of the Bankruptcy Act does not delegate to the Commission authority to originate and impose upon the parties a plan of reorganization and to nullify completely the rights of the parties to propose and negotiate a fair and equitable plan.

When an administrative agency, with the accumulated prestige possessed by the Commission, writes an unsupported gloss upon a statute, its construction receives a surprising amount of non-critical acceptance. The briefs of the petitioners furnish examples of this.

At page 27 of the Reconstruction Finance Corporation brief the following statement occurs:

> "Under Section 77 Congress has delegated the primary responsibility for the development of the reorganization plan to the Commission, * * *."

Needless to say, the brief does not attempt to refer to what language in Section 77 supports this bald statement.

On page 48 of the brief for the Institutional Bondholders the following statement appears:

> "Section 77, as administered by the Commission, has substituted the Commission as the 'reorganizer' and its expert judgment for the old 'bargaining' among the securityholders. * * *"

The phrasing of this statement is illuminating. It does not assert that the language of Section 77 makes the Commission a "reorganizer". It does say that under Section 77, **"as administered by the Commission"**, the Commission has been substituted as "reorganizer". Surely, one may fairly ask, in view of the drastic change in reorganization procedure involved, and the tremendous burdens thus imposed on the Commission, that there be pointed out express language in Section 77 which makes the Commission a "reorganizer" and substitutes its fiat for any renegotiation of contractual relationships between the groups of security holders.

Again, at pages 118-119 of the Institutional Bondholders' brief, this expansive statement appears:

> "Indeed the new legislation, as has already been stated, created a procedure under which the Commission has **in effect** become substituted for the securityholders as the 'reorganizer' and its expert judgments substituted for the 'bargaining process' among securityholders for the determination in the first instance, not only of the over-all questions of public interest, such as the total amount and character of capitalization to be issued in the reorganization, but also of the financial and other factual problems affecting the distribution of that capitalization in accordance with the legal rights of the old securityholders."

The brief does not attempt to support this statement by reference to the language of the statute, but refers only to the former statement in the brief itself.

Developing the thesis that the Commission is required to "formulate" a plan of reorganization, the Institutional Bondholders' brief states, at page 124:

"The essential jurisdiction of the Commission under Section 20a is carried into Section 77 not only by the requirement that the Commission shall **formulate** a plan 'compatible with the public interest.' * * *"

And at page 131:

"By subsection (d) the Commission is vested with jurisdiction to *determine* a plan that will be compatible with the public interest. * * *" (Italics in the brief.)

Neither of these statements is supported by any reference to the language of Section 77 which would authorize the Commission to "formulate" a plan. Actually subsection (d) of Section 77 does not at all authorize the Commission to "determine" a plan; on the contrary the language is that the Commission shall *approve* or *disapprove* a plan.

Any construction of Section 77 which takes from the creditors and the equity owners the right to initiate by agreement among themselves a plan of reorganization, provided that such plan does not disregard the priorities of secured creditors and does not conflict with basic and well defined considerations of public interest, cannot be sustained under the language or demonstrable intent of Section 77.

The relations between various classes of security holders in a railroad property are contractual relationships. When uncontemplated factors (such as the impact of the 1929 depression) render it impossible that these contracts be performed according to their terms, the parties have an inherent right to renegotiate their contractual relationships.

There is no language in Section 77 which purports to take away from the parties this right of renegotiation. Even more clearly, there is no language in Section 77, which, on its face, gives to the Commission the power and the responsibility of framing plans of reorganization for railroads; and yet this is the practical effect of the construc-

tion of Section 77 of the Bankruptcy Act adopted by the Commission and applied in this proceeding.

A reading of Section 77 of the Bankruptcy Act as a whole indicates, of course, that it was the intention of Congress to extend the function of the Commission as to railroad reorganizations. The Commission itself had from time to time pointed out the difficulties which arose under the previously existing practice in equity reorganizations. It was said that plans of reorganization came before the Commission only after they were formulated and agreed upon by the parties and solely, under Section 20a of the Interstate Commerce Act, for action upon the authorization of the issue of new securities. Section 77 clearly accomplishes a contemporaneous supervision by the Commission and by the Court of the steps in reorganization with a view primarily to accelerating the reorganization of railroads as against the alleged delays of the old equity practice.

It is also clear that it was the Congressional intent in enacting Section 77 to limit, so far as it legally might, the opportunity of minorities to frustrate the formulation and putting into effect of a plan of reorganization.

The entire plan and scheme of Section 77, however, clearly indicates that the parties should propose a plan of reorganization and by negotiation and adjustment agree upon its essential features, within the framework of Section 77. Under the terms of Section 77, the debtor is made the moving party in submitting a fair and equitable plan to the court and to the Commission, but any creditor is entitled to submit a plan and there is express and detailed provision in the Act for agreement among the various parties in interest by formal vote.

Nowhere in the Act is there imposed upon the Commission an express power and duty to formulate a plan of reorganization. The Commission, however, has seized upon an almost parenthetical phrase, hereinafter quoted,

which appears in the first paragraph of subsection (d) of Section 77 of the Bankruptcy Act, as justifying an expansion of its powers. This phrase states merely that the plan approved by the Commission "may be different from any which has been proposed." The phrase in question actually appeared in parentheses in the original act, prior to the 1935 amendment. On the basis of this phrase, which should reasonably be interpreted to give a far narrower scope of authority to the Commission, the Commission has asserted a right in this proceeding to originate and impose upon the parties its own plan of reorganization.

When the Bureau of Finance of the Commission first formulated and released its proposed plan of reorganization, which rejected and disregarded all plans filed by the parties, every party to the proceeding filed objections to the proposed plan. When the Commission on October 10, 1938, issued this Bureau of Finance plan, with some modifications, as its plan of reorganization, every party to the proceeding filed objections and petitions for rehearing (R. 675 to 818).

The only parties in interest who are supporting this plan in this Court are First Mortgage bondholder interests (and as to the First Mortgage bonds, only those held by institutions whose interests may well be different in some respects from the interests of the average First Mortgage bondholder) and the Reconstruction Finance Corporation. The reason for such support is obvious. The Institutional Bondholders may well feel that they benefit, because of the complete priority granted to them by the Commission, from the cancellation or foreclosure of the interests of secured creditors, general creditors and equity owners.

The Reconstruction Finance Corporation is, under the Commission Plan, granted clearly preferential treatment in relation to other secured creditors and treated on a

parity with the First Mortgage bondholders. The fact that the Commission Plan has been supported in the courts by these two favored interests does not negative the fact that the plan here before the Court is a Commission Plan originated and promulgated by the Commission and resting not at all upon any proposal or agreement of the parties to the proceeding.

The language upon which the Commission bases its right to initiate and promulgate a plan is the clause which is emphasized in the following sentence taken from subsection (d) of Section 77 of the Bankruptcy Act:

> "* * * After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, *which may be different from any which has been proposed,* that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. * * *"

It is far more reasonable to assume that Congress intended by the language from subsection (d) of Section 77, italicized above, to make possible minor changes in the plan, consistent with the general intent and agreement of the parties, in order that reorganization might be expedited, rather than a broad grant of power to the Commission to originate and promulgate plans of reorganization. The language is reasonably calculated to meet any argument that the Commission must approve or disapprove a plan precisely as submitted to it and cannot condition its approval upon the making of definite modifications, which the Commission may find to be in the public interest and required by the express limitations set out in

Section 77. This is a far different thing from a broad grant to originate plans by administrative fiat.

If Congress had meant to give the Commission broad power to formulate plans of reorganization, it could (subject to obvious doubts as to whether such a delegation of right to interfere with the contractual freedom of the parties would be constitutional) have said so in clear and express language. Certainly it might well have omitted from the provisions of Section 77 the express and time-consuming provisions for the filing of plans with the Commission.

We shall have occasion in Point V, which follows, to indicate what seems to us to be the reasonable interpretation of Section 77 as to the relative functions of the security holders and the Commission in the formulation of a plan of reorganization.

POINT V

The groups of security holders represented in this proceeding should be permitted, under supervision by the Commission and the courts as contemplated by Section 77, to renegotiate their contractual relationships, and formulate and agree upon a plan of reorganization, which would (a) observe the rule of priorities of the *Boyd* and *du Bois* cases, (b) provide for fixed charges only to the extent that they shall be adequately covered by "probable earnings", and (c) provide for a total capitalization within the limit established by the value of the property of the debtor used in the public service, after due consideration of its earning power.

We have pointed out in Points II, III and IV, above, that the theory and construction of Section 77 by the Commission is not supported by the language of the statute, nor within the intent of Congress, and that it produced an

unfair and inequitable result when applied to the facts before it in this proceeding. We believe, and think it proper to so state at this point, that many of the difficulties and delays which have occurred generally in the attempt to reorganize railroads under Section 77, are to be attributed to the Commission's erroneous and impracticable construction of its functions and duties under Section 77.

Section 77 of the Bankruptcy Act was enacted in 1933 and substantially amended in 1935. It has not accomplished the purposes which prompted its enactment; that is, the improvement of the reorganization procedure as against the old equity practice. Since the enactment of the Act, three major railroad reorganizations have been effectuated under the procedure provided by Section 77. The three properties are:

The Erie Railroad System, 2,392 miles operated (see 239 I. C. C. 653 (1940), 240 I. C. C. 469 (1940), *In re Erie R. Co.*, 37 F. Supp. 237 (N. Dist. Ohio 1940));

Chicago & Eastern Illinois Railway, 925 miles operated (see 230 I. C. C. 199 (1938), *ibid* 571 (1939), opinion and order N. Dist. Ill. 1940, unreported);

Chicago Great Western Railroad, 1,502 miles operated (see 228 I. C. C. 585 (1938), 233 I. C. C. 63 (1939), 29 F. Supp. 149 (N. Dist. Ill. 1940)).

It is interesting to note that in the case of the three properties so reorganized, the Commission did not seek to foreclose or cancel the interests of creditors, secured or unsecured, and instead gave substantial recognition to the equity.

A number of small railroad properties have been reorganized under the Commission's interpretation of Section 77. Their aggregate mileage is relatively unimportant. These include such properties as:

Chicago, South Shore and South Bend Railroad, 90 miles operated (see 212 I. C. C. 547 (1936), 217 I. C. C. 423 (1936) opinion and orders, N. Dist. Ind. 1936, 1937, unreported);

Copper Range Railroad, 107 miles operated (see 212 I. C. C. 479 (1936) opinion and orders W. Dist. Mich. 1936, 1937, unreported);

Louisiana & North West Railroad, 99 miles operated (see 224 I. C. C. 58 (1937), 36 F. Supp. 636 (S. Dist. N. Y. 1938), *ibid* 639;

Reader Railroad, 22 miles operated (see 221 I. C. C. 190 (1937) opinion and order, W. Dist. Ark. 1937, unreported);

Savannah & Atlanta Railway, 147 miles operated (see 224 I. C. C. 197 (1937) opinion and order, S. Dist. Ga. 1938, C. C. H. Bankr. par. 51,448);

Spokane International Railway, 152 miles operated (see 228 I. C. C. 387 (1938), 233 I. C. C. 157 (1939), opinion and order, E. Dist. Wash. 1940, C. C. H. Bankr., par. 52,567).

It is a fair statement, however, that the major railroad properties, except the three mentioned above, which came into financial difficulties as a result of the impact of the 1929 depression, and as to which the reorganization procedure was invoked, are still dragging a laborious course through the Commission and the courts, mainly because of the Commission's unsound and unsupported interpretation of Section 77. These major properties, still in process of reorganization, include:

Chicago & North Western Railway, 8,319 miles operated (236 I. C. C. 575 (1939), 239 I. C. C. 613 (1940), 35 F. Supp. 230 (N. Dist. Ill. 1940), 126 F. (2d) 351 (C. C. A. 7th, 1942));

Chicago, Milwaukee, St. Paul & Pacific Railroad, 10,854 miles operated (239 I. C. C. 485 (1940), 240 I. C. C. 257 (1940), 36 F. Supp. 193 (N. Dist. Ill. 1940), 124 F. (2d) 754 (C. C. A. 7th, 1941));

Chicago, Rock Island & Pacific Railway System, 7,900 miles operated (242 I. C. C. 298 (1940), 247 I. C. C. 533 (1941));

Denver & Rio Grande Western Railroad System, 2,566 miles operated (233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940), Finance Docket No. 11002, July 13, 1942, unreported, 38 F. Supp. 106 (Dist. Colo. 1940));

Florida East Coast Railway, 685 miles operated (Finance Docket No. 13170, April 6 and Aug. 10, 1940, unreported);

Minneapolis, St. Paul & Sault Ste. Marie Railway, 4,269 miles operated (Finance Docket No. 11897, March 17 and June 17, 1942, unreported);

Missouri Pacific Railroad System, 10,254 miles operated (239 I. C. C. 7 (1940), 240 I. C. C. 15 (1940), 39 F. Supp. 436 (E. Dist. Mo. 1940));

New York, New Haven & Hartford Railroad, 1,853 miles operated (239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941), 16 F. Supp. 504, opinion and order Dist. Conn. 1941, unreported));

St. Louis-San Francisco Railway, 4,769 miles operated (240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940));

St. Louis Southwestern Railway System, 1,650 miles operated (249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942));

Central of Georgia Railway, 1,864 miles operated (Fifty-fourth Annual Report of the I. C. C., p. 58).

This respondent contends that while Section 77 of the Bankruptcy Act, as erroneously construed and applied by the Commission, has not worked well, the statute itself is wisely conceived and statesmanlike legislation. If given a reasonable interpretation, according to the true legislative intent, it would function fairly and efficiently and with much greater expedition than the old equity practice.

Only because of the unsound and unsupported construction which has been given the Section by the Commission, have defects arisen in its administration.

At the outset it should be noted that Congress itself has expressed clearly and without ambiguity in subsection (b) of Section 77 what it deems to be the basic public interest in capitalization. It has expressly provided that a plan of reorganization

> "* * * shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; * * *"

Congress meant just what it said in that provision; that it was the duty of the Commission and of the Court not to approve a plan unless its probable prospective earnings would clearly cover its fixed charges. It is the failure to earn fixed charges which carries with it the objectionable sequence of default on fixed interest payments and possible foreclosure of liens, with the resultant disastrous effect on credit and continuity of management. A failure to earn contingent interest, or dividends, creates no similar situation affecting vitally the public interest.

As to the elements of capitalization, other than those involving fixed charges, there is no evidence of any intent or purpose on the part of Congress to limit or restrain by the language of Section 77 of the Bankruptcy Act the freedom of negotiation and adjustment traditionally possessed by parties who have existing contractual relations and are called upon by economic circumstances to modify such contractual arrangements. On the contrary, there is every indication in Section 77 that Congress contemplated that

fair and equitable plans of reorganization would emerge mainly from agreement of the parties.

There is, of course, a necessary restriction inherent in Section 20a of the Interstate Commerce Act and expressly confirmed by Section 77 of the Bankruptcy Act, that the capital structure upon which the parties may agree shall be fully warranted by the capitalizable assets of the debtor and so entitled to approval of the Commission under its consistent and well established administrative practice under Section 20a of the Interstate Commerce Act. Subsection (f) of Section 77 contains an express provision to that end as follows:

> "* * * Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. * * *"

Congress must be deemed in the enactment of the above quoted provision to have had in contemplation the established administrative practice of the Commission under Section 20a of the Interstate Commerce Act to which reference is made above in this brief at pages 59 to 69. That established administrative practice of the Commission was clearly that no securities should be issued which were not soundly based upon adequate capitalizable assets "intended for continuing productive use"[1] in the service of the public. It did not involve or contemplate any attempt to restrict the issue of equity securities in order that a material return might be expected upon such stock. (See quotation from Commission's report of October 10, 1938, appearing at page 51, above.)

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[1] *Securities of Louisville & Nashville R. R.*, 76 I. C. C. 718, 720 (1923).

It is obvious that the interpretation and application which the Commission has given to Section 77 in this proceeding has rendered completely nugatory the provision in Section 77 for the valuation of the property of the debtor. That provision occurs as the last paragraph in subsection (e) of Section 77 and reads as follows:

> "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

A revaluation of the debtor's property by the Commission may not be necessary where the parties can arrive at a plan of reorganization which gives due recognition to the rights of each class of creditors and stockholders, and otherwise complies with the limitations of Section 77, but it needs no extended argument to point out that a valuation of the property of the debtor is essential before the property rights of a secured creditor can be foreclosed and this is what is attempted in the plan here before this Court. It is also obvious that the rights of general creditors and of equity owners can be held to be without value only on the basis of a valuation of the assets of the debtor in which such general creditors and equity owners have an interest.

The very language used in the quoted paragraph from subsection (e) of Section 77 of the Bankruptcy Act negatives the validity of the interpretation which the Commission has sought to give to the Section. The Commission has

tried to foreclose the interests of secured creditors and unsecured creditors and the equity on the basis of a capitalization determined solely with reference to "probable earnings reasonably foreseeable for the future" (R. 244, 310). To be sure, the Commission does not squarely find in its reports in this proceeding what the probable prospective earnings of the debtor are. More important, however, is the fact that Congress has expressly provided that the value of the properties of the debtor, which value is necessarily reflected in the values to be assigned to its securities, must be based, not upon "probable earnings reasonably foreseeable", but upon quite a different thing: "earning power".

"Power" is generally and properly defined as "capacity to produce an effect". "Earning power", as used by Congress, necessarily means "capacity to produce earnings". That is quite a different thing from "probable prospective earnings", which is interpreted by the Commission to mean earnings that are reasonably foreseeable for the immediate or near future.

Respondent earnestly contends that the above quoted language from subsection (e) of Section 77 of the Bankruptcy Act must be construed in the light of the knowledge by Congress that the Commission had, at great expense to the public and to the carriers, prepared and promulgated valuations of the properties of the carriers under Section 19a of the Interstate Commerce Act which valuations accurately disclosed the true investment of the carriers in their properties, and readjusted such valuations to exclude unwarranted capital expenditures and abandoned properties, and kept these valuations up to date by the record of additions and betterments made under Commission supervision.

The emphasis in the quoted language on earning power, construed as capacity to earn, clearly authorized and directed the Commission to make such modifications in its

valuations made under Section 19a of the Interstate Commerce Act as would take into account those situations where an actual investment in railroad property did not properly reflect a capacity to earn under present conditions, or for the future, either because of permanent changes in traffic conditions or because the industrial decline of areas served had diminished the economic usefulness of the properties, or where the original investment had been ill-conceived and did not represent such potential service to the public as would give the property a capacity to earn commensurate with the investment.

The legislative history of the enactment of the 1935 amendment to Section 77 of the Bankruptcy Act supports the view that Congress meant no more by the language it uses as to the basis of valuation in subsection (e) of Section 77 than such express extension of power to the Commission, where necessary, to revise and modify, for reorganization purposes, its prior valuations of the railroads, with full consideration of "earning power", in the sense of "capacity to earn" based on the usefulness to the public of such property. From this point of view, the concept carried into Section 77 is closely akin to the much discussed doctrine of "prudent investment", enunciated by Mr. Justice Brandeis when a member of this Court (*Southwestern Bell Telephone Co.* v. *Public Service Comm.*, 262 U. S. 276, 289).

The 1935 amendment to Section 77 of the Bankruptcy Act was separately introduced in the House of Representatives and in the Senate. Neither in the House nor in the Senate was there discussion on the floor as to the significance of the phrase "earning power" as it appears in the valuation provisions of subsection (e) of Section 77. When the House bill was before the Committee on the Judiciary of the House of Representatives, Mr. Leslie Craven, counsel for the Federal Coordinator of Transportation and accredited draftsman of the proposed legislation, appeared

on April 15 and April 16, 1935, before the Committee to outline the intent and purpose of the proposed amendment to Section 77 of the Bankruptcy Act. Throughout his presentation to the Committee on the Judiciary there appear statements which are illuminating as to the true significance and intent of the phrase "earning power" as used in Section 77. The language quoted below is that of Mr. Leslie Craven, except where otherwise indicated in the case of members of the Committee on the Judiciary of the House of Representatives:

Page 28 report of hearing before the Committee on the Judiciary of the House of Representatives

"If you have built a Mayflower Hotel in Alexandria and it is not able to make operating expenses, what it cost does not have anything really to do with the case, because that is not even evidence of the probable value of that property.

• • • • • • • • • •

"If you will excuse me I think that this is sufficiently important to read:

'For the purposes of any determination in proceedings under this section to which the fair valuation of any property used in railroad operation—'

"That is important; this would not apply to land which was held for investment purposes. [Reading:]

'may be necessary, including, but not limited by, the solvency of the debtor, such valuation shall be determined on a basis which will give due consideration to the earning power of the property, present and prospective, and all other relevant facts.'

"That is the law as we understand it for the determination of the kind of value which is here in issue.

"Personally I think that prospective earnings are the things which are the most important and you will

observe that we are talking about 'earning power'. We are not proposing that we organize these railroads on the basis of present earnings. You could not do it. The roads now either in bankruptcy or equity proceedings are only earning one-seventh of their bond interest."

Page 31

"For that reason, to be quite frank with you about the matter, this rule is not an entirely satisfactory rule, because it is not precise. It is not as definite as you would like to have it, but we do not know any way to get a more definite rule.

"This is legally sound; that is, I mean that it puts emphasis, as it ought to, off of costs and on to earnings.

"Now, we have to leave that to the determination of the court and the Commission. We do not think that it is wise to try to straightjacket that thing, by telling them how they shall do it, and we do not believe, let me say, that under this rule this Interstate Commerce Commission is going to take that provision and use it in a senseless way, that is, in a way whereby they would, for example, reorganize these railroads on the basis of these obviously subnormal present earnings.

"In getting up a statute like this, you have to count on the intelligence of your administrative agency, and you cannot legislate intelligence into it.

"Now, what I have said has largely to do with provisions designed to enable the putting through of plans, when times are propitious, with fair treatment of equity interests and in a manner not to permit their obstruction for purposes of driving a better bargain."

Page 38

"There is not any question, I believe—at least serious question—that in the determination of value for reorganization purposes, the weight must be given to the actual economic value of the property. That

is its worth. And, as I illustrated yesterday, if you should unwisely do what thousands of people have done, invest large sums in boom times in such a thing as a Mayflower Hotel located over in Alexandria, it cannot be expected, in the very nature of things, that if that property becomes insolvent, or unable to meet its bills, when it is reorganized, it shall be again organized on the basis of the investment or the reproduction cost at present prices. That is an absurdity on the face of it."

Page 39

"Another point is this: We set up in the last provision of that paragraph a rule of evidence; evidence of these respective kinds of cost figures shall not be received unless it shall be first established that in the light of its earning capacity, which we regard as the true measure of value, and all the other relevant facts —we do not exclude anything; we let the court look at the whole proposition—such sums as are evidenced by such reproduction or original cost of, or actual investment in, the property could, at the time of the proceeding or within a reasonable period thereafter, be reasonably invested therein.

"In other words, you cannot bring in testimony and prove, over months of time, with all of the labor that is required to make such proof, these investment and reproduction cost figures, unless you first establish that the sum claimed in that way could be reasonably invested.

"'Reasonably invested' is merely another way of saying that you could get a return on it in a reasonably near future period. Our authority for that is the following case, and I submit it to you as a bit of sound reasoning. It is a decision of the circuit court of appeals in *United States* v. *Boston & New York Canal Co.* (271 Fed. 877, at 889), which was a condemnation case."

Pages 40 and 41

"The point there is this: That the value that was in issue before the Interstate Commerce Commission was a value for rate-making purposes and it was based

on cost figures; because when you come to make rates on the basis of value you cannot take earnings and capitalize them, because if you do you get into a vicious circle. Therefore a value for rate-making purposes such as was found by this Commission produces a sum which, with reference to its actual value, is often tremendously in excess, because it is primarily a cost figure.

"Their effort was to ascertain as well as they could by the use of reproduction-cost figures an approximation of what they thought was probably the proven investment."

Pages 42 and 43

"Take my hotel down there in Alexandria, my Mayflower Hotel. The reproduction cost of that property at 1928 prices ought not to be received in evidence unless somebody can show that under the reasonable and prospective earnings of that property a sensible man would make that investment. Now, we are not trying to be hard-boiled about this thing. This was not an effort to be harsh. This will be objected to, you will find, by the equity holder."

Page 43

"Now, this could be done: It would be perfectly constitutional. It would be a provision that a road would be regarded as insolvent, so that there would not be the necessity of submitting a plan to stockholders, in the event that the earnings available for the payment of dividends on that stock, for a period of, say 5 years had not been adequate to pay any dividends. Under the law, there is not the slightest doubt that the Congress—it has been decided in many cases—has latitude in the fixation of its definition of insolvency. That provision would be proper. Now, if there is anyone who thinks that this valuation provision is not what it ought to be, then the substitute for it is a provision of the kind which I have suggested, which would be very effective.

"Mr. Michener (a member of the Committee on the Judiciary). It would be very effective in wiping out all equities in any kind of business in the country.

If business has got to be measured by its earnings in the last 5 years—any business, I do not care what it is—it would be just about as unfair a thing as could be imagined or suggested.

"Mr. Craven. And that is why we did not adopt it. I think this is a fairer standard.

"Now, I will say this with reference to this valuation provision. I brought it up here for discussion because it is an essential and important part of this act. But I do not think that it will attain any such importance in an actual reorganization, as you might suppose, from the conversation that has been had here, because what will happen will be that they will come in with a plan, it will be considered as to whether it is reasonable, and the valuation determination will be apt to be a secondary thing, not a primary thing.

"I do not think the court ought to—if I were a judge I would not, and I am sure you would not—sit down and say in a coldblooded way, 'Well, now, gentlemen, we are going first to fix a valuation.' I would consider the plan first. That is what the courts are going to do."

It may be conceded that Mr. Craven has subsequently made many public statements about the meaning of the valuation clause in Section 77, which might be urged as inconsistent with the excerpts set out above. There is, for instance, his explanation of the clause, which somewhat surprisingly was quoted with approval by the District Court in its opinion approving the Commission's theory of capitalization and its resulting Plan, as follows (R. 1584):

"* * * the valuation provisions in the existing law were so drawn that whoever tried to upset the valuation of the Commission would not be able to do it. The language is left in generalities. * * *"

However, what Mr. Craven said subsequently is of little importance; what he said to the House Committee, in ex-

plaining the purpose of the provision in his capacity of accredited draftsman, and during the consideration of the 1935 amendment, is of considerable importance as bearing upon the legislative intent.

In the proceeding here under review, the Commission deliberately avoided making any findings as to the valuation of the property of the debtor other than its finding under Section 19a of the Interstate Commerce Act which it incorporated in its report of October 10, 1938 (R. 224). That valuation was, as indicated above (Point I), adequate to justify the recognition of the secured claim of this respondent in full, with ample margin over for the general creditors and the equity. The Commission did in its report use discursive language expressing a doubt as to whether the original line of railroad of the debtor, which is the nucleus of its present railroad system, represented initially a prudent investment on the part of the Denver and Rio Grande Railroad Company (R. 244), which fell into financial difficulties because of that investment. It is obvious, however, that the Commission could not have found on the record before it that the present railroad system of the debtor was not a property essential to the efficient functioning of our national transportation system.

In this connection and as bearing upon the economic justification for the debtor's railroad system, attention of the Court is called to the tabulation which appears in the record as Exhibit L, annexed to the stipulation filed by the parties in the District Court (R. 1267-8). This table is reprinted for the convenience of the Court at page LIV in the appendix to this brief.

This table shows that even during the depression years the traffic burden borne by the debtor's railroad system for the benefit of the public has steadily increased in an impressive manner in ratio to the increase of traffic on

other Class I carriers. While undoubtedly, the present high level of gross earnings may be attributed in part to war conditions, it is more largely attributable to the developments in the debtor's railroad system and connections with it, which are discussed above at pages 27 to 29 of this brief. The fact that the debtor's railroad system is carrying its share of the burden of war traffic merely helps to demonstrate that its properties represent an essential investment in the public interest. That it has a capacity to earn at least commensurate with its investment valuation as found by the Commission under Section 19a of the Interstate Commerce Act is clear beyond doubt.

If the Western Pacific Railroad System, as now constituted, did not exist, the public interest would make desirable its present construction if this were possible under existing conditions. There is no doubt that the earning power of the property today fully justifies the valuation on the investment basis found by the Commission in its 19a proceedings. The actual earnings of $4,548,138 available for interest during the calendar year 1941 and of $7,987,512 available for interest for the year from August 1, 1941 to July 31, 1942, as discussed above at pages 24 and 25 of this brief, are an adequate practical demonstration that the property has a capacity to earn commensurate with its Section 19a valuation as found by the Commission.

No reasonable ground can be found in the record before this Court to justify a refusal on the part of the Commission to allow the parties to the proceeding to agree upon a plan of capitalization acceptable to creditors and stockholders, providing the limits of such capitalization fall within the 19a valuation as found by the Commission, after application of full accrued depreciation on roadway and structures as well as on equipment.

The Commission's "realistic" construction of Section 77

The Commission in its reports leans heavily upon the word "realistic" to characterize its proposal to substitute in its Plan a limited capital structure for determinations of value and earning power. For example, in its report of October 10, 1938 (R. 244) the Commission says:

> "* * * If this reorganization is to be successful, the capital structure of the reorganized company must be *realistically* related to its actual earning power, and consideration given to the investment in its property only to the extent that such investment is justified by the probable earnings reasonably foreseeable for the future."

The Commission's basic assumption is that all the ills of the railroad industry can be cured and the credit of the railroads assured, by revising downward the capitalization of the railroads, on the basis of depression earnings, so as to foreclose the interests of investors, including secured creditors, to the end that dividends may be assured on the new common stock. To characterize any such theory as "realistic" involves a sad straining of the ordinary meaning of the word. A more doctrinaire approach to the problems of the railroad industry could hardly be conceived.

It amounts to saying that every investor in railroad property placed in the service of the public takes the risk, not merely of not receiving interest or dividends during depression periods, but also of having his entire investment cancelled and foreclosed for all time on the basis of such depression earnings or forecasts based upon such depression earnings. When an attempt was made to legislate this theory into Section 77, as an amendment in 1939 (see S. 1869 and Report of Hearings before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary of the House), the

theory was properly rejected by the Committee on the Judiciary and the proposed amendment failed of enactment.

The sound construction of Section 77

A sounder and more realistic interpretation of Section 77, and one supported by the language of the statute, would be to hold that the legislation was intended to facilitate the reorganization of railroads in distress, under regulatory supervision of the Commission and the Courts, rather than to delegate to the Commission alone the power and the responsibility of formulating plans of reorganization under economic concepts which find little or no support in the language used by Congress.

We contend that Section 77 of the Bankruptcy Act clearly contemplates that the parties in interest, creditors and stockholders, should be given an opportunity to renegotiate and adjust their contractual relationships, which have been disturbed by the failure of the property to earn its fixed charges under depression conditions. This right to renegotiate is, admittedly, subject, under the language of Section 77 of the Bankruptcy Act, to certain definite limitations.

In the first place, the plan of reorganization submitted must be "fair and equitable"; this necessarily means, among other things, that under the rule of the *Boyd* case, as reenunciated by this Court in *Consolidated Rock Products Co.* v. *du Bois, supra,* the priority rights of secured creditors must not be impaired.

In the second place, the proposed plan of reorganization must not provide for fixed charges in excess of an amount which is fully covered by "probable prospective earnings." The Commission is expressly charged under the terms of Section 77 with regulatory authority to assure

that no plan be put into effect which violates this limitation. A reasonable corollary of this clearly expressed legislative intent (although not so clearly expressed in the language of the statute) is that income bonds provided for by a plan of reorganization should be long term, and not short term securities, so as to avoid imposing upon the property the equivalent of fixed charges and the possibility of default upon its obligations within any reasonable period in the future.

In the third place, the total capitalization contemplated by the plan of reorganization must be within the amount of capitalizable assets turned over to the new company. Section 77 of the Bankruptcy Act is quite clear in supporting the standard as to capitalization which has been applied by the Commission since 1920 in the authorization of the issue of securities under Section 20a of the Interstate Commerce Act. (See discussion as to Commission's established administrative practice at pp. 59 to 69, above.) All that the valuation provision appearing in subsection (e) of Section 77 of the Bankruptcy Act can reasonably be interpreted to mean is that the Commission is authorized to revise its 19a valuation (which is substantially on an investment basis) where basic changes in economic conditions or other circumstances have permanently reduced the earning power of the assets devoted to the public service.

Practical application of Section 77 to the situation presented in this proceeding

The parties to this proceeding did not agree upon a plan of reorganization, and unite in urging it upon the Commission. Three separate plans of reorganization, and a number of modified plans, were filed with the Commission by the parties to this proceeding. All three plans submitted by the parties contemplated the refunding in full of the secured claim of this respondent. All three of these plans were rejected by the Commission on the ground

that they contemplated capital structures which the Commission regarded as in excess of that capital structure which they deemed should be created "in the public interest."

This respondent submits that within the fair contemplation of the legislative intent of Section 77, in the light of the facts before the Court, the parties should be permitted to agree upon a fair and equitable plan of reorganization which would:

(a) fully preserve the rights of priority of all creditors;

(b) contemplate a capital structure clearly within the limitation of properly capitalizable assets as determined by the 19a valuation made by the Commission (which in view of the demonstrated earning power of the present property of the debtor should not be reduced on any theory of loss of economic usefulness for the service of the public);

(c) contemplate (as does the Commission Plan) the complete elimination of all fixed charges except to the limited extent that it may be necessary to issue obligations for new money;

(d) preserve original debt as debt, on a contingent or income basis so far as interest is concerned, and on a long maturity basis so that the ability of the enterprise to function continuously for the future shall be assured against any danger arising from possible default on either fixed interest obligations or near maturity of income obligations; and

(e) avoid any unnecessary confiscation of property rights of secured creditors (such as this respondent), general creditors or equity owners, represented by investment in property fully used and usable in the public interest.

If the parties to this proceeding are allowed to renegotiate and adjust their contractual relationships within the clearly expressed limitations imposed by Section 77 and are relieved from the unreasonable limitations of the unsound economic theories which the Commission has sought to impose upon Section 77 as a gloss, it is submitted that an agreed plan of reorganization can be worked out and made effective without loss of time. Only if the parties are free from the limitation upon total capitalization proposed by the Commission can a plan be framed which is truly "fair and equitable" within the express requirements of Section 77.

What is here proposed involves no long drawn out valuation proceeding before the Commission or in the courts. The Commission has, as disclosed in its reports in this proceeding, full data as to the investment of the debtor in its properties and as to the Commission's own valuation of the properties under Section 19a. This latter valuation excluded and disregarded a substantial part of the debtor's original investment as representing excessive construction costs (*Western Pacific Ry. Co.*, 29 I. C. C. Val. Rep. 239, I. C. C. Exhibit 104, R. 2498, unprinted record). This valuation data has been kept currently up to date by the Commission through its exercise of its regulatory powers as to the debtor's additions and betterments and its accounting. There is obviously no need in this proceeding that the Commission should substantially readjust downward, for the purpose of determining the total allowable capitalization, its prior valuations of the properties of the debtor, by giving further consideration to "earning power" as authorized by subsection (e) of Section 77. The present actual earnings of the debtor's properties are a complete and irrefutable demonstration that those properties have a "capacity to earn" fully commensurate with the Commission's prior Section 19a valuation.

POINT VI

The District Court in this case failed to exercise an informed and independent judgment in approving the Commission Plan.

The Circuit Court of Appeals for the Ninth Circuit in its opinion has pointed out (R. 2672-4) that the District Court in passing upon the Commission Plan misconstrued and improperly limited its judicial functions under Section 77 of the Bankruptcy Act. Because of the District Court's misconception of its functions no adequate review of the Commission's determinations was possible, and judicial questions affecting private rights have not been decided.

The theory of the District Court

The opinion of the District Judge discloses the premises upon which he relied in dismissing all objections and approving the plan of reorganization of the debtor which was formulated and certified by the Commission. The opinion states (R. 1596):

> "• • • The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. • • •"

The District Court does not tell us by what authority this division of issues is made—"amount and character of capitalization" to the Commission, "distribution of new

securities" to the Court. The phrases themselves do not appear in Section 77, 77B or in Chapter X of the Bankruptcy Act. Subsection (e) of Section 77 expressly directs the Court to approve the plan only if satisfied that it meets the requirements of the statute, and is fair and equitable, non-discriminatory and in conformity with law.

Even as to the issue of the "distribution of the new securities," as to which the District Court accepted a judicial responsibility, the opinion of the District Court shows complete surrender to "the experience, ability and specialized knowledge" of the Commission (R. 1588), and a complete acceptance of its preliminary determination of questions relating to the distribution of the new securities (R. 1597), which was of "inestimable value to the court" and with which the Judge was "wholly in accord". Hence, "further discussion would be superfluous. Every question presented by the objections was considered and passed upon by the Commission as shown by its original and supplemental reports" (R. 1597).

Thus, it appears that, as to questions of capitalization, the District Court refused to pass judgment. As to questions of distribution, the stated acceptance of judicial responsibility was not accompanied, so far as can be spelled out from the opinion of the District Court, by more than a merely superficial review of the Commission's prior determinations.

This judicial renunciation should be compared with the standard indicated by the words of Mr. Justice Douglas in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 115 (under 77B), where this Court rejected the contention that the approval of a plan of reorganization by the great majority of security holders relieved the reorganization court of the duty to make an independent determination as to the fairness and equity of the proposed plan. The Court said:

"* * * The contrary conclusion in such cases would make the judicial determination on the issue of fairness a mere formality and would effectively destroy the function and the duty imposed by the Congress on the district courts under § 77B. That function and duty are no less here than they are in equity receivership reorganizations, where this Court said, 'Every important determination by the court in receivership proceedings calls for an informed, independent judgment.' *National Surety Co.* v. *Coriell*, 289 U. S. 426, 436."

This principle was reaffirmed in *Consolidated Rock Products Co.* v. *du Bois*, 312 U. S. 510, at page 520.

Under these decisions and the doctrine of the *Boyd* case, questions of the amount, character and distribution of new securities must be scrutinized by the District Court, notwithstanding the prior approval of the overwhelming majority of the security holders. Can the duty of the Court be less where the determination of capital structure and the distribution ordered by the Commission, without the consent of security holders, cuts off property rights of secured creditors?

Public interest and private rights are intertwined in a reorganization proceeding. The District Judge in this proceeding, by arbitrarily excluding the most important issue from his consideration, has denied a proper judicial hearing on the plan of reorganization. This abdication of judicial power and refusal to perform the Court's duty is justified neither by logic nor by authority nor by the provisions of Section 77.

In any consideration of any plan of reorganization the question of amount and character of new capitalization is a question to be determined. It is involved in an equity receivership, in a reorganization under Section 77B or Chapter X and in a reorganization under Section 77. In any reorganization this determination affects private rights as well as the public interest. Section 77 does not withdraw the consideration of this issue from the District Court.

A Reorganization Proceeding under Section 77 is a Judicial Proceeding in Bankruptcy.

Section 77 of the Bankruptcy Act is a law on the subject of bankruptcies, enacted by Congress under its power to legislate upon that subject.

Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pac. Ry. Co.*, 294 U. S. 648;
Palmer v. *Massachusetts*, 308 U. S. 79.

In *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pac. Ry. Co., supra*, the Supreme Court held that Section 77 conferred upon the bankruptcy court jurisdiction to enjoin creditors, who held notes of the debtor railway secured by its bonds and the bonds of its subsidiaries, from selling the collateral under the power of sale in the notes, and that this grant of power was a constitutional exercise of the bankruptcy power. This decision involved the Section as enacted in 1933, prior to the 1935 amendments which added the valuation provision and made numerous other changes.

The companion Section (Section 77B, now Chapter X of the Bankruptcy Act), has also been held valid as an exercise of the bankruptcy power.

Kuehner v. *Irving Trust Co.*, 299 U. S. 445;
Campbell v. *Alleghany Corporation*, 75 F. (2d) 947; certiorari denied, 296 U. S. 581.

An order confirming a plan of reorganization under Section 77B is an order in a "proceeding in bankruptcy" (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160).

A reorganization proceeding under Section 77 must be initiated by a petition filed with the District Court and approved by the judge. Thereupon, by the express

provisions of subsection (a), the Court is vested with "exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose."

Subject only to express provisions of the statute, the powers and duties of the court in a reorganization proceeding under Section 77 are the same as the powers and duties of the bankruptcy court in an ordinary bankruptcy proceeding. It is so provided in subsection (l) of Section 77:

> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 77 Does Not Curtail the Judicial Powers of the Bankruptcy Court.

The statute does not attempt to subject the District Court to the power and control of the Commission, or to make the Court a reviewing body or to confer upon the Commission the judicial powers of a bankruptcy court (*In re New York, N. H. & H. R. Co.*, 16 F. Supp. 504).

Under the statute only the judge may dismiss the proceedings upon the filing of the original petition, after approval of a plan by the Commission, or after certification of a plan by the Commission. While no plan shall be approved or confirmed by the Court unless it has first been approved by the Commission, the order of the Commission approving a plan is merely a jurisdictional prerequisite and is of

no force and effect unless and until the plan has received the independent approval of the Court after a judicial hearing upon the objections and claims of the parties (*In re New York, N. H. & H. R. Co., supra*).

No plan of reorganization may be submitted to the vote of creditors and stockholders by the Commission unless such plan has received the independent approval of the judge, and the judge must be satisfied as to the results of the submission to creditors and stockholders found by the Commission. A finding of the Commission that submission to any class of creditors or stockholders is not necessary is without force unless affirmed by the judge. The determination whether the rights of creditors and stockholders who refuse to accept the plan are adequately protected is left to the judge. Final confirmation of a plan is left to the judge.

Throughout the statute it is abundantly clear that a proceeding in bankruptcy, a judicial proceeding, is contemplated; and the adjudication and protection of private rights is at every point left to the court.

True, by the provisions of Section 77, Congress has delegated to the Commission primarily the duty of determining certain matters. Among these are the following: (1) the ratification of the appointment of trustees for the debtor [subsection (c) (1)]; (2) the fixing of maximum limits for expenses and fees to be paid by the debtor's estate [subsection (c) (2) and (12)]; (3) the determination of the value of any property of the debtor for any purpose under Section 77 if it shall be necessary to determine such value [subsection (e)]; and (4) whether the plan of reorganization will be compatible with the public interest [subsection (d)]. Only the third and fourth questions mentioned are in issue before this Court.

To the Commission primarily are referred issues affecting the public interest (not "determination of the extent and character of the capitalization"), but these issues also

affect private rights. As to private rights, the Commission's findings and conclusions are preliminary and advisory. Similarly, the court may deal in a preliminary way with questions affecting the public interest. In authorizing the abandonment or sale of lines or portions of lines under subsection (o), the Court makes a preliminary determination of public interest, subject to the subsequent approval of the Commission. Also, in paragraph (6) of subsection (c), during the administration, the judge may decree, after hearing, that would be "contrary to the public interest" for a lessor of the debtor to operate a leased line, in which case the Commission is given full authority in abandonment proceedings.

Cooperation and coordination are necessary for a successful reorganization, but this does not justify a refusal by the court to perform its duties.

The determination by the Commission, that the plan approved by it is compatible with the public interest, does not indicate that no other plan would be compatible with the public interest and does not require the Court to approve the plan certified by the Commission without a critical examination and determination of judicial questions affecting private rights. Another plan may be framed which will adequately protect private rights and be compatible with the public interest. Section 77 does not purport to make the findings of the Commission conclusive upon the Court.

The Commission's Determinations Are Not Binding on the District Court.

Even if we should concede that the determination, whether a plan of reorganization of the debtor railroad is compatible with the public interest, has been referred by Congress to the Commission exclusively, a finding of the Commission upon this question is subject to review by the District Court and upon this appeal if such a

finding is made arbitrarily or without support in the evidence, or if it results in the confiscation of private property rights.

St. Joseph Stock Yards Co. v. *United States,* 298 U. S. 38;
Baltimore & Ohio R. Co. v. *United States,* 298 U. S. 349;
Crowell v. *Benson,* 285 U. S. 22.

When the issue is whether the findings of the Commission result in the confiscation of private property rights, the Court is not bound to accept those findings even though supported by substantial evidence. Upon this issue the Court must weigh the evidence and determine the facts independently.

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, this Court said (pp. 49-50, 52):

> "A preliminary question is presented by the contention that the District Court, in the presence of this issue [confiscation], failed to exercise its independent judgment upon the facts [citing cases]. The District Court thought that the question was still an open one under the Packers and Stockyards Act, and expressed the view that, even though the issue is one of confiscation, the Court is bound to accept the findings of the Secretary if they are supported by substantial evidence and that it is not within the judicial province to weigh the evidence and pass upon the issues of fact. The Government points out that, notwithstanding what was said by the court upon this point, the court carefully analyzed the evidence, made many specific findings of its own, and in addition adopted, with certain exceptions, the findings of the Secretary. * * * Hence, the Government says that the decree should be affirmed irrespective of possible error in the reasoning of the District Court. * * *
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> * * * * * * *

> "* * * But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. * * * The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled."

And in *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 368-369, the Court said:

> "* * * when he [the owner of private property] appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it."

In *Crowell* v. *Benson*, 285 U. S. 22, where the Court even required a trial *de novo* on jurisdictional facts, the Court said (p. 60):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of

> questions of fact. This court has held the owner to be entitled to 'a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts.' *Ohio Valley Water Co.* v. *Ben Avon Borough, supra.* * * *"

Moreover, if the Commission in making an administrative determination has committed an error of law or foreclosed determination by the Court of questions of private rights, the error of the Commission must be corrected by the courts. The Court must make an independent determination of challenged questions of law which are involved in administrative determinations and, if necessary, must examine the entire record, including the evidence (*St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, at page 74). The Court's reversal of the Commission upon a question of law will be binding on the Commission but will not prevent it from enforcing the legislative policy committed to its charge, within the limits of the law as declared by the courts.

> *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134;
> *Federal Power Commission* v. *Pacific Co.*, 307 U. S. 156.

The powers of the district courts under Section 77 were discussed by Mr. Justice Frankfurter in *Palmer* v. *Massachusetts*, 308 U. S. 79, in considering whether the statute confers upon the district courts power to authorize the abandonment by the debtor's trustees of local passenger stations without securing the approval of state agencies. He stated that the provision of Section 77(a) giving the District Court "exclusive jurisdiction of the debtor and its property wherever located" and other general provisions, were doubtless sufficient "to confer upon the district courts power appropriate for adjusting

property rights in the railroad debtor's estate and, as to such rights, beyond that in ordinary bankruptcy proceedings." He stated further: "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission"; and "the authority of the court is intertwined with that of the Commission."

Mr. Justice Reed has stressed cooperation:

> "* * * The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations. * * *" (*Warren* v. *Palmer*, 310 U. S. 132, 138)

In these statements one finds no indication that the District Court in approving a plan of reorganization is merely reviewing determinations of the Commission.

Both Court and Commission Must Perform Their Functions.

Section 77 contemplates and requires cooperation and coordinated action by the Commission and the District Court in bringing about a reorganization. The Commission must perform its administrative and quasi-judicial functions. The extent of the Commission's jurisdiction and the scope of its powers in this proceeding are fixed by the statute, and Commission action in excess of the authority conferred by the statute is always subject to review and control by the courts (*Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266). The Commission's violation of law and failure to proceed according to law are discussed elsewhere in this brief. At this point we urge that the District Court failed to perform its proper functions as a court of bankruptcy, and that such failure is contrary to law and vitiates and nullifies the whole proceeding (*Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; *Gross* v. *Irving Trust Co.*, 289 U. S. 342).

Review of mere administrative orders distinguished

The petitioners would apply to this reorganization proceeding principles and rules applicable to the review of Commission action as to rates, service regulations and similar administrative matters. In rate making, service regulation and the like, the Commission is a legislative or policy making body and its determinations and conclusions are binding if they are within the power conferred by Congress and are supported by evidence. This well settled proposition is supported by many decisions of this Court, including the following:

Terminal R. R. Assn. v. *United States*, 266 U. S. 17;
United States v. *Louisiana*, 290 U. S. 70;
United States v. *Illinois Central R. Co.*, 291 U. S. 457;
Atlanta, Birmingham & Coast R. Co. v. *United States*, 296 U. S. 33;
Manufacturers Ry. Co. v. *United States*, 246 U. S. 457.

When the Commission exercises the legislative or discretionary authority conferred by Congress, it is concerned "not so much with past situations as with future adjustments" and its determinations "are clothed with a high degree of finality." (SHARFMAN, *The Interstate Commerce Commission*, Vols. I, p. 7; II p. 357). Even under Section 20a of the Interstate Commerce Act, however, "The initiation of financial policies was left undisturbed in the hands of the carriers"; and the holding of hearings was optional (*Ibid.*, Vol. I, p. 191).

But the quasi-judicial acts of the Commission under Section 77 of the Bankruptcy Act deal directly with private rights. Hence, they do not possess "the high degree of

finality" of mere administrative determinations under the Interstate Commerce Act (REMINGTON ON BANKRUPTCY, Section 4326). It is for this reason that Section 77 has not taken over the statutory provisions which govern the review of regulatory action under the Interstate Commerce Act.

Review of the Commission's administrative orders is governed by the Urgent Deficiencies Act of October 22, 1913, and must be heard by a statutory three judge court (38 Stat. 208, 220, 28 U. S. C. A. § 47). Thereafter a direct appeal to the Supreme Court lies under Section 210 of the Judicial Code (28 U. S. C. A. § 47a). Appeals in bankruptcy, however are taken to the Circuit Court of Appeals and are governed by Section 24 of the Bankruptcy Act (11 U. S. C. A. § 47).

To label the actions of the Commission under Section 77 as "legislative" and in the "public interest" by pointing to its characteristic administrative functions under Section 20a of the Interstate Commerce Act (as has been attempted by the petitioners) is to conceal the Commission's quasi-judicial powers. "The fact is that the Interstate Commerce Commission is a legislative agency or an administrative agency or a quasi-judicial agency depending upon what part of its particular job one happens to be looking at. It has all three attributes simultaneously, or perhaps it would be more accurate to say that it exhibits them successively at different stages of its activity." (CUSHMAN, *The Constitutional Status of the Independent Regulatory Commissions*, 24 Cornell Law Quarterly 13, 47; see also *Ibid.*, 49).

While the District Court should not usurp "merely administrative functions" of the Commission, or substitute its judgment as to the wisdom or expediency of the Commission's administrative action, "the essence of judicial authority may not be curtailed" or "avoided" by the Court (*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470).

Summary

In approving the plan of reorganization the District Court doubted its power to pass upon the Commission's legislative determinations even if arbitrary or confiscatory. The Court completely overlooked the Commission's failure to act upon the basis of adequate data and make precise findings as to the basic factors of value and earning capacity (Point I, above). But the District Court also misinterpreted Section 77 and misconstrued its own functions and duties under that section and the law of the land. Even without an express statutory command, the Court must pass independent judgment upon challenged questions of law which are involved in or imbedded in administrative determinations of the Commission. Furthermore, by the express mandate of Section 77, the District Court must, as a condition of approving the plan of reorganization, be satisfied that the plan is fair and equitable and non-discriminatory, and that it gives due recognition to the rights of each class of creditors. Although the District Court may not control the Commission's determination whether the plan is "compatible with the public interest," except where the administrative action is capricious, arbitrary or confiscatory, or not supported by adequate data and findings, the Commission's determination of the public interest does not relieve the District Court of its duty under the statute to protect private rights (*Palmer* v. *Massachusetts*, 308 U. S. 79), and to determine whether the plan is fair and equitable and non-discriminatory as to bondholders, creditors and stockholders.

Congress did not, by the enactment of Section 77, "withdraw from the courts control over insolvent railroads and lodge it with the Interstate Commerce Commission." (*Palmer* v. *Massachusetts*, 308 U. S. 79, 87)

The District Court misinterpreted the statute and failed and refused to perform its judicial functions and thereby committed reversible errors of law.

POINT VII

Preferential treatment given the claim of the Reconstruction Finance Corporation under the Commission Plan is unsupported by necessary administrative or judicial findings and cannot be justified under the facts of this case.

In the Commission Plan it is provided that the Reconstruction Finance Corporation shall "receive for the secured notes of the debtor held by it, treatment equal to that accorded to the holders of the debtor's existing first-mortgage bonds" (R. 312). The Commission states that this preferential treatment of the government Corporation's secured claim is in consideration of the purchase by that Corporation of the $10,000,000 of new first mortgage four per cent bonds which are authorized for the purpose of raising the new money said to be needed to effect the reorganization, and in consideration of the value of the collateral securing the claim. No adequate finding of the value of the collateral is made.

Thus, the Commission Plan proposes that the Reconstruction Finance Corporation shall receive a substantial underwriting fee if it elects to take this $10,000,000 of new first lien bonds upon most favorable terms, without a finding as to the value of the new bonds and without reference to the marketability of the bonds at par. Its secured claim is to be advanced to a preferred position ahead of the secured claim of The Railroad Credit Corporation and far superior to the secured claim of A. C. James Co., which is to be funded only in part.

No provision is made for a public offering of the new first mortgage bonds though considerations of equity and law require such an offering and only in the event that no other purchaser is found should the government Corporation receive an underwriting fee. And yet the pro-

posed purchase of the new bonds by the Reconstruction Finance Corporation is subject to future approval thereof by the Commission.

The preferential treatment accorded to Reconstruction Finance Corporation, by funding its secured claim in full in the same kind of securities allocated to First Mortgage bondholders, while the secured claim of The Railroad Credit Corporation does not receive comparable treatment, and more than half of the secured claim of A. C. James Co. is cut off entirely, is a clear violation of the doctrine of priorities reaffirmed by this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106.

In *Case* v. *Los Angeles Lumber Products Co., supra,* this Court held that stockholders could not participate in the reorganization of an insolvent corporation upon the basis of the tenuous considerations alleged. The Court said (308 U. S. at p. 122):

> "In view of these considerations we believe that to accord 'the creditor his full right of priority against the corporate assets' where the debtor is insolvent, the stockholder's participation must be based on a contribution in money or in money's worth, reasonably equivalent in view of all the circumstances to the participation of the stockholder."

In the light of this principle the preferential treatment accorded to Reconstruction Finance Corporation cannot be justified. It is not "based on a contribution in money or in money's worth" which is reasonably equivalent to the reward conferred. No provision is made for a public offering of the new first mortgage bonds; no finding was made as to the fair value of these bonds or that they could not be sold at par or better.

Under the *Los Angeles* case the Court had ample power and discretion to make the needed finding as to "money's worth" and equivalency but there is no finding and no evidence that the value to the debtor's estate of the pro-

posed purchase of bonds by Reconstruction Finance Corporation is "reasonably equivalent in view of all the circumstances" to the value of the preference accorded to that Corporation.

Furthermore, the reward and preference which the Commission Plan contemplates for the Reconstruction Finance Corporation is in violation of the provisions of the Reconstruction Finance Corporation Act and Emergency Relief and Construction Act of 1932 (15 U. S. C. A., chap. 14, § 605), which authorizes loans to railroads engaged in interstate commerce only when such railroads are "unable to obtain funds through banking channels or from the general public." The section provides further:

> "* * * *Provided*, That no fee or commission shall be paid by any applicant for a loan under the provisions hereof in connection with any such application or any loan made or to be made hereunder, and the agreement to pay or payment of any such fee or commission shall be unlawful. * * *"

In addition to the above objections, it is now obvious that since the trustees of the debtor's properties now hold cash in an amount in excess of the total amount due on the Trustees' Certificates outstanding (see brief of Institutional Bondholders, p. 110), and this cash holding is rapidly increasing, it is at least doubtful that there is need for the issue of the proposed new first mortgage bonds in that amount to furnish new money "needed" for the purposes of the reorganization.

The preference is unfair, inequitable, discriminatory and contrary to law.

POINT VIII

The General and Refunding Mortgage is a first lien upon assets of the debtor sufficient in value to cover fully the claims of the three secured creditors, including this respondent.

The unfair and discriminatory treatment of A. C. James Co. and The Railroad Credit Corporation in relation to First Mortgage bondholders and Reconstruction Finance Corporation results principally from the Commission's drastic limitation upon capitalization and its failure to recognize and give legal effect in the plan of reorganization to the value of the debtor's property. The value of the property of the debtor on the basis of "earning power" and other relevant factors, we contend, is more than sufficient to provide fully for the claims of all secured creditors.

This unfair and discriminatory treatment also results from erroneous determinations of the Commission and Court as to the priority and coverage of the debtor's General and Refunding Mortgage. A. C. James Co. contends that the assets of the debtor upon which the General and Refunding Mortgage constitutes a prior lien, when taken with the assets upon which such mortgage constitutes a lien subject only to the First Mortgage of the debtor, are sufficient to cover fully the secured claims of Reconstruction Finance Corporation, The Railroad Credit Corporation and A. C. James Co., and hence, that all three of these secured creditors should receive treatment as favorable as that accorded to First Mortgage bondholders.

In support of its contention as to the coverage and priority of the debtor's General and Refunding Mortgage and the adequacy of the security held by it thereunder, A. C. James Co. adopts and relies upon the brief and argument submitted on behalf of the Irving Trust Company of New York, Trustee under the debtor's General and Refunding Mortgage.

IN CONCLUSION

At pages 4 to 9 of this brief there are set forth some of the reasons why it is desirable that this Court, in the interests of substantial justice, fully consider and definitely dispose of the broad issues as to the construction of Section 77 of the Bankruptcy Act which arise in this proceeding.

To this respondent it seems entirely clear, on the record before this Court, that the Circuit Court of Appeals for the Ninth Circuit correctly decided the issues which it considered, and should be affirmed. There are, however, weighty considerations, both of private interest and of public interest, which render it desirable, and almost essential in the interests of substantial justice, that this Court at this time consider broadly the construction of Section 77 of the Bankruptcy Act in its application to the facts before it in this proceeding.

Section 77 has by no means accomplished, in this proceeding or in other similar proceedings, the objectives sought by Congress. It has not, in practical operation, facilitated and speeded up the reorganization of those railroads which found themselves unable to meet their fixed charges, as a result of the enormous shrinkage in traffic which followed the 1929 collapse. It has not proved itself to be better machinery for reorganization than the old equity proceedings.

This failure to accomplish the legislative purposes is not due to any inherent defect in Section 77. The difficulties in administering Section 77 have clearly resulted from an attempted administrative distortion of the clear language of the statute. An unrealistic and doctrinaire distortion of the statute has resulted from an attempt to read into the statute economic and political theories which were not within the contemplation of Congress and have no practical justification. Only such a distortion of the language

of Section 77 can explain (but not justify) the result reached in this proceeding, where the Commission's theory led it to confiscate the larger part of the claim of a secured creditor (this respondent) without any such finding of the value of the debtor's property as would justify such confiscation.

The errors which the Circuit Court of Appeals found in the proceedings below were due to basic errors in the construction of Section 77 of the Bankruptcy Act. These errors were in no sense due to an inadvertent administration of the statute; they root back into a basic misconstruction of the legislative mandate which was embodied in Section 77.

Only if the statute is given finality at this time by a clear and comprehensive construction of the legislative intent embodied in Section 77 of the Bankruptcy Act, and its appropriate application to this proceeding, can the substantial interests of the parties to this proceeding be protected and the public interest conserved.

WHEREFORE, this respondent prays this Court that it dispose of all substantial issues raised before it in this proceeding, and, on the basis of its construction of Section 77, and its disposition of the substantial issues herein raised, that it affirm the decision of the Circuit Court of Appeals for the Ninth Circuit here under review.

Respectfully submitted,

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HORACE E. WHITESIDE,
of Counsel.

October 3, 1942.

APPENDIX.

Section 77 of the Bankruptcy Act (47 Stat. 1474 as amended by 49 Stat. 911, 49 Stat. 1969 and 53 Stat. 1406; 11 U. S. C. A. §205).

SEC. 77. REORGANIZATION OF RAILROADS ENGAGED IN INTERSTATE COMMERCE.—(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"): *Provided,* That when any railroad, although engaged in interstate commerce, lies wholly within one State, such proceedings shall be brought in the Federal district court of the district in which its principal operating office in such State during the preceding six months or the greater portion thereof has been located. The petition shall be accompanied by payment to the clerk of a filing fee of $100, which shall be in addition to the fees required to be collected by the clerk under other sections of this Act. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which such order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with

this section, which a Federal court would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and any other rules which it may deem advisable in order to aid district courts and circuit courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor." Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned, either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which such other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of such other debtor; and upon the filing of such petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon such court, if it approves such petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to such other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of such corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if such corporation has not filed a petition under this sec-

tion, file with the court in which such corporation might file a petition under this section, a petition stating that such corporation is insolvent or unable to meet its debts as they mature and that such creditors have claims aggregating not less than 5 per centum of all such indebtedness of such corporation and propose that it shall effect a reorganization; copies of such petition shall be filed at the same time with the Commission and served upon such corporation. Such corporation shall, within ten days after such service, answer such petition. If such answer shall admit the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If such answer shall deny either the jurisdiction of the court or any material allegation of the petition the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury and if he shall find that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise he shall dismiss the petition. If any such petition shall be so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. In case any petition shall be dismissed, neither the petition nor the answer of a debtor shall constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evidence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this Act or in any State or Federal court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors shall, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear

and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations of the petition are sustained by the proofs, shall dismiss the petition.

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien

at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor, because such contract or lease had been previously adopted. The term "securities" shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term "stockholders" shall include the holders of voting-trust certificates. The term "creditors" shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

The term "claims" includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 60 of this Act shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) hereof. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section.

(c) After approving the petition:

(1) The judge shall forthwith (and in pending proceedings immediately upon the effective date of this amendatory section) require the debtor to give such notice as the order may direct to the mortgage trustees, creditors and stockholders, and to cause publication thereof for such period and in such newspapers as the judge may direct, of a hearing to be held not later than thirty days

after the date of such order, at which hearing or any adjournment thereof the judge shall appoint one or more trustees of the debtor's property. Such appointments shall become effective upon ratification thereof by the Commission without a hearing, unless the Commission shall deem a hearing necessary. Where a trustee is appointed who within one year prior thereto has been an officer, director, or employee of the debtor corporation, any subsidiary corporation, or any holding company connected therewith, the judge, subject to ratification by the Commission as herein provided, shall appoint another trustee or trustees who shall not have had any such affiliations: *Provided*, That the appointment of such additional trustee or trustees shall not be required for a debtor the annual operating revenues of which were less than $1,000,000 for the previous calendar year.

(2) The judge shall fix the amount of the bond of every trustee. He may thereafter terminate any such appointments on cause shown, and may in that event and in the event of a vacancy from any other cause, in the manner and within the qualifications herein provided for the appointment of trustees, appoint a substitute trustee or trustees, and in the same manner and within the same qualifications may appoint an additional trustee, and shall fix the amount of the bond of every such substitute or additional trustee or trustees. The judge shall in his discretion confirm the appointment of such legal counsel for the trustees as they shall select, with power of removal. The trustee or trustees and their counsel shall receive only such compensation from the estate of the debtor as the judge may from time to time allow within such maximum limits as may be approved by the Commission as reasonable. The trustee or trustees so appointed, upon filing such bond, shall have all the title and shall exercise, subject to the control of the judge and consistently with the provisions of this section, all of the powers of a trustee

appointed pursuant to section 44 of this Act or any other section of this Act, and, to the extent not inconsistent with this section, if authorized by the judge, the powers of a receiver in an equity proceeding, and, subject to the control of the judge and the jurisdiction of the Commission as provided by the Interstate Commerce Act as now or hereafter amended, the power to operate the business of the debtor. Prior to the appointment of a trustee, the debtor on behalf of the court shall continue in the possession of the property and shall operate the business thereof during such period, and shall have all the title to the property and shall exercise all power consistent with the provisions of this section, subject at all times to the control of the judge, and to such limitations, restrictions, terms, and conditions as he may from time to time impose and prescribe.

(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission, in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful.

(4) The judge shall require the officers of the debtor or the trustee or trustees, at such time or times as the judge may direct, and in lieu of the schedules required by section 7 of this Act, to file with the court such schedules and submit such other information as may be necessary to disclose the conduct of the debtor's affairs and the fair-

ness of any proposed plan; and shall direct the officers of the debtor, or the trustee or trustees, within such time as the judge shall set, to prepare and file with the court a list of all known bondholders and creditors of the debtor, and the amounts and character of their debts, claims, and securities, and the last known post-office address or place of business of each bondholder and creditor, and a list of all known stockholders of the debtor, with the last known post-office address or place of business of each, which lists the judge may require to be brought down to date at any time. The contents of such lists shall not constitute admissions by the debtor or the trustees in a proceeding under this section or otherwise.

(5) [Securing information as to holders of securities.]

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(6) [Rejection of leases.]

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(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown; the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests. Such division shall not provide for separate classification unless there be substantial differences in priorities, claims, or interests. The trustee or trustees under any mortgage, deed of trust, or indenture outstanding against the property may, within the time prescribed, file a verified claim in behalf of all bonds or securities outstanding under such mortgage, deed of trust, or indenture, in which event it shall be unnecessary for the holders of such bonds or

securities to file claims in their own behalf, but nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization.

(8) The judge shall cause reasonable notice of the period in which claims may be filed, of hearings on application for the dismissal of the proceedings, or for the final allowance of fees or expenses to be given creditors and stockholders by publication or otherwise.

(9) [Reports of fraud, etc.]

* * * * * * * * * * *

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the Commission, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the Commission for its recommendations after hearings thereon if the parties shall so request and/or the Commission determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The Commission may direct such of its agencies as it may designate to file in the proceedings before the Commission a report, and additional or supplemental reports at such time or times as the Commission shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the Commission, after hearing if it deems necessary, shall determine to be necessary or help-

ful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the Commission and shall be borne by the debtor's estate.

(12) [Allowances.]

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(13) The judge may on his own motion or at the request of the Commission refer any matters for consideration and report, either generally or upon specified issues, to one of several special masters who shall have been previously designated to act as special masters in any proceedings under this section by order of any circuit court of appeals and may allow such master a reasonable compensation for his services and actual and reasonable expenses. The circuit court of appeals of each circuit shall designate three or more members of the bar as such special masters whom they deem qualified for such services, and shall from time to time revise such designations by changing the persons designated or their number, as the public interest may require: *Provided, however,* That there shall always be three of such special masters qualified for appointment in each circuit who shall hear any matter referred to them under this section by a judge of any district court. The debtor, any creditor or stockholder, or the duly authorized committee, attorney or agent of either or the trustee or trustees of any mortgage, deed of trust or indenture pursuant to which securities of the debtor are outstanding, shall have the right to be heard on all questions arising in the proceedings, and, upon petition therefor and cause shown, any such person or any

other interested party may be permitted to intervene. The judge may, after hearing, make reasonable rules defining the matters upon which notice shall be given to other than interveners and the manner of giving such notice.

(d) The debtor, after a petition is filed as provided in subsection (a), shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of the effective date of this Act, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court.

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far

as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: Provided, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time

of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is

required under this subsection holding, more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law; *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): Provided further, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interests in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order

and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have accepted

it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention; and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended. The provisions of title I and of section 5 of the Securities Act of 1933, as amended,

shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (*e*), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof.

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

(h) [Revenue acts inapplicable to issuance, etc. of securities.]

* * * * * * * *

(i) [Transfer of title between receivers and trustees or to debtor.]

* * * * * * * * *

(j) [Restraining or staying commencement or continuation of proceedings against debtor; removal of causes; owners' rights to equipment leased or conditionally sold unaffected.]

* * * * * * * * *

(k) [Certified copy of order confirming plan or directing conveyance of property as evidence.]

* * * * * * * * *

(l) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed.

(m) The term "railroad corporation" as used in this amendatory section means any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban, or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment. Wherever used in this section the term "person" shall include an individual, corporation, partnership, association, joint-stock company, unincorporated organization, or a government or political subdivision thereof.

(n) [Claims of employees for personal injuries and claims of sureties as preferred claims; change in wages or working conditions regulated; moving shops, etc. regulated.]

* * * * * * * * *

(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by the Interstate Commerce Act as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. Any such order of the judge shall be a final order for the purposes of appeal. The judge may order and decree any sale of property, whether or not incident to an abandonment, under this subsection at public or private sale and subject to or free from liens. The proceeds derived from any such sales shall be received by the trustee or trustees subject, in case the property was sold free from lien, to any liens thereon at the time of sale, and shall be applied or disposed of in such manner as the judge by further order shall direct. The expense of such sale shall be borne in such manner as the judge may determine to be equitable. The judge may order the trustee or trustees of the debtor to deposit such proceeds with any mortgage trustee entitled thereto, to be applied in payment of all or part of such mortgage.

(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receiver-

ship proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission after hearing by order authorizes such solicitation, use, employment, or action: *Provided, however,*

That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

Every application for authority shall be made in such form and contain such matters as the Commission may

prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this subsection relates.

Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a mis-

demeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to the effective date of this amendatory section in connection with proceedings under this section as in force prior to such effective date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided*, That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses.

(q) The provisions of section 12 of the Interstate Commerce Act, as amended March 2, 1889, February 10, 1891,

and February 28, 1920, shall be applicable to enable the Commission to perform its duties under this section and the provisions of such section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

(r) If any provision of this amendatory section, or the application thereof to any person or circumstances, is held invalid, the remainder of this amendatory section, or application of such provision to other persons or circumstances, shall not be affected thereby.

(s) Proceedings pending under this section (Act of March 3, 1933) on the effective date of this amendatory section shall continue under, and be governed by, the provisions of this amendatory section: *Provided*, That the enactment of this amendatory section shall not invalidate any action taken before its effective date pursuant to this section as it existed prior to the enactment of this amendatory section.

Report of the Interstate Commerce Commission, dated November 20, 1930 (Original Exhibit No. 47, R. 2323)

FINANCE DOCKET NO. 8548

WESTERN PACIFIC RAILROAD COMPANY
DEBENTURES

Submitted November 18, 1930. Decided November 20, 1930

Authority granted to issue $5,000,000 of 5 per cent gold debentures to be sold to the highest bidder at not less than par and accrued interest and the proceeds used in connection with the construction and acquisition of an extension to the applicant's railroad.
F. M. Angellotti for applicant.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND MAHAFFIE

By DIVISION 4:

The Western Pacific Railroad Company, a common carrier by railroad engaged in interstate commerce, has duly applied for authority under section 20a of the interstate commerce act to issue $5,000,000 of 5 per cent gold debentures. No objection to the granting of the application has been presented to us.

The debentures are to be issued in connection with the financing of the applicant's Northern California extension. The construction by the applicant of approximately 112 miles of the extension and the construction and/or acquisition by it of approximately 36 miles jointly with the Great Northern Railway Company was authorized by our certificate and order of June 9, 1930, in *Great Northern Ry. Co. Construction*, 166 I. C. C. 3. A description of the extension is contained in our report in that proceeding;

The applicant has estimated the total cost to it of the construction and acquisition of the extension as $10,049,077. A portion of this amount will be derived from proceeds of $5,000,000 of its first-mortgage bonds authorized by our order of October 6, 1930, in *Western Pac. R. Co. Bonds,* 166 I. C. C. 536. The $5,000,000 of proposed debentures are to be issued to provide additional funds to be applied in payment of the cost of the extension.

The debentures will be issued under an indenture to be entered into between the applicant and the Chase National Bank of the City of New York, as trustee, under date of July 1, 1930. They may be issued in coupon or registered form in denominations of $500, $1,000, or any multiple thereof, the coupon debentures to be dated July 1, 1930, and the registered debentures to be dated as of July 1 or January 1 next preceding the date of issue, unless issued on either of those dates, in which event they are to be dated the date of issue. They will bear interest at the rate of 5 per cent per annum, payable semiannually on January 1 and July 1, and will mature January 1, 1950. All or any part of them will be redeemable at the election of the applicant on any interest date prior to maturity at par and accrued interest.

The indenture will provide that not to exceed 50 per cent of the cost of the extension shall be met by the issue of debentures and that the amount of debentures which may be issued and outstanding at any one time shall not exceed $5,000,000. In the indenture the applicant will covenant that, so long as any of the debentures shall be outstanding, neither the applicant nor any of its subsidiaries will mortgage or, except as required by the applicant's first mortgage dated June 26, 1916, pledge any property now owned or hereafter acquired, without calling for redemption all outstanding debentures, and making suitable provision for their payment. The covenant, however, does not restrict the issue of securities,

including the securing thereof by mortgage or pledge, by subsidiary companies so far as permitted by the first mortgage, or apply to purchase-money mortgages or pledges, or to the acquisition of property already subject to lien, the issue or reissue of bonds or other obligations issuable under any existing mortgage or deed of trust, the extension or refunding of bonds or other obligations issued thereunder, or the issue of equipment-trust obligations.

A written offer to purchase the debentures was made by the A. C. James Company, but as that company and the applicant to some extent have interlocking officers and directors the proposal has taken the form of an offer to bid at par for the debentures upon a public sale thereof. The applicant therefore proposes to offer the debentures at public sale to the highest bidder at not less than par and accrued interest.

We find that the proposed issue by the Western Pacific Railroad Company of $5,000,000 of 5 per cent gold debentures as aforesaid (*a*) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered.

Report of the Interstate Commerce Commission, dated February 27, 1932 (Original Exhibit No. 53, R. 2341)

FINANCE DOCKET No. 9162

WESTERN PACIFIC RAILROAD COMPANY SECURITIES

Submitted February 27, 1932. Decided February 27, 1932

Authority granted to issue not exceeding $15,000,000 of general and refunding mortgage gold bonds, series A, and a promissory note or notes for not exceeding $5,000,000, said bonds or such part thereof as may be required, to be pledged as collateral security for a loan or loans and for the notes; and the notes to be exchanged at not less than par for an equal amount of outstanding 5 per cent debentures.

Frank M. Angellotti and *Carl Taylor* for applicant.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND MAHAFFIE

By DIVISION 4:

The Western Pacific Railroad Company, a common carrier by railroad engaged in interstate commerce, by its application as amended, has duly applied for authority under section 20a of the interstate commerce act to issue not exceeding $15,000,000 of general and refunding mortgage gold bonds, series A, and a note or notes in the aggregate face amount of not exceeding $5,000,000, maturing not less than three years nor more than four years and 11 months from the date thereof, and to pledge

the bonds as collateral security for a certain loan or loans and for the note or notes. No objection to the granting of the application has been presented to us.

Our order of November 20, 1930, in *Western Pac. R. Co. Debentures,* 166 I. C. C. 720, authorized the applicant to issue not exceeding $5,000,000 of 5 per cent gold debentures in connection with the financing of its Northern California extension. By the indenture dated July 1, 1930, to the Chase National Bank of the City of New York, under which the debentures were issued, the applicant covenanted that, so long as any of the debentures were outstanding, neither it nor any of its subsidiaries, would mortgage or, except as required by the applicant's first mortgage dated June 26, 1916, pledge any property now owned or hereafter acquired, without calling for redemption all outstanding debentures and making suitable provision for their payment. The debentures were sold to the A. C. James Company. Under the terms of the sale it appears that that company has from time to time taken delivery of various amounts of the debentures so that as of February 8, 1932, the amount outstanding was $4,504,000, but is obligated to take the entire issue.

The applicant proposes to make a new mortgage on its properties and to do this must comply with the covenant mentioned. Therefore, it has arranged with the holder of the debentures to pay them by issuing to it a 5 per cent note or notes of an equal amount, to mature not less than 3 years nor more than 4 years 11 months from the date thereof, and to be secured by the pledge of bonds to be issued under the proposed mortgage. The note or notes will contain a provision for the acceleration of the maturity of the principal thereof in case of default under the first mortgage, or the proposed new mortgage, or any of the loans made to the applicant by the Reconstruction Finance Corporation or the Railroad Credit Corporation,

such provision for acceleration of principal to be in the form agreed upon by the applicant and the A. C. James Company. The applicant seeks authority to issue a note or notes in the maximum amount necessary to pay all the debentures which may be issued and outstanding under the authority heretofore granted.

The proposed new mortgage will be known as the applicant's general and refunding mortgage, will be dated as of January 1, 1932, and will be made to the Chase National Bank of the City of New York, as trustee. The mortgage will limit the amount of bonds that may be outstanding thereunder at any one time to $100,000,000, and will provide for the issue of bonds to refund the applicant's first-mortgage bonds issued under its first mortgage dated June 26, 1916, and the $5,000,000 of debentures issued under the indenture of July 1, 1930. The mortgage will also provide that bonds may be issued in series as determined by the board of directors, and under section 1 of article two $15,000,000 of general and refunding mortgage bonds of any series, one or more, may be authenticated and delivered without further action on the part of the applicant, except the filing with the trustee of (1) resolutions of the board of directors, requesting authentication and delivery of the bonds, and (2) an opinion of counsel. Pursuant to these provisions, the board of directors has determined that the initial series of general and refunding mortgage gold bonds in the total amount of $15,000,000 is to be designated series A.

The series A bonds may be issued either in coupon or registered form, coupon and registered bonds being interchangeable. Coupon bonds in denominations of $1,000 and $500 will be dated January 1, 1932, and registered bonds in the denomination of $1,000 or any multiple thereof will be dated the day of issue, if an interest date, or, if not, the last preceding interest date, and will bear interest

from the date thereof. The bonds of this series will be redeemable at the applicant's election either in whole or in part on any interest date at par and accrued interest, will bear interest at the rate of 5 per cent per annum, payable semiannually on January 1 and July 1, and will mature January 1, 1957.

The applicant has applied for a loan from the Reconstruction Finance Corporation to aid in temporarily financing its requirements and has also applied for a loan from the Railroad Credit Corporation to enable it to meet its fixed interest charges maturing on March 1, 1932. The applicant states that since the filing of these applications it has been advised that the Railroad Credit Corporation is without funds and that arrangements have been made between the two corporations whereby it is expected the Reconstruction Finance Corporation will loan to the applicant the amount applied for from the Railroad Credit Corporation, or so much thereof as may be approved.

In applying for the loans mentioned, the applicant offered to pledge as security for each of the loans such principal amount of the proposed general and refunding mortgage gold bonds, series A, as the corporation making the loan should require and we should approve. As part of its agreement to accept in payment for the outstanding debentures a 5 per cent note or notes of a like face amount, the holder of the debentures required that the applicant should pledge as security for the note or notes general and refunding mortgage bonds, such security to be of the same maturity, to bear the same rate of interest, and to be comparable in all respects with the security for the loan or loans. Accordingly, the applicant requests authority to pledge series A bonds as collateral for the note or notes on the same basis at which they are pledged for the loans.

There was not submitted with the application in support of the proposed bonds a report of uncapitalized ex-

penditures listed on Form A, as required by our order of February 19, 1927, respecting applications filed under section 20a of the act. Because of the urgency of the applicant's receiving the authority sought, we will not require that the statement of expenditures and supporting data be filed before acting upon the application, but our order to be entered herein will require the applicant to file the requisite report on Form A together with the supporting data within three months from the date of the order. In the absence of specific expenditures to support the proposed bonds, it will be necessary to consider the applicant's capital assets and capital liabilities as shown by its general balance sheet as of December 31, 1931, filed with the application.

The investment in road and equipment amounts to $138,404,243.38, and "accrued depreciation, equipment" is shown at $7,537,331.79. Miscellaneous physical property amounts to $1,816,929.57. The greater portion of this amount represents the cost of real estate in San Francisco, Oakland, and Oakland Moie, Calif., held for the development of terminal facilities and the relocation of the applicant's main line in the city of Oakland; an appreciable portion of the amount represents investment in track material leased to various companies and would be classifiable as working capital; the remainder consists mostly of improved and unimproved property adjacent to the right of way located at various points along the line. While we are without an analysis of the various items comprising the investment in miscellaneous physical property, it appears that most of the property is either being used for railroad purposes or is intended ultimately to be used for such purposes. For the purposes of this application the entire amount will be considered as part of working capital. The investments in affiliated companies aggregate $14,781,334.36. The capital stock, bonds, and notes of subsidiary companies owned by the applicant will be pledged under

the proposed general and refunding mortgage subject to their prior pledge, if so pledged, under the applicant's first mortgage. Included under investments in affiliated companies are the following: Subscriptions to capital stock of Western Pacific California Railroad $27,500, Railway Express Agency, Incorporated, capital stock $200, advances $9,600, total $37,300. The applicant does not claim that any of these items are capitalizable. Under investments in affiliated companies are also various amounts of advances to subsidiary companies aggregating $3,473,533.33. It appears that a portion of the advances was made for operating expenses and therefore would not be capitalizable. As to the remainder, the capitalization thereof by the issue of proposed bonds would be premature and should be postponed until the subsidiaries have issued and delivered to the applicant their securities in satisfaction of the advances and such securities have been or will be pledged under the proposed general and refunding mortgage. See *Stock of Baltimore & O. R. Co.*, 154 I. C. C. 258, 260.

Giving effect to the foregoing, capital assets would consist of the following:

Investment in road and equipment	$138,404,243.38	
Less "accrued depreciation — equipment"	7,537,331.79	
		$130,866,911.59
Investments in affiliated companies		11,270,501.43
Working capital:		
Cash	946,117.22	
Material and supplies	2,255,823.50	
Miscellaneous physical property	1,816,929.57	
		4,918,870.29
Total		147,056,283.31

The outstanding capital liabilities consisted of the following:

Common stock	$ 47,500,000
Preferred stock	28,300,000
First-mortgage 5 per cent gold bonds	47,940,100
5 per cent gold debentures	4,154,000
Equipment-trust certificates	4,925,000
Total	132,819,100

As has been indicated above, the amount of outstanding 5 per cent gold debentures had increased from $4,154,000, the amount shown in the balance sheet, to $4,504,000 on February 8, 1932, and it is probable that the entire authorized amount of $5,000,000 will ultimately be issued. The proposed issue of not exceeding $5,000,000 of promissory notes and the pledge as security therefor of proposed general and refunding mortgage bonds for the purpose of paying the outstanding debentures are in the nature of temporary financing, inasmuch as under the proposed general and refunding mortgage $5,000,000 of bonds issuable thereunder is reserved to refund a like amount of 5 per cent gold debentures. Therefore, for the purpose of this application and a comparison of capital assets and capital liabilities, the $4,154,000 of outstanding debentures should be considered as having been replaced by the issue of $5,000,000 of general and refunding mortgage bonds. This change would increase the total capital liabilities to $133,665,100, making the excess of capital assets over capital liabilities amount to $13,391,183.31. It has been intimated that $5,000,000 of the proposed $15,000,000 of general and refunding mortgage bonds will ultimately be issued to refund a like amount of outstanding debentures. Therefore, it appears that the remaining $10,000,000 of proposed bonds may be considered as being issuable against the excess of capital assets over capital liabilities in the amount shown above.

In *Western Pacific Ry. Co.*, 29 Rep. 239-279, we reported the value of the property of the applicant as of June 30, 1914, pursuant to section 19a of the act. We there found the value for rate-making purposes of property owned and used by the applicant to be $63,861,208, including $561,208 for working capital. In addition, there was a small amount of common-carrier property owned but not used, and the applicant held other property which we classified as noncarrier, including lands, structures, and rights in the public domain, for which we found a value of $4,469,003. As accurately as it could be determined, the original cost of all the applicant's property as of valuation date was found to be $72,555,963.87. The investment in road and equipment, including land, as stated in the applicant's books at that time, was $156,318,136.40. Subsequent to valuation date the applicant was reorganized and the investment in road and equipment as stated on its books was reduced to approximately $83,000,000. Since valuation date the applicant has reported net additions and betterments to its property to the end of 1930 costing $39,030,394. If this amount be added to the value formerly found for the applicant's property, exclusive of working capital but including property owned and classified as noncarrier, this sum is approximately $106,800,000.

We find that the proposed issue (1) of not exceeding $15,000,000 of general and refunding mortgage gold bonds, series A, and (2) of a note or notes in the aggregate face amount of not exceeding $5,000,000 by The Western Pacific Railroad Company as aforesaid (*a*) is for lawful objects within its corporate purposes, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

Report of the Interstate Commerce Commission, dated March 24, 1932 (Original Exhibit No. 53, R. 2341)

FINANCE DOCKET NO. 9162

WESTERN PACIFIC RAILROAD COMPANY SECURITIES

Submitted March 18, 1932 *Decided March 24, 1932*

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1. Order of February 27, 1932, 180 I. C. C. 652, amended so as to permit the applicant to issue, substantially in the form submitted with the supplemental application a note or notes in the aggregate face amount of not exceeding $5,000,000, to pledge as collateral security therefor general and refunding mortgage gold bonds, series A, in the ratio of not exceeding $125, principal amount, of bonds to each $100, face amount, of notes, and to exchange the notes at not less than par for not exceeding $5,000,000 of the applicant's 5 per cent gold debentures.

2. Authority granted, upon the surrender and cancellation of a note for $4,504,000 to issue in exchange therefor a note or notes in an equal aggregate face amount, to be secured by the pledge of $5,630,000, principal amount, of the applicant's general and refunding mortgage gold bonds, series A, provided that the total amount of notes to be outstanding at any one time under authority of the original and supplemental orders shall not exceed $5,000,000, and that the total amount of bonds to be pledged as collateral security for the notes shall not exceed $6,250,000.

Carl Taylor for applicant.

SUPPLEMENTAL REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND MAHAFFIE

By Division 4:

Our order of February 27, 1932, in this proceeding, 180 I. C. C. 652, authorized The Western Pacific Railroad Company, the applicant herein, to issue not exceeding $15,000,000 of general and refunding mortgage gold bonds, series A, and a promissory note or notes in the aggregate face amount of not exceeding $5,000,000, to pledge the bonds as collateral security for a loan or loans and for the notes, and to exchange the notes at not less than par for an equal amount of the applicant's outstanding 5 per cent gold debentures.

By a supplemental application filed herein on March 16, 1932, the applicant seeks an amendment of the order so as to permit it to pledge the general and refunding mortgage gold bonds, series A, as collateral for the notes at the ratio hereinafter stated and to exchange the promissory notes for not exceeding $5,000,000 of 5 per cent gold debentures. Authority is also sought to issue a new note or notes in the principal amount of $4,504,000 in exchange for, and upon the surrender and cancellation of, a note in a like amount issued March 1, 1932, under the authority heretofore granted. No objection to the granting of the supplemental application has been presented to us.

The order of February 27, 1932, authorizes the general and refunding mortgage bonds to be pledged for the promissory note or notes in the same ratio as that for a loan or loans from the Railroad Credit Corporation or the Reconstruction Finance Corporation. The applicant shows that subsequent to the entry of the order of February 27, 1932, the holder of the 5 per cent gold debentures consented to modify its previous agreement and to accept as collateral for the note issued in exchange for the debentures general and refunding mortgage bonds in the ratio of $125, principal amount, of bonds, for each $100, face amount, of the note. Authority is sought to pledge

at the ratio indicated not exceeding $6,250,000 of bonds as collateral for not exceeding $5,000,000 of promissory notes.

The report filed with and made a part of the order of February 27, 1932, indicated that as of February 8, 1932, the debentures outstanding amounted to $4,504,000, but it also indicated that the total amount that might eventually be issued and outstanding was $5,000,000, as authorized by our order of November 20, 1930, in *Western Pac. R. Co. Debentures*, 166 I. C. C. 720, and that authority was sought to issue a note or notes in the maximum amount necessary to pay all the debentures which might be issued and outstanding under that order. However, the order of February 27, 1932, provided that the $5,000,000 of notes therein authorized to be issued was to be exchanged at not less than par for an equal amount of the applicant's outstanding 5 per cent gold debentures, which then amounted to $4,504,000. As the applicant proposes to issue presently $347,000 additional debentures, and expects to issue other debentures up to the authorized limitation of $5,000,000, all of which will be exchanged for notes as aforesaid, it considers it desirable to have the order modified so as to indicate that the notes may be exchanged for a maximum of $5,000,000 of debentures.

At the date of the original order in this proceeding a form or specimen of the proposed notes had not been filed and the order required that within 10 days after the execution of the note or notes the applicant should file with us a specimen or copy thereof. The applicant has complied with that part of the order and has filed a copy of its note dated March 1, 1932, for $4,504,000, payable three years after date, to the A. C. James Company, or order. A copy of this note is also filed with the supplemental application. It bears interest at the rate of 5 per cent per annum, payable quarterly on April 1, July 1, October 1, and January 1, and is secured by the pledge of $5,630,000 of the applicant's general and refunding mortgage gold bonds, series A. The applicant agrees to deposit with

the payee such additional security as the payee may from time to time demand. Provisions are also made for selling or otherwise disposing of the collateral in the event of the nonperformance of certain covenants and agreements therein specified, and for the payee's transferring the note and the collateral therefor. Authority is sought to issue a new note or notes to replace the note already issued. Any authority herein granted is not to be construed as authorizing the applicant to pledge as collateral for the note or notes any additional securities issued or assumed by it without first obtaining our authorization under section 20a.

We find that the issue by The Western Pacific Railroad Company (1) of not exceeding $15,000,000 of general and refunding mortgage gold bonds, series A, and of a note or notes in the aggregate face amount of not exceeding $5,000,000, as heretofore authorized, such an amount of the bonds as may be required, not exceeding $6,250,000, principal amount, to be pledged as collateral security for the note or notes at the ratio of not exceeding $125, principal amount, of bonds to each $100, face amount, of notes, and the note or notes to be substantially in the form submitted with the supplemental application, and (2) of a note or notes in the face amount of not exceeding $4,504,000 in exchange for a note for a like amount issued under authority of our order of February 27, 1932, herein, the new note to be substantially in the form submitted with the supplemental application and to be secured by the pledge of not exceeding $5,630,000 of the bonds to be pledged as collateral for notes authorized by that order, (*a*) is for lawful objects within its corporate purposes, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) is reasonably necessary and appropriate for such purposes.

An appropriate supplemental order will be entered.

Report of the Interstate Commerce Commission, dated December 9, 1932 (Original Exhibit No. 92, R. 2458)

FINANCE DOCKET NO. 9572

WESTERN PACIFIC RAILROAD COMPANY BONDS

Submitted November 17, 1932. Decided December 9, 1932

1. Authority granted to issue not exceeding $4,000,000 of general and refunding mortgage gold bonds, series B, and to pledge applicant's equity therein, subject to their pledge to the Reconstruction Finance Corporation as collateral security for a note issued to the Railroad Credit Corporation amounting to $1,303,000, or any extension or renewal thereof. Condition prescribed.

2. That part of the application which seeks authority to pledge said bonds to the Reconstruction Finance Corporation dismissed.

Carl Taylor and *Rollin Browne* for applicant.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MEYER, EASTMAN, AND MAHAFFIE

BY DIVISION 4:

The Western Pacific Railroad Company, on August 5, 1932, applied for authority (1) to issue not exceeding $5,000,000 of general and refunding mortgage gold bonds, Series B, (2) to pledge them, or such amount thereof as we may authorize, to the Reconstruction Finance Corporation as collateral security for applicant's note dated June 29, 1932, for $734,584 payable to that corporation, or order, or for any extension or renewal thereof, and for

the payment of any other liability or liabilities of the applicant to the Finance Corporation, including a note dated March 1, 1932, for $799,000, and (3) to pledge all right, title, and interest in and to all of the series B bonds which may be pledged with the Finance Corporation, subject to the lien thereon of that corporation, to the Railroad Credit Corporation to secure the payment of applicant's note dated June 29, 1932, for $1,303,000, payable to the Credit Corporation, or order, or any extension or renewal thereof, as well as for the payment of any other liability or liabilities of the applicant to the Credit Corporation due or to become due or which may hereafter be contracted or existing, and as collateral for the payment of any and all indebtedness of the applicant to the Credit Corporation whether or not represented by a note or notes or in any manner secured and at any time or times incurred or to be incurred under the marshaling and distributing plan, 1934. No objection to the application has been offered.

The proposed bonds will be issued under and pursuant to the general and refunding mortgage dated January 1, 1932, made by the applicant to the Chase National Bank of the City of New York, trustee, and in accordance with the provisions of that mortgage a new series of bonds has been created to be designated as series B. The bonds of this series may be issued either in coupon or registered form, coupon and registered bonds being interchangeable. Coupon bonds in denominations of $1,000 and $500 will be dated July 1, 1932, and registered bonds in the denomination of $1,000, or any multiple thereof, will be dated the date of issue if an interest date, or, if not, the last preceding interest date, and will bear interest from the date thereof. The bonds of this series will be redeemable at the applicant's election either in whole or in part on any interest date at par and accrued interest, will bear interest at the rate of 5 per cent per annum, payable semi-annually on January 1 and July 1, and will mature January 1, 1957.

As part of the basis for the proposed issue of series B bonds, the applicant submits expenditures made during the period August 1, 1930, to May 31, 1932, for constructing its Northern California extension, in the amount of $10,183,641.90, of which $5,000,000 was capitalized by the issue of a like amount of first-mortgage gold bonds authorized to be issued by our order of October 6, 1930, in *Western Pac. R. Co. Bonds*, 166 I. C. C. 536, leaving $5,183,641.90 of expenditures to support the proposed bonds.

In *Western Pac. R. Co. Securities*, 180 I. C. C. 652, it was stated that the applicant had not submitted with the application filed in that proceeding a report of uncapitalized expenditures listed on form A, as required by our order of February 19, 1927, respecting applications filed under section 20a of the interstate commerce act and the order entered therein required the applicant to file such a report within three months from the date of the order. Pursuant to this requirement the applicant has filed the necessary form A purporting to show that during the period July 14, 1916, to January 31, 1932, it expended for capital purposes upon its properties and the properties of its subsidiaries the sum of $16,596,058.10 not theretofore used as a basis for capitalization.

The applicant states that if to this amount there be added the $10,183,641.90 above mentioned as having been expended in constructing the Northern California extension, the expenditures submitted in this and the previous applications would total $26,779,700. It is asserted that should there be deducted from that amount $1,303,679.79 which might not be considered properly capitalizable, consisting of sinking funds $326.02, deposits in lieu of mortgaged property sold $710.50, subscription to capital stock of Western Pacific California Railroad Company $27,500, Railway Express Agency capital stock $200, advances to subsidiary companies for other than capital purposes

$919,076.37, other advances $270,977.57, and other investments $84,889.33, there would remain $25,476,020.21 of expenditures, against which there has been issued and outstanding $19,999,500 of bonds, leaving $5,476,520.21 to support the proposed issue of $5,000,000 of series-B bonds.

To finance the cost of constructing its Northern California extension, the applicant was authorized to issue $19,000,000 of securities, consisting of $5,000,000 of first-mortgage gold bonds in *Western Pac. R. Co. Bonds, supra,* and $5,000,000 of 5 per cent gold debentures in *Western Pac. R. Co. Debentures,* 166 I. C. C. 720. As was indicated in *Western Pac. R. Co. Securities, supra,* and supplemental report therein, 184 I. C. C. 13, the applicant was authorized to issue to retire the 5 per cent debentures a promissory note or notes for not exceeding $5,000,000, to be secured by the pledge of not exceeding $6,250,000 of general and refunding mortgage gold bonds, series A. The applicant shows that the debentures have been retired by the issue of $4,999,800 of 3-year notes and a cash payment of $200. In the original report in the proceeding last cited, we stated that the issue of notes to retire the debentures was in the nature of temporary financing and that $5,000,000 of the series-A bonds therein authorized should be regarded as being issued to retire the debentures. Accordingly there has been authorized against the total expenditures above mentioned $5,000,000 of first-mortgage gold bonds and $15,000,000 of general and refunding mortgage gold bonds, series A, although the applicant has issued only $14,999,500 of the series-A bonds. Deducting from $25,476,020.21 the $20,000,000 of bonds authorized would leave $5,476,020.21 of expenditures as support for the series-B bonds. However, our examination of the expenditures made during the period July 14, 1916, to January 31, 1932, amounting to $16,596,058.10, discloses many duplications of expenditures submitted in prior applications as support for the issue of securities therein

sought, so that until these seeming discrepancies have been accounted for by the applicant, which has been requested of it, we are unable to accept as a basis for the issue of additional bonds the $5,476,020.21 of expenditures mentioned above.

Therefore, for the purposes of this application it will be necessary for us to consider as a basis for the issue of the series-B bonds the excess of capital assets over capital liabilities as shown by the applicant's general balance sheet as of May 31, 1932, and certain analytical statements. These assets and liabilities are as follows: Investment in road and equipment $139,226,500.53 less accrued depreciation, equipment, $7,885,379.55, net investment in road and equipment $131,341,120.98, miscellaneous physical property $1,029,513.85, investment in affiliated companies pledged under applicant's first mortgage $8,625,454, investment in affiliated companies pledged under applicant's general and refunding mortgage $2,642,648.38, advances to affiliated companies for additions and betterments (including $27,500 subscription to capital stock of the Western Pacific California Railroad Company), $2,276,316.04, working capital $2,880,994.35, consisting of cash $737,322.30 and material and supplies $2,143,672.05, total capital assets $148,796,047.60, common stock $47,500,000, preferred stock $28,300,000, first-mortgage 5 per cent gold bonds $49,290,100, general and refunding mortgage gold bonds, series A, $14,999,500, equipment-trust certificates $4,550,000, total capital liabilities $144,639,600.

The balance sheet shows investment in miscellaneous physical property in the amount of $1,817,379.03. The amount shown above as capitalizable consists of $862,429.18 representing property at Oakland, Calif., acquired for the purpose of relocating the applicant's main line and $167,084.67 representing leased track material. The remainder of the balance sheet figure for miscellaneous physical property represents investments in property of a character

not considered as affording a proper basis for capitalization. In addition to the amounts given above for advances to affiliated companies, the general balance sheet figures include, under investment in affiliated companies unpledged, other advances not considered as capitalizable and several small items representing investment in the capital stock of various companies. The sum of these items is $1,832,460.63, and consists principally of $1,383,477.43 of advances to carrier companies for purposes other than for additions and betterments, and $413,598.53 of advances to a land company. The general balance sheet shows none of the general and refunding mortgage bonds to be outstanding, but does show outstanding $4,999,800 of notes payable to A. C. James Company, and $2,102,000 of notes payable to the Reconstruction Finance Corporation. These notes are secured by the pledge of general and refunding mortgage bonds, series A, issued against capital expenditures. Therefore, for the purpose of comparing capital assets and liabilities, the primary obligations consisting of the notes have been excluded and instead there have been included the general and refunding mortgage bonds constituting the collateral security therefor.

The excess of capital assets over capital liabilities, as shown above, is $4,156,447.60, which may be accepted as a proper basis for additional capitalization and in respect of which the applicant may issue not exceeding $4,000,000 of the proposed bonds. Ordinarily, advances to affiliated companies carried in open account would not constitute an appropriate basis for the issue of capital securities, but inasmuch as the applicant included in the expenditures to January 31, 1932, amounting to $16,596,058.10, the expenditures made for additions and betterments to the properties of its affiliated companies, the advances from which such expenditures were made may, in this instance, be considered as capital assets upon condition that the applicant require the affiliated companies, upon due authorization,

to issue to it their capital stock, bonds, notes, or other obligations in payment and settlement of the advances, such securities upon their delivery to the applicant forthwith to be pledged with the trustee of its general and refunding mortgage dated January 1, 1932. The order to be entered herein will require that this be done.

As indicated above, the applicant requests authority to pledge the bonds as collateral security for two notes payable to the Finance Corporation and for the payment of any other liability or liabilities due or to become due, or which may hereafter be contracted or existing. As under the provisions of section 5 of the Reconstruction Finance Corporation Act, no authorization under section 20a of the interstate commerce act is necessary for the applicant to pledge its bonds as collateral for notes issued to evidence loans from the Finance Corporation, that part of the application will be dismissed.

The applicant also seeks authority to pledge its equity in the proposed bonds, subject to their pledge to the Finance Corporation, to the Credit Corporation for a note for $1,303,000 payable to that corporation, or order, on demand, but, if no demand is made, then on or before February 28, 1934, and any extension or renewal thereof, and for various other existing or possible obligations to the Credit Corporation. Our authorization herein will be limited to the pledge of the applicant's equity in the proposed bonds as security for the $1,303,000 note or any extension or renewal thereof.

We find that, subject to the condition indicated above, the proposed issue by The Western Pacific Railroad Company of not exceeding $4,000,000 of general and refunding mortgage gold bonds, series B, and the pledge by it of its equity therein, as collateral security for a note of $1,303,000 or any extension or renewal thereof, to the Railroad Credit Corporation as aforesaid (*a*) are for lawful objects within

its corporate purposes, and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (*b*) are reasonably necessary and appropriate for such purposes.

An appropriate order will be entered.

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY (c)

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER		Increase or Decrease.		PERIOD JANUARY 1 TO DEC	
	1940	1939	Amount	Per Cent	1940	1939
AVERAGE MILEAGE OR ROAD OPERATED	1,536.19	1,545.09	8.90	.58	1,547.00	1,571.92
OPERATING REVENUES						
Freight	$ 1,718,568.29	$ 1,351,283.31	$ 367,284.98	27.18	$ 18,701,678.52	$ 16,819,156.81
Passenger	73,747.22	56,303.33	17,443.89	30.98	860,046.90	1,014,887.10
Mail	4,893.72	6,115.30	1,221.58	19.98	41,830.53	45,135.06
Express	8,069.86	5,693.10	2,376.76	64.36	79,282.94	92,722.02
Dining Car, Hotel & Restaurant	8,049.54	5,076.44	2,973.10	58.57	82,231.30	97,561.41
Miscellaneous	19,025.36	18,236.36	786.91	4.31	233,271.80	238,059.06
Total Railway Operating Revenues	$ 1,830,363.89	$ 1,440,709.83	$ 389,644.06	27.05	$ 19,998,341.99	$ 18,307,521.45
OPERATING EXPENSES						
Maintenance of Way & Structures	$ 171,912.36	$ 209,115.24	$ 37,202.88	17.79	$ 3,082,805.73	$ 2,809,949.28
Maintenance of Equipment	246,236.01	262,768.04	16,533.03	6.29	2,820,508.72	3,097,290.12
Power	7,860.59	10,994.80	3,134.21	28.51	129,216.59	146,921.44
Traffic	64,792.76	64,192.52	600.24	.94	788,256.19	795,026.73
Transportation - Rail Line	684,360.24	610,015.57	74,534.67	12.22	7,367,110.31	7,033,671.20
Miscellaneous Operations	10,985.96	8,934.10	2,051.86	22.97	127,300.68	146,974.66
General	64,039.87	59,379.19	4,660.68	7.85	935,849.22	768,142.50
Transportation for Investment - Credit	3,769.77	3,312.59	457.18	13.80	11,653.55	9,529.91
Total Railway Operating Expenses	$ 1,246,607.02	$ 1,222,086.87	$ 24,520.15	2.01	$ 15,239,393.89	$ 14,778,446.02
NET REVENUE FROM RAILWAY OPERATIONS	$ 583,746.87	$ 218,622.96	$ 365,123.91	167.01	$ 4,758,948.10	$ 3,529,075.43
Excise and Use Tax Accruals	$ 41,933.18	$ 38,077.09	$ 3,856.09	10.13	$ 534,791.71	$ 498,429.69
Railway Tax Accruals - All Other	52,190.72	47,365.16	4,825.56	10.19	636,028.15	633,816.62
Railway Operating Income	$ 489,622.97	$ 133,180.71	$ 356,442.26	267.64	$ 3,588,128.24	$ 2,396,829.12
Hire of Equipment - Net Debit	$ 137,066.76	$ 116,035.63	$ 21,031.13	18.12	$ 1,338,079.09	$ 1,179,970.54
Joint Facility Rents - Net Credit	19,404.61	12,778.18	6,626.43	51.86	139,141.08	126,926.42
Net Railway Operating Income	$ 371,960.82	$ 29,923.26	$ 342,037.56	-	$ 2,389,190.23	$ 1,343,785.00
NON-OPERATING INCOME						
Rental of Property	$ 22,151.30	$ 23,967.33	$ 1,816.03	7.58	$ 296,247.83	$ 245,113.20
Interest Accruals	2,983.77	2,313.91	669.86	28.95	30,167.44	23,825.23
Miscellaneous	14,235.63	2,954.42	14,190.05	-	2,569.34	4,669.80
Total Non-Operating Income	$ 13,899.44	$ 29,235.66	$ 15,336.22	52.46	$ 327,984.61	$ 313,608.23
GROSS INCOME	$ 385,860.26	$ 59,158.92	$ 326,701.34	552.24	$ 2,717,174.84	$ 1,657,393.23
MISCELLANEOUS DEDUCTIONS						
Miscellaneous Rents	$ 2,579.16	$ 2,579.16	$ -	-	$ 31,038.93	$ 30,895.46
Miscellaneous Tax Accruals	5,459.03	5,180.98	278.05	5.37	59,655.47	59,564.55
Amortization of Discount	11,352.25	12,251.27	899.02	7.34	136,706.42	137,903.98
Miscellaneous	4,965.47	9,460.61	4,495.14	47.51	23,316.52	44,514.71
Total Miscellaneous Deductions	$ 24,355.91	$ 29,472.02	$ 5,116.11	17.36	$ 204,084.30	$ 272,878.70
AVAILABLE FOR INTEREST	$ 361,504.35	$ 29,686.90	$ 331,817.45	-	$ 2,513,090.54	$ 1,384,514.53
Interest on Funded Debt	$ 304,373.62	$ 238,930.65	$ 65,442.97	27.39	$ 3,653,106.90	$ 2,870,913.26
					47,976.94	839,515.62

THE WESTERN PACIFIC RAILROAD COMPANY
SACRAMENTO NORTHERN RAILWAY
TIDEWATER SOUTHERN RAILWAY COMPANY
DEEP CREEK RAILROAD COMPANY (*)

OPERATING RESULTS-COMBINED
(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1 TO DECEMBER 31			
			Increase or *Decrease.*				Increase or *Decrease.*	
	1940	1939	Amount	Per Cent	1940	1939	Amount	Per Cent
AVERAGE MILEAGE OR ROAD OPERATED	1,536.19	1,545.09	*8.90*	*.58*	1,547.00	1,571.92	*24.92*	*1.59*
OPERATING REVENUES								
Freight	$ 1,718,568.29	$ 1,351,283.31	$ 367,284.98	27.18	$ 18,701,678.52	$ 16,819,156.81	$ 1,882,521.71	11.19
Passenger	73,747.22	56,303.33	17,443.89	30.98	860,046.90	1,014,887.10	*154,840.20*	*15.26*
Mail	4,893.72	6,115.30	*1,221.58*	*19.98*	41,830.53	45,135.05	*3,304.52*	*7.32*
Express	6,069.86	3,693.10	2,376.76	64.36	79,282.94	92,722.02	*13,439.08*	*14.49*
Dining Car, Hotel & Restaurant	8,049.54	5,076.44	2,973.10	58.57	82,231.30	97,561.41	*15,330.11*	*15.71*
Miscellaneous	19,025.26	18,238.35	786.91	4.31	233,271.80	238,059.06	*4,787.26*	*2.01*
Total Railway Operating Revenues	$ 1,830,353.89	$ 1,440,709.83	$ 389,644.06	27.05	$ 19,998,341.99	$ 18,307,521.45	$ 1,690,820.54	9.24
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 171,912.36	$ 209,115.24	*$ 37,202.88*	*17.79*	$ 3,082,805.73	$ 2,809,949.28	$ 272,856.45	9.71
Maintenance of Equipment	246,235.01	262,768.04	*16,533.03*	*6.29*	2,820,508.72	3,097,290.12	*276,781.40*	*8.94*
Power	7,860.59	10,994.80	*3,134.21*	*28.51*	129,216.59	146,921.44	*17,704.85*	*12.05*
Traffic	64,792.76	64,192.52	600.24	.94	788,256.19	735,026.73	3,229.46	.41
Transportation - Rail Line	684,550.24	610,015.57	74,534.67	12.22	7,367,110.31	7,033,671.20	333,439.11	4.74
Miscellaneous Operations	10,985.96	8,934.10	2,051.86	22.97	127,300.68	146,974.66	*19,673.98*	*13.39*
General	64,039.87	59,379.19	4,660.68	7.85	935,849.22	768,142.50	167,706.72	21.83
Transportation for Investment - Credit	3,769.77	3,312.59	457.18	13.80	11,653.55	9,529.91	2,123.64	22.28
Total Railway Operating Expenses	$ 1,246,607.02	$ 1,222,086.87	$ 24,520.15	2.01	$ 15,239,393.89	$ 14,778,446.02	$ 460,947.87	3.12
NET REVENUE FROM RAILWAY OPERATIONS	$ 583,746.87	$ 218,622.96	$ 365,123.91	167.01	$ 4,758,948.10	$ 3,529,075.43	$ 1,229,872.67	34.85
Excise and Use Tax Accruals	$ 41,933.18	$ 38,077.09	$ 3,856.09	10.13	$ 534,791.71	$ 498,429.69	$ 36,362.02	7.30
Railway Tax Accruals - All Other	52,190.72	47,365.16	4,825.56	10.19	636,028.15	633,816.62	2,211.53	.35
Railway Operating Income	$ 489,622.97	$ 133,180.71	$ 356,442.26	267.64	$ 3,588,128.24	$ 2,396,829.12	$ 1,191,299.12	49.70
Hire of Equipment - Net Debit	$ 137,066.76	$ 116,038.63	$ 21,031.13	18.12	$ 1,338,079.09	$ 1,179,970.54	$ 158,108.55	13.40
Joint Facility Rents - Net Credit	19,404.61	12,778.18	6,626.43	51.86	139,141.08	126,926.42	12,214.66	9.62
Net Railway Operating Income	$ 371,960.82	$ 29,923.26	$ 342,037.56	-	$ 2,389,190.23	$ 1,343,785.00	$ 1,045,405.23	77.80
NON-OPERATING INCOME								
Rental of Property	$ 22,151.30	$ 23,967.33	*$ 1,816.03*	*7.58*	$ 295,947.83	$ 245,113.20	$ 10,134.63	3.56
Interest Accruals	2,983.77	2,313.91	669.86	28.95	30,167.44	23,825.23	6,342.21	26.62
Miscellaneous	*11,235.63*	2,954.42	*14,190.05*	-	2,569.34	4,669.80	*2,100.46*	*44.98*
Total Non-Operating Income	$ 13,899.44	$ 29,235.66	*$ 15,336.22*	*52.46*	$ 327,984.61	$ 313,608.23	$ 14,376.38	4.58
GROSS INCOME	$ 385,860.26	$ 59,158.92	$ 326,701.34	552.24	$ 2,717,174.84	$ 1,657,393.23	$ 1,059,781.61	63.94
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,579.16	$ 2,579.16	$ -	-	$ 31,038.93	$ 30,895.46	$ 143.47	.46
Miscellaneous Tax Accruals	5,459.03	5,180.98	278.05	5.37	59,655.47	59,564.55	90.92	.15
Amortization of Discount	11,352.26	12,251.27	*899.02*	*7.34*	136,706.42	137,903.98	*1,197.56*	*.87*
Miscellaneous	4,965.47	9,460.61	*4,495.14*	*47.51*	*23,316.52*	44,514.71	*67,831.23*	-
Total Miscellaneous Deductions	$ 24,355.91	$ 29,472.02	*$ 5,116.11*	*17.36*	$ 204,084.30	$ 272,878.70	*$ 68,794.40*	*25.21*
AVAILABLE FOR INTEREST	$ 361,504.35	$ 29,686.90	$ 331,817.45	-	$ 2,513,090.54	$ 1,384,514.53		
Interest on Funded Debt	$ 304,373.62	$ 238,930.65	$ 65,442.97	27.39	$ 3,653,108.90	$ 2,870,913.26		
Interest on Unfunded Debt	6,081.51	71,098.82	*65,017.31*	*91.45*	47,976.94	839,515.62		
Total Interest Deductions	$ 310,455.13	$ 310,029.47	$ 425.66	.14	$ 3,701,083.84	$ 3,710,428.88		
NET INCOME	$ 51,049.22	*$ 280,342.57*	$ 331,391.79	-	*$ 1,187,993.30*	*$ 2,325,914.35*		

NOTE: Italics denote red.

(*) - Deep Creek Railroad Company discontinued operations effective July 31, 1939

Accounting Department
San Francisco, California
February 3, 1941

1940	1939	Amount	Per Cent	1940	1939	Amount	Per Cent
1,536.19	1,545.09	8.90	.58	1,547.00	1,571.92	24.92	1.59
2,718,568.29	$ 1,351,283.31	$ 367,284.98	27.18	$ 18,701,678.52	$ 16,819,156.81	$ 1,882,521.71	11.19
73,747.22	56,303.33	17,443.89	30.98	860,046.90	1,014,887.10	154,840.20	15.26
4,893.72	6,115.30	1,221.58	19.98	41,830.53	45,135.05	3,304.52	7.32
6,069.86	3,693.10	2,376.76	64.36	79,282.94	92,722.02	13,439.08	14.49
8,049.54	5,076.44	2,973.10	58.57	82,231.30	97,561.41	15,330.11	15.71
19,025.96	18,238.35	786.91	4.31	233,271.80	238,059.06	4,787.26	2.01
1,830,363.89	$ 1,440,709.83	$ 389,644.06	27.05	$ 19,998,341.99	$ 18,307,521.45	$ 1,690,820.54	9.24
171,912.36	$ 209,115.24	$ 37,202.88	17.79	$ 3,082,805.73	$ 2,809,949.28	$ 272,856.45	9.71
246,236.01	262,768.04	16,533.03	6.29	2,820,508.72	3,097,290.12	276,781.40	8.94
7,860.59	10,994.80	3,134.21	28.51	129,216.69	146,921.44	17,704.85	12.05
64,792.76	64,192.52	600.24	.94	788,256.19	785,026.73	3,229.46	.41
684,550.24	610,015.57	74,534.67	12.22	7,367,110.31	7,033,671.20	333,439.11	4.74
10,985.96	8,934.10	2,051.86	22.97	127,300.68	146,974.66	19,673.98	13.39
64,039.87	59,379.19	4,660.68	7.85	935,849.22	768,142.50	167,706.72	21.83
3,769.77	3,312.59	457.18	13.80	11,653.55	9,529.91	2,123.64	22.28
1,246,607.02	$ 1,222,086.87	$ 24,520.15	2.01	$ 15,239,393.89	$ 14,778,446.02	$ 460,947.87	3.12
583,746.87	$ 218,622.96	$ 365,123.91	167.01	$ 4,758,948.10	$ 3,529,075.43	$ 1,229,872.67	34.85
41,933.18	$ 38,077.09	$ 3,856.09	10.13	$ 534,791.71	$ 498,429.69	$ 36,362.02	7.30
52,190.72	47,365.16	4,825.56	10.19	636,028.15	633,816.62	2,211.53	.35
489,622.97	$ 133,180.71	$ 356,442.26	267.64	$ 3,588,128.24	$ 2,396,829.12	$ 1,191,299.12	49.70
137,066.76	$ 116,035.63	$ 21,031.13	18.12	$ 1,338,079.09	$ 1,179,970.54	$ 158,108.55	13.40
19,404.61	12,778.18	6,626.43	51.86	139,141.08	126,926.42	12,214.66	9.62
371,960.82	$ 29,923.26	$ 342,037.56	-	$ 2,389,190.23	$ 1,343,785.00	$ 1,045,405.23	77.80
22,151.30	$ 23,967.33	$ 1,816.03	7.58	$ 295,247.83	$ 285,113.20	$ 10,134.63	3.55
2,983.77	2,313.91	669.86	28.95	30,167.44	23,825.23	6,342.21	26.62
11,235.63	2,954.42	14,190.05	-	2,569.34	4,669.80	2,100.46	44.98
13,899.44	$ 29,235.66	$ 15,336.22	52.46	$ 327,984.61	$ 313,608.23	$ 14,376.38	4.58
385,860.26	$ 59,158.92	$ 326,701.34	552.24	$ 2,717,174.84	$ 1,657,393.23	$ 1,059,781.61	63.94
2,579.16	$ 2,579.16	$ -	-	$ 31,638.93	$ 30,895.46	$ 743.47	.46
5,459.03	5,180.98	278.05	5.37	89,655.47	89,564.55	90.92	.85
11,352.25	12,251.27	899.02	7.34	136,706.42	137,903.98	1,197.56	.87
4,965.47	9,460.61	4,495.14	47.51	23,316.52	44,514.71	67,831.23	-
24,355.91	$ 29,472.02	$ 5,116.11	17.36	$ 204,084.30	$ 272,878.70	$ 68,794.40	25.21
361,504.35	$ 29,686.90	$ 331,817.45	-	$ 2,513,090.54	$ 1,384,514.53	$ 1,128,576.01	81.51
304,373.62	$ 238,930.65	$ 65,442.97	27.39	$ 3,653,106.90	$ 2,870,913.26	$ 782,193.64	27.25
6,081.51	71,098.82	65,017.31	91.45	47,976.94	839,515.62	791,538.68	94.29
310,455.13	$ 310,029.47	$ 425.66	.14	$ 3,701,083.84	$ 3,710,428.88	$ 9,345.04	.25
51,049.22	$ 280,342.57	$ 331,391.79	-	$ 1,187,993.30	$ 2,325,914.35	$ 1,137,921.05	-

31, 1939

THE WESTERN PACIFIC RAILROAD COMPANY

SACRAMENTO NORTHERN RAILWAY

TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS-COMBINED

(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF DECEMBER				PERIOD JANUARY 1 to DECEMBER 31			
	1941	1940	Increase or *Decrease.* Amount	Per Cent	1941	1940	Increase or *Decrease.* Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,536.19	-	-	1,536.19	1,547.00	*10.81*	*.70*
OPERATING REVENUES								
Freight	$ 2,279,243.48	$ 1,718,568.29	$ 560,675.19	32.62	$ 24,119,568.04	$ 18,701,678.52	$ 5,417,889.52	28.97
Passenger	122,803.41	73,747.22	49,056.19	66.52	873,173.63	860,046.90	13,126.73	1.53
Mail	3,886.06	4,893.72	*1,007.66*	*20.59*	36,898.35	41,830.53	*4,932.18*	*11.79*
Express	5,367.08	6,069.86	*702.78*	*11.58*	70,325.59	79,282.94	*8,957.35*	*11.30*
Dining Car, Hotel & Restaurant	13,930.64	8,049.54	5,881.10	73.06	125,898.78	82,231.30	43,667.48	53.10
Miscellaneous	35,686.07	19,025.26	16,660.81	87.57	320,618.24	233,271.80	87,346.44	37.44
Total Railway Operating Revenues	$ 2,460,916.74	$ 1,830,353.89	$ 630,562.85	34.45	$ 25,546,482.63	$ 19,998,341.99	$ 5,548,140.64	27.74
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 411,392.64	$ 171,912.36	$ 239,480.28	139.30	$ 3,115,547.19	$ 3,082,805.73	$ 32,741.46	1.06
Maintenance of Equipment	403,667.40	246,235.01	157,432.39	63.94	3,873,731.31	2,820,508.72	1,053,222.59	37.34
Power	7,293.22	7,860.59	*567.37*	*7.22*	88,380.60	129,216.59	*40,835.99*	*31.60*
Traffic	86,625.77	64,792.76	21,833.01	33.70	872,011.66	788,256.19	83,755.47	10.63
Transportation - Rail Line	1,140,972.01	684,550.24	456,421.77	66.67	9,159,206.62	7,367,110.31	1,792,096.31	24.33
Miscellaneous Operations	20,669.69	10,985.96	9,683.73	88.15	167,073.93	127,300.68	39,773.25	31.24
General	91,895.77	64,039.87	27,855.90	43.50	794,896.43	935,849.22	*140,952.79*	*15.06*
Transportation for Investment - Credit	1,545.36	3,769.77	*2,224.41*	*59.00*	10,214.70	11,653.55	*1,438.85*	*12.35*
Total Railway Operating Expenses	$ 2,160,971.14	$ 1,246,607.02	$ 914,364.12	73.36	$ 18,060,633.04	$ 15,239,393.89	$ 2,821,239.15	18.51
NET REVENUE FROM RAILWAY OPERATIONS	$ 299,945.60	$ 583,746.87	$ *283,801.27*	*48.62*	$ 7,485,849.59	$ 4,758,948.10	$ 2,726,901.49	57.30
Excise and Use Tax Accruals	$ 86,343.42	$ 41,933.18	$ 44,410.24	105.91	$ 644,779.33	$ 534,791.71	$ 109,987.62	20.57
Railway Tax Accruals - All Other	157,667.16	52,190.72	105,476.44	202.10	1,072,774.23	636,028.15	436,746.08	68.67
Railway Operating Income	$ 55,935.02	$ 489,622.97	$ *433,687.95*	*88.58*	$ 5,768,296.03	$ 3,588,128.24	$ 2,180,167.79	60.76
Hire of Equipment - Net Debit	$ 179,298.88	$ 137,066.76	$ 42,231.92	30.81	$ 1,711,134.09	$ 1,338,079.09	$ 373,055.00	27.88
Joint Facility Rents - Net Credit	17,104.56	19,404.61	*2,300.05*	*11.85*	145,757.64	139,141.08	6,616.56	4.76
Net Railway Operating Income	$ *106,259.10*	$ 371,960.82	$ *478,219.92*	*128.57*	$ 4,202,919.58	$ 2,389,190.23	$ 1,813,729.35	75.91
NON-OPERATING INCOME								
Rental of Property	$ 45,682.59	$ 22,151.30	$ 23,531.29	106.23	$ 398,533.56	$ 295,247.83	$ 103,285.73	34.98
Interest Accruals	2,589.89	5,983.77	*393.88*	*13.20*	41,813.41	30,167.44	11,645.97	38.60
Miscellaneous	37,250.02	*11,235.69*	48,485.66	-	39,945.81	2,569.34	37,376.47	-
Total Non-Operating Income	$ 85,522.50	$ 13,899.44	$ 71,623.06	515.30	$ 480,292.78	$ 327,984.61	$ 152,308.17	46.44
GROSS INCOME	$ *20,736.60*	$ 385,860.26	$ *406,596.86*	*105.37*	$ 4,683,212.36	$ 2,717,174.84	$ 1,966,037.52	72.36
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,321.78	$ 2,279.16	$ 42.62	1.87	$ 27,261.84	$ 27,438.93	$ *177.09*	*.65*
Miscellaneous Tax Accruals	5,738.91	5,459.03	279.88	5.13	61,840.02	59,655.47	2,184.55	3.66
Miscellaneous	18,756.60	4,965.47	13,791.13	277.74	42,372.57	*23,316.52*	65,689.09	-
Total Miscellaneous Deductions	$ 26,817.29	$ 12,703.66	$ 14,113.63	111.10	$ 131,474.43	$ 63,777.88	$ 67,696.55	106.14
AVAILABLE FOR FIXED CHARGES	$ *47,553.89*	$ 373,156.60	$ *420,710.49*	*112.74*	$ 4,551,737.93	$ 2,653,396.96	$ 1,898,340.97	71.54
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-	$ 3,600.00	$ 3,600.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	$ 205,375.41	$ 205,375.41	$ -	-	$ 2,464,505.00	$ 2,464,505.00	$ -	-
Equipment Obligations do	5,352.56	5,542.60	*190.04*	*3.43*	62,223.39	70,029.18	*7,805.79*	*11.15*
Trustees' Certificates do	16,122.22	33,311.11	*17,188.89*	*51.60*	379,794.43	399,977.78	*20,183.35*	*5.05*
Other Obligations (*)	62,255.49	60,144.50	2,110.99	3.51	743,529.71	718,594.94	24,934.77	3.47
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	364.99	688.50	*323.51*	*46.99*	5,515.31	9,613.27	*4,097.96*	*42.63*
Other Obligations	2,418.69	5,393.01	*2,974.32*	*55.15*	6,015.10	38,363.67	*32,348.57*	*84.32*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	-	-	135,401.88	136,401.88	*1,000.00*	*.73*
Equipment Obligations do	109.06	68.76	40.30	58.61	975.97	304.54	671.43	220.50
Total Fixed Charges	$ 303,581.91	$ 322,107.38	$ *18,525.47*	*5.75*	$ 3,801,560.79	$ 3,841,390.26	$ *39,829.47*	*1.04*
NET INCOME	$ *351,135.80*	$ 51,049.22	$ *402,185.02*	*787.84*	$ 750,177.14	$ *1,187,993.30*	$ 1,938,170.44	-

AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,536.19		-	1,536.19	1,547.00	10.81	.70
OPERATING REVENUES								
Freight	$ 2,279,243.48	$ 1,718,568.29	$ 560,675.19	32.62	$ 24,119,566.04	$ 18,701,678.52	$ 5,417,889.52	28.97
Passenger	122,803.41	73,747.22	49,056.19	66.52	873,173.63	860,046.90	13,126.73	1.53
Mail	3,886.06	4,893.72	*1,007.66*	*20.59*	36,898.36	41,830.53	*4,932.18*	*11.79*
Express	5,367.08	6,069.86	*702.78*	*11.58*	70,395.89	79,282.94	*8,887.35*	*11.30*
Dining Car, Hotel & Restaurant	13,930.64	8,049.54	5,881.10	73.06	125,898.78	82,231.30	43,667.48	53.10
Miscellaneous	35,686.07	19,025.26	16,660.81	87.57	320,618.24	233,271.80	87,346.44	37.44
Total Railway Operating Revenues	$ 2,460,916.74	$ 1,830,353.89	$ 630,562.85	34.45	$ 25,546,482.63	$ 19,998,341.99	$ 5,548,140.64	27.74
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 411,392.64	$ 171,912.36	$ 239,480.28	139.30	$ 3,115,547.19	$ 3,082,805.73	$ 32,741.46	1.06
Maintenance of Equipment	403,667.40	246,236.01	157,432.39	63.94	3,873,731.31	2,820,508.72	1,053,222.59	37.34
Power	7,293.22	7,860.59	*567.37*	*7.22*	88,360.60	129,216.59	*40,855.99*	*31.60*
Traffic	86,625.77	64,792.76	21,833.01	33.70	872,011.66	788,256.19	83,755.47	10.63
Transportation - Rail Line	1,140,972.01	684,550.24	456,421.77	66.67	9,159,206.82	7,367,110.31	1,792,096.51	24.33
Miscellaneous Operations	20,669.69	10,985.96	9,683.73	88.15	167,073.93	127,300.68	39,773.25	31.24
General	91,895.77	64,039.87	27,855.90	43.50	794,896.43	935,849.22	*140,952.79*	*15.06*
Transportation for Investment - Credit	1,545.36	3,769.77	*2,224.41*	*59.00*	10,214.70	11,653.55	*1,438.85*	*12.35*
Total Railway Operating Expenses	$ 2,160,971.14	$ 1,246,607.02	$ 914,364.12	73.35	$ 18,060,633.04	$ 15,239,393.89	$ 2,821,239.15	18.51
NET REVENUE FROM RAILWAY OPERATIONS	$ 299,945.60	$ 583,746.87	$ *283,801.27*	*48.62*	$ 7,485,849.59	$ 4,758,948.10	$ 2,726,901.49	57.30
Excise and Use Tax Accruals	$ 86,343.42	$ 41,933.18	$ 44,410.24	105.91	$ 644,779.33	$ 534,791.71	$ 109,987.62	20.57
Railway Tax Accruals - All Other	157,667.16	52,190.72	105,476.44	202.10	1,072,774.23	636,028.15	436,746.08	68.67
Railway Operating Income	$ 55,935.02	$ 489,622.97	$ *433,687.95*	*88.58*	$ 5,768,296.03	$ 3,588,128.24	$ 2,180,167.79	60.76
Hire of Equipment - Net Debit	$ 179,298.68	$ 137,066.76	$ 42,231.92	30.81	$ 1,711,134.09	$ 1,338,079.09	$ 373,055.00	27.88
Joint Facility Rents - Net Credit	17,104.56	19,404.61	*2,300.05*	*11.85*	145,757.64	139,141.08	6,616.56	4.76
Net Railway Operating Income	$ *106,259.10*	$ 371,960.82	$ *478,219.92*	*128.57*	$ 4,202,919.58	$ 2,389,190.23	$ 1,813,729.35	75.91
NON-OPERATING INCOME								
Rental of Property	$ 45,682.59	$ 22,151.30	$ 23,531.29	106.23	$ 348,533.56	$ 295,247.83	$ 103,285.73	34.98
Interest Accruals	2,589.89	2,983.77	*393.88*	*13.20*	41,813.41	30,167.44	11,645.97	38.60
Miscellaneous	37,250.02	*11,235.63*	48,485.65	-	39,945.81	2,569.34	37,376.47	-
Total Non-Operating Income	$ 85,522.50	$ 13,899.44	$ 71,823.06	516.30	$ 480,292.78	$ 327,984.61	$ 152,308.17	46.44
GROSS INCOME	$ *20,736.60*	$ 385,860.25	$ *406,596.86*	*105.37*	$ 4,683,212.36	$ 2,717,174.84	$ 1,966,037.52	72.36
MISCELLANEOUS DEDUCTIONS								
Miscellaneous Rents	$ 2,321.78	$ 2,279.16	$ 42.62	1.87	$ 27,261.84	$ 27,438.93	$ *177.09*	.65
Miscellaneous Tax Accruals	5,738.91	5,459.03	279.88	5.13	61,840.02	59,655.47	2,184.55	3.66
Miscellaneous	18,756.60	4,965.47	13,791.13	277.74	42,372.57	*23,316.52*	66,689.09	-
Total Miscellaneous Deductions	$ 26,817.29	$ 12,703.66	$ 14,113.63	111.10	$ 131,474.43	$ 63,777.88	$ 67,696.55	106.14
AVAILABLE FOR FIXED CHARGES	$ *47,553.89*	$ 373,156.60	$ *420,710.49*	*112.74*	$ 4,551,737.93	$ 2,653,396.96	$ 1,898,340.97	71.54
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-	$ 3,600.00	$ 3,600.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	$ 205,375.41	$ 205,375.41	$ -	-	$ 2,464,505.00	$ 2,464,505.00	$ -	-
Equipment Obligations do	5,359.56	5,542.60	*190.04*	*3.43*	62,283.39	70,029.18	*7,805.79*	*11.15*
Trustees' Certificates d	16,122.22	33,311.11	*17,188.89*	*51.60*	379,794.43	399,977.78	*20,183.35*	*5.05*
Other Obligations (*)	62,255.49	60,144.50	2,110.99	3.51	743,529.71	718,594.94	24,934.77	3.47
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	384.99	688.50	*323.51*	*46.99*	5,515.31	9,613.27	*4,097.96*	*42.63*
Other Obligations	2,418.69	5,393.01	*2,974.32*	*55.15*	6,015.10	38,363.67	*32,348.57*	*84.32*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	-	-	135,401.88	136,401.88	*1,000.00*	.73
Equipment Obligations do	109.06	68.76	40.30	58.61	975.97	304.54	671.43	220.50
Total Fixed Charges	$ 303,581.91	$ 322,107.38	$ *18,525.47*	*5.75*	$ 3,801,560.79	$ 3,841,390.26	$ *39,829.47*	*1.04*
NET INCOME	$ *351,135.80*	$ 51,049.22	$ *402,185.02*	*787.84*	$ 750,177.14	$ *1,187,993.30*	$ 1,938,170.44	-

NOTE: - Italics denote loss.

ORIGINAL
FILED
FEB 17 1942
With Clerk, U. S. Dist. Court
San Francisco

Accounting Department
San Francisco, California
February 7th, 1942

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month		Period	
		1941	1940	1941	1940
Notes Payable	- Reconstruction Finance Corporation	$12,582.61	$12,582.61	$148,149.97	$148,555.84
" "	- A. C. James Co.	20,832.50	20,832.50	249,990.00	249,990.00
" "	- Railroad Credit Corporation	2,105.93	-	24,795.74	-
Advances	- The Western Pacific Railroad Corporation	22,894.80	22,894.80	274,736.10	274,736.10
"	- The Western Realty Company	208.35	208.35	2,500.00	2,500.00
"	- The Western Pacific Railroad Corporation to Sacramento Northern Railway	3,585.92	3,626.24	42,813.00	42,813.00
S.N.Ry.Bonds	- Other than Bonds held by The Western Pacific Railroad Company	45.38	-	544.90	-
	TOTAL	$62,255.49	$60,144.50	$743,529.71	$718,594.94

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AUG 22 1942

with Clerk, U. S. Dist. Court
San Francisco

THE WESTERN PACIFIC RAILROAD COMPANY

SACRAMENTO NORTHERN RAILWAY

TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS - COMBINED

(All Inter-Company Items Eliminated)

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ITEM OR ACCOUNT	MONTH OF JUNE				PERIOD JANUARY 1 TO JUNE 30			
	1942	1941	Increase or Decrease. Amount	Per Cent	1942	1941	Increase or Decrease. Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,536.19	-	-	1,536.19	1,536.19	-	-
OPERATING REVENUES								
Freight	$ 2,569,699.19	$ 1,699,924.52	$ 869,774.67	51.17	$16,012,453.97	$ 9,498,738.47	$ 6,513,715.50	68.58
Passenger	178,827.21	98,875.60	80,951.61	81.87	798,653.14	383,987.48	414,665.66	107.99
Mail	3,000.00	3,000.00	-	-	17,986.87	18,012.29	(25.42)	(.14)
Express	37,540.02	15,352.56	22,187.46	144.52	72,201.29	41,929.82	30,271.47	72.20
Dining Car, Hotel & Restaurant	28,798.24	11,749.85	17,048.39	145.10	108,520.03	48,998.49	59,521.54	122.84
Miscellaneous	34,666.98	23,333.86	11,333.12	48.57	225,786.90	119,633.93	106,152.97	88.73
Total Railway Operating Revenues	$ 2,853,531.64	$ 1,852,236.39	$ 1,001,295.25	54.06	$16,235,600.20	$10,111,000.26	$ 6,124,601.92	60.57
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 314,121.66	$ 291,853.74	$ 22,267.92	7.63	$ 1,870,770.74	$ 1,445,419.45	$ 425,351.29	29.43
Maintenance of Equipment	380,778.55	340,050.32	40,728.23	11.98	2,213,640.73	1,788,863.93	424,786.80	23.75
Power	6,758.68	6,805.54	(46.86)	(.69)	44,064.86	44,106.32	(41.76)	(.09)
Traffic	75,011.62	73,814.82	1,803.20	1.63	466,100.69	428,663.50	37,437.39	8.73
Transportation - Rail Line	895,681.48	649,286.72	246,394.76	37.95	5,623,697.69	3,784,305.07	1,839,392.62	48.61
Miscellaneous Operations	28,311.55	13,907.42	14,404.13	103.57	121,088.83	67,621.09	53,464.64	79.06
General	75,572.79	66,565.24	9,007.55	13.53	450,113.58	361,924.88	88,188.70	17.85
Transportation for Investment - Credit	-	1,048.41	(1,048.41)	-	-	2,878.89	(2,878.89)	-
Total Railway Operating Expenses	$ 1,776,236.31	$ 1,446,235.39	$ 330,000.92	22.82	$10,789,673.72	$ 7,938,015.35	$ 2,851,658.37	35.92
NET REVENUE FROM RAILWAY OPERATIONS	$ 1,077,295.33	$ 406,001.00	$ 671,294.33	165.34	$ 5,445,926.48	$ 2,172,984.93	$ 3,272,943.55	150.62
Railway Tax Accruals - Payroll	$ 66,018.86	$ 49,886.18	$ 16,129.68	32.33	$ 408,466.37	$ 280,618.30	$ 127,846.98	45.56
Railway Tax Accruals - All Other	57,466.58	51,891.83	5,576.75	11.39	380,914.09	350,341.30	30,572.79	8.73
Railway Tax Accruals - Total	$ 123,484.44	$ 101,478.01	$ 22,006.43	21.69	$ 789,379.46	$ 630,959.60	$ 158,419.77	25.11
RAILWAY OPERATING INCOME	$ 953,810.89	$ 304,522.99	$ 649,287.90	213.21	$ 4,656,549.02	$ 1,542,025.34	$ 3,114,523.78	201.98
Equipment Rents - Net Debit	$ 116,313.23	$ 101,700.87	$ 14,612.36	14.37	$ 841,404.19	$ 627,365.00	$ 214,039.19	34.12
Joint Facility Rents - Net Credit	14,794.82	16,693.53	(1,898.71)	(11.37)	47,551.60	49,073.65	(842.03)	(1.13)
NET RAILWAY OPERATING INCOME	$ 852,292.48	$ 219,515.65	$ 632,776.83	288.26	$ 3,862,676.43	$ 968,733.87	$ 2,899,942.56	301.22
OTHER INCOME								
Rental of Property	$ 53,000.44	$ 32,289.42	$ 20,711.02	64.14	$ 292,322.23	$ 182,856.90	$ 109,468.33	59.87
Interest Accruals	1,747.30	3,440.37	(1,693.07)	(49.21)	10,933.13	19,688.73	(8,755.60)	(44.47)
Miscellaneous	167.89	11.00	156.89	-	3,237.30	919.31	2,317.99	252.14
Total Other Income	$ 54,915.63	$ 35,740.79	$ 19,174.84	53.65	$ 306,495.66	$ 203,464.94	$ 103,030.72	50.64
TOTAL INCOME	$ 907,208.11	$ 255,256.44	$ 651,951.67	255.41	$ 4,169,172.09	$ 1,166,198.81	$ 3,002,973.28	257.50
MISCELLANEOUS DEDUCTIONS FROM INCOME								
Miscellaneous Rents	$ 2,214.22	$ 2,189.16	$ 25.06	1.14	$ 13,988.06	$ 13,715.36	$ 272.70	1.84
Miscellaneous Tax Accruals	4,853.93	4,946.91	(92.98)	(1.88)	31,027.55	29,946.82	1,080.73	3.61
Miscellaneous	6,762.16	7,764.45	(1,002.29)	(12.91)	44,066.39	39,009.31	5,077.08	13.02
Total Miscellaneous Deductions	$ 13,830.31	$ 14,900.52	$ (1,070.21)	(7.18)	$ 89,081.99	$ 82,671.48	$ 6,410.51	7.75
INCOME AVAILABLE FOR FIXED CHARGES	$ 893,377.80	$ 240,355.92	$ 653,021.88	271.69	$ 4,080,090.10	$ 1,083,527.33	$ 2,996,562.77	276.56
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	-	-	$ 1,800.00	$ 1,800.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	205,375.41	205,375.41	-	-	1,232,252.50	1,232,252.50	-	-
Equipment Obligations do.	6,093.53	5,162.50	931.03	18.03	36,618.66	31,362.50	5,254.16	16.75
Trustees' Certificates do.	12,286.89	33,061.11	(20,772.22)	(62.83)	67,541.67	199,991.66	(111,449.99)	(56.01)
Other Obligations (*)	61,763.54	62,008.74	(245.20)	(.40)	371,064.11	370,945.24	108.87	.03
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	337.44	523.25	(185.81)	(35.51)	2,093.72	3,231.92	(1,138.20)	(35.22)
Other Obligations	26.21	80.20	(53.99)	(67.32)	1,822.41	233.75	1,588.66	12.79
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	-	-	67,700.94	67,700.94	-	-
Equipment Obligations do.	306.68	80.76	225.92	279.74	1,884.67	490.04	1,394.63	284.55
Total Fixed Charges	$ 297,775.19	$ 317,875.46	$ (20,100.27)	(6.33)	$ 1,802,999.83	$ 1,908,207.21	$ (105,207.38)	(5.53)
NET INCOME	$ 595,602.61	$ 77,519.54	$ 673,122.15	-	$ 2,277,090.27	$ 825,069.88	$ 3,102,160.43	-

Freight	$ 2,589,699.19	$ 1,699,924.52	$ 889,774.67	51.17	$16,212,453.97	$ 9,496,738.47	$ 5,513,715.50	58.06
Passenger	179,827.21	98,875.60	80,951.61	81.87	798,653.14	383,997.48	414,655.66	107.99
Mail	3,000.00	3,000.00	-	-	17,986.87	18,012.29	*25.42*	*.14*
Express	37,540.02	15,352.56	22,187.46	144.52	72,201.29	41,929.62	30,271.67	72.20
Dining Car, Hotel & Restaurant	28,798.24	11,749.85	17,048.39	145.10	108,520.03	48,686.49	59,821.54	122.84
Miscellaneous	34,666.98	23,333.12	11,333.12	48.57	225,786.90	119,633.93	106,152.97	88.73
Total Railway Operating Revenues	$ 2,853,531.64	$ 1,852,236.39	$ 1,001,295.25	54.06	$16,236,602.20	$10,111,000.28	$ 6,124,601.92	60.57
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 314,121.66	$ 291,853.74	$ 22,267.92	7.63	$ 1,870,770.74	$ 1,445,419.45	$ 425,351.29	29.43
Maintenance of Equipment	380,778.55	340,050.32	40,728.23	11.98	2,213,640.73	1,789,853.93	424,786.80	23.73
Power	6,788.66	6,805.54	*16.88*	*.69*	44,064.56	44,106.32	*41.76*	*.09*
Traffic	75,011.62	78,814.82	*3,803.20*	*4.83*	466,100.89	428,663.50	37,437.39	8.73
Transportation - Rail Line	895,681.48	649,286.72	246,394.76	37.95	5,823,697.89	3,784,308.07	1,839,389.82	48.61
Miscellaneous Operations	28,311.55	13,907.42	14,404.13	103.57	121,085.53	67,681.09	53,404.44	79.06
General	75,572.79	66,565.24	9,007.55	13.53	450,113.58	381,984.88	68,128.70	17.84
Transportation for Investment - Credit	-	1,048.41	*1,048.41*	-	-	2,878.89	*2,878.89*	-
Total Railway Operating Expenses	$ 1,776,236.31	$ 1,445,235.39	$ 330,000.92	22.82	$10,789,673.72	$ 7,938,015.35	$ 2,851,658.37	35.92
NET REVENUE FROM RAILWAY OPERATIONS	$ 1,077,295.33	$ 406,001.00	$ 671,294.33	165.34	$ 5,445,928.48	$ 2,172,984.93	$ 3,272,943.55	150.62
Railway Tax Accruals - Payroll	$ 66,015.85	$ 49,386.18	$ 16,129.68	32.33	$ 408,466.37	$ 280,418.39	$ 127,946.98	45.56
Railway Tax Accruals - All Other	57,468.58	51,891.83	5,576.75	11.39	360,914.09	360,241.30	50,672.79	8.73
Railway Tax Accruals - Total	$ 123,484.44	$ 101,278.01	$ 22,006.43	21.39	$ 769,379.46	$ 630,959.69	$ 188,419.77	25.11
RAILWAY OPERATING INCOME	$ 953,810.89	$ 304,522.99	$ 649,287.90	213.21	$ 4,656,549.02	$ 1,542,025.24	$ 3,114,523.78	201.96
Equipment Rents - Net Debit	$ 116,313.23	$ 101,700.87	$ 14,612.36	14.37	$ 841,404.19	$ 627,368.00	$ 214,039.19	34.12
Joint Facility Rents - Net Credit	14,794.82	16,693.53	*1,898.71*	*11.37*	47,531.60	48,073.63	*542.03*	*1.13*
NET RAILWAY OPERATING INCOME	$ 852,292.48	$ 219,515.65	$ 632,776.83	288.26	$ 3,862,676.43	$ 962,733.87	$ 2,899,942.56	301.22
OTHER INCOME								
Rental of Property	$ 53,000.44	$ 32,289.42	$ 20,711.02	64.14	$ 292,322.23	$ 182,856.90	$ 109,465.33	59.87
Interest Accruals	1,747.30	3,440.37	*1,693.07*	*49.21*	10,933.13	19,688.73	*8,755.60*	*44.47*
Miscellaneous	167.89	11.00	156.89	-	3,237.30	919.31	2,317.99	288.14
Total Other Income	$ 54,915.63	$ 35,740.79	$ 19,174.84	53.65	$ 306,495.66	$ 203,464.94	$ 103,030.72	50.64
TOTAL INCOME	$ 907,208.11	$ 255,256.44	$ 651,951.67	255.41	$ 4,169,172.09	$ 1,166,198.81	$ 3,002,973.28	257.50
MISCELLANEOUS DEDUCTIONS FROM INCOME								
Miscellaneous Rents	$ 2,214.22	$ 2,189.16	$ 25.06	1.14	$ 13,988.06	$ 13,715.35	$ 272.70	1.84
Miscellaneous Tax Accruals	4,853.93	4,946.91	*92.98*	*1.88*	31,027.86	29,946.88	1,080.73	3.61
Miscellaneous	6,762.16	7,764.45	*1,002.29*	*13.91*	44,086.39	39,009.31	5,077.08	13.02
Total Miscellaneous Deductions	$ 13,830.31	$ 14,900.52	$ *1,070.21*	*7.18*	$ 89,081.99	$ 82,671.48	$ 6,410.51	7.75
INCOME AVAILABLE FOR FIXED CHARGES	$ 893,377.80	$ 240,355.92	$ 653,021.88	271.69	$ 4,080,090.10	$ 1,083,527.33	$ 2,996,562.77	276.56
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	-	-	$ 1,800.00	$ 1,800.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	206,375.41	206,375.41	-	-	1,232,252.50	1,232,252.50	-	-
Equipment Obligations do.	6,093.53	5,162.50	931.03	18.03	36,616.66	31,332.50	5,284.16	16.75
Trustees' Certificates do.	12,288.89	33,061.11	*20,772.22*	*62.83*	87,641.97	198,991.66	*111,449.99*	*56.01*
Other Obligations (*)	61,763.54	62,006.74	*243.20*	*.40*	371,054.11	370,945.24	108.87	.03
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	337.44	523.25	*185.81*	*35.51*	2,093.72	3,231.92	*1,138.20*	*35.22*
Other Obligations	26.21	80.20	*53.99*	*67.32*	2,056.46	1,822.41	233.75	12.79
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	-	-	67,700.94	67,700.94	-	-
Equipment Obligations do.	306.68	80.76	225.92	279.74	1,884.47	480.04	1,384.43	284.55
Total Fixed Charges	$ 297,775.19	$ 317,875.46	$ *20,100.27*	*6.32*	$ 1,802,999.83	$ 1,908,887.21	$ *105,887.38*	*5.53*
NET INCOME	$ 595,602.61	$ *77,519.54*	$ 673,122.15	-	$ 2,277,090.27	$ *825,069.88*	$ 3,102,160.45	-

NOTE - Itálics denote Red

Note (*) - "Interest on Funded Debt - Other obligations" includes the following:

		Month		Period	
		1942	1941	1942	1941
Notes Payable	- Reconstruction Finance Corporation	$ 12,176.71	$ 12,176.71	$ 73,466.16	$ 73,466.16
do.	- A. C. James Co.	20,832.50	20,832.50	124,995.00	124,995.00
do.	- Railroad Credit Corporation	2,036.01	2,036.01	12,216.06	12,216.06
Advances	- The Western Pacific Railroad Corporation	22,894.80	22,894.80	137,368.05	137,368.05
do.	- The Western Realty Company	208.35	208.35	1,250.00	1,250.00
do.	- The Western Pacific Railroad Corporation to Sacramento Northern Railway	3,567.75	3,566.90	21,406.50	21,397.58
S.N.Ry. Bonds	- Other than held by The W.P.R.R.Co.	45.42	272.47	272.42	272.47
	TOTAL:	$ 61,763.54	$ 62,008.74	$371,054.11	$370,945.24

Accounting Department
San Francisco, California
August 12, 1942.

THE WESTERN PACIFIC RAILROAD COMPANY

SACRAMENTO NORTHERN RAILWAY

TIDEWATER SOUTHERN RAILWAY COMPANY

OPERATING RESULTS - COMBINED

(All Inter-Company Items Eliminated)

ITEM OR ACCOUNT	MONTH OF JULY				PERIOD JANUARY 1 TO JULY 31			
	1942	1941	Increase or Decrease. Amount	Per Cent	1942	1941	Increase or Decrease. Amount	Per Cent
AVERAGE MILEAGE OF ROAD OPERATED	1,536.19	1,536.19	-	-	1,536.19	1,536.19	-	-
OPERATING REVENUES								
Freight	$ 2,796,294.30	$ 1,932,800.89	$ 863,493.41	44.68	$17,807,678.27	$11,431,539.36	$ 6,376,138.91	55.78
Passenger	187,680.40	83,383.11	104,297.09	125.01	988,373.54	467,370.79	518,902.75	111.03
Mail	3,000.00	3,000.00	000.00	0.07	21,186.67	21,012.29	174.38	.83
Express	16,560.97	5,549.73	11,080.24	199.67	88,771.96	47,479.35	41,291.91	86.97
Dining Car, Hotel & Restaurant	28,908.41	14,186.47	12,722.94	89.68	135,488.44	62,883.98	72,544.46	115.36
Miscellaneous	53,996.49	33,386.98	20,609.51	61.73	279,783.39	153,080.91	126,702.48	82.84
Total Railway Operating Revenues	$ 3,083,519.57	$ 2,072,306.38	$ 1,011,213.19	48.80	$19,319,181.77	$12,183,306.66	$ 7,135,875.11	58.57
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 355,228.27	$ 309,285.93	$ 45,942.34	14.85	$ 2,226,009.01	$ 1,754,715.38	$ 471,293.63	26.86
Maintenance of Equipment	370,272.67	351,906.80	18,366.87	5.22	2,583,913.50	2,140,729.73	443,183.47	20.70
Power	6,994.72	8,253.54	*1,258.82*	*15.10*	50,989.88	52,360.86	*1,370.58*	*2.62*
Traffic	80,318.13	74,537.77	5,774.36	7.75	546,413.02	503,201.27	43,211.75	8.59
Transportation - Rail Line	977,753.12	692,776.77	284,976.35	41.14	6,601,580.81	4,477,081.84	2,124,498.97	47.46
Miscellaneous Operations	28,098.05	15,489.03	12,609.02	81.41	149,183.88	83,110.12	66,073.46	79.50
General	78,827.87	61,560.69	17,067.18	27.72	588,741.45	443,686.87	85,255.88	19.22
Transportation for Investment - Credit	33.82	297.70	*263.88*	*88.64*	33.82	3,176.99	*3,142.77*	*98.94*
Total Railway Operating Expenses	$ 1,897,198.81	$ 1,513,821.83	$ 383,370.98	25.38	$12,696,856.53	$ 9,481,637.19	$ 3,236,389.36	34.23
NET REVENUE FROM RAILWAY OPERATIONS	$ 1,186,320.76	$ 558,784.55	$ 627,848.21	112.30	$ 6,622,325.24	$ 2,731,769.48	$ 3,900,488.76	142.78
Railway Tax Accruals - Payroll	$ 74,914.72	$ 52,268.28	$ 22,646.44	43.33	$ 483,160.09	$ 338,715.93	$ 150,464.16	44.20
Railway Tax Accruals - All Other	334,243.86	103,316.78	230,927.80	223.82	715,187.74	453,687.79	261,499.95	57.65
Railway Tax Accruals - Total	$ 409,158.57	$ 155,584.03	$ 253,574.54	162.98	$ 1,198,537.83	$ 792,543.72	$ 411,994.11	52.00
RAILWAY OPERATING INCOME	$ 777,162.19	$ 403,200.52	$ 373,967.67	92.75	$ 5,423,717.41	$ 1,948,225.76	$ 3,488,491.65	179.14
Equipment Rents - Net Debit	$ 141,731.53	$ 125,262.56	$ 16,468.97	13.15	$ 983,135.72	$ 752,627.56	$ 230,508.16	30.63
Joint Facility Rents - Net Credit	30,174.55	8,194.17	11,980.36	146.21	87,706.15	56,967.80	11,438.35	20.33
NET RAILWAY OPERATING INCOME	$ 665,611.41	$ 286,132.13	$ 369,479.28	129.13	$ 4,518,287.94	$ 1,248,886.00	$ 3,269,421.94	261.79
OTHER INCOME								
Rental of Property	$ 57,614.86	$ 34,320.05	$ 23,294.81	67.88	$ 349,940.09	$ 217,176.95	$ 132,763.14	61.13
Interest Accruals	1,789.30	3,488.53	*1,699.23*	*49.13*	12,692.43	23,147.26	*10,454.83*	*45.17*
Miscellaneous	46,719.70	46.00	46,674.70	-	49,987.00	964.31	49,022.69	-
Total Other Income	$ 106,093.86	$ 37,823.58	$ 68,270.28	180.50	$ 412,599.52	$ 241,288.52	$ 171,301.00	70.99
TOTAL INCOME	$ 761,706.27	$ 323,966.71	$ 437,749.56	135.13	$ 4,930,877.36	$ 1,490,154.52	$ 3,440,722.84	230.90
MISCELLANEOUS DEDUCTIONS FROM INCOME								
Miscellaneous Rents	$ 2,199.23	$ 2,174.17	$ 25.06	1.15	$ 16,167.23	$ 15,889.52	$ 277.76	1.75
Miscellaneous Tax Accruals	5,486.80	5,075.25	351.25	6.92	36,454.05	35,022.07	1,431.98	4.09
Miscellaneous	3,272.90	5,111.67	*1,838.77*	*35.97*	47,309.29	44,120.98	3,238.31	7.34
Total Miscellaneous Deductions	$ 10,998.93	$ 12,361.09	$ *1,462.46*	*11.83*	$ 99,980.82	$ 95,032.57	$ 4,948.05	5.21
INCOME AVAILABLE FOR FIXED CHARGES	$ 750,806.64	$ 311,894.62	$ 439,212.02	140.98	$ 4,830,896.74	$ 1,395,121.95	$ 3,435,774.79	246.27
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-	$ 2,100.00	$ 2,100.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	205,375.41	205,375.41	-	-	1,437,627.91	1,437,627.91	-	-
Equipment Obligations do.	6,093.54	5,162.50	931.04	18.03	42,710.20	36,525.00	6,185.20	16.93
Trustees' Certificates do. (A)	12,206.56	33,019.44	*20,813.88*	*63.04*	99,747.23	232,011.10	*132,263.87*	*57.01*
Other Obligations (e)	62,237.14	62,256.29	*18.15*	*.03*	433,291.35	433,200.53	90.72	.02
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	328.81	413.02	*80.21*	*19.42*	2,426.53	3,644.94	*1,218.41*	*33.43*
Other Obligations	60.49	356.86	*296.37*	*83.05*	2,115.95	2,179.27	*63.32*	*2.91*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.69	11,283.69	-	-	78,984.43	78,984.43	-	-
Equipment Obligations do.	315.10	80.76	234.34	290.17	2,199.87	570.50	1,629.37	285.35
Total Fixed Charges	$ 298,903.54	$ 318,246.77	$ *20,043.23*	*6.30*	$ 2,101,203.07	$ 2,226,843.98	*125,640.91*	*5.64*
NET INCOME	$ 452,603.10	$ *6,652.15*	$ 459,255.25	-	$ 2,729,693.67	$ *831,722.03*	$ 3,561,415.70	-

NOTE - Italics denote red.

Freight	$ 2,798,224.30	$ 1,932,800.89	$ 882,423.41	44.82	$17,807,676.27	$11,431,539.36	$ 6,376,136.91	55.78
Passenger	187,280.40	83,383.31	104,237.09	125.01	986,573.54	467,370.79	518,902.75	111.03
Mail	3,000.00	3,000.00	200.00	6.67	21,186.87	21,012.29	174.58	.83
Express	16,569.97	5,549.73	11,020.24	198.57	89,771.96	47,479.35	41,291.61	86.97
Dining Car, Hotel & Restaurant	28,908.41	14,186.47	12,722.94	89.69	136,428.44	62,883.98	72,544.46	115.36
Miscellaneous	53,996.49	33,386.98	20,609.51	61.73	279,783.39	153,090.91	126,692.48	82.84
Total Railway Operating Revenues	$ 3,088,819.87	$ 2,072,306.38	$ 1,011,213.19	48.80	$19,319,121.77	$12,183,306.66	$ 7,135,815.11	58.57
OPERATING EXPENSES								
Maintenance of Way & Structures	$ 355,239.87	$ 309,295.93	$ 45,943.94	14.85	$ 2,226,009.01	$ 1,754,715.38	$ 471,293.63	26.86
Maintenance of Equipment	370,272.47	351,905.80	18,366.67	5.22	2,583,913.20	2,140,729.73	443,183.47	20.70
Power	6,994.72	8,283.54	*1,328.82*	*16.10*	50,989.88	52,360.26	*1,370.38*	*2.62*
Traffic	80,312.13	74,537.77	5,774.36	7.75	546,413.02	503,201.27	43,211.75	8.59
Transportation - Rail Line	977,753.12	692,776.77	284,976.35	41.14	6,601,550.81	4,477,081.84	2,124,468.97	47.45
Miscellaneous Operations	26,090.05	10,489.03	12,600.02	61.41	149,183.58	83,110.12	66,073.46	79.50
General	78,627.87	61,560.69	17,067.18	27.72	588,741.45	443,486.87	85,256.58	19.22
Transportation for Investment - Credit	33.82	297.70	*263.88*	*88.64*	33.82	3,176.99	*3,143.17*	*98.94*
Total Railway Operating Expenses	$ 1,897,198.81	$ 1,513,821.83	$ 383,970.98	25.36	$12,696,986.53	$ 9,451,837.19	$ 3,236,389.36	34.23
NET REVENUE FROM RAILWAY OPERATIONS	$ 1,196,326.76	$ 548,794.85	$ 627,548.21	118.30	$ 6,628,235.24	$ 2,731,769.48	$ 3,900,465.76	142.78
Railway Tax Accruals - Payroll	$ 74,914.72	$ 52,968.88	$ 22,646.44	43.33	$ 683,360.09	$ 338,918.93	$ 180,464.16	45.20
Railway Tax Accruals - All Other	334,943.85	103,316.75	230,227.30	223.52	715,167.74	453,667.79	261,499.95	57.65
Railway Tax Accruals - Total	$ 409,138.37	$ 156,284.03	$ 253,874.34	162.98	$ 1,198,837.83	$ 792,543.72	$ 411,994.11	52.36
RAILWAY OPERATING INCOME	$ 777,188.39	$ 402,800.86	$ 373,987.87	92.78	$ 5,433,717.41	$ 1,945,225.76	$ 3,488,491.98	179.34
Equipment Rents - Net Debit	$ 141,731.53	$ 125,262.86	$ 16,468.67	13.15	$ 983,135.72	$ 732,627.86	$ 250,508.16	30.65
Joint Facility Rents - Net Credit	20,174.55	9,294.17	11,980.38	146.21	67,736.15	56,267.80	11,439.25	20.33
NET RAILWAY OPERATING INCOME	$ 655,611.41	$ 286,132.13	$ 369,479.28	129.13	$ 4,518,287.84	$ 1,268,865.00	$ 3,249,321.84	261.79
OTHER INCOME								
Rental of Property	$ 87,614.86	$ 54,280.08	$ 33,294.81	97.86	$ 349,940.09	$ 217,176.95	$ 132,763.14	61.13
Interest Accruals	1,789.30	3,468.53	*1,699.23*	*49.13*	12,922.43	23,147.26	*10,454.83*	*45.17*
Miscellaneous	46,719.70	46.00	46,674.70	-	49,987.00	964.31	48,992.69	-
Total Other Income	$ 106,083.86	$ 57,823.88	$ 48,270.28	180.50	$ 412,869.82	$ 241,288.52	$ 171,301.00	70.99
TOTAL INCOME	$ 761,705.27	$ 323,955.71	$ 437,749.56	135.13	$ 4,930,877.36	$ 1,490,154.52	$ 3,440,722.84	230.90
MISCELLANEOUS DEDUCTIONS FROM INCOME								
Miscellaneous Rents	$ 2,199.23	$ 2,174.17	$ 25.06	1.15	$ 16,187.25	$ 15,889.52	$ 277.76	1.75
Miscellaneous Tax Accruals	5,426.50	5,075.25	351.25	6.92	36,454.05	35,022.07	1,431.98	4.09
Miscellaneous	3,272.90	5,111.67	*1,838.77*	*35.97*	47,359.29	44,120.98	3,238.31	7.34
Total Miscellaneous Deductions	$ 10,898.63	$ 12,361.09	*$ 1,462.46*	*11.83*	$ 99,980.62	$ 95,032.57	$ 4,948.05	5.21
INCOME AVAILABLE FOR FIXED CHARGES	$ 750,806.64	$ 311,594.62	$ 439,212.02	140.96	$ 4,830,896.74	$ 1,395,121.95	$ 3,435,774.79	246.27
FIXED CHARGES								
Rent for Leased Roads and Equipment	$ 300.00	$ 300.00	$ -	-	$ 2,100.00	$ 2,100.00	$ -	-
Interest on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	205,375.41	205,375.41	-	-	1,437,627.91	1,437,627.91	-	-
Equipment Obligations do.	6,093.54	5,162.50	931.04	18.03	42,710.20	36,585.00	6,125.20	16.93
Trustees' Certificates do. (A)	12,206.56	33,019.44	*20,813.88*	*63.04*	99,747.23	232,011.10	*132,263.87*	*57.01*
Other Obligations (*)	68,237.14	68,255.29	*18.15*	*.03*	433,291.25	433,200.53	90.72	.02
Interest on Unfunded Debt:								
Equipment Obligations (W.P.R.R.Co.)	338.81	413.02	*80.21*	*19.42*	2,426.53	3,644.94	*1,218.41*	*33.43*
Other Obligations	80.69	386.86	*306.37*	*83.08*	2,115.96	2,179.27	*63.32*	*2.91*
Amortization of Discount on Funded Debt:								
First Mortgage Bonds (W.P.R.R.Co.)	11,283.49	11,283.49	-	-	78,984.43	78,984.43	-	-
Equipment Obligations do.	318.10	80.76	*234.34*	*290.17*	2,199.87	570.80	*1,629.77*	*285.56*
Total Fixed Charges	$ 306,203.84	$ 318,246.77	*$ 20,043.23*	*6.30*	$ 2,101,203.07	$ 2,226,843.98	*125,640.91*	*5.64*
NET INCOME	$ 452,603.10	$ *6,652.15*	$ 459,255.25	-	$ 2,729,693.67	$ *831,722.03*	$ 3,561,415.70	-

NOTE - Italics denote red.

(A) Excluding interest on cash collateral deposited with Reconstruction Finance Corporation, as follows:

$5,000,000.00 December 1, 1941.
1,000,000.00 April 24, 1942.

Note (*) - "Interest on Funded Debt - Other Obligations" includes the following:

		Month		Period	
		1942	1941	1942	1941
Notes Payable	- Reconstruction Finance Corp.	$ 12,582.61	$ 12,582.61	$ 86,048.77	$ 86,048.77
do.	- A. C. James Co.	20,832.50	20,832.50	145,827.50	145,827.50
do.	- Railroad Credit Corp.	2,106.94	2,106.94	14,401.92	14,401.92
Advances	- The Western Pacific Railroad Corp.	22,894.65	22,894.65	160,262.70	160,262.70
do.	- The Western Realty Co.	208.32	208.32	1,458.32	1,458.32
do.	- The Western Pacific Railroad Corp. to Sacramento Northern Railway	3,867.78	3,585.90	24,974.25	24,883.48
S.N.Ry. Bonds	- Other than held by The Western Pacific Railroad Co.	45.37	45.37	317.79	317.84
	TOTAL:	$ 68,237.14	$ 68,255.29	$433,291.25	$433,200.53

Accounting Department
San Francisco, California
September 16, 1942.

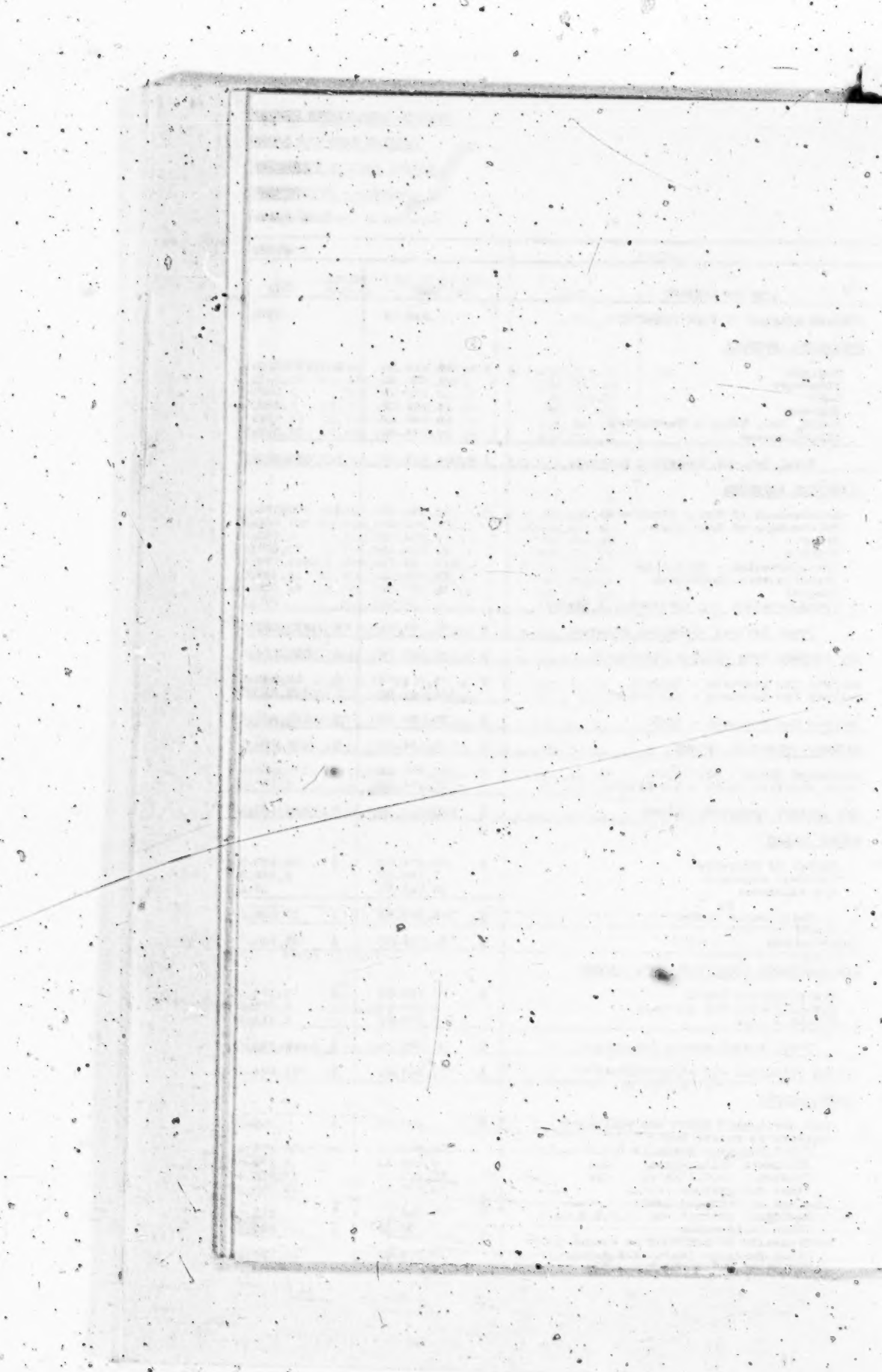

Exhibit L

Total Operating Revenues
of
THE WESTERN PACIFIC RAILROAD SYSTEM (‡)
and
CLASS I RAILROADS OF THE UNITED STATES (†)
(Revenues shown in Thousands)

ASSUMED "NORMAL" PERIOD

	Class I Railroads of United States (†)		The Western Pacific System	
	Revenues (000)	% of Assumed Normal Period	Revenues (000)	% of Assumed Normal Period
1923	$6,289,580	101.92%	$14,415	88.72%
1924	5,921,496	95.96	14,669	90.28
1925	6,122,509	99.22	15,899	97.85
1926	6,382,939	103.44	17,951	110.48
1927	6,136,300	99.44	18,306	112.67
5-Yr. Av.	$6,170,565	100.00%	$16,248	100.00%

AFTER ASSUMED "NORMAL" PERIOD

	Class I Railroads of United States (†)		The Western Pacific Railroad System (‡)				
	Revenues (000)	% of Assumed Normal Period	W. P. Excl. N.C.E. Revenues (000)	% of Assumed Normal Period	Add'l for N.C.E. (*) (000)	W. P. Incl. N.C.E. Revenues (000)	% of Assumed Normal Period
1928	$6,111,735	99.04%	$19,422	119.53	$	$	%
1929	6,279,521	101.76	20,097	123.69			
1930	5,281,197	85.58	18,819	115.82			
1931	4,188,343	67.87	14,688	90.40	165	14,853	91.41
1932	3,126,760	50.67	11,018	67.81	1,233	12,251	75.40
1933	3,095,404	50.16	10,711	65.92	1,491	12,202	75.10
1934	3,271,566	53.02	11,660	71.76	2,119	13,779	84.80
1935	3,451,929	55.94	12,117	74.58	2,290	14,407	88.67
1936	4,052,734	65.68	13,395	82.44	3,152	16,547	101.84
1937	4,166,069	67.52	14,492	89.19	3,426	17,918	110.28
1938	3,565,491	57.78	12,963	79.78	3,094	16,057	98.82

Source:—Class I revenues 1923-1937 taken from I. C. C. Statistics of Railways, and 1938 revenues taken from Bureau of Railway Economics statements.

(‡) The Western Pacific Railroad System is comprised of
The Western Pacific R.R. Co.,
Sacramento Northern Railway,
Tidewater Southern Railway Co.,
Deep Creek Railroad Company.

(†) Excludes Switching and Terminal Companies.

(*) Northern California Extension (NCE) placed in freight service Nov. 10, 1931.

FILE COPY

163

FILED
OCT 5 1942
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of The Western Pacific Railroad Company, a corporation, dated June 26, 1926,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation,
Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner.

vs.

FREDERICK H. ECKER, *et al.*,
Respondents.

BRIEF ON BEHALF OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

FRANK C. NICODEMUS, JR.,
Counsel for The Western Pacific Railroad Company,
40 Wall Street,
New York, N. Y.

October 1, 1942.

INDEX

PAGES

FOREWORD 1-2

SCOPE OF THE DEBTOR'S BRIEF 2

THE DEBTOR'S STATUS UNDER SECTION 77 3-6

SUMMARY OF ARGUMENT 6

ARGUMENT

Point I. The effective date of the Plan should be the date of the filing of the Petition. . . .6-11

Point II. The new Plan should be purged of the discriminatory treatment attempted to be given Reconstruction Finance Corporation 11-14

Point III. The new Plan should provide for the surrender to the Debtor for restoration to the owners of all accommodation collateral pledged under its secured notes 14-17

Point IV. The new Plan should be carried out by the Debtor and not by a Reorganization Committee 17-21

Point V. The Debtor's unsecured creditors and stockholders may not lawfully be excluded from participating in the new Plan 21-36

CONCLUSION 36

Table of Cases

	PAGES
Atlanta, Birmingham and Coast Railroad Company v. *United States*, 296 U. S. 33	27
Chicago, Milwaukee and St. Paul Railway Company (1928 Equity Reorganization), 131 I. C. C. 615, 282 U. S. 311	22
Commercial Nat. Bank v. *National Surety Co.*, 259 N. Y. 181	15
Consolidated Rock Products Company v. *du Bois*, 312 U. S. 510	25
Continental Illinois Bank and Trust Company v. *Chicago, Rock Island and Pacific Railway Company*, 294 U. S. 648	22
Crowell v. *Benson*, 285 U. S. 22	26
Denver and Rio Grande Western Railroad Company v. *McCarthy, et al.*, 111 F. (2d) 820	3, 4
In re O'Gara Coal Company, 12 F. (2d) 426	9
Matter of Cooke, 147 Misc. 528	15
Monongahela Navigation Company v. *United States*, 148 U. S. 312	26
Robinson v. *Roe*, 233 Fed. 936	15
Sexton v. *Lloyds Bank*, 219 U. S. 339	8
Ticonic National Bank v. *Sprague*, 303 U. S. 406	8

Table of Statutes

Bankruptcy Act:

Section 73	21
Section 77	2, 3, 4, 5, 6, 8, 9, 11, 16, 20, 21, 22, 25, 26, 36
Subsection (a)	3
(c)	3, 5
(e)	2, 4, 10, 11, 25, 26, 33
(f)	3, 21
(l)	7, 9, 10
(p)	5

PAGES

Reconstruction Finance Corporation Act:

Section 5 14

Chandler Act of July 28, 1939 (11 U. S. C. A. Sec. 1200-1255) 23

United States Constitution:

Fifth Amendment 26

Interstate Commerce Act:

Section 19A 27, 28, 29

Urgencies Deficiencies Act (28 U. S. C. A. 47) 28

OTHER AUTHORITIES

49 Corpus Juris, 982, 986 15

Moody's Steam Railroads (1942) 120 23

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Respondents.

BRIEF ON BEHALF OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

Foreword

The views of The Western Pacific Railroad Company (herein called the Debtor) upon the fundamental questions

now arising in this Court under Section 77 of the Bankruptcy Act (herein referred to as Section 77) are in complete accord with those presented in the brief of Western Pacific Railroad Corporation, which is the Debtor's sole stockholder and the beneficial owner of all of the Debtor's unsecured indebtedness.[1]

In order to avoid duplication of argument the Debtor, therefore, adopts in its entirety the brief filed herein by Western Pacific Railroad Corporation.

In addition, and for reasons hereinafter stated, the Debtor adopts as correctly expressing the position which the Debtor conceives it to be its duty to take in respect of conflicting lien claims asserted herein, the brief filed by Irving Trust Company, as Trustee of the Debtor's General and Refunding Mortgage.

Scope of the Debtor's Brief

This brief assumes affirmance by this Court of the decision of the Circuit Court of Appeals herein and a reference of this proceeding back to the Interstate Commerce Commission pursuant to subsection (e) of Section 77 on the basic grounds developed in the brief of the Western Pacific Railroad Corporation, and is intended (a) to supplement that brief in the discussion of certain questions which this Court may think ought to be settled before the Interstate Commerce Commission undertakes the consideration of a new plan and (b) to add a few further words of confidence in the earning capacity of the Debtor's properties and in the strength and future of the railway industry.

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1. Tr. 1044, 1143.

The Debtor's Status Under Section 77

As this Court is aware, this proceeding was commenced (and we think this also is true of other like proceedings pending in the Courts) by the filing by the Debtor as required by Section 77 of a petition alleging in the language of subsection (a) that it is "unable to meet its debts as they mature and that it desires to effect a plan of reorganization."

Thus at the very outset the Debtor became the moving party in these proceedings and by the express terms of paragraph (13) of subsection (c) invested with "the right to be heard on all questions arising in the proceedings." That this right is a continuing one persisting throughout the proceeding is made clear by Section 77 as a whole and particularly by subsection (f) which provides—

> "* * * Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding."

As stated in an opinion written by Circuit Judge PHILLIPS for the Circuit Court of Appeals in the Tenth Circuit:

> "Undoubtedly, the debtor has important duties to perform in the reorganization proceedings, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 679, * * * not only in connection with the formulation and presentation of the plan of the debtor but also in connection with the proceeding, the debtor hav-

ing the right to be heard on all questions arising therein."[2]

Since it is the statutory duty of the Debtor to formulate and carry through a reorganization plan which must conform to the meticulous statutory specifications set out and referred to in subsection (e) of Section 77, and since the formulation of such a plan necessarily involves a determination by the Debtor of the status and lien position of every security holder or creditor entitled to participate therein, it cannot perform this statutory duty and discharge its obligations to the Interstate Commerce Commission and the Court if it remain complaisant in respect of a plan proposed by any other party to the proceeding or formulated by the Commission itself which fails either as to creditor or equity interest to conform to any one or more of such statutory specifications. So it seems quite clearly to be the intent of Section 77 that the Debtor serve throughout the proceeding in a *quasi* judicial capacity and to that end have the right to be heard under paragraph (13) of subsection (e) on behalf of any creditor or equity interest whose rights are adversely affected by any feature of a plan certified to a District Court by the Interstate Commerce Commission pursuant to subsection (d). This general duty becomes definite and specific as to any class of creditors which in whole or in part may be otherwise unrepresented in the proceeding.

The holders of a very large part of the Debtor's funded debt are in this situation.

The Debtor has created and there are now outstanding an issue of its First Mortgage Bonds in the amount of $49,290,100, of which $16,941,400 are represented by an

2. *Denver and Rio Grande Western Railroad Company* v. *McCarthy, et al.*, 111 F. (2d) 820.

Institutional Bondholders' Committee,[3] a group of not more than twenty-five members organized under the following exceptive provision of subsection (p) of Section 77—

> "• • • That nothing contained in this section shall • • • prohibit groups of not more than twenty-five *bona fide* holders of securities or claims or groups of mutual institutions from acting together *for their own interests and not for others* • • •." (Italics supplied.)

The limitations of subsection (p) are clear and unequivocal. The Institutional Bondholders' Committee organized under this subsection may represent the $16,941,400 of First Mortgage Bonds owned by members of the group but *may not* represent others, thus leaving $32,348,700 of the same issue of First Mortgage Bonds wholly unrepresented in the proceeding except as they may be represented either by the mortgage trustees in the execution of their trust or by the Debtor in the proper discharge of its duties under Section 77. The authority of the mortgage trustees may, however, be subject to question in view of the *caveat* in paragraph (7) of subsection (c) that "nothing herein shall constitute such trustee or trustees the representative or representatives of such holders for the purpose of accepting or rejecting any plan of reorganization."

In the argument which follows the Debtor is aligned in its technical position with the interest of the holders of the unrepresented First Mortgage Bonds in opposing the proposed violation of their lien priority by the offer of parity of treatment to the secured notes of the Debtor held by Reconstruction Finance Corporation and in opposing the creation of a reorganization committee upon which these Bonds (nearly two-thirds of the entire issue) are accorded no representation; but, for reasons which will be

3. Tr. 1855.

apparent to this Court the Debtor has adopted the brief of the Trustee of the General and Refunding Mortgage as more consistent with its own public representations and as reflecting the definitely sounder view in the lien controversy between the Trustees of the First Mortgage and the Trustee of the General and Refunding Mortgage.[4]

Summary of Argument

I. The effective date of the Plan should be the date of the filing of the Petition.

II. The new Plan should be purged of the discriminatory treatment attempted to be given Reconstruction Finance Corporation.

III. The new Plan should provide for the surrender to the Debtor for restoration to the owners of all accommodation collateral pledged under its secured notes.

IV. The new Plan should be carried out by the Debtor and not by a Reorganization Committee.

V. The Debtor's unsecured creditors and stockholders may not lawfully be excluded from participating in the new Plan.

Argument

I. The effective date of the Plan should be the date of the filing of the Petition.

The first question which ought to be judicially settled for the future guidance of the Interstate Commerce Commission and the Courts is the precise capital structure of a Debtor to which a plan of reorganization under Section 77 should be applied.

4. Tr. 1649.

In the present case, the Interstate Commerce Commission has selected January 1, 1939, as the effective date of the plan certified to the Court and has applied the plan to the capital structure, including interest accrued at contract rates, as it existed on December 31, 1938, but it points to no legal warrant for that particular date.[5] There is no reason why it could not with equal propriety say December 31, 1937, or December 31, 1940, or why it should not project things forward to December 31, 1941, or carry them back to August 2, 1935.[6]

The Debtor says that the plan for its reorganization should be applied to its capital structure as it existed August 2, 1935 (adjusted for accounting purposes to the nearest July 1 or January 1) and it points to subsection (l) of Section 77 as its warrant for that date. The Debtor contends that Section 77 contemplated a prompt reorganization in accordance with a uniform pattern applied to the capital structure as it existed at the basic date of bankruptcy—the date of the filing of the petition—and that this is the plain implication of subsection (l) which provides—

> "In proceedings under this section * * * the rights and liabilities of creditors, * * * shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

5. Tr. 307.

6. In an up to date study of railroad reorganization Plans certified by the Interstate Commerce Commission, issued by the Stock Exchange firm of Pflugfelder, Bampton & Rust, it appears that the following Plans bear the effective dates indicated:

Chicago, Milwaukee, St. Paul and Pacific Railroad Company	—January 1, 1939
Chicago & North Western Railway Company	—January 1, 1939
Akron, Canton & Youngstown Railway Company	—October 1, 1938
Missouri Pacific Railroad Company	—January 1, 1940
Chicago, Rock Island & Pacific Railway Company	—January 1, 1942
Florida East Coast Railway	—January 1, 1942
St. Louis Southwestern Railway Company	—January 1, 1942
St. Louis—San Francisco Railway Company	—January 1, 1940
The Denver and Rio Grande Western Railroad Company	—January 1, 1942
New York, New Haven & Hartford Railroad Company	—January 1, 1940

It is quite clear from the authorities reviewed in *Ticonic National Bank* v. *Sprague*,[7] that the capital structure to be dealt with in reorganization must include the principal of all indebtedness, both secured and unsecured, together with contract interest accrued to the basic date of bankruptcy and that the right to interest *after* that date only survives as to *secured* indebtedness. The following terse but comprehensive statement of the law appears in one of the footnotes to Mr. Justice REED's opinion in that case (p. 413): "*A mortgagee shall have his interest run on* upon a bankrupt's estate, because he hath a right in rem, *but as to other interest, it ceaseth on the bankruptcy.* Per Ld. Chan. King, 18 July 1729." In effect, therefore, the filing of a petition under Section 77 is an impounding of subsequent income for the liens under which it was earned. This also is the clear import of this Court's decision in *Sexton* v. *Lloyds Bank*.[8]

In the case now before this Court, the petition was filed August 2, 1935, and the effective date which the Interstate Commerce Commission has assigned to the plan is January 1, 1939.[9] Accordingly, the creditors are to receive upon their principal obligations, either in cash or securities, interest accrued at existing contract rates up to August 2, 1935, and thereafter until January 1, 1939; but for the period *after* January 1, 1939 (to the extent that their creditor status is permitted to survive) they are to receive interest accrued at the rates to be prescribed in the new securities. The result of this is that for approximately three and one-half years out of the seven years elapsed since August 2, 1935, the lien and secured creditors are to

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7. 303 U. S. 406.

8. 219 U. S. 339.

9. Tr. 307.

be given recognition for interest on the basis of the pre-bankruptcy contract, and for the three and one-half years of the same seven year period (*i. e.* from January 1, 1939 to date) their interest adjustment will be on the basis of the new or substituted contract; but for neither of these two periods do they receive what the law gives them—the income actually earned under their respective liens.

The Debtor submits that reorganization plans under Section 77 should be made effective as of the date of the filing of the petition as contemplated by subsection (l) and that the rights of all parties in respect of subsequently accruing interest shall be in accordance with the terms of the substituted securities which they are allotted in reorganization. This will avoid tedious segregation or mortgage section studies of income earned *pendente lite* and will give to interest accruing after basic date the same treatment as is accorded principal and is fair and equitable if the plan itself is sound. No one could criticize as unfair and inequitable a plan otherwise sound which gives identical treatment to both principal and interest. No one could, in our view, contend, however, that a plan is not fundamentally wrong which treats interest for part of the administration period on one basis and for another part of the administrative period on a different basis but ignores in each case the actual income lawfully impounded as applicable thereto.[10]

There is no real problem in formulating a plan as of the basic date of bankruptcy and then carrying the plan for-

10. Whether a secured creditor may stand on his lien for both principal and interest and at the same time participate in the general estate presents a grave question under the Bankruptcy Act which need not be here considered. The rule seems to be settled that a secured creditor cannot prove his entire claim in bankruptcy without surrendering or abandoning his security. (*In re O'Gara Coal Company*, 12 F. [2d] 426.) The mortgage creditors who participate in a reorganization under Section 77 might logically be held to be subject to the same disability without thereby running counter to what heretofore has been deemed fair and equitable in a court of bankruptcy.

ward to any subsequent date selected as convenient and in utilizing for interest adjustments for the post-bankruptcy period the same securities as are given for principal as of basic date. Experienced railway accountants will readily make all of the adjustments and readjustments necessary to carry the capital structure forward to any given date and to expand it by issuing new capital securities in lieu of income that it may be necessary to withhold from distribution. Such a situation is well illustrated by the case now before the Court. As will be shown hereafter approximately $10,000,000 of Trustees' Certificates mature December 1, 1942, and ample funds representing income earned during trusteeship appear to be available for their payment. The use of the cash for this purpose (we shall show hereafter that the law makes its use mandatory) will, however, render impracticable any substantial cash distribution to holders of the new securities issuable under the plan. Additional new securities of precisely the same character as are to be issued under the plan in respect of principal and accrued interest at basic date will of necessity be issued in respect of such part of the $10,000,000 fund as would have been distributed on the new securities so issued if the fund had not been used to pay the Trustees' Certificates. So the holders of new securities will receive for interest after basic date exactly what they receive for interest up to basic date.

Should it be contended here that the provision of subsection (1) fixing all rights as of the date of the filing of the petition, if held to establish the basic date for a plan of reorganization, is inconsistent with the provision of subsection (e) that a finding of *no value* for a *stratum* of debt or for a class of stock in order to exclude it from the right to vote upon a plan of reorganization shall give effect to the value of the estate at "the time of the finding" it is

submitted that the contention is without merit. No inconsistency exists. The provision of subsection (e) is merely a recognition of the constitutional rule that a valuation involving possible confiscation must be on a current basis or equated to a current basis. It does no more than assure a class excluded from a plan predicated upon obsolete values the right to vote down such plan and to require the formulation of a new plan on the basis of current values. The new plan would bear the same date as the original plan corresponding to the date of bankruptcy but would establish rights translated into new securities reflecting true values instead of depression values and would give the precise relief contemplated by Section 77.

But if the Court shall conclude that a lawful plan may be formulated on the basis of the Debtor's funded debt with the capital structure moved forward and interest added to a date subsequent to bankruptcy at contract rates regardless of whether it was earned or unearned, and if earned regardless of where earned, then we submit that the plan should be moved forward to the latest practicable date which, if it be the January 1 or July 1 following the date of certification of the plan to the District Court could conveniently be made to coincide with the actual date of judicial confirmation.

II. The new Plan should be purged of the discriminatory treatment attempted to be given Reconstruction Finance Corporation.

Reconstruction Finance Corporation is the owner and holder of approximately $10,000,000 principal amount of Trustees' Certificates representing a debt incurred by the Trustees, as officers of the Court, and not by the Debtor, but constituting a first and paramount lien upon all of the Debtor's railways and other

properties and, in addition, Reconstruction Finance Corporation is the owner and holder of the Debtor's collateral notes in the principal amount of $2,963,000, secured by the pledge, among other things, of $11,750,000 principal amount of the Debtor's General and Refunding Mortgage Bonds which, under the decision of the Interstate Commerce Commission—a decision accepted by the District Court but not dealt with on this point by the Circuit Court of Appeals—are for all practical purposes subordinate to the lien of $49,290,100 principal amount of the Debtor's First Mortgage Bonds. Nevertheless, the Interstate Commerce Commission in the Plan certified to the District Court advanced or elevated the claim of Reconstruction Finance Corporation represented by the Debtor's notes in the principal amount of $2,963,000, so that this claim is given parity of treatment with the holders of the Debtor's First Mortgage Bonds. This discriminatory treatment of the claim of Reconstruction Finance Corporation, so plainly violative of the rule of strict priority, is sought to be justified upon the theory that Reconstruction Finance Corporation is to aid consummation of the Plan by buying at par (or accepting at par in exchange for its Trustees' Certificates in like principal amount) $10,000,000 principal amount of First Mortgage Bonds of the reorganized Company, bonds which witnesses undertook to testify would not be worth, when issued, more than 90% of their face.[11] The difficulties here are threefold: first, there is no commitment whatsoever on the part of Reconstruction Finance Corporation to buy the new Bonds at par or at any other price (nor any commitment to exchange the Trustees' Certificates for the new Bonds); secondly, it was quite impossible for any witness to place a dependable value upon new Bonds to be

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11. Tr. 1530, 1537.

issued, one, two or three years hence; and, thirdly, neither the Interstate Commerce Commission nor the Court made any finding as to the amount of the claimed deficiency of which the expectation of financial aid from Reconstruction Finance Corporation was assumed to be the "equitable equivalent." Such an expectation is not a valid consideration to support the displacement or dilution of senior liens. If the new Bonds at the time of issue are not worth par, the Reconstruction Finance Corporation need not buy them and the reorganization may fail. If the new Bonds are worth par, then the Reconstruction Finance Corporation becomes the beneficiary of any premium and the unlawful discrimination in its favor is aggravated.

This question will in all probability be academic if either of the two major lien claims are decided *against* the First Mortgage and in favor of the General and Refunding Mortgage in accordance with the brief of Irving Trust Company, adopted by the Debtor, because such a decision would indicate a collateral value for the General and Refunding Mortgage Bonds pledged as security for the $2,963,500 of the Debtor's notes held by Reconstruction Finance Corporation sufficient to entitle such notes to payment in cash or at least to parity of treatment with the Debtor's First Mortgage Bonds.

Moreover, changed economic conditions since the Commission's Plan was formulated appear to have so improved the cash position of the Trustees as to assure ample funds for the payment of the Trustees' Certificates at their maturity on December 1, 1942. Indeed, $6,000,000 has been deposited as dollar collateral for these Trustees' Certificates in consideration of the abatement of all interest on $6,000,000 of the principal indebtedness represented there-

by.[12] Assuming that an extension of the Trustees' Certificates at their maturity on December 1, 1942, is the legal equivalent of a new loan (we cannot see how it can be treated otherwise) an extension becomes inadmissible because (a) Trustees' Certificates secured by dollar collateral would be readily marketable among banks and like investors at a very low interest rate and it would not be possible truly to certify as required by Section 5 of the Reconstruction Finance Corporation Act that the money cannot be obtained on reasonable terms in ordinary channels, and (b) Trustees' Certificates may only be lawfully issued in derogation of existing liens for a very limited number of purposes which do not include the maintenance of a large cash fund greatly in excess of essential working capital.

Should it become necessary, however, to look to Reconstruction Finance Corporation for any cash to be provided under a new plan of reorganization by the sale of Bonds of the reorganized Company and to give it preferred treatment in consideration thereof, it is submitted that there must be included in the arrangement a factor which does not now exist—there must be included therein a binding commitment on its part to perform the undertaking which is the consideration for such preferred treatment, subject only to such authorization as may be required by law.

III. The new Plan should provide for the surrender to the Debtor for restoration to the owners of all accommodation collateral pledged under its secured notes.

In the late depression period when the Debtor was endeavoring to protect interest payments upon its First Mortgage Bonds and at the same time finance the completion of the Northern California Extension, the A. C. James Co. loaned

12. Statement of System Operating Results for July, 1942, dated September 16, 1942. The Trustees have applied for instructions as to the action to be taken at the maturity of the Certificates and have forecast available cash for payment amounting to approximately $12,000,000.

the Debtor certain collateral which was pledged by the Debtor to Reconstruction Finance Corporation and The Railroad Credit Corporation with full knowledge on the part of these pledgees that they were receiving accommodation collateral. The Commission's original report provided:

> "The plan should provide, however, that its approval and confirmation in no wise disturbs or alters the rights of the Reconstruction Finance Corporation and the Railroad Credit Corporation in collateral pledged with them by parties *other* than the debtor."[13]

> "The plan should provide further that all collateral pledged by the debtor as security for its notes to the Reconstruction Finance Corporation, Railroad Credit Corporation, and A. C. James Company shall be surrendered to the reorganized debtor."[14]

In substance, the Commission provided that the collateral owned and pledged by the Debtor should be surrendered to the reorganized Company but that the accommodation collateral borrowed from others and pledged by the Debtor should be confiscated; or, to state the proposal somewhat differently, the accommodation collateral is to be resorted to first instead of last as is required by the most elemental principles of equity and by the authorities cited below.[15]

The Institutional Bondholders' Committee requested certain modifications of the original report of the Interstate Commerce Commission, including a modification requiring

13. Tr. 271.

14. Tr. 280.

15. 49 Corpus Juris, 982, 986;
Commercial Nat. Bank v. *National Surety Co.*, 259 N. Y. 181;
Matter of Cooke, 147 Misc. 528;
Robinson v. *Roe*, 233 Fed. 936.

that "all collateral pledged by others than the Company * * * be surrendered to the pledgors thereof."[16] The Debtor itself proposed that the following provision be inserted in any plan approved by the District Court:

> "All collateral pledged by others than the Company as security for the Company's notes to R.F.C., R.C.C. and A.C.J. shall be surrendered to the pledgors thereof, and all collateral pledged by the Company as security for said notes shall be surrendered to the New Company and cancelled, except that R.C.C. shall not release or surrender any right or interest in the distributive shares of the Company or its subsidiaries under the Marshaling and Distributing Plan, 1931, but any proceeds from such distributive shares after the effective date of the Plan, shall become the property of and be retained by the R.C.C., but to the extent to which received prior to the issue of the new securities under the Plan shall be applied in reduction of the claim of the R.C.C. in respect of which such new securities are to be issued at the rates provided in Article IV."[17]

The Interstate Commerce Commission declined to approve the proposal that all collateral pledged by others than the Debtor be surrendered to the pledgors thereof.[18] The learned District Court did not deal with this subject correctively or otherwise. The suggestion was made in the District Court and in the Circuit Court of Appeals, and we understand it is repeated here, that the District Court has no jurisdiction under Section 77 to deal with the accommodation collateral. This is a strange suggestion. Why a party who loans the Debtor collateral instead of money is not a creditor of the Debtor entitled to the protection of the

16. Tr. 812.

17. Tr. 878.

18. Tr. 345.

bankruptcy court is not at all clear. In the new plan a provision for the restoration of the accommodation collateral to the owners as proposed by the Debtor, which is a provision identical in principle with the one proposed by the Institutional Bondholders' Committee, should be included.

IV. The new Plan should be carried out by the Debtor and not by a Reorganization Committee.

Provision is made in the plan certified by the Interstate Commerce Commission to the District Court for a reorganization committee consisting of three members, one appointed by the Institutional Bondholders' Committee, one by Reconstruction Finance Corporation, and one jointly by the Debtor's two remaining holders of secured notes.[19] It may be noted in passing that inasmuch as the Institutional Bondholders' Committee represents only $16,941,400 out of $49,290,100 of First Mortgage Bonds, no recognition or voice in reorganization is given to $32,348,700 of First Mortgage Bonds which the Committee does not represent.[20] Moreover, it seems quite evident that the creditor position of Reconstruction Finance Corporation is in process of rapid liquidation.

If there is to be a reorganization committee under the new plan it should, we submit, be more distinctively representative than the Committee provided for in the Commission's Plan.

There may be cases, but this is not one of them, where a reorganization committee can serve a useful purpose.

Here the reorganization committee is assigned two general functions—

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19. Tr. 395.

20. Tr. 1855.

First—To determine the form and character of the securities and incidental instruments created and executed under the plan, and

Second—To name the first board of directors of the reorganized Company.

The first of these functions is largely theoretical. The form and character of the securities will appear in great detail in the orders of the Commission but if and to the extent that features are left open they will necessarily conform to standards recognized and accepted by creditor interests. Whether there is or is not a reorganization committee, such problems will be solved in conference by counsel representing the parties to the present proceeding. Little will be gained by giving these same counsel an additional title as counsel for a reorganization committee. If differences between parties are not solved in conference they should be reconciled by the Judge and not committed to the decision of a reorganization committee of the character here proposed.

The second of these functions—the one involving the selection and setting up of the first board of directors of the reorganized company—is of greater practical significance.

At or near the end of the Commission's final report dated June 21, 1939, among the sections dealing with matters of mechanics and detail, is the following paragraph under the caption,

"*Management*"

"Under the modified plan of the bondholders' committee the board of directors of the reorganized

company would consist of not less than 7 nor more than 11 members, who would be elected by the stockholders of the reorganized company at an election to be held not later than 90 days after the consummation of the plan. Pending such election the board of directors would consist of such persons as may be designated by the reorganization committee with the approval of the court.

Conclusion.—We find that the foregoing provisions should be incorporated in the modified plan."[21]

Persons unfamiliar with the technique of corporate control would attribute no real importance to a temporary board of directors which is to be superseded by a definitive board elected by the stockholders within ninety days. They would assume all functions of such interim board to be wholly within the category of what is strictly routine. With but a single exception this assumption would perhaps be quite correct. This exception is the function of the temporary board to name the proxy committee which will officially solicit proxies to be voted by the management for the permanent board to be elected by the stockholders. Its exercise will, of course, enable the reorganization committee to dictate the composition of the permanent board which in turn will name the proxy committee for the stockholders' meeting to be held in the following year. This process, repeated from year to year, will assure due maintenance and preservation in corporate control and management of a sound "apostolic succession."

Since a majority of the reorganization committee will be named by the Institutional Bondholders' Committee in conjunction with Reconstruction Finance Corporation, we set out in the subjoined footnote the constituents of the

21. Tr. 354.

group which the Committee represents.[22] From this it appears that by reason (a) of ownership of $9,852,400 out of $16,941,400 of the group Bonds by the Metropolitan Life Insurance Company and The Prudential Insurance Company of America, and (b) the composition of the Committee itself, one of its three members being the Chairman of the Board of the Metropolitan Life Insurance Company and another being the Financial Vice President of The Prudential Insurance Company of America, complete control of the Institutional Bondholders' Committee rests in these two insurance companies. Upon liquidation, which seems imminent, of the loans held by Reconstruction Finance Corporation, it will, of course, cease to be a factor, leaving the control of the reorganized Company safely lodged in the Metropolitan Life Insurance Company and The Prudential Insurance Company of America.

Without intending to reflect in the slightest degree upon these splendid institutions the Debtor submits that such a result is out of line with the underlying purpose and intent of Section 77 and that in proceedings under that Section a reorganization committee should be the exception and not the rule. At least this should be the governing principle in those cases (of which we maintain the present case is pre-eminently one) where the value and earning power of the Debtor's properties require that recognition be given to existing stockholding interests. Continuity of management and a minimum disruption of organization and sacrifice of *esprit de corps* are the very

22. Metropolitan Life Insurance Company $6,852,400.00
The Prudential Insurance Company of America 2,000,000.00
The Chase National Bank of the City of New York
As Owner 25,000.00
as Pledgee 4,464,000.00
The Travelers Insurance Company 200,000.00
New York Life Insurance Company 1,300,000.00
The Mutual Benefit Life Insurance Company 500,000.00
Home Life Insurance Company 300,000.00
John Hancock Mutual Life Insurance Company 300,000.00

essence of the relief to debtors contemplated by Section 77. For these reasons the Debtor urges that in any new Plan all the present provisions for a reorganization committee should go into the discard and the Debtor be expressly authorized to "put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and control of the judge" as provided in subsection (f) of Section 77.

V. The Debtor's unsecured creditors and stockholders may not lawfully be excluded from participating in the new Plan.

In concluding this argument, it may be helpful to the Court if the Debtor presents very briefly and informally its position as to the underlying purposes of Section 77, points out the salient facts of record arranged in sequence bearing upon what the Debtor conceives to be the constitutionally protected value of its properties and then directs attention to the economic changes occurring since the formulation of the Commission's Plan which have revolutionized the railway industry.

Section 77 was approved March 3, 1933, when the world-wide depression was very close to its low point.

By the title of Chapter VIII, of which Section 77 formed a part, and by the text of Section 73, this legislation was declared to be for "the relief of debtors." No one can seriously question therefore that Section 77 was and is a remedial statute subject to liberal construction for the protection and preservation of the property rights of the debtors then in jeopardy.

From the Committee Reports and Congressional debates it is clear that Congress assumed that this objective would be attained by means of speedy and economical reorganizations entirely purged of the evils of the past as

exemplified by the 1928 equity reorganization of The Chicago, Milwaukee and St. Paul Railway Company.[23] Indeed, this Court expressly so states in its opinion in *Continental Illinois Bank and Trust Company* v. *Chicago, Rock Island and Pacific Railway Company.*[24]

Since the Debtor itself had placed the same interpretation upon Section 77, it undertook to prepare and agree with its creditors and stockholders upon a plan which could be carried through without any delay and at a minimum cost to the trust estate. The outline of such a plan was annexed to the Debtor's petition as filed under Section 77 on August 2, 1935.[25] At later stages Plans were filed by other parties in interest.[26]

On October 10, 1938, the Interstate Commerce Commission made its report and order promulgating and approving a plan of reorganization which differed from all plans filed by interested parties and with the exception of a plan released somewhat later for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, is the most drastic plan ever proposed for a major property.[27] On September

23. 131 I. C. C. 615; 282 U. S. 311.

24. 294 U. S. 648.

25. Tr. 8-9, 196.

26. Tr. 196.

27. In The New York Times, April 13, 1941, it appears that in the Commission's Plan for nine major carriers the Commission prescribed annual charges and preferred dividends equivalent to a return under the respective capitalizations (no par value stock taken at $100) as follows:

Chicago & North Western	4.16
Chicago Great Western	4.06
Chicago, Milwaukee, St. Paul and Pacific	3.28
Denver and Rio Grande Western	3.86
Erie (including Chicago and Erie)	4.12
Missouri Pacific	3.95
New York, New Haven & Hartford	4.21
Western Pacific	3.73

This indicates such radical curtailment of senior securities that it will be necessary for the reorganized Western Pacific to earn only 3.73% on such revised capitalization when earnings begin to flow through to the Common Stock.

28, 1939, after various proceedings, including entry of a report and order modifying in minor features its original report and order, the Interstate Commerce Commission certified this drastic plan to the District Court.[28]

It may be observed in passing that what the Interstate Commerce Commission construed as a Congressional demand for drastic reorganizations wiping out equities and junior debt was merely an expression of the ephemeral political views of individual members.[29] This was demonstrated by the subsequent passage of the Chandler Act of July 28, 1939, under which financial readjustments liberal in their provisions for the preservation of equities were carried into effect by the Baltimore and Ohio Railroad Company and the Lehigh Valley Railroad Company.[30] A voluntary financial readjustment without the aid of any legislation was recently perfected by the Boston and Maine Railroad Company, leaving its stock undisturbed.[31]

At December 31, 1938—January 1, 1939, the latter being the effective date assigned to the plan, the Debtor's total outstanding bonds and secured notes, together with $10,000,000 of Trustees' Certificates constituting a paramount lien on the entire trust estate, amounted to $87,712,654. The Debtor has consistently urged and now confidently submits that its properties valued as of that date in accordance with the law of the land represented a sound income producing investment of not less than $120,000,000 (after applying full straight line depreciation to all depreciable property), indicating a residuum of constitu-

28. Tr. 194, 300, 1034-5.

29. Transcript of hearings before Judiciary Committee on Senate Bill 1869, pages 460-464.

30. 11 U. S. C. A. § 1200-1255.

31. Moody's Steam Railroads (1942) 120.

tionally protected value of at least $33,287,546.[32] All parties except the Institutional Bondholders' Committee and Reconstruction Finance Corporation have supported this position and two or more reorganization proposals predicated on this approximate valuation were under consideration by the Commission, but all were rejected. As the Court is advised by briefs of other counsel, the Interstate Commerce Commission, without reporting any value for the Debtor's properties, proposed a plan providing for a total capitalization of $97,712,654 (taking no par value stock at $100 per share) all of which is allocated to holders of the Debtor's Bonds and secured notes and the holders of Trustee's Certificates without any provision for the Debtor's unsecured debt and capital stock.

Commissioner Miller, a member of Division 4 (Finance) of the Commission, dissented. We quote from his dissenting report:

> "In connection with capitalization the majority state
>
> > It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company.
>
> With this conclusion I can not agree but am strongly of the view that the capitalization should be generally on the basis of original cost less depreciation amounting to something over $120,000,000, which is about the same as is proposed in two of the three plans referred

32. The constitutionally protected value is believed to be substantially in excess of $120,000,000 and not lower than the 19A value of $150,000,000. Tr. 1061-1063.

to in the above quotation. The no-par-value common stock may have little or no market value when the company is reorganized, but the issuance in the neighborhood of $30,000,000 more than the majority authorize would give the present stockholders a chance to participate in the future profits of the reorganized company."[33]

It will be assumed (the point is argued by other counsel) that if the value of the Debtor's properties as a whole determined in accordance with subsection (e) of Section 77 exceeds the principal amount of the Debtor's bonds and secured debt and Trustees' Certificates, together with interest accrued to the proper basic date, recognition must be given to the Debtor's unsecured debt, and if it exceeds the combined secured debt and unsecured debt, then also to its capital stock in any *lawful* plan of reorganization under Section 77. This seems implicit in the decision of this Court in *Consolidated Rock Products Company* v. *du Bois*, where it is stated in the opinion of Mr. Justice DOUGLAS:

> "In view of what we have said, it is apparent that a determination of that value must be made so that *criteria* will be available to determine an appropriate allocation of new securities between bondholders and stockholders in case there is an equity remaining after the bondholders have been made whole."[34]

The Debtor submits (a) that upon the facts of record as to which there is no issue or dispute, there can be no lawful value for purpose of expropriation whether by eminent domain or decree in bankruptcy or other forcible divesture below $120,000,000, and (b) that earning capacity

33. Tr. 283, 284.

34. 312 U. S. 510.

established since the record was closed in the Interstate Commerce Commission, which is before the Court by stipulation but of which it would take judicial notice without such stipulation, reflects a constitutionally protected value in excess of $120,000,000.

We will discuss each of these propositions in its order.

(a) Valuation on basis of facts of record. Subsection (e) of Section 77 specifies various factors including "earning power of the property, past, present and prospective" which are to be considered in a determination of value under Section 77, but the specification of earning power is safeguarded by a reference to "the law of the land." By the reference to the law of the land the protection of the Fifth Amendment is read into Section 77 and recognition given to the rule asserted by the Court in *Monongahela Navigation Company* v. *United States*[35] that it does not lie within the competency of Congress to prescribe the test of the property value protected by the Constitution. Included within this protection, when, as here, confiscation is involved, is the right, as held by this Court in *Crowell* v. *Benson*[36] to submit "that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

The following facts are not in dispute and are covered by the Stipulation of Facts and by the Supplemental Record in the District Court, including the System Income Accounts to July 31, 1942:

(1) That the depreciated cost of the Debtor's properties was, as of December 31, 1938, in excess of $120,000,000.[37]

35. 148 U. S. 312.
36. 285 U. S. 22.
37. Tr. 283, 284; 1044-1047; 1062-3; 1114.

(2) That the properties of the Debtor and its subsidiaries are valued by the Interstate Commerce Commission under its drastic Section 19A valuation methods at more than $150,000,000.[38]

(3) That the Debtor's properties have been rehabilitated at a cost of $18,000,000 and henceforth may be operated economically and efficiently with only normal maintenance.[39]

(4) That the Debtor has recently opened up new routes which are profitable *per se* and are contributing greatly increased tonnage to the System lines.[40]

It is our fundamental contention that those factors establish a constitutionally protected value of not less than $120,000,000 which cannot be written down for the purpose of an expropriation of the property by an estimate of earning power based solely upon regulated past earnings; and, unless the Commission's action was wholly arbitrary, it is made clear by the simple process of elimination that such an estimate was the sole factor to which it could have resorted.

Certainly this must be true in the absence of positive evidence that earning power adequate to yield a return upon the capital prudently invested in the properties of the Debtor as they exist today was never realized or, if realized, has been permanently lost.

Facts comparable with those developed in the case of *Atlanta, Birmingham and Coast Railroad Company* v. *United States*,[41] would be necessary, assuming contrary

38. Tr. 1061-3.

39. Tr. 1052; 1984; 2161.

40. Tr. 1283-1288.

41. 296 U. S. 33.

to what we conceive to be due process of law that regulated earnings can be used at all in a determination of value as a basis for divesture of property.

That case is interesting in a double aspect.

First, it illustrates the category of purposes, all falling short of the expropriation or destruction of property or vested rights for which an administrative body may find and use a property value that cannot be disturbed by a Court unless the action is arbitrary and the finding unsupported by evidence.

Second, it illustrates the kind of factual foundation that would be required to support a finding of impaired or lost earning capacity.

It appeared that the property of the carrier had been actually acquired by another carrier and reorganized in equity and a new capital structure established which included an issue of common stock without par value; that the carrier had sought to place a book value on the new stock predicated upon the Commission's 19A valuation of the property, which was substantially in excess of the actual commercial valuation resulting from the arm's-length acquisition of the property by the Atlantic Coast Line; that the Commission's Bureau of Accounts insisted upon a lower book value somewhat related to the price at the foreclosure sale; and that this issue had finally reached the three-judge court provided for in the Urgent Deficiencies Act.[42] The Interstate Commerce Commission had, however, revalued the property for the purpose of fixing the book value of the new stock in accordance with the views of its own Bureau and in reaching its determination of value it had found among other things that the carrier's traffic—it had its origin in the consolidation of a group

42. 28 U. S. C. A. § 47.

of short line timber roads in Southern Georgia—was approaching exhaustion; that it could no longer earn the return to which it was entitled under its 19A valuation because of insufficient traffic and that its books should reflect its true financial condition. The case having arisen under the Interstate Commerce Act which made the authority of the Interstate Commerce Commission exclusive, the three-judge court held, and this Court affirmed the holding, that there being evidence to support the Commission's finding it was binding on the Court. The question was one of accounting which involved no taking or confiscation of property. The holders of the stock continued to own it and continued to have a constitutional right to earn and retain a fair return in the full 19A valuation of the property represented thereby if the finding of traffic exhaustion should prove erroneous. There was, however, a specific finding that the capacity to earn had been destroyed by exhaustion of traffic, whereas in the case of the Debtor there is not only no such finding or evidence to support such finding but there is positive evidence to the contrary.

In the State of Nevada for a distance of 178 miles the tracks of the Southern Pacific and those of the Debtor, each single track lines, are paired and operated jointly. The two companies use the Western Pacific tracks for all east bound traffic and the Southern Pacific tracks for west bound traffic. The expenses of operation are divided as to the number of cars of the two companies operating over the joint or paired tracks. This has necessitated accurate records of all car movements over this section which incidentally is a complete record of all business moving between the Great Salt Lake and the Sierra Nevada Mountains and its division between these two competing Systems. Charles Elsey, the Debtor's President testified, and his testimony was confirmed by the late Col. J. W. Williams,

the Debtor's Chief Engineer, that the physical condition of the property was better than it ever was in its history with reference to its ability to handle efficiently the traffic tendered to it or to handle a substantially increased traffic, but that it was only moving *one* car out of every *four* over the joint track. *It is apparent therefore that there has been no dearth of business moving between the east and west termini of The Western Pacific Railroad Company and that its only problem is to increase its proportion.* President Elsey further submitted figures based upon traffic over the paired track for the fifteen year period 1924-1939 showing that the Southern Pacific Company started in 1924 with 77.17% of the business against Western Pacific's proportion of only 22.83%, and that from year to year thereafter (with but few exceptions) the Southern Pacific's percentage progressively decreased and the Western Pacific's percentage progressively increased, so that in 1939 only 72.78% of the business moved Southern Pacific and 27.22% was transported by Western Pacific.[43]

Since at the time of the Court hearing the Debtor was moving only one car out of every four passing over the paired track, which represents the great bulk of the Debtor's business, and since it has consistently increased its proportion over the long period to which the data relates, the natural conclusion is that it will continue in the future as in the past to gain progressively on its competitor and if it increases its proportion from one car out of four to one and one-half cars out of four the indicated increase in its total railway operating revenue would approach 50%. If it gains only one-fourth of a car, the increase in railway operating revenue would approach

43. Tr. 1283-1288, 1530. The percentages supplied by the Trustees since the close of the record are:

1940—	S. P. 72.37%	W. P. 27.63%
1941—	S. P. 71.86%	W. P. 28.14%

25%. What this would mean in increased income available for interest and dividends if not measurable is at least suggested by the account of system operations for 1941 compared with 1940 filed herein under Stipulation, which shows that an increase of 27.74% in operating revenue in 1941 over 1940 resulted in an increase in income available for interest and dividends in the amount of $1,897,341.[44] This is in excess of 12% on the capitalization above that proposed by the Commission (taking no par stock at $100) necessary to bring the total up to the minimum of $120,000,000 required by every legally admissible factor in a valuation.

For the foregoing reasons, the Debtor submits in confidence that the action of the Interstate Commerce Commission in seeking to extinguish the equity of its unsecured creditors and stockholders was, in the light of all relevant facts as of October 10, 1938, unsupported and confiscatory.

There remains for consideration the impact of subsequent economic changes.

(b) Established earning power reflects constitutionally protected value above $120,000,000.

As already pointed out, the income accounts of the Debtor's properties for the period from the closing of the record in the Interstate Commerce Commission up to and including July, 1942, are before this Court under Stipulation and independently of the Stipulation as part of its judicial knowledge of the economic history of the period.

The chart forming part of the brief of counsel for the Western Pacific Railroad Corporation (Judge Sloss) shows that the Debtor was passing through the low point of the decade of depression culminating in the secondary reaction of 1938 when the Interstate Commerce Commission ap-

44. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

proved the plan which afterwards, with only minor modification, was certified to the District Court, and that at the effective date of the Plan the Debtor was definitely on the upgrade.

In 1940, income for fixed charges amounted to $2,653,396.96, an increase over 1939 of $1,268,882.43.[45] In 1941 income available for fixed charges reached $4,551,737.93.[46] This is only slightly less than 4% upon $120,000,000, which the Debtor maintains is the minimum value which may lawfully be placed upon its properties. This figure, however, understates the true available income since it is depressed by retroactive wage adjustments not compensated by rate increases afterwards granted. In the six months' period January-June, 1942, the income available for fixed charges amounts to $4,080,090.[47] This is only $471,647 below what was earned in the full calendar year 1941. Transcontinental railway revenues are invariably heavier in the last half of the year. In 1941 more than 75% of the total year's income was earned in the last six months. If this ratio is maintained throughout 1942, income available for fixed charges should reach $10,000,000. The statement for July, 1942, the latest one filed, shows an increase in revenues over July, 1941, of 48.80%.[48] If this rate of increase persists (and there is every indication of a higher rate) income available for fixed charges for the calendar year 1942 should exceed $10,000,000.

The Petitioners who are supporting the Commission's plan and would, if it is made effective, acquire by allot-

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45. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

46. Statement of System Operating Results for 1941, dated February 7, 1942, filed February 17, 1942.

47. Statement of System Operating Results January 1—June 30, 1942, dated August 12, 1942, filed August 22, 1942.

48. Statement of System Operating Results for July, 1942, dated September 16, 1942.

ments of new common stock a very large part of the equity which the Debtor contends belongs to its unsecured creditors and stockholders, insist that current income is not in any sense a measure of true earning capacity but is an incident of the war and must be summarily dismissed from the discussion; that it will end when the war ends and may not be given weight in a permanent valuation of the Debtor's properties.

Contrary to this contention with which the Debtor is in fundamental disagreement, it is submitted that the capacity of the railway transportation systems of the country to assume and to carry the hitherto undreamed of burdens of the present war offers conclusive proof of the kind of earning power referred to in subsection (e) and equally significant proof that these properties have been maintained and equipped not in relation to supposed normal demands or to normal levels of railway operating revenue but in relation to the maximum service that they may render to the public in any great emergency. Railways were fitted into our national economy for private ownership and operation with the knowledge that their earnings would rise and fall with the trends of commercial and industrial activity, but that they nevertheless must stand ready at all times to meet the maximum demand. In the present war emergency they have displayed both a capacity to serve and a capacity to earn and it would be incredibly unjust to forfeit their properties on the theory that their true power of usefulness will only be sporadically invoked.

No one can say, however, that the present day prosperity of the railway industry will end when the war ends. Many economists believe it will increase when the war ends and the United Nations enter upon the stupendous task of rebuilding what has been destroyed and creating a new

economy designed to revolutionize the trade and commerce of the world.[49] Much of this prosperity (as will be demonstrated by data to be submitted to this Court) is not attributable at all to the increased traffic due to the war but is the result of recent advances in the art of railway transportation and the capacity of the carriers to convert a very much higher percentage of their railway operating revenue into distributable *Net Income*. This, of course, is a permanent accretion to the earning power of the carriers.

Much of the present prosperity of the railways is due to the elimination of pre-war competition which was destructive and unsound and may never be restored. The Transcontinental Railways particularly have benefited by

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49. The following release cabled on September 20, 1942, was made to the British Press by The Honorable Oliver Lyttleton, Chief of British War Production:

"Perhaps this war will turn out to have been far more constructive, even materially, than it has been destructive. The trouble is that most of us do not understand the colossal capacity this modern world has for recreating its wealth, for reconstruction and for production.

I once made a calculation that between the two wars—1914 and 1939—technical improvements in the production of non-ferrous metals such as copper, tin, lead, zinc, etcetera, recreated in that one industry alone more wealth than was destroyed by all the belligerents during the whole of the last war.

One of our troubles is that we take a too deflationary view. We seldom remember that from the year 800 to 1800 advance in the sciences of production was so slow that one could almost say it did not exist. Then from 1800 to 1900, with steam, steel and electricity, the advance was extraordinarily rapid.

But the advance from 1900 to 1942 was infinitely faster. We cannot even measure the ability we have now to produce.

The change-over from war industries to peace industries ought to be extremely simple. Markets will be enormous—bigger than ever before in world history. Take textiles for example. There is today probably not one yard of cloth on the shelves of merchants or in government stores from the eastern boundary of Russia at Vladivostok to the southern tip of Spain. It would take four years of unremitting full time work of all the textile factories now in existence to get the population of Europe back to its peace-time stock of textiles.

Think of the immense demand for building, not only to repair damage done but to catch up with buildings needed but not built during the war.

If labor is redistributed skillfully and our means of exchange are adjusted to our power to produce, then the postwar world ought to see a very great economic renaissance."

cessation of the competition of the Panama Canal. Many well informed persons believe that the Canal will be permanently withdrawn by the Government from commercial operation; but even if Canal competition is ultimately restored it may well be that for many years after the war ends the available vessels can be more profitably utilized in foreign commerce and it is reasonable to assume if full commercial operation of the Canal ever is resumed that tolls will be elevated so as to eliminate concealed subsidies and more truly reflect the cost of the service.

Reasons could be multiplied almost indefinitely to support the view that the existing peak demands for rail transportation service will continue after the war for a period measurable by decades rather than by years. That period will necessarily be one of construction and reconstruction unparalleled in history. No one could possibly predict either its breadth or its duration. Included in the vast economy will be the rebuilding of a world's merchant marine to take the place of what is now being destroyed; the replacement of millions upon millions of motor vehicles whose service lives already are nearing their end; the restoration of maintenance already long deferred and as the war progresses certain to be cumulating in factories, in homes, on farms and in almost every other ramification of the peacetime existence of all civilized peoples.

All of this is indicative of a long lasting era of maximum utility for the rail transportation system of our country adequate to sustain for an indefinite period the present level, if not an even higher level, of railway earnings—but however this may be surely this Court will not permit constitutionally protected investments in the great rail transportation industry to be forfeited because the Interstate Commerce Commission entertains a fear that at some

time in the future our country may suffer the visitation of another depression.

Conclusion

The Debtor asks that the proceeding be referred back to the Interstate Commerce Commission under a mandate to approve a new plan of reorganization which will give it the relief contemplated by Section 77.

Respectfully submitted,

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October 1, 1942.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942
Nos. 7 and 8

IN THE MATTER
of
WESTERN PACIFIC RAILROAD COMPANY,
a corporation.

FREDERICK H. ECKER, *et al.*
v.
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*

CROCKER FIRST NATIONAL BANK, etc., *et al.*
v.
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*

BRIEF OF RESPONDENT, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE

H. C. McCOLLOM,
Attorney for IRVING TRUST COMPANY,
as Successor Trustee under Debtor's
Refunding Mortgage.

ORRIN G. JUDD,
of Counsel.

Dated: October 3, 1942.

INDEX

	PAGE
Limitations of This Brief	2
Cash and Securities on which Refunding Mortgage is Admittedly a First Lien	2
The Reorganization Plan	4
The Effect of the Circuit Court of Appeals Opinion	4
I. The Income Bonds and Preferred Stock Awarded to the Refunding Mortgage Creditors by the Commission Represent Compensation Only for the Cash Deposited with the Trustee and the Note and Stock of Tidewater Southern	5
II. The Evidence Compels a Finding That the Bonds and Stock of Central California Traction Company and Alameda Belt Line Have Substantial Value	6
Acquisition and Importance of Central California Traction Company	7
Importance of Alameda Belt Line to the Debtor	10
III. The Refunding Mortgage Creditors Are Entitled to Senior Securities of the New Company in Compensation for Their Lien on Bonds and Stock of Central California Traction and Alameda Belt Line	11
Conclusion	12

CASE CITED

PAGE

Consolidated Rock Products Co. v. *DuBois*, 312 U. S. 510, 528 11

STATUTE CITED

Bankruptcy Act, Section 77(e) 6

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BRIEF OF RESPONDENT, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE

Respondent, Irving Trust Company, is Trustee under the Debtor's General and Refunding Mortgage dated as of January 1, 1932, under which there are presently outstand-

ing $18,999,500 principal amount (R. 1053) of bonds, all of which are pledged in varying amounts with three creditors of the Debtor, namely, A. C. James Co., Railroad Credit Corporation and Reconstruction Finance Corporation. Such mortgage is hereinafter called "Refunding Mortgage" and this respondent is hereinafter called "Refunding Mortgage Trustee".

The briefs of Frederick H. Ecker, et al., as Institutional Bondholders Committee, and of Crocker First National Bank et al., as Trustees under the Debtor's First Mortgage (Petitioners in Nos. 7 and 8) contain a number of statements respecting the properties subject to the lien of the Refunding Mortgage, which require answer in those proceedings.

Limitations of This Brief

The only points which we propose to answer in this brief are those which relate to the treatment to be given the Refunding Mortgage Creditors in respect of their lien on bonds and stock of Central California Traction Company, Alameda Belt Line and Tidewater Southern Railway Company. On all of these items the Refunding Mortgage is admittedly a first lien.

The questions of dispute concerning the priority of lien (relating to equipment-trust rolling stock, the Northern California Extension and non-carrier real estate) are treated in the Refunding Mortgage Trustee's brief as Petitioner in No. 61, and will not be repeated in this brief.

Cash and Securities on which Refunding Mortgage is Admittedly a First Lien

The Refunding Mortgage is *admittedly* a first lien on the following items:

Cash deposited with Refunding Mortgage Trustee as of January 1, 1939 (R. 1096).		$ 223,732
Note of Tidewater Southern Railway Co., at face amount (R. 1095)		$ 508,278
Stock of Tidewater Southern Railway Co. at par value (R. 1095)		$1,147,955
Central California Traction Company securities (at book value to Western Pacific I. C. C. Ex. 82, p. 16):		
Bonds	$270,000	
Preferred Stock	264,715	
Common Stock	128,952	$ 663,667
Stock of Alameda Belt Line (at par value —I. C. C. Ex. 103)		$ 465,300
Total		$3,008,631.

The Refunding Mortgage Trustee urged in the District Court that the Tidewater Southern stock was worth more than its par value (R. 314)—which was the value used by the Commission—, since the Tidewater Southern had not only paid regular interest on its note but had demonstrated consistent ability to earn an average of $100,000 a year (R. 1098), had furnished revenue to the Debtor of over $500,000 a year on freight interchanged (R. 1098, 1308) and had built up a corporate surplus of over $900,000 (R. 1097). For the purposes of this brief, however, the Refunding Mortgage Trustee does not dispute the value set forth above in respect of the Tidewater Southern stock, so that the question before this Court will relate primarily to whether the stocks and bonds of Central California Traction and Alameda Belt Line have any value.

The Reorganization Plan

Under the Commission's modified Plan of Reorganization, the Refunding Mortgage Bondholders were awarded new income mortgage bonds in the amount of $732,010, which is the exact total of the cash on deposit with the Refunding Mortgage Trustee and the face amount of the Tidewater Southern note (R. 313). They were also awarded preferred stock in the amount of $1,147,955, which is the exact par value of the Tidewater Southern stock (R. 313).

The Commission refused to award any securities in respect to the first lien on the Central California Traction or Alameda Belt Line bonds and stock on the ground that "the lien on the securities of these two companies has no material value" (R. 315). That is, it refused to award any new securities except insofar as the common stock allotted to the Refunding Mortgage creditors may have been based in part thereon.

Before the District Court, the Refunding Mortgage Trustee introduced additional evidence bearing on the value of these bonds and stock.

The Refunding Mortgage Trustee argued below that the Plan was unfair in refusing to award new senior securities in compensation for the first lien on the Central California Traction and Alameda Belt Line bonds and stock; and contended that the entire evidence before the Court required a finding that such bonds and stock had substantial value.

The Effect of the Circuit Court of Appeals Opinion

The opinion of the Circuit Court of Appeals requires the Commission to find "the value of (1) the property subject to the refunding mortgage only * * *" (R. 2670; 124 Fed. 2d at 139). The Refunding Mortgage Trustee believes that compliance with this instruction will result in

a determination that the Central California and Alameda Belt Line bonds and stock have substantial value, and that senior securities should be allocated to the Refunding Mortgage creditors in respect thereof.

The briefs to this Court on behalf of the Institutional Bondholders' Committee and the First Mortgage Trustees attempt to avoid the necessity of any such finding—the First Mortgage Trustees by supporting the Commission's statement that the lien on such securities has no value (Petitioner's brief in No. 8, pp. 25-26), and the Institutional Bondholders' Committee by arguing that the new income bonds and preferred stock issued to the Refunding Mortgage creditors constitute joint compensation for the Tidewater Southern securities and the other bonds and stock (Petitioner's brief in No. 7, pp. 102-03).

I

The income bonds and preferred stock awarded to the Refunding Mortgage creditors by the Commission represent compensation only for the cash deposited with the Trustee and the note and stock of Tidewater Southern.

The record is devoid of any support for the suggestion made by the Institutional Bondholders' Committee that the income bonds and preferred stock allocated to the Refunding Mortgage creditors were intended as compensation in part for the first lien on bonds and stock of Central California Traction Company and Alameda Belt Line.

The income bonds, as pointed out above, were exactly equal in face amount to the cash held by the Refunding Mortgage Trustee plus the face amount of the Tidewater Southern note. Surely cash and interest-paying notes are worth at least an equal amount of income-mortgage bonds. Therefore, none of such income bonds can be regarded as allocable to any other part of the property held by the Refunding Mortgage Trustee.

The preferred stock allocated to Refunding Mortgage creditors was exactly equal to the par value of the Tidewater Southern stock, and obviously was intended to be compensation only for that stock, and not for any other securities. The dividend requirements of such preferred stock are only $57,000, against average earnings of Tidewater Southern exceeding its interest requirements by more than $75,000 per year (R. 1098), without any consideration to Tidewater Southern's additional value as a feeder. Therefore, none of such preferred stock can be regarded as allocable to any other part of the property held by the Refunding Mortgage Trustee.

II

The evidence compels a finding that the bonds and stock of Central California Traction Company and Alameda Belt Line have substantial value.

The value of Central California Traction and Alameda Belt Line lies in the traffic which the Debtor derives from them, rather than in the earnings reflected on their books, but this in no way prevents such value from being real and substantial.

For the evidence bearing on such value, it is necessary to look to the testimony in the District Court as well as the evidence before the Commission. The right of all parties to offer additional evidence in the District Court is conceded (Petitioner's Brief in No. 7, pp. 20-21, 132; Bankruptcy Act, Section 77(e)). The Court, therefore, is not faced with a request to reverse the judgment of the Commission on the facts which were before the Commission, but simply with the question of the fairness of this phase of the Plan on consideration of all the facts in the record before the District Court.

Acquisition and Importance of Central California Traction Company

The Debtor's holdings in Central California Traction Company represent a one-third ownership in the Company, one of the remaining thirds being owned by Atchison, Topeka and Santa Fe Railway Company, and the other by Southern Pacific Company (R. 1042).

Ownership by the Debtor of an equal interest in Central California Traction Company is essential to protect its share of the traffic which originates and terminates on the Central California Traction lines. The Traction Company serves a very rich agricultural district (R. 1315). The Stipulation of Facts Not in Dispute states that the Traction Company has a value to the Debtor as a feeder and would be of value to any corporation which might succeed to its properties (R. 1102).

Mr. Elsey, chief operating officer for the Debtor's Trustees, stated to the Refunding Mortgage Trustee, in a letter which was written in 1937, after the close of the Commission hearings, and which was placed in evidence before the Court (R. 1247-63), some of the reasons why it was necessary to maintain the Debtor's equal interest in the Central California Traction Company.

This letter, designed to obtain the Refunding Mortgage Trustee's cooperation in action being taken by the other holders of the Traction Company's bonds, pointed out the difficulty the Debtor had undergone to obtain its interest in the Traction Company, and the continuing importance of preserving that pro-rata interest.

The circumstances of the Debtor's acquisition of its one-third interest in Central California Traction Company, as set forth in that letter, are extremely pertinent. Until 1927 the Traction Company had been operated as an independent electric freight and passenger railway. During 1925, however, Southern Pacific Company had made an agreement with the owner of the Traction Company to purchase all its

outstanding stock and the major portion of its First Mortgage Bonds. (All publicly-held bonds have since been retired.) When Southern Pacific Company applied for I. C. C. approval of this purchase, the Debtor and the Atchison, Topeka and Santa Fe Railway Company intervened to oppose. The Debtor felt that the matter was so serious that it filed an independent petition to construct a parallel line of railroad in the event the Traction Company ceased to be an independent line, free of control by any interstate railway company (R. 1251).

As a result of the objections by the Debtor and the Santa Fe, the Commission conditioned its permission to Southern Pacific Company to complete the purchase upon Southern Pacific's admitting the Debtor and the Santa Fe to participation equally with said Southern Pacific Company in joint control of Central California Traction Company, upon payment of proportionate shares in the cost of the securities to be acquired (R. 1251).

On the basis of these and other facts, Mr. Elsey stated to the Refunding Mortgage Trustee in such letter (R. 1262-63):

> "Parity has existed between the three parent companies from the beginning, and has been scrupulously maintained throughout the years of joint ownership. The United States District Court here which has jurisdiction of the Western Pacific reorganization proceeding made a special order permitting the Western Pacific Reorganization Trustees to make such advances and payments as might be necessary to protect Debtor's interest therein or to meet its contractual pro rata obligation as to Traction Company (and other affiliates with similar situation).
>
> "It would * * * be most unfortunate and establish a precedent with possibly far-reaching consequences to the future owner of the Western Pacific's Traction Company holdings—for one of the three owners to abandon its participation and parity in all Traction Company dealings—especially as the interest the Western Pacific and Santa Fe acquired in Traction

Company was solely because the Interstate Commerce Commission compelled the Southern Pacific to permit the participation."

The importance of the Traction Company as a source of traffic is shown by the fact that the Debtor's proportion of revenue from traffic interchanged with the Traction Company has averaged approximately $225,000 a year (R. 1102-03), with virtually no falling off even during the depression. In 1939 such proportion of revenue was $268,484 (R. 1311).

Although the Debtor has admittedly been compelled to contribute cash to the Traction Company in most of the years that the Company has operated (Petitioner's Brief in No. 7, p. 19), these contributions have been largely for capital purposes. The Company showed an average income for the five years 1934-1938 of $11,775 (R. 1100) and for the year 1939 of $30,452 (R. 1309). In only one year since 1933 has it shown an operating deficit (R. 1100).

The interest on the Central California Traction bonds pledged with the Refunding Mortgage Trustee has been paid regularly throughout the reorganization. The Stipulation of Facts Not in Dispute makes clear that the Debtor's Trustees "have considered it important that default not be permitted in the payment of interest on the outstanding bonds of the Traction Company or of the Debtor's share of other advances to the Traction Company" (R. 1102).

In the face of these facts, it is clearly unfair and improper to say that the lien on the Central California Traction bonds has no value. If the Debtor's Reorganization Trustees felt it important to maintain interest payments on the Central California Traction Bonds at a time when interest was not being paid on the Western Pacific First Mortgage bonds, the holders of the Central California Traction bonds should certainly receive in satisfaction of their lien on such bonds, at least an equal amount of income bonds of the new Company. They should also receive, in satisfaction of their lien on the stocks which represent a share in control of the Traction Company, preferred stock of the new Company

having a par value at least equal to the book value of the Debtor's Traction Company stock. It may be noted that the book value of such stock on the books of the Traction Company (based on one-third of its stated value plus one-third of the corporate surplus) is $890,862 (I. T. Co.'s Court Ex. 3; R. 1315), or substantially more than its book value on the Debtor's books, $393,667 (I. C. C. Ex. 82, p. 16).

From the nature and circumstances of the property, it is certain that if the Refunding Mortgage were foreclosed and the securities of Central California Traction Company, which are pledged thereunder, were sold, the Refunding Mortgage Trustee could realize a substantial amount from such securities, either by sale to the other proprietary companies or even to outsiders. The Commission's Plan gives no consideration or allowance to this fact.

Importance of Alameda Belt Line to the Debtor

Half the outstanding stock of Alameda Belt Line is owned by Atchison, Topeka & Santa Fe Railway (R. 1103), and half by the Debtor.

The Belt Line furnishes the sole access for Western Pacific to the industrial district of Alameda (R. 1313), and the important Encinal Terminals and docks (R. 2087), which are a source of substantial traffic that might not be available except for the Debtor's participation in ownership of the Belt Line.

As its name implies, the Belt Line is merely a switching facility (R. 1313), and does not share in a division of line-haul rates. It has operated at a deficit which the Debtor has underwritten to the extent of approximately $22,000 per year (R. 1105).

The value of the Belt Line to the Debtor is in the substantial amounts of traffic which it contributes, averaging 4800 carloads per year for the years 1935 to 1938 (R. 1105-06)—years before the war increased the importance of the Alameda docks and industries. Thus the Alameda Belt Line contributed between $315,000 and $331,000 per year to the Debtor's gross revenues (R. 1312-13), which would largely be lost if the Refunding Mortgage lien on the Belt Line were

foreclosed and the stock sold to someone other than the Western Pacific.

Lack of feeders was one of the factors which led to the first reorganization of the Western Pacific in 1916 (R. 1116). In view of the intense competitive situation on transcontinental freight, it is important for the Western Pacific to retain every feeder line in which it has an interest. The very fact that the Debtor's Trustees have felt it advisable to continue to meet their shares of the Belt Line's operating deficits during the period of reorganization shows that they consider it a valuable property. Its physical value, as fixed in Section 19-a proceedings, is over $1,140,000 (R. 1314).

Mr. Elsey was asked at the hearing before the Court:

> "Is it your best judgment that the benefit derived by the Debtor from retaining its participation in the Alameda Belt Line and the Central California Traction Company is greater than any loss through having to make advances to those companies?"

His answer was "Yes, sir" (R. 1315).

In view of this testimony, which was not in the Commission record, and in view of the facts concerning the Debtor's revenue on traffic derived from the Belt Line, which also were not in the Commission record, the conclusion that the lien on the Alameda Belt Line stock has no material value cannot be accepted as a fair basis for allocating new securities under the Plan.

III

The Refunding Mortgage creditors are entitled to senior securities of the new company in compensation for their lien on bonds and stock of Central California Traction and Alameda Belt Line.

As this Court stated in *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 528:

> "Full compensatory provision must be made for the entire bundle of rights which the creditors surrender".

No provision has been made for compensation for the Refunding Mortgage creditors' surrender of their first lien on the Central California Traction and Alameda Belt Line bonds and stock. Yet the Refunding Mortgage creditors are being required (by release of the lien of the Refunding Mortgage—R. 394) to give up their right to have the Refunding Mortgage foreclosed and the Alameda Belt Line and Central California Traction bonds and stock sold thereunder.

The same principle which prompted the Interstate Commerce Commission to award income bonds and preferred stock (the same securities given to First Mortgage bondholders) in recognition of the Refunding Mortgage lien upon the Tidewater Southern note and stock (R. 315) requires that similar income bonds and preferred stock be awarded in recognition of the Refunding Mortgage lien upon the securities of Central California Traction Company and Alameda Belt Line.

Conclusion

This Court should direct that the Interstate Commerce Commission, when the case is referred back to it, award senior securities of the new company to the Refunding Mortgage creditors in exchange for their first lien on the bonds and stock of Central California Traction Company and Alameda Belt Line.

Dated: October 3, 1942.

Respectfully submitted,

H. C. McCOLLOM,
Attorney for Irving Trust Company,
as Successor Trustee under Debtor's
Refunding Mortgage.

Orrin G. Judd,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY, *Debtor.*

FREDERICK H. ECKER, *et al., Petitioners,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 7
CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, *Petitioners,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 8
THE WESTERN PACIFIC RAILROAD COMPANY, *Cross-Petitioner,* *v.* FREDERICK H. ECKER, *et al., Cross-Respondents.*	No. 20
RECONSTRUCTION FINANCE CORPORATION, *Petitioner,* *v.* WESTERN PACIFIC RAILROAD CORPORATION, *et al., Respondents.*	No. 33
IRVING TRUST COMPANY, *Petitioner,* *v.* CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, *et al., Respondents.*	No. 61

REPLY BRIEF ON BEHALF OF A. C. JAMES CO., RESPONDENT

ROBERT E. COULSON,
Attorney for A. C. James Co.

HORACE E. WHITESIDE,
Of Counsel.

SUBJECT INDEX

PAGE

SCOPE OF THIS BRIEF 1

(a) Disregards brief of First Mortgage Trustees on main issue

(b) Deals with certain arguments of Institutional Bondholders Committee and Reconstruction Finance Corporation

(c) Adopts reply brief of General and Refunding Mortgage Trustee on lien issue

POINTS

I. THE PETITIONERS HAVE FAILED TO SHOW ANY FINDINGS OR DETERMINATIONS OF FACT, OR ADEQUATE SUBSTITUTES THEREFOR, TO SUPPORT OR JUSTIFY THE TREATMENT OF THIS RESPONDENT'S CLAIM UNDER THE COMMISSION PLAN .. 4

II. THE COMMISSION PLAN AND THE PETITIONERS' ARGUMENTS ARE BASED UPON PAST EARNINGS OF THE DEBTOR'S PROPERTY AS IT EXISTED PRIOR TO THE SUBSTANTIAL CHANGES MADE FROM 1927 TO 1938, AND NOT UPON THE PRESENT AND PROSPECTIVE EARNING POWER OF THE PRESENT PROPERTY WHICH IS THE PROPERTY TO BE REORGANIZED 7

(a) Significance as to earning power of Northern California Extension, Improvement and Rehabilitation Program and Dotsero Cut-off

(b) Facts as to present demonstrated capacity to earn cannot be disregarded

(c) Petitioners' fourfold classification of degrees of probability is a standard which finds no support in Section 77 or Commission reports

III. PROPERTY VALUES MUST BE DETERMINED AND APPLIED IN TERMS OF DOLLARS AND NOT IN "DEGREES OF PROBABILITY OF PROSPECTIVE EARNING POWER" OR IN "EQUITABLE EQUIVALENTS" ... 14

IV. SECTION 77 OF THE BANKRUPTCY ACT DOES NOT MAKE THE COMMISSION THE "REORGANIZER" OF RAILROADS, SUBJECT ONLY TO REVIEW OF ITS DETERMINATIONS AND CONCLUSIONS AS MERE ADMINISTRATIVE MATTERS 19

IN CONCLUSION 22

TABLE OF CASES

PAGE

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 ..... 18, 21

Consolidated Rock Products Co. v. *du Bois*, 312 U. S. 510 ..... 12, 13, 16, 17

Northern Pacific Railway Co. v. *Boyd*, 228 U. S. 482 21

INTERSTATE COMMERCE COMMISSION REPORT

Securities of Louisville & Nashville R. R., 76 I. C. C. 718 8

PERIODICAL

Bourne, *Findings of "Value" in Railroad Reorganizations*, 51 Yale Law Journal 1057 (1942) 15

STATUTES

Bankruptcy Act:

Section 77 (47 Stat. 1474 as amended by 49 Stat. 911, 49 Stat. 1969 and 53 Stat. 1406; 11 U. S. C. A. § 205) 3, 4, 9, 12, 13, 14, 17, 18, 19, 20, 21, 22
Subsection (b) 11, 12
Subsection (c) (7) 4
Subsection (e) 8, 11, 12, 15
Subsection (p) 3, 4

Interstate Commerce Act:

Section 19a (49 U. S. C. A. § 19a) 10, 18
Section 20a (49 U. S. C. A. § 20a) 19

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REPLY BRIEF ON BEHALF OF A. C. JAMES CO., RESPONDENT

Scope of this Brief

This proceeding is before this Court under petitions and cross-petitions for certiorari. In order to simplify the presentation and eliminate any duplication of effort that might be felt to be necessary in the complicated situation pre-

sented under the rules, the parties, by a letter stipulation dated August 15, 1942, filed with the Court, agreed upon the time schedule for briefs. This stipulation provided, *inter alia:*

> "* * * that on the main issue, briefs for the parties supporting the Commission Plan should be served and filed on September 15, 1942, and briefs for the parties opposing the Commission Plan served and filed on October 3, 1942, and that **any party** may serve and file reply briefs up to the time of the argument."[1]

This respondent has construed the stipulation as authorizing the filing of this brief by the respondent, supplementing its main brief, and dealing with contentions of the parties supporting the Commission Plan which could not conveniently be discussed within the scope of the affirmative presentation of this respondent's main brief.

One of the parties supporting the Commission Plan has now objected to this construction of the stipulation. This respondent, therefore, in compliance with the request of opposing counsel, furnished counsel for adverse parties with page proofs of this brief, in substantially final form, approximately one week before the argument in this Court, and consents to matter in reply to anything herein contained being included in reply briefs of the opposing parties.

In the main brief filed on behalf of A. C. James Co. on October 3rd in these cases, we sought to present the pertinent facts as to the origin of this respondent's secured claim, and its proposed treatment under the Commission Plan, and as to the property and earning power of the debtor, all of which facts clearly indicate that the secured claim of this respondent should be recognized and refunded in full. This respondent's main brief also necessarily dealt affirmatively with the important questions of the construc-

[1] All emphasis in quoted matter has been supplied throughout this brief unless otherwise noted.

tion of Section 77 of the Bankruptcy Act and its proper application to the facts of this proceeding, which questions are necessarily raised by what we conceive to be the basically erroneous interpretation and application of Section 77 by the Interstate Commerce Commission and the District Court in this proceeding.

In connection with the factual analysis and argument, as presented in our main brief, we have answered the arguments and contentions of the petitioners which appear to be directed to or related to the affirmative presentation on behalf of this respondent. It has, however, appeared necessary and desirable to answer in this brief certain contentions of the petitioners which did not conveniently fall within the scope of the affirmative presentation in this respondent's main brief.

The First Mortgage Trustees have not in their briefs confined themselves to a discussion of the points of law and fact raised by the issues of the extent of the coverage of the debtor's First Mortgage and its General and Refunding Mortgage, respectively, and the value of the property securing the bonds issued under each mortgage (subjects properly within the scope of the duties of such trustees), but have aligned themselves with the Institutional Bondholders Committee and Reconstruction Finance Corporation in supporting the Commission Plan and have adopted and reiterated the contentions of those parties.

The Institutional Bondholders Committee (not organized as a representative committee under subsection (p) of Section 77, but acting under the exceptive clause of that subsection) acts for a group of insurance companies and one bank which hold, in the aggregate, only $16,641,400 principal amount of the First Mortgage bonds, out of a total of $49,290,100. Obviously, therefore, the Institutional Bondholders cannot, under the express provisions of Section 77, represent the remaining $32,648,700 of First Mortgage bonds of the debtor. Under the restrictive provisions of subsection (p) of Section 77, the Institutional Bondholders may act together **"for their own interests and not for others".**

Nor may the First Mortgage Trustees represent the remaining $32,648,700 of First Mortgage bonds of the debtor since subsection (c) (7) of Section 77, which permits the Trustees to file a claim in behalf of all bonds outstanding under their mortgage expressly provides:

> "• • • nothing herein shall constitute such trustee or trustees, the representative or representatives of such holders [bondholders] for the purpose of accepting or rejecting any plan of reorganization."

Congress could not have adopted language by which to prohibit more clearly the active support of the Commission Plan in this proceeding by the First Mortgage Trustees. Those who would represent security holders in a proceeding under Section 77 must comply with the requirements of subsection (p).

It would appear, therefore, unnecessary to make any reply, on behalf of A. C. James Co., to the brief submitted by the First Mortgage Trustees upon the main issues in this controversy. So far as the brief of the First Mortgage Trustees on the lien controversy is concerned, this respondent concurs in and adopts the reply brief filed by the Trustee of the General and Refunding Mortgage. This brief will, therefore, be directed to the briefs heretofore filed on behalf of Institutional Bondholders Committee and Reconstruction Finance Corporation.

POINT I

The petitioners have failed to show any findings or determinations of fact, or adequate substitutes therefor, to support or justify the treatment of this respondent's claim under the Commission Plan.

It is admitted that the Commission found that the securities allocated to this respondent under the Commission Plan would be inadequate to satisfy its claim (R 269), but made no revaluation of the property of the

debtor which would support the refusal to recognize more than half of respondent's secured claim. As is shown in our main brief, neither the prior valuation of the debtor's property, which was reported by the Commission in this proceeding, nor the fully depreciated investment, nor even the capitalization authorized by the Commission Plan, can support this confiscatory treatment of a secured creditor.

The petitioners, Institutional Bondholders Committee and Reconstruction Finance Corporation, have in their briefs conceived elaborate and even ingenious arguments and rationalization (which we believe are demonstrably unsound) in attempting to support the Commission's supposed findings that the equity of debtor's stockholder and the claims of unsecured creditors had no value. **But neither petitioner has even attempted to point out actual findings or determinations of fact which would support the elimination of more than half of this respondent's secured claim.** The treatment of this respondent's secured claim has not been set forth by either petitioner in its "Statement" or mentioned as one of the "Questions Presented".

The Commission has stated that the securities proposed to be given to this respondent will be inadequate in value to satisfy its secured claim in full (R. 269). But the necessity for or fairness of this treatment does not follow from the Commission's prior valuation of the debtor's property, which valuation is clearly in excess of the total of all secured claims (R. 224); it does not follow from the capitalization proposed by the Commission in its Plan which includes 319,441 shares of no par common stock; it does not follow from the preference accorded in the Commission Plan to the Reconstruction Finance Corporation claim, which is also secured by General and Refunding Mortgage bonds, since no sufficient facts or findings appear in justification of such preference; and it does not follow from the supposed findings that the equity of the debtor's stock and claims of unsecured creditors were without value in 1938 and 1939 (R. 269-270).

The conclusion is inescapable from the petitioners' failure to meet this issue that the record and the reports of the Commission are wholly barren of any facts or findings which would justify the elimination of substantially more than half of this respondent's secured claim.

In this connection, the language appearing at page 66 of Reconstruction Finance Corporation's brief demonstrates the petitioners' total inability to justify the treatment of this respondent's claim. The brief says (pp. 65-66):

> "We have demonstrated elsewhere in this brief that the finding of the Commission, approved by the District Court, that the equity and interests of the unsecured creditors and stockholders of the Debtor had no value was unquestionably adequate to support their exclusion from participation in the reorganized company, and that an additional attempted finding of the exact dollar value of the Debtor's assets would have served no useful purpose. **Similar situations may well exist as between senior and junior creditors. Conversely, where it is not controverted that a senior issue is fully satisfied, or that a junior issue has received all that remains after such satisfaction, is it not unnecessary to place a dollar valuation upon the property or securities received by the junior issue?** And where the contributions of different mortgage divisions to the earning power of the total enterprise are clearly shown, may not the new securities, in the application of the determination of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941), that 'the criterion of earning capacity * * * is the essential one,' be distributed essentially on the basis of such contributions without attempting the intermediate formality of a dollar valuation?"

Obviously, the answer to the rhetorical questions posed in the brief must be in the negative where there are, as in this case, three secured creditors holding securities of like character, and one of these creditors is advanced to a position of equality with first mortgage bondholders, while most of this respondent's secured claim is cut off.

POINT II

The Commission Plan and the petitioners' arguments are based upon past earnings of the debtor's property as it existed prior to the substantial changes made from 1927 to 1938, and not upon the present and prospective earning power of the present property which is the property to be reorganized.

In our main brief we have discussed the revenues and earnings of the debtor's property (pp. 21, *et seq.*) and pointed out that the earnings of the property as it existed prior to the substantial changes made from 1927 to 1938 are of little significance in determining present and prospective earning power of the property.

The increases in earning power (in the sense of "capacity to produce earnings") which have necessarily resulted from the construction and operation of the Northern California Extension, the completion in 1938 of the Improvement and Rehabilitation Program, the building of the Dotsero Cut-off on the lines of the Denver & Rio Grande Western, and other relevant factors, have been reflected in the current high level of earnings of the property and in the enhanced prospects for the future. These increases in revenue and earnings are due in large measure to continuing factors other than the war effort. The present enlarged revenues conclusively demonstrate that the transportation facilities now provided by the debtor's plant are "used and useful in the public service". It is no answer to say that the present is a period of industrial expansion instead of industrial depression. The public is clearly entitled to have transportation facilities put at its service adequate to meet its needs in periods of industrial expansion.

The Commission's extended narrative of the past earnings history of the debtor's property (R. 218, *et seq.*, 308, *et seq.*), upon which the Commission Plan was based,

bears little relation to the demonstrated present and future earning capacity of the property. And yet the Commission made only casual reference to the effect of the important changes in the debtor's property which were made from 1927 to 1938, and brushed aside its prior $150,000,000 valuation of the property which had been provided and is adapted and required "for continuing productive use in the service of transportation" (*Securities of Louisville & Nashville R. R.*, 76 I. C. C. 718, 720). If the Commission meant to indicate, what it did not state, that it was reducing its prior valuation as not "justified by the probable earnings reasonably foreseeable for the future" (R. 310), then we contend that it applied a standard which (even though it justified a writing down of the Commission's prior valuations, and this respondent contends it does not) is entirely different from the "earning power" standard of subsection (e) of Section 77.

Furthermore, the Commission's exclusive emphasis on past earnings during the period which included the depression years, and its insistence that not only fixed charges, but contingent charges and dividends, should be covered by "probable earnings reasonably foreseeable" makes it certain, beyond the possibility of successful refutation, that the Commission completely ignored the statutory standard of "earning power of the property, past, present, and prospective, and all other relevant facts."

The Commission also ignored the right of the investor to earn, whenever possible, a reasonable return upon the sound investment devoted to and useful in the public service, and necessary and required to meet all reasonable maximum demands of the public.

In their efforts to support the Commission's capitalization and the resulting Plan, the petitioners have again paraded the past earnings history of the old property, before the substantial changes made from 1927 to 1938 (Institutional Bondholders' brief, pp. 58-60; Reconstruc-

tion Finance Corporation's brief, pp. 9, 37-41), have belittled the demonstrated increase in earning power of the property (Institutional Bondholders' brief, pp. 61-68; Reconstruction Finance Corporation's brief, pp. 41-44, 55), have omitted to mention the actual increased earnings from 1939 to 1942 (Reconstruction Finance Corporation's brief, p. 9) or have sought to minimize or conceal such earnings by reference to theoretical Federal taxes that would have been payable under the unsound capital structure proposed in the Commission Plan if the Plan had been approved and confirmed and in effect during these years (Institutional Bondholders' brief, pp. 6, 7, 62, 63).

In other words, in the eyes of the petitioners, the high level of earnings actually produced by the property during recent years does not demonstrate earning capacity or justify a recognition of the actual investment devoted to the public service. They contend that reduced earnings during years of industrial depression require a write-down of investment. They even contend that theoretical taxes that would be payable after an unjustified and drastic write-down in capitalization should be used to justify the proposed reduction of capitalization by more than forty per cent. This result is manifestly unsound and impracticable, as well as unfair and inequitable to this respondent.

An ingenious attempt to support the Commission's construction of Section 77 appears in the Institutional Bondholders' brief. At pages 56 to 57 of their brief, the Institutional Bondholders apparently admit that the Commission gave no substantial consideration to the investment in the property of the debtor and the Commission's prior valuation as reported in this proceeding (R. 224, 1061-63), since the only evidence of "substantial consideration" suggested in the brief is the fact that the Commission made "many references" to these factors and the Institutional Bondholders' unsupported conclusion

that the earning power of the property is inadequate, taken alone, to support the proposed capitalization.

The brief for the Reconstruction Finance Corporation evades the problem of a discussion of the demonstrated earning capacity of the debtor's railroad system by refraining from any discussion of actual earnings subsequent to the calendar year 1938. It will be remembered that it was in the calendar year 1938 that the Improvement and Rehabilitation Program was completed and the debtor's railroad system, as it exists today, emerged.

The brief for the Institutional Bondholders faces more squarely the facts as to the current level of earnings, but seeks to minimize their significance by a reference (brief, pp. 61-68) to the temporary transportation needs due to war conditions. Not satisfied, however, with the attempt to minimize the current earnings level as allegedly due in large part to war conditions, the brief for the Institutional Bondholders presents tables, charts and graphs where the demonstrated earning power of the debtor's railroad system is substantially reduced by the ingenious device of deducting large sums in taxes, not paid or payable by the debtor, but taxes that the brief insists would have been payable if the drastically reduced scheme of capitalization proposed by the Commission had been in effect (Institutional Bondholders' brief, pp. 7, 58).

There is certainly no adequate attempt made in the brief for the Institutional Bondholders to justify, in relation to the present demonstrated earning capacity of the property, a reduction in asset value from the $150,000,000, which emerged from the Commission's Section 19a valuation proceedings, to the $84,027,559, which amount the Institutional Bondholders' brief (p. 76) calculates would have been the Commission's valuation for reorganization purposes, if it had made such a valuation.

The irrefutable facts as to the present demonstrated earning capacity of the debtor's railroad system can be set out

briefly. The property's earnings available for interest were (as is pointed out in our main brief, pp. 24, 25):

$1,519,916	in	1939
$2,649,797	in	1940
$4,548,138	in	1941
$7,987,512	for the 12 calendar months, August 1, 1941 to July 31, 1942	

Apparently, the Institutional Bondholders' brief intends to build up support for the Commission's theory of capitalization by substantially ignoring the plain standard of valuation of subsection (e) of Section 77, "earning power of the property, past, present, and prospective, and all other relevant facts". Their brief seeks to escape this standard by a process of rephrasing so as to change the content and meaning of the statutory language to the standard of "probable prospective earnings of the property". They fail to face frankly the fact that this latter standard is expressly provided by the statute but in quite a different connection and application. It appears in subsection (b) of Section 77, and is used only in connection with the requirement that fixed charges of the reorganized company shall be adequately covered by the "probable earnings available for the payment thereof". The standard "probable earnings reasonably foreseeable for the future" is frankly invoked by the Commission in explanation of its refusal to recognize investment and value (R. 310), and the same standard apparently provides the basis for the Institutional Bondholders' elaborate attempt to justify the Commission's results.

It is true that the Institutional Bondholders' brief states, at page 38, that the capitalization of the reorganized company was determined "primarily upon the basis of the future earning power of the venture reasonably to be foreseen" and at page 39, that this is the standard of "value for reorganization" adopted by the Commission and approved by the District Court in this proceeding. At other points

in the brief (pp. 40, 64, 81) the Institutional Bondholders state that their "reorganization value" must be supported by "prospective earning power". To add to the general confusion of thought as to the basis upon which the Commission here proceeded, at page 87, the Institutional Bondholders' brief emphatically asserts that this Court in the *du Bois* case insists upon "capitalization of prospective earnings" (a clear departure from this Court's insistence of findings upon **earning capacity**; see 312 U. S. at 525 and 526). Later, the Institutional Bondholders' brief has further rephrased the opinion of this Court in the *du Bois* case and has stated (p. 88) that this Court stresses the "capitalization of earnings" and the "capitalization of prospective earnings" (p. 91). Actually, it is of course significant that this Court, dealing in the *du Bois* case with a statute which did not itself make the clear distinction between "probable prospective earnings" and "earning power", which is found in Section 77, gave, as it did, clear emphasis to **earning capacity**, as distinct from earnings existing at the time, or foreseeable for the immediate future.

Obviously this ingenious rephrasing of the "earning capacity" standard of the *du Bois* decision is in preparation for the figment of "different degrees of probability of prospective earning power" (p. 81 of the brief) which the Institutional Bondholders have created without the slightest evidence of support either in the record or in the reports of the Commission, in an effort to explain the Commission's treatment of capitalization. This fourfold classification of probable future earnings is fully developed at pages 46 and 53 of the Institutional Bondholders' brief. It is adopted in substance in the brief of Reconstruction Finance Corporation (pp. 47, 48, 66).

Three obvious answers can be made to this attempt by the petitioners to build a foundation under the capital structure erected by the Commission in 1937 to 1939:

(a) There is not in Section 77, in either subsection (b) or subsection (e), the slightest authority in support of a

fourfold "probable future earnings" basis for capitalization. The statute expressly and clearly lays down the standard of "probable prospective earnings" for use by the Commission in determining fixed charges, and a standard of "earning power of the property, past, present, and prospective, and all other relevant facts" for use by the Commission in determining values and hence capitalization. Nor can the suggested fourfold classification of probable earnings be read into the opinion of this Court in the *du Bois* case. In fact, that opinion quite properly recognizes the difficulties attendant upon any estimate of future earning power as a whole, difficulties which would prove insurmountable if the petitioners' fantastic scheme should ever be adopted.

(b) There is not the slightest evidence that the Commission in fact used or considered using any such fourfold classification of future probable earnings as that proposed by the petitioners. In fact, the Commission Plan allocates income mortgage bonds, preferred stock and common stock to all classes of creditors and awards to Reconstruction Finance Corporation a preferential distribution of bonds and preferred stock.

(c) The fourfold classification or levels of probable earnings, as conceived by the petitioners, together with their vague doctrine of "equitable equivalents", would, if sanctioned by this Court, represent a complete repudiation of investment and earning power in any proper sense, as the proper yardsticks to be used in determining whether the property rights of investors may be foreclosed for all time, and would permit private rights to be cancelled and annulled in complete disregard of the language of Section 77 and constitutional guarantees.

The Commission's reports in this proceeding (R. 244, 257) make it perfectly clear that the Commission did not give that consideration to the present and prospective earning power of debtor's property and all other relevant facts

which is required by Section 77 of the Bankruptcy Act (see Points I and II, respondent's main brief). The ingenious arguments of the petitioners have not changed or concealed this fact or supplied the findings or determinations and reasons which are lacking in the Commission's reports.

POINT III

Property values must be determined and applied in terms of dollars and not in "degrees of probability of prospective earning power" or in "equitable equivalents".

If there were any doubt that the Commission had failed in its reports in this proceeding to make the necessary findings or determinations of fact which would legally justify and sustain the foreclosure and cancellation of property rights of investors proposed in the Commission Plan, that doubt would be resolved by the extremes to which counsel for the petitioners are driven in their attempts to spell out a justification for the action taken by the Commission and the District Court. In the able brief submitted on behalf of the Institutional Bondholders Committee, counsel, a recognized leader of the reorganization bar, has felt it necessary to devise a new terminology in which to frame the argument that the Commission and the District Court proceeded properly and lawfully. The extremes to which the argument goes is proof of the complete absence of the essential determinations and integrated reasoning as to valuation in the reports of the Commission and the decision of the District Court required to sustain the drastic treatment of investors proposed under the Commission Plan.

A notable instance of the extremes to which counsel for the petitioners have gone is their insistence that, after all, determinations or findings, in terms of dollars, are un-

necessary and meaningless. That the language of those who have negotiated reorganizations has always been, of necessity, one of dollars and cents, just as is the language of business generally, is brushed aside and disregarded by counsel for the petitioners. They brand any requirement of adequate findings and valuation data with such labels as "fictitious mathematical formula", "excessively formalistic, unnecessary and impracticable", "specific dollars and cents findings of value", "precise number of dollars and cents findings", "exact dollars and cents valuation", etc. More specifically, the Institutional Bondholders assert that subsection (e) of Section 77 "does not require the Commission to determine and certify 'value' in detail of exact dollars and cents in every case" (Institutional Bondholders' brief, p. 72) and express no concern over the "failure of the Commission to find a specific number of dollars and cents as the Debtor's prospective earnings" (p. 44).

In support of their argument for the elimination of the dollar sign from reorganization law and practice, the petitioners cite for authority a discursive and diffuse article published in the Yale Law Journal, during the pendency of these cases before this Court, by a member of the New York Bar who has a substantial interest in other reorganization proceedings, the outcome of which may be affected by the decision by this Court of the important questions presented by this proceeding.[1]

In this connection, it should be noted that no respondent in this proceeding has ever asserted that a large railroad property has a "market value" or asked that the "market value" of the property be determined, as is suggested by the petitioners.

Another instance of the ingenuity of counsel for the petitioners in substituting phrasing for reasoning is to be found in their use of language taken from the opinion of

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[1]Bourne, *Findings of "Value" in Railroad Reorganizations*, 51 Yale Law Journal 1057 (1942). See footnotes 1 and 16 of the article.

this Court in the *du Bois* case. As pointed out in the main brief of this respondent (Point VII), there is a complete absence, in the reports of the Commission and in the decision of the District Court, of any adequate findings or determinations of fact which would support the preferential treatment given the Reconstruction Finance Corporation for its claim as a secured creditor. Counsel for the petitioners attempt to meet this by taking the phrase "bundle of rights" from the decision in the *du Bois* case and giving to it an extended content and meaning. As used in the *du Bois* case, the phrase was quite properly used as a convenient and compact expression of the fact that a secured creditor has something more than a bare right to receive from the debtor a given principal sum and, meanwhile, interest at a given rate. The secured creditor has additional rights, such as a definite maturity for principal, a clearcut and well defined lien upon assets, a right to have payments made by way of amortization, a right to have the property of the debtor kept up and properly maintained, and many other rights arising from his contractual relations with the debtor. He has, in the true sense, in his secured claim, a "bundle of rights".

What the petitioners do with this phrase is to extend it far beyond its original content and use it as a catch basket for two entirely different groups of rights. The Reconstruction Finance Corporation holds two entirely distinct claims: one, a claim against the debtor represented by the debtor's notes secured largely by the same sort of collateral that secures the notes held by The Railroad Credit Corporation and this respondent; the other, a claim on Trustees' Certificates, authorized by the Commission and the Court after the properties of the debtor had passed from the control of the debtor to the custody of the Court, and, which, though secured by a first lien on all the assets of the debtor in the custody of the Court, is in the true sense a debt of the Court rather than a debt of the debtor. To talk about this "bundle of rights" as something which must of neces-

sity be dealt with as a whole and as justifying the preference given the Reconstruction Finance Corporation as to its secured claim against the debtor, without any necessary findings or determinations of fact, is a mere evasion of the issue. Certainly there is nothing in the *du Bois* case which supports the argument.

Moreover, the lack of weight in the argument is somewhat emphasized by the fact that the Trustees of the Court hold, as stated in the Institutional Bondholders' brief (p. 110) an amount of cash adequate to permit the Trustees to pay off and discharge at this time the temporary debt incurred by the Trustees for the maintenance of the properties of the debtor.

The resort to adjectives and catch phrases cannot conceal the absence of essential determinations and integrated reasoning as to valuation in the Commission's reports and the District Court's decision. By their oft repeated protest and by express concession (Institutional Bondholders' brief, p. 22), the petitioners admit the complete absence of findings or determinations of value, in the generally accepted sense, by the Commission and the District Court.

Since findings or determinations of value are required by the decisions of this Court and by Section 77 of the Bankruptcy Act, we again urge that affirmance of the Circuit Court of Appeals for the Ninth Circuit, upon this ground alone, is clearly indicated. Where valuation findings are needed, they must necessarily be stated in terms of dollars and not in terms of "degrees of probability" or in "equitable equivalents".

This is not to say that either the Commission or the District Court is required to initiate a lengthy valuation proceeding (in the sense of the current presentation of expert testimony on inventory of physical properties, reproduction cost of items of property, and the like, such as has been common in rate cases arising in the public

utility field) as has been suggested by the petitioners as a necessary result of insistence upon the requirement of determinations of values and supporting data. In the course of a reorganization proceeding under Section 77 of the Bankruptcy Act, a redetermination of values will ordinarily be entirely unnecessary, as we have pointed out in our main brief (p. 101). We say emphatically to this Court, from the background of contact with this proceeding from its start, that no extended presentation of additional valuation data is necessary or desirable in reorganizing the debtor. Only the attempt of the Commission to exclude entire classes of investors, for the purpose of writing down of the capitalization of the debtor to an extent which is unwarranted, in view of its demonstrated earning power, and unauthorized by Section 77, brings the issue of valuation into the picture.

The valuation data available to the Commission from its labors under Section 19a, including complete data as to the true investment, accepted by all parties to the proceeding, constitutes an entirely adequate basis for reorganization. While the clear right of the Commission, under Section 77, to revalue with reference to "earning power", in the event basic changes have occurred permanently impairing the usefulness of the debtor's railroad system or any part thereof in the public service, is recognized by the respondent, any such revaluation (even if it were justified by the facts here presented), would not involve any extended presentation of valuation data as to elements other than "earning power". If Section 77 were properly construed and a reorganization of the debtor effectuated along the lines indicated in the respondent's main brief (Point V), no valuation proceeding would conceivably be required.

POINT IV

Section 77 of the Bankruptcy Act does not make the Commission the "reorganizer" of railroads, subject only to review of its determinations and conclusions as mere administrative matters.

In our main brief, we have attempted to point out the functions of the Commission and the District Court under a proper interpretation of Section 77; at pages 59 to 70 we have shown that the interpretation urged by us is entirely consistent with the Commission's exercise of its authority under Section 20a of the Interstate Commerce Act. Furthermore, at pages 75 to 81 we have answered specifically the position taken by the petitioners that the Commission was constituted "the reorganizer" by Section 77.

In this connection, however, it should be noted that the position taken by Reconstruction Finance Corporation as to the relative functions of the Commission and the District Court (Reconstruction Finance Corporation's brief, pp. 27 and 70 to 88) would reduce the reorganization process to the same status as rate or service regulations and similar administrative functions which have been expressly delegated to the Commission by Congress, and would take away from the district courts their essential judicial powers as courts of bankruptcy in reorganization matters. The district courts would then sit merely to review, as administrative matters, the determinations and conclusions of the Commission. We will, of course, insist that Congress did not, by the enactment of Section 77, delegate to the Commission exclusive authority and power of adjudication of those phases of bankruptcy law which pertain to the reorganization of railroads or constitute the district courts merely reviewing bodies. There is not the slightest indication that Congress intended such drastic changes.

Furthermore, serious doubts would necessarily be raised as to the constitutionality of Section 77 if it could be interpreted as conferring upon the Commission the powers asserted by Reconstruction Finance Corporation.

While the brief of the Institutional Bondholders, at pages 113 to 138, purports to take a position which would confer upon the Commission exclusive jurisdiction in matters affecting the public interest, while preserving to the Courts their "traditional jurisdiction" to determine questions affecting the contractual rights of creditors and stockholders, the Institutional Bondholders have clearly adopted, in substance and effect, practically the same position as that taken by the Reconstruction Finance Corporation.

This is disclosed by the following language from pages 118-119 of the Institutional Bondholders' brief:

> "Indeed the new legislation, as has already been stated, created a procedure under which the Commission has in effect become substituted for the securityholders as the 'reorganizer' and its expert judgment substituted for the 'bargaining process' among securityholders for the determination, in the first instance, not only of the over-all questions of public interest, such as the total amount and character of capitalization to be issued in the reorganization, but also of the financial and other factual problems affecting the distribution of the capitalization in accordance with the legal rights of the old securityholders."

The above language should be considered in connection with the statement at page 114:

> "The findings and conclusions of the Commission upon questions affecting the public interest, *e. g.*, the amount and classification of the new capitalization, are binding and conclusive upon the Court, in the absence of errors of law or lack of supporting evidence. * * *"

and the statement at page 115:

> "The determination of a capital structure for a railroad is essentially a legislative and not a judicial function."

Obviously the determination of the total amount of the capitalization and the character of that capitalization and the distribution of the securities approved in the reorganization are the most important problems arising in the reorganization process. The determination of the amount and character of the capitalization necessarily affects and delimits private property or rights since thereafter the allocation and distribution of the approved securities is largely determined by the doctrine of priorities as laid down by the Court in *Northern Pacific Railway* v. *Boyd*, 228 U. S. 482 and *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. If Congress has conferred upon the Commission "exclusive and plenary" power to determine the amount and character of capitalization in the public interest, subject only to the extremely limited review announced by the District Court in this case (R. 1596), then for all practical purposes the security holders of a railroad in reorganization have been deprived of the protection of the courts in respect of determinations which are essentially judicial; and the Commission has been constituted a court of bankruptcy in reorganization matters with far greater powers than any district court or court of bankruptcy has ever possessed.

In connection with this matter we call the attention of the Court to Point VI of our main brief.

There is no support either in the language of Section 77 or in the circumstances which led to its enactment that even remotely tends to sustain the extreme position taken by both petitioners.

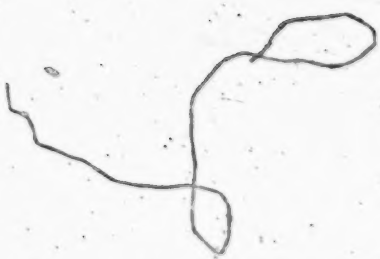
In Conclusion, this respondent again prays this Court that it dispose of all substantial issues raised before it in this proceeding, and, on the basis of its construction of Section 77, and its disposition of the substantial issues herein raised, that it affirm the decision of the Circuit Court of Appeals for the Ninth Circuit here under review.

Respectfully submitted,

Robert E. Coulson,
Attorney for A. C. James Co.

Horace E. Whiteside,
of Counsel.

October 9, 1942.



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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 8.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,

v.

Petitioners,

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONERS, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916.

ORVILLE W. WOOD,
Attorney for Petitioners.

ARTHUR A. GAMMELL,
Of Counsel.

Dated, New York, N. Y., September 15, 1942.

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
Statutes Involved	3
Questions Presented	3
Summary of Argument	6
Argument	7
Point I. Neither Section 77 Nor Judicial Precedent Requires the Strait-Jacketing of the Reorganization Process with the Rigid Valuation Formula Prescribed by the Circuit Court of Appeals	7
A. The Valuation Formula Prescribed by the Circuit Court of Appeals	7
B. The Provisions of Section 77	8
C. The Judicial Content of the Phrase "Fair and Equitable"	11
Equity Receivership Cases	11
The *Los Angeles Lumber Products* Case	13
The *Consolidated Rock Products* Case	13
D. The Practical Requirements of the Reorganization Process	16
Point II. The Commission's Findings Are Sufficient, in the Light of the Valuation Data in the Record, to Sustain the Exclusion of the Unsecured Creditors and the Sole Stockholder from Participation in the Reorganization	18
Point III. The Commission's Findings Are Sufficient, in the Light of the Valuation Data in the Record, to Sustain the Allocations of New Securities Among the Secured Creditors	21

PAGE

A. The Commission's Findings 21
B. The Fairness of the Allocations as Between Holders of First Mortgage Bonds and Holders of Refunding Mortgage Bonds 24
C. The Fairness of the Allocations as Between the RCC and A. C. James Co. 26
D. The Fairness of the Compromise Allocation to the RFC 26

POINT IV. THE DISTRICT COURT CORRECTLY CONCEIVED THE RELATIVE FUNCTIONS OF THE COMMISSION AND OF THE COURT IN APPROVING A PLAN OF REORGANIZATION 28

POINT V. THIS COURT SHOULD, UPON THE ENTIRE RECORD, REVERSE THE DECREE OF THE CIRCUIT COURT OF APPEALS AND AFFIRM THE ORDER OF THE DISTRICT COURT APPROVING THE COMMISSION PLAN .. 32

POINT VI. THE COSTS OF THE APPEAL SHOULD BE ASSESSED DIRECTLY AGAINST THE DEBTOR'S ESTATE 33

CONCLUSION 34

APPENDIX 35

The Statutes Involved 35

TABLE OF AUTHORITIES CITED.

CASES.

Case v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939) 9, 11, 13

Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510 (1941) 10, 13, 25

Continental Illinois National Bank & Trust Co., v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935) 33

First National Bank of Cincinnati v. *Flershem*, 290 U. S. 504 (1934) 12

PAGE

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541 (1912) ---------- 30

Kansas City Southern Railway Company v. *Guardian Trust Company*, 240 U. S. 166 (1916) ---------- 11

Kansas City Terminal Railway Company v. *Central Union Trust Company of New York*, 271 U. S. 445 (1926) ---------- 11

Louisville Trust Company v. *Louisville, New Albany, and Chicago Railway Company*, 174 U. S. 674 (1899) 11

National Surety Co. v. *Coriell*, 289 U. S. 426 (1933) 12

New York Central Securities Corporation v. *United States*, 287 U. S. 12 (1932) ---------- 30

Northern Pacific Railway Company v. *Boyd*, 228 U. S. 482 (1913) ---------- 11, 13, 15, 17

Palmer v. *Massachusetts*, 308 U. S. 79 (1939) ---------- 31

Railroad Company v. *Howard*, 7 Wall. 392 (1868) ---- 11

Truax v. *Corrigan*, 257 U. S. 312 (1921) ---------- 18

Warren v. *Palmer*, 310 U. S. 132 (1940) ---------- 31, 32

STATUTES.[1]

Bankruptcy Act, § 24(c) (11 U. S. C. A., § 47(c)) ---- 3

Interstate Commerce Act, § 20a (49 U. S. C. A., § 20a) ---------- 3, 30, 44

Judicial Code, § 240(a), as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)) ---------- 3

Rule 27 (U. S. Sup. Ct.) ---------- 3

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[1] Citations to Section 77 of the Bankruptcy Act are too frequent to enumerate. The pertinent portions of Section 77, i. e., subsections (b), (d), (e), and (f), are printed in the Appendix at pages 35, 37, 38, and 43, respectively.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 8.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY,
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Debtor.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916,

Petitioners,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional First Mortgage Bondholders Committee; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONERS, CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916.

This is a proceeding to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit rendered on November 28, 1941 (R. 2663, 2675), which reversed an order of the District Court of the United States for the

Northern District of California, Southern Division, entered on August 15, 1940 (R. 1569). The order of the District Court approved a plan of reorganization (hereinafter called the "Commission Plan") for the the Debtor, The Western Pacific Railroad Company, which had theretofore been approved and certified to the District Court by the Interstate Commerce Commission (R. 1600), in a proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205).

OPINIONS BELOW.

The Commission's report and order (R. 194, 284) dated October 10, 1938, approving a plan of reorganization for the Debtor, are reported at 230 I. C. C. 61. The Commission's report and order on further consideration (R. 300, 362) dated June 21, 1939, modifying the plan of reorganization approved in the Commission's report and order dated October 10, 1938, are reported at 233 I. C. C. 409. The Commission's report (R. 884) dated September 19, 1939, on which its order (R. 891) dated September 19, 1939, was entered, denying the Debtor's petition for modification of the Commission Plan, is reported at 236 I. C. C. 1.

The opinion of the District Court (R. 1569) dated August 15, 1940, approving the Commission Plan, is reported at 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals (R. 2663) dated November 28, 1941, reversing the order of the District Court, is reported at 124 F. (2d) 136.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered on November 28, 1941 (R. 2675). This decree was amended, in certain particulars not here relevant, by order of the Circuit Court of Appeals filed February 12, 1942, as amended by order of February 16, 1942 (R. 2681, 2682).

The petition for a writ of certiorari in the instant case (No. 8) was filed on December 29, 1941, and was granted on

April 27, 1942, 316 U. S. . Writs of certiorari were also granted on April 27, 1942, to the Institutional Bondholders Committee (No. 7), the Debtor (No. 20), Reconstruction Finance Corporation (No. 33), and the Trustee under the Debtor's General and Refunding Mortgage (No. 61). The writ granted to the Committee in No. 7 raises issues substantially identical with those involved in the instant case; the issues raised by the writs granted in Nos. 20, 33, and 61 are more limited in scope.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)) and Section 24(c) of the Bankruptcy Act (11 U. S. C. A., § 47(c)).

STATEMENT OF THE CASE.

A concise statement of the case, containing all that is material to the consideration of the questions here presented, appears at pages 4-27 of the brief of the Institutional Bondholders Committee which is being filed in No. 7. To avoid burdening this Court with what seems an unnecessary repetition, we beg leave to refer to that statement in the brief of the Committee and respectfully pray that that statement be deemed incorporated herein for all purposes of Rule 27.

STATUTES INVOLVED.

The statutory provisions involved are contained in Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205), and in Section 20a of the Interstate Commerce Act (49 U. S. C. A., § 20a). The relevant provisions are set forth in the Appendix, *infra*, pages 35-45.

QUESTIONS PRESENTED.

The questions presented, as set forth in the petition for certiorari, are as follows:

1. Are the Commission's findings (a) that "the equity of the existing stock has no value" (R. 269) and (b) that

"the claims of the unsecured creditors • • • have no value" (R. 269-270), if supported by the requisite valuation data, sufficient to sustain the Commission's conclusions that the stockholders and unsecured creditors should be excluded from participation in the reorganization?

2. As to the following findings of the Commission: (a) that the securities available for distribution to the secured creditors holding notes secured by the pledge of Refunding Bonds "are inadequate in value to satisfy the aggregate claims of these parties" (R. 271), (b) that the "allocation of reorganization securities to" Reconstruction Finance Corporation "exhausts the value of the collateral pledged by the debtor under the notes held by" Reconstruction Finance Corporation (R. 316), and (c) that "the equity of" The Railroad Credit Corporation "in such collateral has no value" (R. 316),—are these findings sufficient, if supported by the requisite valuation data, to sustain the Commission's conclusions that the "value of each of the claims is proportionate to the collateral securing it" (R. 271) and that the allocation of new securities issued in respect of the pledged Refunding Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271)?

3. Should the participation in the reorganization of the holders of First Mortgage Bonds and of the pledgee holders of Refunding Bonds, respectively, be "in proportion to the value of their respective claims", ascertained by determining the exact dollar values of (1) the Debtor's entire property, (2) the property subject to the First Mortgage as a first lien and to the Refunding Mortgage as a second lien, (3) the property subject to the Refunding Mortgage as a first lien, and (4) the new securities distributable to each class? Or should their participation be based upon a determination by the Commission, in terms of the new securities, of the "equitable equivalent of the debtor's assets available for the satisfaction" of the respective claims of each class, giving due effect to the relative priorities of the respective mortgages upon system

earnings at the different levels which such earnings must reach in order to service the various classes of new securities and all other factors which should be considered in order that the District Court may approve the result as being fair and equitable?

4. May not the two claims of Reconstruction Finance Corporation, the one represented by the outstanding Trustees' Certificates and the other represented by notes secured by the pledge of Refunding Bonds, be treated as an "entire bundle of rights" and dealt with on the basis of a practicable and fair compromise which will eliminate the necessity of obtaining elsewhere on less favorable terms the new money needed to refinance the outstanding Trustees' Certificates?

5. Does the present record contain sufficient valuation data to support the Commission's findings and conclusions as to what classes are entitled to participate in the reorganization and as to what new securities should be allocated to each of such classes?

6. Does not Section 77 vest exclusively in the Commission jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest", including jurisdiction to determine the amount, character and financial details of capitalization, and is not the scope of the judicial review of the Commission's determination of such matters limited to an inquiry as to whether the Commission's action was arbitrary or in excess of its constitutional or statutory powers?

7. Should not this Court, upon the entire record, reverse the judgment or decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan, in view of the public interest in bringing about a speedy termination of the reorganization proceedings, and in order to prevent further and unnecessary litigation of questions which were before the

Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination?

8. Should the costs of a successful appeal be assessed against mortgage trustees whose appearance as appellees before a circuit court of appeals is occasioned solely by reason of the circumstance that the appellants challenge the fairness of the treatment accorded their *cestuis que trustent* under a plan of reorganization approved by the Commission and by a district court, or should such costs be assessed directly against the Debtor's estate?

SUMMARY OF ARGUMENT.

I. Neither Section 77 nor judicial precedent requires the strait-jacketing of the reorganization process with the rigid valuation formula prescribed by the Circuit Court of Appeals.

II. The Commission's findings are sufficient, in the light of the valuation data in the record, to sustain the exclusion of the unsecured creditors and the sole stockholder from participation in the reorganization.

III. The Commission's findings are sufficient, in the light of the valuation data in the record, to sustain the allocations of new securities among the secured creditors.

IV. The District Court correctly conceived the relative functions of the Commission and of the court in approving a plan of reorganization.

V. This Court should, upon the entire record, reverse the decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan.

VI. The costs of the appeal should be assessed directly against the Debtor's estate.

ARGUMENT.

POINT I.

NEITHER SECTION 77 NOR JUDICIAL PRECEDENT REQUIRES THE STRAIT-JACKETING OF THE REORGANIZATION PROCESS WITH THE RIGID VALUATION FORMULA PRESCRIBED BY THE CIRCUIT COURT OF APPEALS.

A. The Valuation Formula Prescribed by the Circuit Court of Appeals.

The Circuit Court of Appeals held that the Commission was under a "duty" to determine and certify to the District Court the "values" of sixteen separate items, to enable the District Court to appraise the fairness of the Commission Plan (1) with respect to the exclusion of the unsecured creditors and the sole stockholder from participation in the reorganization and (2) with respect to the allocation of new securities among the secured creditors. "That duty", said the Circuit Court of Appeals, "was not performed" (R. 2668-2671).

In the light of the extensive valuation findings actually made by the Commission, this amounts to a requirement that the Commission make findings of exact dollar values.

Thus interpreted, the decision of the Circuit Court of Appeals means that the exclusion of the unsecured creditors and the sole stockholder from participation in the reorganization must be based upon a finding of the exact dollar value of the Debtor's entire property. It also means that the allocation of new securities among the secured creditors must be based upon a precise mathematical formula, expressed in terms of equivalents of exact dollar values of claims to exact dollar values of new securities, such dollar values to be ascertained by determining the exact dollar values of the properties securing the respective claims and the respective new securities.

If a "duty" rests upon the Commission to make such findings of exact dollar values, from what source does that "duty" spring?

B. **The Provisions of Section 77.**

Turning to Section 77, one searches in vain for language requiring the Commission to make findings of exact dollar values. Indeed, the statute is barren of mandatory provisions with respect to valuation findings of any sort.

Subsection (d) provides, among other things, that

> "the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. *In such report the Commission shall state fully the reasons for its conclusions.*"[1]

This constitutes the only mandatory provision with respect to findings by the Commission.

Subsection (b) specifies what type of provisions must be, and what type of provisions may be, included in a plan of reorganization. Among those in the mandatory category are "provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise". Among those in the permissive category are "provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise".

Subsection (e) requires that the plan be "fair and equitable", that it afford "due recognition to the rights of each class of creditors and stockholders", that it do "not discriminate unfairly in favor of any class of creditors or

[1] Italics in this brief are ours, unless otherwise designated.

stockholders", and that it "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." These requirements would seem to be epitomized in the phrase "fair and equitable."[1]

The statute contains only three provisions referring specifically to findings of value by the Commission. None of them is mandatory.

The first two are the provisions in the second paragraph of subsection (e) that submission of the plan "to any class of stockholders shall not be necessary *if the Commission shall have found*, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or *that at the time of the finding the equity of such class of stockholders has no value*, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity," and that submission of the plan "to any class of creditors shall not be necessary *if the Commission shall have found*, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or *that at the time of the finding the interests of such class of creditors have no value*, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests." Curiously enough, the Circuit Court of Appeals held that findings of "no value" made by the Commission in the exact language of these statutory provisions were insufficient to sustain the exclusion of the unsecured creditors and the sole stockholder from participation in the reorganization and held that a finding of the exact dollar value of the Debtor's property was required (R. 2668).

---

[1] This Court, in *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), said: "The words 'fair and equitable' as used in §77B(f) are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations" (p. 115), and which were "used to indicate that a plan of reorganization fulfilled the necessary standards of fairness" (p. 118).

The third provision, which was quoted in part by the Circuit Court of Appeals (R. 2670-2671), is found in the last paragraph of subsection (e), reading as follows:

> "*If it shall be necessary* to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Had Congress intended a valuation finding by the Commission to be necessary for testing the fairness of every provision in a plan "modifying or altering the rights" of creditors or stockholders, there would have been no reason to insert the qualifying words "if it shall be necessary". Moreover, there is nothing in the language used which requires that findings of "value" under this provision be stated in terms of exact dollar values. On the contrary, the emphasis placed upon earning power as the ultimate criterion of value[1] indicates that a finding of value expressed in terms of earning power translated into new securities would satisfy every requirement of this provision.

The conclusion seems clear that the supposed "duty" of the Commission to make findings of exact dollar values springs not from any express requirement of Section 77; if such a "duty" exists, it must derive from some requirement inherent in the nature of the reorganization process and implicit in the phrase "fair and equitable".

---

[1] See *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 526 (1941).

C. **The Judicial Content of the Phrase "Fair and Equitable".**

Equity Receivership Cases.

The decisions of this Court in *Railroad Company* v. *Howard*, 7 Wall. 392 (1868), *Louisville Trust Company* v. *Louisville, New Albany and Chicago Railway Company*, 174 U. S. 674 (1899)—the *Monon* case,—and *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482 (1913), established the so-called rule of "full or absolute priority" as a "fixed principle" for judging the fairness of reorganization plans. The rule was applied in *Kansas City Southern Railway Company* v. *Guardian Trust Company*, 240 U. S. 166 (1916), and was elaborated in *Kansas City Terminal Railway Company* v. *Central Union Trust Company of New York*, 271 U. S. 445 (1926), in which the doctrine of "quantitative preference" was announced. The rule laid down in these cases forms a part of the judicial content of the phrase "fair and equitable."[1]

The Court made clear that in these cases it was prescribing merely a standard of fairness, not a rigid formula.

In the *Boyd* case, the Court spoke of a "fair offer" to unsecured creditors and stated (p. 508):

> "This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock."

In the *Kansas City Terminal* case, the Court, after referring to the above quoted statement in the *Boyd* case, said:

> "And we now add that, when necessary, they may be protected through other arrangements which distinctly recognize their equitable right to be preferred to stock-

[1] *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, 115 (1939).

holders against the full value of all property belonging to the debtor corporation, and afford each of them fair opportunity, measured by the existing circumstances, to avail himself of this right." (pp. 454-455.)

"But reasonable adjustments should be encouraged. Practically, it is impossible to sell the property of a great railroad for cash; and, generally, the interests of all parties, including the public, are best served by co-operation between bondholders and stockholders." (p. 455.)

"In such or similar cases the chancellor may exercise an informed discretion concerning the practical adjustment of the several rights." (p. 455.)

In none of these cases did the Court express a view as to the type of findings needed to test the fairness of a reorganization plan.

In *National Surety Co.* v. *Coriell*, 289 U. S. 426 (1933), one of the cases cited by the Circuit Court of Appeals (R. 2672), this Court held that nonassenting creditors were entitled "to a decree based on adequate data" (p. 435). The opinion referred to the "failure to require relevant data before deciding whether the plan should be approved" (p. 436) and declared that "Every important determination by the court in receivership proceedings calls for an informed, independent judgment" (p. 436). But in that case the Court was dealing with a record wholly lacking in basic valuation data; there was no evidence from which a finding of any kind could be made. To hold that a decree must be supported by proper evidence of value is vastly different from holding that, on a record containing abundant valuation data, the decree must be supported by detailed findings of exact dollar values.

First National Bank of Cincinnati v. *Flershem*, 290 U. S. 504 (1934), another of the cases cited by the Circuit Court of Appeals (R. 2672), sheds little light upon the problem we are considering. In that case, this Court found, from the evidence in the record, that the upset price and the sale price were "grossly inadequate" (p.

524) and held that a nonassenting creditor was entitled to receive "that sum in cash which it would have received if the property had been sold at a proper price" (p. 526). For the purpose of ascertaining that sum, the Court directed a "detailed appraisal" (p. 527) of the assets as of the date of the sale. In that case, the problem was to ascertain a dollar amount to be paid in cash. Our problem is quite different—it concerns the fairness of a plan under which bundles of rights represented by old securities are to be exchanged for bundles of rights represented by new securities.

The *Los Angeles Lumber Products* Case.

In *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939), also cited by the Circuit Court of Appeals (R. 2672), this Court reaffirmed and clarified the doctrine of the *Boyd* case and concluded that "that doctrine is firmly imbedded in § 77B" (p. 119).

The sufficiency of the valuation findings was not in issue. The District Court had found that the debtor corporation was insolvent both in the equity sense and in the bankruptcy sense, and the facts in the record so clearly showed that the equity of the stockholders was valueless and that the "alleged consideration furnished by the stockholders" (p. 122) was inadequate that the Court had no difficulty in holding that "as a matter of law the plan was not fair and equitable" (p. 114).

The *Consolidated Rock Products* Case.

In the final analysis, the controversy in this case centers upon the correct interpretation of the decision of this Court in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941), cited by the Circuit Court of Appeals as its chief authority (R. 2668, 2670, 2671-2672). We believe the Circuit Court of Appeals misconceived the import of that decision.

In the *Consolidated Rock Products* case, the Court said (p. 520):

> "On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails."

On the record before it, the Court could not have done otherwise. What was lacking was basic evidence of value and other basic evidence without which no intelligent conclusion as to the fairness of the plan was possible. What evidence there was threw serious doubt upon the findings made by the District Court. The fatal defect in the findings lay in the failure to make a valuation based upon earning capacity.

The key to the decision, we believe, is to be found in the Court's discussion of the method of valuation:

> "From this record it is apparent that little, if any, effort was made to value the whole enterprise by a capitalization of prospective earnings. • • • Findings as to the earning capacity of an enterprise are essential to a determination of the feasibility as well as the fairness of a plan of reorganization." (p. 525.)

> "The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. • • • Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance. • • • The extent and

method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." (pp. 526-527.)

This flexible realistic approach to the valuation problem is the antithesis of the rigid scholastic formula prescribed by the Circuit Court of Appeals.

That this Court had in mind no strait-jacket requirement is further indicated by its discussion of the doctrine of the *Boyd* case. While insisting that "Full compensatory provision must be made for the entire bundle of rights which the creditors surrender" (p. 528), the Court said:

> "Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case. * * * But whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case. So long as the new securities offered are of a value equal to the creditors' claims, the appropriateness of the formula employed rests in the informed discretion of the court." (pp. 529-530.)

> "If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied." (p. 530.)

> "Any other standard might well place insuperable obstacles in the way of feasible plans of reorganization." (p. 530.)

We believe that the judicial content of the phrase "fair and equitable" affords no basis for a requirement that the Commission make findings of exact dollar values.

D. The Practical Requirements of the Reorganization Process.

Finding the exact dollar value of a railroad is like finding the product of two variables. It is an attempt to reduce to certainty that which is inherently uncertain.

A valuation "by a capitalization of prospective earnings" involves two preliminary steps. The first step is to make an estimate of the prospective earnings. This at best can be no more than an informed guess and can reach only an approximate result. The second step is to determine what rate of capitalization to use. This involves a problem of judgment, which is complicated by the practical necessity of capitalizing earnings at different rates in determining what amounts of fixed interest debt, contingent interest debt, and stock the earning power of the enterprise will support. The complexity of this problem increases with the number of different types of securities having varying interest and dividend rates into which the new capital structure is to be classified.

The estimate of prospective earnings must be realistically related to the types of new securities which those earnings are to service. For the servicing of fixed interest debt, earnings must be estimated at depression levels. For the servicing of contingent interest debt, they must be estimated at levels which are reasonably certain to be maintained under "normal" future conditions. For the servicing of dividends on preferred and common stock, still higher levels of earnings may be used, depending upon the degree of probability that those levels will be reached with sufficient frequency to give value to the stock. At those rarefied levels, the inquiry reaches increasingly into the realm of the speculative, and to determine the exact point at which probability of future earnings ceases to be even a reasonable hope is obviously impossible.

The result of such a valuation is logically stated in terms of new securities. Nothing useful can be added by an unrealistic attempt to state that result in terms of exact dollar values.

The futility of requiring findings of exact dollar values becomes even more apparent when separate parts of a railroad system are valued for the purpose of determining the allocations of new securities.

By way of illustration, let us assume that a railroad has a number of divisional first and second mortgages and several system mortgages. Each of the system mortgages is a first lien on certain parts of the system and is further secured by the pledge of divisional mortgage bonds or senior system mortgage bonds, or both, and also by the pledge of stocks and bonds of subsidiary companies. Some of the divisional lines show substantial earnings at comparatively low levels of system earnings, while others do not begin to show earnings until system earnings reach higher levels. This is not an imaginary situation: it is typical of some of the railroads now in reorganization.

To measure the value of the assets contributed to the reorganization by each of the various classes of security holders in such a situation presents a staggering problem. Even with the aid of such devices as earnings segregation studies, severance studies, and contributed traffic studies, no approach can be made to scientific accuracy. Findings expressed in terms of exact dollar values would merely lend a pretense of exactness.

Findings of exact dollar values tend to obscure the real nature of the problem of allocations, because they create the impression that the things valued are exactly equal if the dollar values are equal. The problem of allocations is not one of merely matching dollar values of claims and dollar values of new securities, as the Circuit Court of Appeals apparently assumed when it said (R. 2669) that "fairness requires" that the participation of the secured creditors "should be in proportion to the value of their respective claims". Such a rule of distribution would disregard the "fixed principle" of the *Boyd* case. The problem is rather one of comparing bundles of rights—bundles of rights entitling the holders to assert claims against the income and assets in varying amounts and at varying levels of priority.

The problem cannot be resolved by a precise mathematical formula. Its solution calls instead for the exercise of an informed judgment, a careful weighing of many factors, tangible and intangible, which are not a matter of arithmetic.

Mr. Justice HOLMES has said:

> "Delusive exactness is a source of fallacy throughout the law."[1]

In no field is it more important to bear in mind the wisdom of that remark than in the field of railroad reorganization valuations.

POINT II.

THE COMMISSION'S FINDINGS ARE SUFFICIENT, IN THE LIGHT OF THE VALUATION DATA IN THE RECORD, TO SUSTAIN THE EXCLUSION OF THE UNSECURED CREDITORS AND THE SOLE STOCKHOLDER FROM PARTICIPATION IN THE REORGANIZATION.

The Commission found, with respect to the stock, "that there is no equity over and above the securities hereinbefore approved; *that the equity of the existing stock has no value*, and hence holders of such stock are not entitled to participate in the plan." (R. 269[2].)

The Commission found, with respect to the claims of the unsecured creditors, "that even though all the securities remaining available for distribution after satisfying the claims of the first mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims * * * *that the claims of the unsecured creditors * * * have no value.*

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[1] Dissenting opinion in *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921).

[2] See also R. 294, 393, and 889.

and hence no securities or cash should be distributed under the plan in respect to those claims." (R. 269-270[1].)

In making these findings of "no value", in the statutory language of subsection (*e*), the Commission made findings of the ultimate facts upon which the exclusion of stockholders and unsecured creditors from participation in the reorganization depends. A finding that the equity of the stock has no value is a finding that the value of the Debtor's property does not exceed the Debtor's liabilities. It is in substance and effect a finding of insolvency in the bankruptcy sense. A finding that the claims of a particular class of creditors have no value is a finding that the value of the property available for the satisfaction of those claims does not exceed the amount of the prior claims against that property. An examination of the record will show that it contains abundant valuation data to support these findings.

The Commission had before it comprehensive valuation data, including traffic studies, data as to past earnings, and an estimate of future earnings, as well as data as to the investment in the property and the physical valuation data contained in the Commission's Section 19a valuation. The Commission's report dated October 10, 1938, recites this data in great detail (R. 203-224), and a reading of that report and of the report dated June 21, 1939, will show not only that the Commission gave due weight to all of the various elements of value but that it expressed a carefully considered judgment as to the relative weight to be given to each (R. 203-224, 244, 245-246, 257, and 310). No one, we believe, can seriously contend that the Commission failed to "state fully the reasons for its conclusions."

Additional valuation data was received in evidence by the District Court (R. 1285-1296 and 1300-1317).

We believe that an analysis of the valuation data in the record will convincingly demonstrate the correctness of the Commission's findings "that the equity of the exist-

[1]See also R. 294, 392, and 889.

ing stock has no value" (R. 269) and "that the claims of the unsecured creditors * * * have no value" (R. 269-270).

The opinion of the District Court contains (R. 1591-1592) a tabulation showing the reported and adjusted earnings available for interest for each of the years from 1922 through 1938 and the first ten months of 1939. Since that opinion was written, earnings figures for the full year 1939 and for subsequent periods through the month of June 1942, have been made available in statements filed with the District Court, which are before this Court pursuant to the stipulation of the parties filed July 23, 1942.[1]

Under the Commission Plan, earnings must reach a level of over $3,500,000 per year in order to pay full dividends on the new preferred stock and must reach a level of over $4,600,000 per year in order to pay dividends of $3 per share on the new common stock.

In only five of the twenty years from 1922 through 1941 did the adjusted earnings reach a level of $3,500,000. Those were the years 1925, 1926, 1928, 1929, and 1941. In only one year (1926) did the adjusted earnings reach a level of $4,600,000.

The adjusted earnings for 1939 were slightly over $1,500,000; for 1940 they were slightly over $2,360,000; for 1941 they were slightly over $3,580,000.

On the basis of the Debtor's past earnings record (through 1941), therefore, the total authorized capitalization provided for in the Commission Plan is, if anything, over-optimistic.

Several of the respondents contended before the Circuit Court of Appeals, and will doubtless contend before this Court, that the recent upward trend of the Debtor's earnings is indicative of a prospective earning power

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[1] A tabulation showing the reported and adjusted earnings available for interest for each of the years from 1922 through 1941 is set forth on page 7 of the brief of the Institutional Bondholders Committee.

sufficient to support a larger capitalization than is provided for in the Commission Plan.

The recent earnings of the Debtor have undoubtedly reflected the effects of increased traffic resulting from the war effort, from the diversion of traffic which would normally pass through the Panama Canal, and from the diversion of traffic which would normally be carried by motor vehicles. These are temporary factors which are a highly uncertain basis for an estimate of future earnings. Against these factors must be offset the possibility of tax increases incident to the financing of the war and the possibility of wage increases and increases in prices of materials, as well as other factors which may produce higher operating costs. War traffic demands are placing a heavy strain upon the physical plant and equipment of the American railroads, while shortages of materials are making adequate maintenance and replacements increasingly difficult. The end of the war may well find the Debtor faced with the problem of financing a rehabilitation program out of greatly reduced earnings.

To erect the new capital structure upon the unsteady foundation of wartime earnings is to build upon a quicksand.

POINT III.

THE COMMISSION'S FINDINGS ARE SUFFICIENT, IN THE LIGHT OF THE VALUATION DATA IN THE RECORD, TO SUSTAIN THE ALLOCATIONS OF NEW SECURITIES AMONG THE SECURED CREDITORS.

A. The Commission's Findings.

The allocations of new securities under the Commission Plan are premised, and we believe correctly premised, upon the complete priority of the First Mortgage over the Refunding Mortgage[1] as a lien on substantially all of

[1] The Debtor's General and Refunding Mortgage.

the Debtor's property, except with respect to certain pledged collateral held by the Refunding Mortgage Trustee.[1] The pledgee holders of Refunding Mortgage Bonds are therefore entitled to receive only (1) whatever new securities are found to be issuable in respect of the pledged collateral on which the Refunding Mortgage is a first lien, plus (2) whatever new securities remain after provision has been made for the refunding of the prior lien Trustees' Certificates and after the holders of the First Mortgage Bonds have been "made whole".

The Commission Plan, after providing for the refunding of the $10,000,000 principal amount of Trustees' Certificates with an equal principal amount of new first mortgage 4% bonds, allocates to the holders of First Mortgage Bonds (a) new income mortgage 4½% bonds in a principal amount equal to 40% of their claim for principal, (b) new 5% preferred stock of a par value equal to 60% of their claim for principal, and (c) new no par common stock in an amount which, taken at $57 per share, is equal to the amount of their claim for accrued interest (R. 317, 390-391). All of the remaining common stock is allocated to the holders of Refunding Mortgage Bonds (R. 317-318, 391-392).

Reconstruction Finance Corporation,[2] which holds all of the outstanding Trustees' Certificates and is also a pledgee holder of Refunding Mortgage Bonds, is given *pari passu* treatment with the holders of First Mortgage Bonds in respect of that portion of its claim which is secured by the pledge of Refunding Mortgage Bonds, as compensation for the sacrifice of rights involved in its acceptance of new long term first mortgage bonds in exchange for the short term Trustees' Certificates (R. 312, 317, 389, 391). As a result of this allocation, the RFC receives 29,360 shares less of new common stock than it would

[1] The determinations of the Commission (R. 261-267) and of the District Court (R. 1597) as to the relative priority of the two mortgages were not disturbed by the Circuit Court of Appeals. The correctness of those determinations is challenged by the petition of the Refunding Mortgage Trustee in No. 61.

[2] Hereinafter referred to as the "RFC".

otherwise receive as a pledgee holder of Refunding Mortgage Bonds. These additional shares of new common stock are allocated to the other pledgee holders of Refunding Mortgage Bonds, namely, The Railroad Credit Corporation[1] and A. C. James Co. (R. 317, 391-392). Common stock is allocated to the RCC at $62 per share.

In addition to their allotment of new common stock, the RCC and A. C. James Co. receive new income mortgage 4½% bonds and new 5% preferred stock in recognition of the value of the pledged collateral on which the Refunding Mortgage is a first lien (R. 315-316). The principal amount of new income mortgage bonds so allocated is equal to the amount of the deposited cash and the principal amount of the Tidewater Southern note held by the Refunding Mortgage Trustee, and the par value of the new preferred stock so allocated is equal to the par value of the Tidewater Southern stock held by the Refunding Mortgage Trustee (R. 313, 315). The Commission found that the lien of the Refunding Mortgage on the pledged securities of Central California Traction Company and Alameda Belt Line "has no material value" (R. 315).

As between the RCC and A. C. James Co., these new securities are allocated in the ratios which their holdings of Refunding Mortgage Bonds bear to the total principal amount of Refunding Mortgage Bonds outstanding, the Commission having found that the new securities "available for distribution are inadequate in value to satisfy the aggregate claims" (R. 271) of the pledgee holders of Refunding Mortgage Bonds, that the "value of each of the claims is proportionate to the collateral securing it" and that the allocation of new securities in respect of the Refunding Mortgage Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271).

The Commission further found that the "allocation of reorganization securities to" the RFC "exhausts the value of the collateral pledged by the debtor under the notes

[1] Hereinafter referred to as the "RCC".

held by" the RFC and that "the equity of" the RCC "in such collateral has no value" (R. 316).

The Commission made specific findings with respect to each of the foregoing allocations,[1] and then made the following over-all findings:

> "These securities represent the equitable equivalent of the debtor's assets available for the satisfaction of claims." (R. 316.)
>
> "Based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor, we find that the new securities should be allotted as follows: * * *" (R. 317.)

These findings are in effect findings of "value", expressed in terms of new securities. We believe that they satisfy every requirement of Section 77 and that they are amply supported by the valuation data and other evidence in the record.

B. **The Fairness of the Allocations as Between Holders of First Mortgage Bonds and Holders of Refunding Mortgage Bonds.**

Considering that, as to 40% of their principal claim, the First Mortgage Bondholders are to receive, on a dollar for dollar basis, contingent interest bonds bearing a lower rate of interest and having an inferior lien position, that, as to 60% of their principal claim, they are to surrender their creditor position and receive preferred stock on a dollar for dollar basis, and that, as to their entire claim for accrued interest, they are to receive nothing but common stock on a basis only a little more than favorable than the basis upon which common stock is allocated to holders of Refunding Mortgage Bonds, we believe any con-

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[1] These findings are summarized at pages 18-21 of the brief of the Institutional Bondholders Committee.

tention that the holders of First Mortgage Bonds are too generously treated is clearly without merit.[1]

Inasmuch as all of the remaining common stock is allocated to the holders of Refunding Mortgage Bonds, that common stock represents the entire value of the second lien of the Refunding Mortgage on the property which is subject to the liens of both mortgages. Consequently, it is unimportant to know the exact value of that property or the exact values of the new securities allocated to the holders of First Mortgage Bonds and the holders of Refunding Mortgage Bonds in respect of that property.

In valuing the pledged collateral subject to the Refunding Mortgage as a first lien, the Commission analyzed and discussed in its report dated June 21, 1939, comprehensive valuation data as to Tidewater Southern Railway Company, Central California Traction Company, and Alameda Belt Line, including traffic studies, data as to earnings, and, in the case of Tidewater Southern Railway Company, physical valuation data contained in the Commission's Section 19a valuation (R. 313-315). The Commission made specific findings as to the separate values of the pledged securities of these companies, its finding as to the value of the pledged Tidewater Southern securities being expressed in terms of new securities and its finding as to the value of the pledged securities of Central California Traction Company and Alameda Belt Line being expressed in the words "the lien on the securities of these two companies has no material value" (R. 315).

In the light of the valuation data as to Tidewater Southern Railway Company, we believe no valid contention can be made that the unsecured Tidewater Southern note has a greater value than an equal principal amount of new income mortgage bonds secured by a second lien upon the Debtor's system or that the pledged Tidewater Southern stock has a greater value than an equal par value of new preferred stock.

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[1] See *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, 527-530 (1941).

We also believe that the data in the record as to the operating losses of Central California Traction Company and Alameda Belt Line (R. 1100-1105, 1309, 1311) fully sustain the Commission's finding that "the lien on the securities of these two companies has no material value" (R. 315).

C. **The Fairness of the Allocations as Between the RCC and A. C. James Co.**

In view of the Commission's findings (a) that the new securities "available for distribution are inadequate in value to satisfy the aggregate claims" (R. 271) of the pledgee holders of Refunding Mortgage Bonds, (b) that the "allocation of reorganization securities to" the RFC "exhausts the value of the collateral pledged by the debtor under the notes held by" (R. 316) the RFC and (c) that "the equity of" the RCC "in such collateral has no value" (R. 316), we submit that the Commission's findings that the "value of each of the claims is proportionate to the collateral securing it" (R. 271), and that the allocation of new securities in respect of the Refunding Mortgage Bonds "should be made on the basis of the collateral held rather than on the amount of the claims" (R. 271) state the obviously correct rule of distribution.

The new securities to be distributed to the RCC and A. C. James Co. comprise all of the new securities remaining after the allocations to the holders of First Mortgage Bonds and after the compromise allocation to the RFC. No additional findings of value are needed to determine the fairness of the allocations as between the RCC and A. C. James Co. Since the RCC and A. C. James Co. are to divide the entire package between them in accordance with a fixed ratio, the value of what is in the package cannot affect the result.

D. **The Fairness of the Compromise Allocation to the RFC.**

The Commission treated the two claims of the RFC as one "bundle of rights" and made an allocation to the

RFC under which the RFC is to receive *pari passu* treatment with the holders of First Mortgage Bonds in respect of its claim as a pledgee holder of Refunding Mortgage Bonds, in consideration of its accepting $10,000,000 in principal amount of new first mortgage bonds in exchange for the $10,000,000 in principal amount of Trustees' Certificates which it holds (R. 312, 317, 389, 391). The basis of the allocation was a practicable and fair compromise. In making this compromise allocation, the Commission took into account the necessity of refunding, or providing new money to pay, the outstanding Trustees' Certificates (which are short term obligations of the Debtor's trustees and rank as an expense of administration prior to the liens of the Debtor's mortgages), as well as the difficulty of financing the retirement of the Trustees' Certificates otherwise than through the RFC (R. 311).

Clearly, the exchange of the short term Trustees' Certificates for long term first mortgage bonds involves a sacrifice of rights by the RFC for which it is entitled to "full compensatory treatment". The question is whether the bundle of rights which the RFC is to receive will give to it more than the full equitable equivalent of the bundle of rights which it is to surrender. This is a question which calls for the exercise of an expert, informed judgment and is a question with which the Commission, by reason of its experience and knowledge of railroad securities, is particularly fitted to deal.

The evidence introduced before the District Court (R. 1530-1567), which indicated the difficulty of marketing the new first mortgage bonds privately (R. 1531-1533, 1545) and which indicated that they probably could not be sold for more than 85 or 90 (R. 1532, 1554), strongly tends to support the Commission's findings.

The problem of dealing with the outstanding Trustees' Certificates is peculiarly one which requires for its solution "practical adjustments, rather than a rigid formula". We believe the Commission has found a fair and sensible solution to that problem.

POINT IV.

THE DISTRICT COURT CORRECTLY CONCEIVED THE RELATIVE FUNCTIONS OF THE COMMISSION AND OF THE COURT IN APPROVING A PLAN OF REORGANIZATION.

The Circuit Court of Appeals criticized, as indicating a "possible misconception" (R. 2672), the following statement in the opinion of the District Court (R. 1588):

> "It cannot be gainsaid that the Commission knows all about the debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the debtor in relation to any of the matters mentioned."

After quoting from the provisions of subsection (e) of Section 77, the Circuit Court of Appeals said (R. 2674):

> "In determining whether a plan of reorganization satisfies the requirements of subsection (e), the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not on the court."

The above quoted statement of the District Court should be read in the light of the following statement in the District Court's opinion (R. 1596-1597):

> "The two issues of (1) amount and character of capitalization and (2) distribution of new securities are closely related. The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is exclusively within the province of the Commission. The only qualifica-

tion, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily. The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court."

We submit that the District Court correctly conceived the relative functions of the Commission and of the court in approving a plan of reorganization under Section 77.

Subsection (d) of Section 77, which defines the functions of the Commission in approving a plan of reorganization, confers upon the Commission jurisdiction to determine whether the plan "will be compatible with the public interest." Subsection (e), which defines the functions of the District Court, confers no such jurisdiction upon the District Court. Thus, by the express terms of the statute, jurisdiction to determine whether a plan of reorganization "will be compatible with the public interest" is vested exclusively in the Commission.

We submit that the exclusive jurisdiction of the Commission to determine whether a plan of reorganization "will be compatible with the public interest" includes jurisdiction to determine the amount, character and financial details of capitalization.

It is difficult to imagine a question more clearly involving the public interest than the question whether a railroad is to emerge from reorganization with a sound capital structure. The disastrous effect upon railroad credit and upon the investing public of successive receiverships resulting from unsound capital structures is too well known to require further comment.

Subsection (f) of Section 77 provides that, upon confirmation of a plan, the Commission shall, among other things, "grant authority for the issue of any securities • • • to the extent contemplated by the plan and not inconsistent with the provisions and purposes of" the Interstate Commerce Act.

The phrase "compatible with the public interest" appears in paragraph (2) of Section 20a of the Interstate Commerce Act (49 U. S. C. A., § 20a), which section vests in the Commission "exclusive and plenary" jurisdiction to control the issue of new securities by carriers engaged in interstate commerce. The scope of the Commission's jurisdiction under Section 20a was defined by this Court in *New York Central Securities Corporation* v. *United States*, 287 U. S. 12 (1932) in the following language (p. 27):

> "In creating federal supervision of the issue of securities by interstate carriers, the Congress, so far from making it necessary for the Commission to determine whether there had been compliance with state requirements, expressly provided in subdivision (7) of § 20a that the jurisdiction of the Commission should be 'exclusive and plenary' and that approval other than as specified in that section, should not be necessary."

Section 20a and the decisions construing it form part of the legislative and judicial background against which the phrase "compatible with the public interest" in Section 77 must be construed.

The scope of the judicial review of the Commission's determination that a plan "will be compatible with the public interest" is limited by the well established doctrine of the finality of administrative determinations. A classic statement of that doctrine is contained in the opinion of this Court in *Interstate Commerce Commission* v. *Union Pacific Railroad Company*, 222 U. S. 541 (1912), at pages 547-548:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that

(4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Int. Com. Com. v. Ill. Cent.*, 215 U. S. 452, 470; *Southern Pacific* v. *Int. Com. Com.*, 219 U. S. 433; *Int. Com. Com.* v. *Northern Pacific*, 216 U. S. 538, 544; *Int. Com. Com.* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Ill. Cent.* v. *I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The applicability of this doctrine to the Commission's determinations of the "public interest" questions under Section 77 is indicated by the expressions of this Court in *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939), and *Warren* v. *Palmer*, 310 U. S. 132 (1940).

In *Palmer* v. *Massachusetts*, this Court said (p. 87):

"The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission. From the re-

quirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission."

And in *Warren* v. *Palmer*, this Court said (p. 138):

"The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

The dictum of the Circuit Court of Appeals, we submit, is not only contrary to the express provisions of Section 77; it runs counter to a principle of administrative law which has long been established by this Court.

POINT V.

THIS COURT SHOULD, UPON THE ENTIRE RECORD, REVERSE THE DECREE OF THE CIRCUIT COURT OF APPEALS AND AFFIRM THE ORDER OF THE DISTRICT COURT APPROVING THE COMMISSION PLAN.

The opinion of the Circuit Court of Appeals (R. 2663) omits to discuss the correctness of the District Court's determination of many of the issues which were before the Circuit Court of Appeals. Prominent among these issues are those involved in the so-called "lien controversy", which have been specifically brought before this Court for determination by the petition of the Refunding Mortgage Trustee in No. 61.

We shall deal with the issues involved in the "lien controversy" in a separate answering brief to be filed in No. 61. The remaining issues are comprehensively dealt with in the brief of the Institutional Bondholders Committee which is being filed in No. 7,[1] and we shall not burden the Court with a further discussion of those issues.

[1] See, in particular, pages 138-145 of the Committee's brief.

We believe that an examination of the record will convince this Court that the District Court committed no error in approving the Commission Plan.

Unless the questions which the Circuit Court of Appeals left unanswered are settled by this Court, they are likely to become the subject of further litigation, which will result in further and unnecessary delay and expense to the parties concerned. To the end that these reorganization proceedings, which have been pending since 1935, may be speedily determined,[1] we believe that this Court should, upon the entire record, reverse the decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan.

POINT VI.

THE COSTS OF THE APPEAL SHOULD BE ASSESSED DIRECTLY AGAINST THE DEBTOR'S ESTATE.

The First Mortgage Trustees in this case are not like ordinary litigants trying a private lawsuit.

The Commission Plan was not proposed by the First Mortgage Trustees. It was formulated by the Commission independently in the exercise of its statutory powers under Section 77, and it was approved by the District Court as being fair and equitable. The efforts of the First Mortgage Trustees before the Circuit Court of Appeals were directed to a defense of the Commission Plan; the Commission did not appear before the Circuit Court of Appeals to defend its plan.

The appearance of the First Mortgage Trustees as appellees before the Circuit Court of Appeals was occasioned solely by the circumstance that the appellants challenged the fairness of the treatment accorded the holders of First Mortgage Bonds under the Commission

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[1] See *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 685 (1935).

Plan and in so doing put in issue the relative priority of the lien of the First Mortgage on important parts of the Debtor's property.

We believe that the public interest in the proper determination of questions affecting the fairness of plans of reorganization under Section 77 makes it important that the courts have the benefit of an adequate presentation of both sides of controversies arising in connection with proceedings for the approval of such plans. Accordingly, we submit that assessing the costs of the appeal directly against the Debtor's estate, rather than against individual parties, is appropriate.

CONCLUSION.

We respectfully submit that the decision of the Circuit Court of Appeals should be reversed and that the order of the District Court approving the Commission Plan should be affirmed.

Dated, New York, N. Y., September 15, 1942.

Respectfully submitted,

ORVILLE W. WOOD,
Attorney for Petitioners, Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

Appendix.

The Statutes Involved.

Subsection (b) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(b)), provides as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds de-

rived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

"The adoption of an executory contract or unexpired lease by the trustee or trustees of a debtor shall not preclude a rejection of such contract or lease in a plan of reorganization approved hereunder, and any claim resulting from such rejection shall not have priority over any other claims against the debtor because such contract or lease had been previously adopted. The term 'securities' shall include evidences of indebtedness either secured or unsecured, bonds, stock, certificates of beneficial interest therein, certificates of beneficial interest in property, options, and warrants to receive, or to subscribe for, securities. The term 'stockholders' shall include the holders of voting-trust certificates. The term 'creditors' shall include, for all purposes of this section all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease.

"The term 'claims' includes debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character. For all purposes of

this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors. In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings. The provisions of section 96 of this title shall apply to a proceeding under this section. For all purposes of this section any creditor or stockholder may act in person or by an attorney at law or by a duly authorized agent or committee subject to the provisions of subsection (p) of this section. The running of all statutes of limitation shall be suspended during the pendency of a proceeding under this section."

Subsection (d) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(d)), provides as follows:

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plan shall also be filed with the Commission at the same time. Such plans may likewise be filed at any time before, or with the consent of the Commission during, the hearings

hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than 10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the Commission by any party in interest. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

"The Commission may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

Subsection (e) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(e)), provides as follows:

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice

to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which

event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided, further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this

section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a

creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States, or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property,

and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."

Subsection (f) of Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205(f)), provides as follows:

"(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be

entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the Commission shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended. The provisions of sections 77a to 77aa of Title 15 shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said sections, be treated as if they were specifically mentioned in sections 77c and 77d of Title 15, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subsection (c), clause (3) of this section; (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) of this section. The provisions of subdivision (a) of section 78n of Title 15 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) of this section."

Paragraph (2) of Section 20a of the Interstate Commerce Act (49 U. S. C. A., § 20a (2)), provides as follows:

"(2) *Issuance of securities; assumption of obligations; authorization.* It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability

as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Paragraph (7) of Section 20a of the Interstate Commerce Act (49 U. S. C. A., § 20a (7)), provides as follows:

"(7) *Jurisdiction of commission as exclusive and plenary.* The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. ~~819 and 820~~ 7-8

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY,
Debtor.

FREDERICK H. ECKER, *et al.*,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, *et al.*,
Petitioners,
against
WESTERN PACIFIC RAILROAD CORPORATION, *et al.*,
Respondents.

Motion of Irving Trust Company, Refunding Mortgage Trustee, to Defer Consideration of Petitions for Writs of Certiorari and Extend Time to File Brief in Answer to Same

January 16, 1942.

HAROLD C. McCOLLOM,
Counsel for Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of the Western Pacific Railroad Company.

FRANCIS R. KIRKHAM,
ORRIN G. JUDD,
Of Counsel.

Appeal Printing Co., Inc., 130 Cedar St., New York - WO 2-3242

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Motion of Irving Trust Company, Refunding Mortgage Trustee, to Defer Consideration of Petitions for Writs of Certiorari and Extend Time to File Brief in Answer to Same

Now comes Irving Trust Company, as Substituted Trustee (hereinafter termed the Refunding Mortgage

Trustee) under the General and Refunding Mortgage of the Debtor, dated as of January 1, 1932, one of the respondents in the above-captioned cases, and respectfully moves that this Honorable Court defer consideration of the above-captioned petitions for certiorari until after the decision by the Circuit Court of Appeals for the Ninth Judicial Circuit of petitions for rehearing of the decision to which said petitions for certiorari are directed, and that this Court extend the time of the Refunding Mortgage Trustee to file its brief in answer to such petitions for certiorari until twenty (20) days after the decision of its said petition for rehearing.

The facts on which this motion is based are as follows:

The two petitions referred to in the caption, one filed by a Committee for Institutional Holders of First Mortgage bonds of the Debtor, and the other by the Trustees of the First Mortgage of the Debtor, both relate to the same decree of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and each raises substantially the same questions as the other.

The opinion of the Circuit Court of Appeals, which is the subject-matter of the petitions, was rendered on November 28, 1941. On December 22, 1941, and within the time limited by the Rules (Rule 25) of said Circuit Court of Appeals, the Refunding Mortgage Trustee filed in the Circuit Court of Appeals its petition for rehearing.

The petitions for certiorari were not served upon counsel or filed until December 29, 1941.

Meanwhile the Debtor, on or about December 29, also filed with the Circuit Court of Appeals a petition for rehearing.

This is a proceeding under Section 77 of the Bankruptcy Act for the reorganization of a railroad.

The decree of the Circuit Court of Appeals reverses an order of the District Court which approved a plan of reorganization certified to it by the Interstate Commerce Commission.

One of the purposes of the Refunding Mortgage Trustee's petition for rehearing was to obtain a determination of the lien issues which it had raised as an appellant in that Court, and which, as stated in the First Mortgage Trustees' petition for certiorari (No. 820, p. 6) "were before the Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination."

The position of the Refunding Mortgage Trustee

There are outstanding $18,999,500 of bonds issued under the Debtor's General and Refunding Mortgage (R. 4053), all of which are pledged as collateral with three creditors, the A. C. James Company, Railroad Credit Corporation, and Reconstruction Finance Corporation (all of whom are parties to the proceeding).

Throughout the proceedings in the Interstate Commerce Commission, and in the courts below, the pledgees of such bonds and all other parties to the proceedings recognized that the Refunding Mortgage Trustee was the appropriate party to present questions of conflicting lien between the Refunding Mortgage and the so-called First Mortgage (R. 911, 961, 1631, 1644; I.C.C. Min. 477, 550-51).

In the District Court the Refunding Mortgage Trustee asserted in its objections to the Plan (R. 974-82) that the Interstate Commerce Commission's plan was based upon an erroneous assumption as to the respective liens of the two mortgages. The District Court having

adopted the Interstate Commerce Commission's views concerning lien (R. 1597), the Refunding Mortgage Trustee appealed from the order approving the Plan. Although the Refunding Mortgage Trustee was fully heard in the Circuit Court of Appeals without objection by any party, and although the two pledgees of Refunding Mortgage bonds who had also appealed relied on the Trustee's arguments with respect to the lien questions, the Circuit Court of Appeals in its opinion determined that the Refunding Mortgage Trustee was not entitled to appeal, and dismissed its appeal (R. 2668), leaving all the questions of conflicting lien undetermined.

The Refunding Mortgage Trustee's petition for rehearing urges as its first point that the Trustee was a proper party appellant, both as the only proper party to enforce or protect the lien of the mortgage, entitled to be heard under the specific provisions contained in Section 77(c)(13) of the Bankruptcy Act, and also as the Trustee of an express trust to enforce the direct obligations of the mortgagor; and that the Circuit Court of Appeals, in dismissing the appeal without the benefit of argument or brief on the question of the Trustee's standing, disregarded controlling authorities and pertinent facts.

The second point of the Refunding Mortgage Trustee's petition for rehearing is that decision of the lien questions by the Circuit Court of Appeals is necessary in order for the Commission to make the findings which that Court's opinion requires with respect to the value of "(1) the property subject to the Refunding Mortgage only and (2) the property subject both to the Refunding Mortgage and to the First Mortgage" (R. 2670).

The nature of any brief which the Refunding Mortgage Trustee may wish to submit in answer to the petitions for certiorari will be affected by the action which the Circuit Court of Appeals takes on its pending petition for rehearing, both with respect to its standing as an appellant and its contentions as to lien. Consequently it is desirable that the filing of a formal answer by this respondent to the certiorari petitions be postponed until the petitions for rehearing have been decided.

The lien questions

If the Refunding Mortgage is a prior lien on the properties to which the Refunding Mortgage Trustee lays claim it is not disputed that the reorganization plan is unfair to the creditors secured by Refunding Mortgage bonds. The matters in controversy are important and of great value.

The first issue of lien relates to rolling stock acquired under conditional sale or equipment-trust agreements, in which the Debtor had an equity at the date of institution of the proceedings of over $6,000,000 (R. 1074). The Refunding Mortgage Trustee contends that the granting clauses of the First Mortgage expressly exclude this equipment from the property subject to its lien; and that it is expressly made subject to the lien of the Refunding Mortgage. The Commission based its plan on the assumption that the First Mortgage covered this equipment, although stating that final adjudication of the lien questions must be made by the Court (R. 262).

The second question relates to the lien of the General and Refunding Mortgage on the Debtor's Northern California Extension. This Extension was completed in 1932 at a cost of over $10,000,000, and has proved to be

one of the most valuable parts of the Debtor's system. The Refunding Mortgage Trustee claims that the Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage bonds ($5,000,000 principal amount) used in the construction thereof and that otherwise it is subject, under the facts appearing in the Record, to the *pari passu* lien of the General and Refunding Mortgage, inasmuch as the moneys for the completion of the Extension were supplied by the Refunding Mortgage creditors.

The third question relates to non-carrier real estate of a book value of approximately $1,850,000, which the Refunding Mortgagee contends is free from both the First Mortgage and the Refunding Mortgage and must be given consideration in the allocation of securities to the Refunding Mortgage creditors in the event it is found that they are not fully secured.

None of these questions was passed on by the Circuit Court of Appeals.

A fourth question was presented to that Court, relating to the amount of securities that should be issued to the Refunding Mortgage creditors in recognition of their undisputed first lien on pledged securities of Alameda Belt Line and Central California Traction Company. Since the Circuit Court of Appeals' opinion requires the Interstate Commerce Commission to find the value of the property subject to the General and Refunding Mortgage (R. 2670), including these securities, and since the lien on these securities is conceded by all parties, the petition for rehearing did not touch this fourth question.

Decision of the lien questions is necessary in connection with any reorganization plan

The Commission, in promulgating its Plan, recognized in respect of the lien questions that "final adjudication of this and similar questions must be made by the Court" (R. 262). Obviously the decision of legal questions relating to the lien on over $12,000,000 of property has an important bearing on the fairness of any reorganization plan. Under this Court's decision in the *Consolidated Rock Products* case (312 U. S. 510, 520) one of the fundamental questions in connection with any reorganization plan is the "determination of what assets are subject to the payment of the respective claims".

One of the petitions to this Court recognizes this fact. The petition of the First Mortgage Trustees (No. 820, pp. 9-10), states "the decision of the Circuit Court of Appeals has left unanswered many important questions, affecting virtually every feature of the Commission Plan. An authoritative determination of all of these questions is essential to the final approval of a plan of reorganization".

The Refunding Mortgage Trustee's petition for rehearing is designed to expedite the ultimate decision of the case, by obtaining a ruling from the Circuit Court of Appeals on questions which were fully argued before the Circuit Court of Appeals and which this Court, if it should grant certiorari, might decline to pass on until they had first been determined by the Circuit Court of Appeals.

Cf. *Grant* v. *Leach & Co.*, 280 U. S. 351;
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257, 267;
Brown v. *Fletcher*, 237 U. S. 583, 587;
District of Columbia v. *Murphy*, 86 L. Ed. 277, 285 (Dec. 15, 1941).

With respect to the petitions

Although the lien questions have not been decided by the Circuit Court of Appeals and are not directly brought in issue by the petitions to this Court, there are certain statements in those petitions which should be corrected.

The First Mortgage Trustees assert (No. 820, Petition pp. 4-5, 7, Brief p. 17) that the Circuit Court of Appeals' opinion requires allocation of new securities to secured creditors "in accordance with a precise mathematical formula based upon exact dollar values" instead of upon the "equitable equivalent of the assets available for the satisfaction" of their respective claims. We do not so read the Circuit Court of Appeals' opinion. What the opinion holds is that the Court is not in a position to exercise an "informed, independent judgment" (R. 2671) concerning the equitable equivalent of the assets securing the two issues of bonds without knowing the value of those assets; and it directs that such value be fixed.

The Committee argues (p. 15 of Petition in No. 819) that such senior securities as were allotted to the Refunding Mortgage bondholders constitute adequate recognition of their aggregate rights by reason of their admitted first lien on securities of Tidewater Southern Railway Company, Central California Traction Company and Alameda Belt Line. The Commission stated that the lien on the latter two items "has no material value" (R. 314-15), but it did not make any finding with respect to the actual values of either of such properties, both of which are important feeders, producing together over $500,000 per year of traffic for the Debtor (R. 110, 203, 1312-13).

An analysis of the Commission's Plan shows very plainly that it makes no allowance for the Central Cali-

fornia Traction or Alameda Belt Line securities. It awarded to the Refunding Mortgage bondholders, by its supplemental report, $732,010 of new income mortgage bonds and $1,147,955 par value of new participating preferred stock (R. 315). The amount of such income bonds was exactly equal to the sum of (R. 313):

1. The amount of cash in the hands of the Refunding Mortgage Trustee	$223,732.00
and	
2. The face amount of the note of Tidewater Southern Railway Company pledged with the Refunding Mortgage Trustee, on which interest is being currently paid at the rate of 5% per annum	508,278.00
Total	$732,010.00

The Commission made no finding that the new income bonds were worth par (which would seem to be the only justification for allotting income bonds in exchange for cash) nor did it make any finding concerning the value of the Tidewater Southern note.

The amount of preferred stock allocated to the Refunding Mortgage bondholders was exactly equal to the par value ($1,147,955) of the stock of Tidewater Southern Railway Company pledged with the Refunding Mortgage Trustee (R. 313). There was no finding concerning the value of the Tidewater Southern stock, although the record showed that its rate-making value was substantially greater than its par value (R. 314), and that its net earnings represent approximately 7% of the total system earnings (R. 1065, 1098)—as compared with its rate-making valuation, referred to by the Committee (p. 15 of

Petition in No. 819), which was 1.3% of the comparable system valuation.

We submit, therefore, that the Circuit Court of Appeals was correct, at least insofar as the relative rights of mortgage creditors are concerned, in holding that the Commission had not furnished to the District Court adequate information on which to determine that the new securities allotted to the Refunding Mortgage bondholders represented an equitable equivalent of the property on which the Refunding Mortgage was admittedly a first lien.

The effect of the Refunding Mortgage Trustee's petition for rehearing

This Court has previously held that an appeal will not lie until after the disposition of petitions for rehearing.

Cherokee Nation v. *Whitmire*, 223 U. S. 108;
Voorhees v. *Nome Manufacturing Co.*, 151 U. S. 135;
Wolf Packing Co. v. *Industrial Court*, 267 U. S. 552.

Whether or not these cases are strictly applicable to petitions for certiorari, we submit that it is desirable in the present circumstances to defer action upon the petitions for certiorari until the Circuit Court of Appeals has had an opportunity to decide the petitions for rehearing which have been filed with it.

For the foregoing reasons, this respondent respectfully prays that this Court defer consideration of the petitions for certiorari until after the Circuit Court of Appeals shall have acted on the petitions for rehearing.

which are pending before it, and that this Court extend the time of this respondent to file its brief in answer to such petitions for certiorari until twenty (20) days after the decision of its petition for rehearing; or in the alternative, if this respondent's motion to defer consideration of such petitions for certiorari be denied, then that this respondent's time within which to file its brief in answer to such petitions shall be extended to a date ten (10) days from the date of such denial.

January 16, 1942.

Respectfully submitted,

HAROLD C. MCCOLLOM,
Counsel for Irving Trust Company, as Substituted Trustee under the General and Refunding Mortgage of the Western Pacific Railroad Company.

FRANCIS R. KIRKHAM,
ORRIN G. JUDD,
Of Counsel.

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Supreme Court of the United States

October Term, 1941

Nos. ~~819, 885~~ 720

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,
Petitioners,
vs.
WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

PETITIONERS' REPLY BRIEF,
MEMORANDUM IN OPPOSITION TO MOTION OF RESPONDENT IRVING TRUST COMPANY TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI
and
MEMORANDUM IN REPLY TO CROSS-PETITION OF THE DEBTOR FOR A WRIT OF CERTIORARI

ROBERT T. SWAINE,
Attorney for Petitioners.

HERBERT W. CLARK,
Of Counsel.

January 23, 1942.

INDEX

PAGE

Reply Brief 2

I. The Decision of the Seventh Circuit in the *Milwaukee* Case, as to the Adequacy of the ICC Findings of Absence of Value, is in Square Conflict with the Decision of the Ninth Circuit Court of Appeals in the Instant Case 2

II. The Petition for Certiorari is not Premature Merely Because the Decree of the Circuit Court of Appeals is Interlocutory or Because the Securityholders Have Not Voted on the Commission Plan 4

Memorandum in Opposition to Motion of Irving Trust Company 6

Memorandum in Reply to Cross-Petition of the Debtor 13

Appendix .....

TABLE OF AUTHORITIES

Cases

PAGE

Adair v. *Bank of America National Trust & Savings Ass'n.*, 303 U. S. 350 (1938) 5

American Construction Co. v. *Jacksonville Ry.*, 148 U. S. 372 (1893) 9

Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939) 14, 15

Cherokee Nation v. *Whitmire*, 223 U. S. 108 (1912) .. 8

In re Chicago, Milwaukee, St. Paul & Pacific R. R. (C. C. A. 7th, December 4, 1941, January 12, 1942, not yet reported) ..... 2, App.

Cole v. *Ralph*, 252 U. S. 286 (1920) 13

Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510 (1941) 5, 14

Denver v. *New York Trust Co.*, 229 U. S. 123 (1913) 5

Federal Communications Commission v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940) 6

Forsyth v. *Hammond*, 166 U. S. 506 (1897) 5

Gay v. *Ruff*, 299 U. S. 25 (1934) 5, 8

Hanover Star Milling Co. v. *Metcalf*, 240 U. S. 403 (1916) 5

Meeker & Co. v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915) 6

National Labor Relations Board v. *Bradford Dyeing Ass'n.*, 310 U. S. 318 (1940) 6

Sampsell v. *Imperial Paper & Color Corp.*, 313 U. S. 215 (1941) 5

In re 620 Church Street Building Corp., 299 U. S. 24 (1936) 5

PAGE

Spiller v. *Atchison, T. & S. F. Ry.*, 253 U. S. 117 (1920) 5
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931) 12
Union Pacific R. R. v. *Board of County Commissioners*, 247 U. S. 282 (1918) 5
United States v. *Gulf Refining Co.*, 268 U. S. 542 (1925) 5
United States v. *Louisiana*, 290 U. S. 70 (1933) 6
Voorhees v. *Noye Manufacturing Co.*, 151 U. S. 135 (1894) 8
Wolff Packing Co. v. *Industrial Court*, 267 U. S. 552 (1925) 8

Statutes and Rules

Bankruptcy Act, § 24 b 5
§ 24 c 5
§ 77(e) 5
Judicial Code, § 237(a) 8
§ 240 8
§ 242 [36 Stat. 1157 (1911)] 8
§ 243 [36 Stat. 1157 (1911)] 8
Revised Statutes, § 691 8
Rules of the Supreme Court of the United States, Rule 7 7

Supreme Court of the United States

October Term, 1941

Nos. 819, 885

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor,

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,

Respondents.

PETITIONERS' REPLY BRIEF, MEMORANDUM IN OPPOSITION TO MOTION OF RESPONDENT IRVING TRUST COMPANY TO DEFER CONSIDERATION OF PETITION FOR CERTIORARI, AND MEMORANDUM IN REPLY TO CROSS-PETITION OF THE DEBTOR FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully request leave to file the attached (1) brief in reply to the briefs submitted by respondents Western Pacific Railroad Corporation, A. C. James Co. and The Railroad Credit Corporation in opposition to the petition for certiorari, (2) memorandum in opposition to the motion of respondent Irving Trust Company to defer consideration of the petition and (3) memorandum in reply to the Debtor's cross-petition.

REPLY BRIEF

I. THE DECISION OF THE SEVENTH CIRCUIT IN THE *MILWAUKEE* CASE, AS TO THE ADEQUACY OF THE ICC FINDINGS OF ABSENCE OF VALUE, IS IN SQUARE CONFLICT WITH THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THE INSTANT CASE.

Various respondents urge that the instant decision and that of the Seventh Circuit in *In re Chicago, Milwaukee, St. Paul & Pacific R. R.* (unreported, December 4, 1941) are identical in reasoning and "arrived at the identical result".[1] They accuse your petitioners of straining "to create an appearance of conflict"[2] which one respondent is "unable to see"[3].

Upon a motion by the Milwaukee Preferred Stockholders Committee requesting the Seventh Circuit Court of Appeals to modify its December 4, 1941, opinion to bring that opinion into full accord with that in the Ninth Circuit in the instant case, the Court, in a memorandum filed January 12, 1942 (printed as an appendix hereto), said:

> "Because counsel seemingly misunderstand our position upon the failure of the Commission to make necessary findings of value so as to allocate the new securities amongst existing bondholders and creditors, we deem it necessary, or at least advisable, to make our position clear.
>
> * * * * * * * *
>
> "Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain,

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[1]ACJ brief, p. 9. [2]ACJ brief, p. 11. [3]RCC brief, p. 7.

and fully meets the rule which requires finding on values of assets."

If the Seventh Circuit is correct in this ruling, the Ninth Circuit must necessarily be wrong[1] in holding inadequate the Commission's negative findings (1) that the Debtor's stock is without value, (2) that the claims of the Debtor's unsecured creditors are without value, and (3) that the second lien equity of RCC in the collateral pledged with RFC is without value.

Until this Court settles the irreconcilable conflict between these two decisions, the District Courts in the Seventh and Ninth Circuits must work at cross purposes in administering the railroad reorganizations in their charge, and the District Courts in other Circuits and the Interstate Commerce Commission will be wholly at a loss to know which of the two conflicting Court-pronounced methods they themselves should follow.

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[1]Respondent WP Corp. has, in the appendix to its brief, endeavored to distinguish the two decisions on the basis of an asserted difference in fact—that the increase in Western Pacific earnings since the date of the Commission Plan has been "vastly greater, relatively, than that relied on by the stockholders in the Milwaukee case". Increases enjoyed by the two roads are compared in terms of percentages which are meaningless except to establish that the rise in Western Pacific earnings began at a point closer to zero dollars than the rise in Milwaukee earnings. Even on the basis of the asserted $2,958,189 of earnings for the first nine months of 1941 (which makes allowance neither for the subsequent wage increase nor for probable tax liabilities), the earnings of the Western Pacific would have to be capitalized at the rate of 4.5% to produce a dollar value in excess of $87,981,672, the dollar figure below which the interests of WP Corp. would necessarily be without value.

However, war-inflated earnings can hardly be a sound foundation for permanent railroad capitalization, a point which this Court may well accent in any ultimate decision in the instant case.

II. THE PETITION FOR CERTIORARI IS NOT PREMATURE MERELY BECAUSE THE DECREE OF THE CIRCUIT COURT OF APPEALS IS INTERLOCUTORY OR BECAUSE THE SECURITYHOLDERS HAVE NOT VOTED ON THE COMMISSION PLAN.

Respondent ACJ contends that the petition for certiorari is premature because the plan of reorganization has not yet "had full consideration by the Commission, by the District Court, and by the Circuit Court of Appeals",[1] and for the further reason that the securityholders have not yet voted on the Commission Plan.

All of the questions involved in this reorganization have had "full consideration by the Commission and by the District Court" and have been decided by those bodies. All the issues presented to, but left undecided by, the Circuit Court of Appeals are clear-cut questions of law, involve no complicated or disputed questions of fact and can readily be decided by the Court at the present time on the present record. None of the further proceedings which respondents say should be had before any decision by the Supreme Court would render any of these issues moot. In truth such further proceedings—as well as many other pending railroad reorganization proceedings—will be a waste of the time and money of everyone (securityholders, Interstate Commerce Commission and Courts) until the questions involved in the instant case are decided by this Court. If the Ninth Circuit Court of Appeals is wrong in its decision in the *Western Pacific* case, the time to find out is now, before years of time and millions of dollars are spent in unnecessary dollars and cents valuation proceedings.

Respondents' contention that an appeal or a petition for certiorari may not properly be taken to review, respectively,

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[1] ACJ brief, p. 19.

a District Court order "approving" a Section 77 plan, or a Circuit Court of Appeals decree reversing that order, merely because creditors have not yet voted upon the plan, goes only to establish that the decree of the Circuit Court of Appeals is not a "final judgment", but is interlocutory only[1].

Petitioners do not contend that the decree of the Ninth Circuit Court of Appeals is anything but interlocutory. However, the certiorari jurisdiction of this Court extends to interlocutory decisions of Circuit Courts of Appeals (as none of the respondents has denied) and the present case is a particularly suitable one for the exercise of that discretionary jurisdiction.[2]

Numerous important recent decisions of this Court on bankruptcy and reorganization matters have been written on certiorari to review similar interlocutory orders.[3] More-

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[1]Bankruptcy Act § 77(e) [11 U. S. C. § 205(e)] provides that the judge shall "approve" the plan. Section 24 b (11 U. S. C. § 47 a) gives the Circuit Courts of Appeals appellate jurisdiction to review interlocutory, as well as final orders entered in bankruptcy proceedings. Section 24 c (11 U. S. C. § 47 c) gives the Supreme Court power to review all "judgments, decrees, and orders" entered by Circuit Courts of Appeals.

[2]Cases in which the power to review interlocutory orders of Circuit Courts of Appeals has been specifically discussed and specifically exercised include *Forsyth* v. *Hammond*, 166 U. S. 506, 511-515 (1897); *Denver* v. *New York Trust Co.*, 229 U. S. 123, 133 (1913); *Union Pacific R. R.* v. *Board of County Commissioners*, 247 U. S. 282, 284 (1918); *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 408 (1916); *Gay* v. *Ruff*, 292 U. S. 25, 30 (1934); *Spiller* v. *Atchison, T. & S. F. Ry.*, 253 U. S. 117, 121 (1920); *United States* v. *Gulf Refining Co.*, 268 U. S. 542, 545 (1925).

[3]*E.g.*, *Adair* v. *Bank of America National Trust & Savings Ass'n*, 303 U. S. 350 (1938); *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510 (1941); *In re 620 Church Street Building Corp.*, 299 U. S. 24 (1936); *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215 (1941).

over, the number of cases in which this Court has granted certiorari "solely because a Circuit Court of Appeals has required further findings from an administrative agency"[1] are legion.[2]

MEMORANDUM IN OPPOSITION TO MOTION OF IRVING TRUST COMPANY

Respondent Irving Trust Company, the Refunding Mortgage Trustee, has moved that consideration of the petitions[3] for certiorari be deferred "until after the decision by the Circuit Court of Appeals for the Ninth Judicial Circuit of petitions for rehearing of the decision to which said petitions for certiorari are directed", and has also asked that its time for filing a brief in this Court be extended until twenty days "after the decision of its said petition for rehearing".

Petitioners submit that this motion should be dismissed for the following reasons:

1. *Standing of Refunding Trustee in this Court.* The decree of the Ninth Circuit Court of Appeals dismissed the appeal of Irving Trust Company, as the Refunding Mortgage Trustee.[4] Neither of the petitions for certiorari seeks

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[1] ACJ brief, p. 20.

[2] *E.g., Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470 (1940); *National Labor Relations Board* v. *Bradford Dyeing Ass'n*, 310 U. S. 318 (1940); *United States* v. *Louisiana*, 290 U. S. 70 (1933) (statutory 3-judge court); *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915).

[3] The petitions in this case (No. 819) and the companion case (No. 820) in which certiorari is requested by the First Mortgage Trustees.

[4] All the holders of Refunding Mortgage Bonds (RFC, RCC and ACJ) are parties in the proceeding and respondents upon the petitions for certiorari.

to review that dismissal. While Irving Trust Company is named as a respondent in the petitions for certiorari because your petitioners believed that it was not for them to decide the right of Irving Trust Company to appear as a respondent in this Court, Irving Trust Company has now placed squarely before this Court the issue of its right to be a respondent party to these Supreme Court proceedings, and to address any motions to this Court.

2. *Propriety of the motion at this time.* Irving Trust Company has filed no brief in opposition to the petitions. Its motion to defer consideration of the petitions until its application for rehearing is passed upon by the Ninth Circuit Court of Appeals is, in practical effect, a motion to *dismiss* the petitions for certiorari without prejudice to the filing of another petition on the same papers after the Ninth Circuit Court of Appeals has acted on the application for rehearing.

Rule 7 of the Rules of this Court provides:

> "3. No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Your petitioners therefore submit that Irving Trust Company's motion should be dismissed as improper in form.

3. *Power of this Court to entertain the certiorari petition.* Irving Trust Company implies (at pp. 10-11 of its motion) that this Court is without jurisdiction to entertain a petition for certiorari if an application for rehearing is pending in a Circuit Court of Appeals. The cases it cites in support of this apparent contention were all decided at times when the jurisdiction of the Supreme Court to review

decisions of the particular lower courts involved was limited to cases in which a final judgment had been rendered.[1] Each of these cases, and many other decisions applying the same rule, proceeded on the theory that until the application for rehearing had been passed upon the lower court judgment was not final but interlocutory, and outside the statutory jurisdiction of this Court.

Since the passage of the amendments to the Judicial Code in 1891, certiorari jurisdiction of the Supreme Court over the decisions of the Circuit Courts of Appeals has not been limited to final judgments, and this Court has held:

> "that the power may be exercised before, as well as after, any decision by that court [Circuit Court of Appeals] and irrespective of any rule or determination therein; and that the sole essential of this Court's jurisdiction to review is that there be a case pending in the circuit court of appeals." [*Gay* v. *Ruff, supra,* 292 U. S., at p. 30.]

Since the passage of the 1925 amendments to the Judicial Code, this power has been plainly conferred by statute (Judicial Code, Section 240, 28 U. S. C. § 347; 43 Stat. 938).

4. *Reasons why this Court should exercise its discretion to entertain the certiorari petition notwithstanding the pen-*

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[1] *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552 (1925), involved a writ of error from a *state* court decision, and was governed by the "final judgment" requirement of Judicial Code § 237 (a), 28 U. S. C. § 344 (a), and its predecessors. *Cherokee Nation* v. *Whitmire*, 223 U. S. 108 (1912), and *Voorhees* v. *Noye Manufacturing Co.*, 151 U. S. 135 (1894), involved appeals from the Court of Claims and the old Circuit Court, respectively, and were governed by the requirements embodied in Judicial Code §§ 242, 243 [36 Stat. 1157-(1911)], repealed by 43 Stat. 941 (1925), and Rev. Stat. § 691, repealed by 26 Stat. 829 (1891).

dency of the Refunding Mortgage Trustee's petition for rehearing below. As early as 1893, when petitions for certiorari were the exception rather than the rule, and when finality was the controlling consideration on the more usual writs of error and appeals, this Court said:

> "But the question at what stage of the proceedings, and under what circumstances, the case should be required, by *certiorari* or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require." [*American Construction Co.* v. *Jacksonville Ry.*, 148 U. S. 372, at p. 385 (1893).]

Your petitioners submit that the pendency of the rehearing petition below should not deter this Court's exercise of its discretionary power to grant certiorari:

(a) Petitions for rehearing in the Ninth Circuit Court of Appeals were filed by two appellants in that court whose appeals to that Court had been dismissed by the Ninth Circuit decree. Your petitioners did not join in such petitions for rehearing, nor did they file any memorandum in opposition thereto.

Good cause might exist for refusing to exercise the discretionary certiorari jurisdiction of this Court in favor of a litigant[1] who was simultaneously pursuing a different remedy—such as an application for rehearing—in the Circuit Court of Appeals. But your petitioners have done nothing to prejudice their right to relief before this Court and they respectfully submit that none of the issues or questions involved in the petition for certiorari can or will be affected by the outcome of the rehearing applications instituted by two of the respondents.

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[1]Such as the Debtor.

Although Irving Trust Company's application for rehearing not only asks reconsideration of its status as an appellant in the Circuit Court of Appeals, but also requests that court to reverse the District Court's decision of the lien questions between the First Mortgage and the Refunding Mortgage on the merits, these lien questions cannot fairly be said to have been put before the Circuit Court of Appeals by Irving Trust Company's application for rehearing. As a dismissed would-be appellant in the Circuit Court of Appeals, Irving Trust Company has no right to ask that court to pass on any question on the merits until it is first reinstated as an appellant. Until such reinstatement is accorded to Irving Trust Company—the earliest date at which it may properly urge the Circuit Court of Appeals to decide the lien questions—its motion addressed to this Court should be dismissed.

(b) Irving Trust Company, as the Refunding Mortgage Trustee, is a fiduciary representing only three persons —RFC, RCC and ACJ—who hold as collateral for the Debtor's Notes all of the Refunding Bonds. All three are themselves parties in the reorganization proceeding, have been represented by counsel and have filed briefs before the Commission, the District Court and the Circuit Court of Appeals. Since RFC has supported the Commission Plan,[1] Irving Trust Company, as a practical matter, is acting only as the *alter ego* of RCC and ACJ.

If a decision by the Circuit Court of Appeals on the lien questions had been the primary objective of any rehearing application, it would not have been necessary to ask the Circuit Court of Appeals, as a preliminary matter, to

[1]Your petitioners are advised that RFC has itself filed, or expects shortly to file, its own petition for certiorari in the instant case.

reconsider the perplexing problem of the right of a mortgage trustee to appeal when all of his *cestuis* are parties and represent themselves before the court. Since these *cestuis* themselves had the right to request a rehearing before the Circuit Court of Appeals and remained silent, Irving Trust Company, as their representative, can hardly be heard in this Court to urge the inconvenience to their interests resulting from a refusal by this Court to wait upon the outcome of the petitions for rehearing.

Against this imaginary inconvenience to RCC and ACJ, which they themselves made no effort to avoid, stand the interests of senior creditors[1] holding $52,253,100 of the Debtor's securities on which they have received no interest for more than eight years, and the interests of all railroad bondholders. All parties sincerely interested in the expedition of this and other railroad reorganizations anxiously await an early Supreme Court decision so that this and all other pending reorganizations may proceed intelligently.

Whatever may be the motive of the Refunding Trustee, the effect of its success in obtaining a rehearing in the Circuit Court of Appeals and deferring review in this Court until after decision on such rehearing would only be to add at least another year to the already too many years by which the junior interests have succeeded in delaying the Western Pacific reorganization.

(c) The contention of Irving Trust Company that the lien questions adjudicated by the Commission and the District Court must in any event be resubmitted to the Circuit Court of Appeals for decision, even if the certiorari petition is entertained and the decree of the Circuit Court of Appeals reversed, is wholly unsound, and does not

[1]The First Mortgage Bondholders and RFC.

support the claim that the whole proceeding will therefore be expedited by awaiting the decision on rehearing.

In *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555 (1931), this Court dealt with an identical problem. Reversing a judgment of the Circuit Court of Appeals and reinstating the judgment of the District Court, the Supreme Court passed on several assignments of error in the Circuit Court of Appeals made there by the Supreme Court respondent in his successful attack on the District Court judgment, including several assignments of error which were not discussed by the Circuit Court of Appeals when it decided in his favor. The Supreme Court said (at pp. 567-8):

> "Other assignments of error made on the appeal from the district court were not considered by the court below. No argument in support of these assignments has been submitted here, and respondents assume that they will be remitted for the consideration of the court below if the judgment of that court be reversed. The entire record, however, is before this court with power to review the action of the court of appeals and direct such disposition of the case as that court might have made of it upon the appeal from the district court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Delk* v. *St. Louis & S. F. R. Co.*, 220 U. S. 580, 588. And see *Langnes* v. *Green, supra* [282 U. S. 531]. Accordingly, we have examined these assignments, some eight in number. One or more of them involve questions which have been disposed of by the foregoing opinion. We find nothing in any of the others of sufficient substance or materiality to call for consideration."

To the same effect is *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920).

MEMORANDUM IN REPLY TO CROSS-PETITION OF THE DEBTOR (No. 885)

It may be desirable that in connection with the review of all the substantive issues in the instant case, this Court should also, as urged by the Debtor, consider the status of a debtor corporation all of whose stockholders are themselves parties to the proceeding.

But three features of the Debtor's cross-petition sharply accentuate the necessity that this Court's review should not be limited to this one question:

1. The Debtor lists, under five sub-headings (pp. 3, 4), a mass of statistical and philosophical findings which it insists must be made to render adequate a fundamental finding that a debtor's stock is without value. Your petitioners believe that the Debtor's bare statement of the requirements which it would impose upon the Commission and the securityholders, shows the impossibility, if not the absurdity, of the alleged requirement. However, if there is any such requirement the Commission and the senior securityholders should know it now in order that they may, after the many years which such a requirement would consume, finally perfect a valid plan. If there is no such requirement everyone should be spared the effort and expense involved in trying to meet it.

2. The Debtor's attack[1] upon an alleged "accord" between "great concentrations of capital as represented by the life insurance companies and the savings banks" and the Commission, whereby senior bondholders are to appropri-

[1]Debtor's cross-petition, p. 8.

ate values belonging to junior debt and capital stock, should be faced squarely by this Court.[1] The Commission, in the spirit of this Court's decisions in the *Consolidated Rock Products* case, *supra*, and the *Los Angeles Lumber Products* case,[2] has, in the Western Pacific as well as in other railroad reorganization plans, refused to take from senior bondholders a part of the permissible reorganized capitalization in order to placate junior interests having no value other than nuisance value. Your petitioners believe it was the intent of this Court, by those two decisions, to eliminate such nuisance value as a factor in any reorganization. It is imperative, therefore, that this Court should promptly put an end to the now general misuse of the two decisions to create a nuisance value for junior interests against senior interests.[3]

3. The inconsistencies of procedural techniques, as well as of argument, between the Debtor's cross-petition, the ACJ brief, the WP Corp. brief, and the Refunding Mortgage Trustee's motion, might mislead this Court into the belief that it is dealing with four *bona fide* separate interests. In fact, these four inconsistent documents represent in substance *one* interest. The record establishes that the same interests which control ACJ also control WP Corp., which in turn controls 100% of the stock and the unsecured debt of the Debtor (R. 1030, 1051). ACJ, as

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[1]It is, of course, true that large amounts of senior railroad bonds are held by insurance companies and savings banks. The nature of their interest in these bonds, however, not only is as fiduciary for innumerable policyholders and depositors, but also is identical with that of the millions of scattered small holders of the same issues.

[2]308 U. S. 106 (1939).

[3]See Mr. Arthur Krock's column in N. Y. Times, January 8, 1942, p. 20, col. 5.

pledgee, is interested in a majority of the Refunding Mortgage Bonds objecting to the Commission Plan (R. 1053-8). It therefore in effect controls the action of the Refunding Mortgage Trustee. Your petitioners do not question the legal right of the James Interests thus to exhibit their split personality in this Court, as they have from the outset of the proceeding before the Commission and the courts below. However, this continued resort to a multiplicity of corporate entities is obviously primarily for the purpose of creating an appearance of confusion of issues and procedural problems as a basis for deferment of review by this Court. Such attempts to impede reorganization by inconsistent procedural techniques and arguments accentuates the public importance of final disposition by this Court of the Western Pacific reorganization and the many questions which it, in common with most other railroad reorganizations, involves. After being deprived of any income return for the past eight years, the First Mortgage Bondholders believe it is time that this Court forcefully demonstrate that "there is no occasion" for the Courts, the Commission, or the senior securityholders, "to yield to such pressures."[1]

Respectfully submitted,

ROBERT T. SWAINE,
Attorney for Petitioners.

HERBERT W. CLARK,
Of Counsel.

Dated: January 23, 1942.

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[1] *Case* v. *Los Angeles Lumber Products Co.*, *supra*, 308 U. S. at 129.

APPENDIX

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 7590, 7610-7617.

October Term, 1941, January Session, 1942.

In the Matter of CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R.R. Co., *Debtor.*	On Motion to Modify Opinion

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January 12, 1942.

Before EVANS, and KERNER, *Circuit Judges*, and LINDLEY, *District Judge*.

PER CURIAM. We are asked to modify our opinion announced in this case, by striking therefrom three paragraphs, beginning with the words, "We are satisfied that the evidence supports the finding of the Commission," appearing on page 15 of the opinion, and ending with the words, "* * * which must be at the bottom of all reorganization plans."

Because counsel seemingly misunderstand our position upon the failure of the Commission to make necessary findings of value so as to allocate the new securities amongst existing bondholders and creditors, we deem it necessary, or at least advisable, to make our position clear.

It was, and is, our opinion that the I. C. C. made a sufficiently specific finding as to value of the equity represented by the common and preferred stock of the Debtor, so as to permit the court to intelligently review this issue, the determination of which is necessary to a disposition of the other questions presented by the reorganization plan.

On these other questions there was lacking the necessary findings by the I. C. C. to permit us to approve or disapprove of the value of the old securities and the value of the new securities, given in exchange for them.

Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I. C. C. as to absence of value of old common and preferred stock, is specific, definite and certain, and fully meets the rule which requires finding on values of assets.

Second, we meant to hold, and do hold, that the evidence supports this finding, that there is no value to either the common or preferred stock of debtor. It follows that this branch of the case, the value of the equity of the debtor, evidenced by the common and preferred stock, is closed, and the I. C. C. need not further investigate or make further finding on this issue unless it is convinced that changed conditions in railroad earnings warrant it. In other words, the I. C. C. has jurisdiction of the matter and may, although it is not required to do so, re-examine the evidence, or receive additional evidence, if in its judgment, justice to the parties requires it.

The motion to amend the opinion is DENIED.

A true Copy:
Teste:

Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, Trustees of the First Mortgage of The Western Pacific Railroad Company, a corporation, dated June 26, 1926,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation,
Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,

vs.

FREDERICK H. ECKER, *et al.*,
Respondents.

PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

FRANK C. NICODEMUS, JR.,
Counsel for The Western Pacific Railroad Company,
40 Wall Street,
New York, N. Y.

April 8, 1943.

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,
vs.
WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
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Respondent.

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,
vs.
FREDERICK H. ECKER, *et al.*,
Respondents.

PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

The Western Pacific Railroad Company, herein called the Debtor, respectfully applies to this Court, pursuant to

Rule 33 of the Revised Rules of this Court for a rehearing on the following grounds:

I.

This Court appears to have overlooked the fact that as the result of its own decision establishing the lien priority of the First Mortgage upon the Debtor's estate (except as to relatively unimportant unmortgaged assets and items pledged under the General and Refunding Mortgage) it has created in this case the same situation as in the companion case of Chicago, Milwaukee, St. Paul and Pacific Railroad Company was held by this Court to require that the proceeding be referred back to the Interstate Commerce Commission to determine and fix the compensation due from the junior lienors to the holders of First Mortgage Bonds for their sacrifices under the Plan. Here, as there, "a large amount of new common stock" is given to the junior lienors in respect of their "claims upon the mortgaged assets" while the holders of First Mortgage Bonds secured by a paramount lien upon the same "mortgaged assets" are "to receive under the plan only a face amount of inferior securities equal to the face amount of their claims." Under the companion case, however, they "must receive in addition compensation for the senior rights which they are to surrender." (All quotations are from the contemporaneous Opinion of Mr. Justice DOUGLAS in the matter of the reorganization of Chicago, Milwaukee, St. Paul and Pacific Railroad Company.) While it is true that the new common stock is allotted to holders of First Mortgage Bonds at $57 per share and to a junior creditor at $62 per share, this differential is too slight even to be considered as compensation for the sacrifices of the senior lienors. For these reasons it is submitted that this Court

should modify its decision herein so that the cause will be remanded to the District Court with the same direction as to a determination and finding as to the compensation due the senior lienors as is given in the case of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

II.

This Court in approving as not legally unwarranted or unduly discriminatory the preferential treatment accorded Reconstruction Finance Corporation has apparently *assumed*, but without searching the record for supporting evidence, that Reconstruction Finance Corporation had in fact given a commitment to purchase $10,000,000 principal amount of new First Mortgage Bonds at par or to exchange $10,000,000 principal amount of Trustees' Certificates for a like amount of new First Mortgage Bonds. A present willingness of Reconstruction Finance Corporation to purchase these new First Mortgage Bonds at par which may be a price well below what could be obtained under prevailing market conditions is not evidence of a prior commitment to purchase at that price regardless of market conditions at the time of purchase and may not be a lawful consideration to support the treatment proposed for the favored creditor. Since the record is silent upon this critical point the cause should it is submitted be remanded to the District Court for reference back to the Interstate Commerce Commission for either (a) a specific finding supported by substantial evidence that such a commitment had been made and has been kept good by Reconstruction Finance Corporation or (b) a modification of the Plan to conform the treatment of Reconstruction Finance Corporation to what is justifiable by its junior collateral position.

III.

This Court did not itself determine that economic changes since closing of the hearings in the Interstate Commerce Commission or the hearing in the District Court are not of such significance as in equity and good conscience to require that the Plan be recommitted to the Interstate Commerce Commission—all that this Court held, as we interpret the Opinion, is that the increased earnings since the hearing in the District Court do not necessarily lead to a rejection of the Commission's Plan by the appellate Courts. It does not follow, however, that a proper analysis of these vastly increased earnings supported by expert opinion would not establish many permanent accretions to earning power which would require a complete reappraisal of past, present and prospective earning power. It is submitted therefore that this cause should be remanded to the District Court without prejudice to its right to receive further evidence or to refer the proceeding back to the Interstate Commerce Commission to take further evidence as to the value of the Debtor's railway properties in the light of changed economic conditions.

IV.

This Court apparently holds that Congress intended to invest the Interstate Commerce Commission with power "to select the date for the institution of the reorganization." This is based upon the broad language of subsection (b). It is submitted, however, that subsection (l) inserted at a later point in the statute clearly fixes all rights as of the date of the filing of the Petition and should under established rules of construction be given effect as expressly limiting

the general language of the earlier subsection to which this Court refers.

Upon each of the foregoing grounds the Debtor respectfully asks that this Court grant a rehearing and remand this cause to the District Court for further proceedings.

Respectfully submitted,

FRANK C. NICODEMUS, JR.,
Counsel for The Western Pacific Railroad Company,
40 Wall Street,
New York, N. Y.

April 8, 1943.

Certificate of Counsel

I, FRANK C. NICODEMUS, JR., counsel herein for The Western Pacific Railroad Company, Debtor, Respondent and Petitioner, hereby certify that the foregoing petition was prepared by me and that I am of the opinion that the petition is well founded in point of law and is not interposed for purposes of delay.

Dated at New York, New York, this 8th day of April, A. D. 1943.

FRANK C. NICODEMUS, JR.

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Office - Supreme Court, U. S.
APR 14 1943
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS COMMITTEE,

Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION, and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,

Respondents.

ANSWER OF INSTITUTIONAL BONDHOLDERS COMMITTEE to PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

April 14, 1943

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 7, 8, 20, 33 and 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the INSTITUTIONAL BONDHOLDERS' COMMITTEE,
Petitioners,

vs.

WESTERN PACIFIC RAILROAD CORPORATION, a corporation; A. C. JAMES CO., a corporation; THE RAILROAD CREDIT CORPORATION, a corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a corporation; IRVING TRUST COMPANY, a corporation, as substituted Trustee under the General and Refunding Mortgage of Western Pacific Railroad Company; RECONSTRUCTION FINANCE CORPORATION; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company, a corporation,
Respondents.

ANSWER OF INSTITUTIONAL BONDHOLDERS COMMITTEE

to

PETITION FOR REHEARING OF THE WESTERN PACIFIC RAILROAD COMPANY, DEBTOR, RESPONDENT, PETITIONER

Frederick H. Ecker, John W. Stedman, and Reeve Schley (herein called the Institutional Bondholders Committee), answering the Petition for Rehearing of The Western Pacific Railroad Company, Debtor, herein, dated April 8, 1943, respectfully show:

I

As to the Debtor's argument that the proceeding should be referred back to the Interstate Commerce Commission "to determine and fix the compensation due from the junior lienors to the holders of First Mortgage Bonds for their sacrifices under the Plan":

1. The Debtor, whose interest in its property has been found to be without value, is without status to assert any rights of the First Mortgage Bondholders.

2. The point now made was not included within the "Objections and Claims for Equitable Treatment" filed by the Debtor in the District Court pursuant to the provisions of subsection (e) of Section 77, nor made by the Debtor in argument in the District Court, the Circuit Court of Appeals, or the Supreme Court.[1] This Court will not examine a point raised for the first time in a petition for rehearing, where the party has failed to make it in its petition for certiorari, briefs, or argument.[2]

3. The contentions of the Debtor throughout the proceeding prior to the filing of the Petition for Rehearing (in contradiction of the argument now made in that Petition) were that the First Mortgage Bondholders should be subjected to further sacrifices, of the character for which the Debtor now asserts compensation should be made, and that the First Mortgage Bondholders were not entitled to

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[1]R. 963-73, 1645-51.

[2]*Independent Wireless Telegraph Company* v. *Radio Corporation of America*, 270 U. S. 84 (1926).

the various forms of compensation embodied in the securities and allocations under the Commission Plan against the sacrifices required of them by that Plan.[1]

4. The problem of the compensation to which the First Mortgage Bondholders might be entitled for their sacrifices under the Plan was fully dealt with in the briefs of the parties and on oral argument, it being the position of the Institutional Bondholders Committee, both in its briefs and on oral argument, that while such Bondholders might succeed in a claim for further compensation, such compensation under the capitalization permitted by the Interstate Commerce Commission could only be in the form of Common Stock, and, in the light of past and prospective earnings, would have only nominal value, and in any event less value than the damage suffered by the First Mortgage Bondholders through delaying reorganization and thereby depriving the First Mortgage Bondholders (a) of income currently being earned upon their investment, and (b) a voice in the management of the property, of which they are the preponderant beneficial owners.[2]

II

There has been no contention by any party throughout the proceeding that Reconstruction Finance Corporation was under any legal commitment to accept the provision made for it by the Plan, any more than any other security-holder was under any such commitment. The only question dealt with before the Commission, the District Court, the Circuit Court of Appeals and the Supreme Court was

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[1]R. 819, 824, 826, 829, 832, 836-41, 843, 857, 963, 965, 970-71, 1645, 1646-47. See Debtor's main brief, pp. 2, 17.

[2]See Committee's main brief, pp. 96-104, 138-45.

whether if Reconstruction Finance Corporation did supply $10,000,000 of new money (or accept new First Mortgage Bonds for its Trustees' Certificates issued against such new money), as provided in the Plan, it could be compensated therefor as provided in the Plan. This issue was fully dealt with in the briefs of the parties and on oral argument, and fully disposed of by the Court's opinion herein.[1]

III

The question as to what evidence the District Court may hereafter take in further proceedings under Section 77 was not involved upon the appeal to the Supreme Court, that appeal being solely from an interlocutory order of approval of the Plan by the District Court pursuant to subsection (e). The evidence to be received by the District Court in the further proceedings, particularly upon the further hearing expressly provided for by Section 77 prior to the entry of an order of confirmation, is a matter for determination by the District Court when the question arises.

IV

The question whether the effective date of the Plan may be a date other than the date of the institution of the proceeding under Section 77 was fully dealt with in the briefs and on oral argument in this Court and was disposed of in the Court's opinion.[2]

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[1]See RFC main brief, pp. 56-62, RCC main brief, pp. 3-21, ACJ main brief, pp. 116-18, Committee's main brief, pp. 107-113, Committee's reply brief, pp. 26-30. Pamphlet opinion herein, pp. 25-27.

[2]See Debtor's main brief, pp. 6-11, Committee's main brief, pp. 139-140. Pamphlet opinion herein, p. 43.

The Institutional Bondholders Committee respectfully asks that this Court deny the Debtor's Petition.

Respectfully submitted,

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

April 14, 1943

In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 819, 820, AND 989

ECKER ET AL., PETITIONERS

v.

WESTERN PACIFIC RAILROAD CORPORATION ET AL.

CROCKER FIRST NATIONAL BANK ET AL., PETITIONERS

v.

WESTERN PACIFIC RAILROAD CORPORATION ET AL.

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

WESTERN PACIFIC RAILROAD CORPORATION ET AL.

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION, AS AMICUS CURIAE

The Interstate Commerce Commission, as *amicus curiae*, urges this Court to grant the petitions for writs of certiorari in these cases. The interest of the Interstate Commerce Commission arises from the fact that under subdivision (d) of Section 77 of the Bankruptcy Act the Commission is charged with the duty of certifying to the

district courts plans of reorganization for railroad corporations which are in reorganization under Section 77. The Commission has already certified many such plans to the appropriate district courts and will be obliged to certify others in the future. In view of the doubt created by the decision below when compared with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Matter of Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*[1] and *Matter of Chicago & North Western Ry Co.*, it is important to the efficient performance of the Commission's duties under Section 77 that the procedure to be followed and the findings to be made by the Commission should be established by a definitive decision of this Court.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

MARCH 1942.

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[1] Now pending in this Court on petitions for writs of certiorari as Nos. 875–883, 988, this Term.

INDEX

	Page
Preliminary Statement	1
Argument:	
I. The decision of the court below and the position of the Commission with respect thereto	2
II. Precise dollar and cents findings of value would be fictitious and misleading	8
III. Compliance with the decision of the court below will involve administrative difficulties tending to defeat the objectives of Section 77	11
IV. The court below misapplied the *Consolidated Rock Products* decision	14
Conclusion	23

CITATIONS

Cases:	
Case v. *Los Angeles Lumber Co.*, 308 U. S. 106	8, 18
Consolidated Rock Products Co. v. *Du Bois*, 312 U. S. 510	8, 18, 19, 21
Continental Bank v. *Chicago, R. I. & P. Ry.*, 294 U. S. 648	11
Grasselli Chemical Co. v. *Aetna Explosives Co.*, 252 Fed. 456	15
Guaranty Trust Co. v. *Missouri Pacific Ry. Co.*, 238 Fed. 812	15, 16
Kansas City Ry. v. *Central Union Trust Co.*, 271 U. S. 445	16
Minnesota Rate Cases, 230 U. S. 352	8
Missouri ex rel. Southwestern Bell Telephone Co. v. *Public Service Commission*, 262 U. S. 276	9
Nashville, C. & St. L. Ry. v. *Browning*, 310 U. S. 362	9
National Surety Co. v. *Coriell*, 289 U. S. 426	17
Northern Pacific Ry. Co. v. *Boyd*, 228 U. S. 482	15, 17
Rowley v. *Chicago & N. W. Ry.*, 293 U. S. 102	9
St. Louis-S. W. Ry. Reorganization, 252 I. C. C. 325	11, 13
Statutes:	
Bankruptcy Act:	
Sec. 77 (e)	3, 14
Miscellaneous:	
48th Annual Report of the Interstate Commerce Commission, 1934	5
Hearing before Committee on Judiciary on H. R. 6249, 74th Cong., 1st Sess. (1935)	6

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 33

RECONSTRUCTION FINANCE CORPORATION, PETITIONER

v.

WESTERN PACIFIC RAILROAD CORPORATION ET AL.

BRIEF FOR INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE

PRELIMINARY STATEMENT

The Interstate Commerce Commission, charged with primary responsibility in the administration of railroad reorganization proceedings, respectfully submits this brief as *amicus curiae* in the *Western Pacific* cases. To avoid unnecessary repetition the Commission refers the Court to the statements of fact as they appear in the briefs of the Reconstruction Finance Corporation (No. 33) and of the Institutional Bondholders Committee (No. 7). Several of the points of argument which the Commission would desire to urge upon the Court have likewise been adequately presented *in*

extenso by these briefs. The argument here will be confined to discussion of the case under the following headings:

I. The decision of the court below and the position of the Commission with respect thereto.

II. Precise dollar and cents findings of value would be fictitious and misleading.

III. Compliance with the decision of the court below will involve administrative difficulties tending to defeat the objectives of Section 77.

IV. The court below misapplied the *Consolidated Rock Products* decision.

ARGUMENT

I

The disputes which gave rise to the appeals from the action of the District Court in approving a plan of reorganization concerned the relative treatment of the stockholders and junior creditors of the debtor. There was no challenge to the new security structure in its provision for $10,000,000 first mortgage fixed income bonds or in their allocation to the payment of the trustees' certificates. The same was true in respect of permitting the equipment trusts to remain undisturbed. The exclusion of stockholders and unsecured creditors and the allotment of income mortgage bonds and the new stocks were the only substantial points

upon which the Circuit Court of Appeals was asked to pass.

That court declined to approve the plan because, as it asserted, the Commission had failed in its duty under the Act of making determinations of value upon which the District Court could independently determine subordinate factual matters on which to predicate an ultimate finding that the plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." In so doing, the court relied upon that portion of subparagraph (e) of Section 77 providing that "If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan." The essence of the court's decision is that where any class of claimants is to be excluded from participation and where senior and junior creditors are involved, the necessity for precise valuation is also present.

The court strongly intimates that the record before the Commission was deficient in "requisite valuation data." If this is the holding of the lower court, it becomes pertinent to determine

what elements of value are to be considered in reorganization proceedings, first, as a basis for denying participation to any class of stockholders or creditors, and, secondly, as a basis for determining whether senior claimants have received full compensatory treatment before distribution is made to junior claimants.

The Commission's position in this case is that the Circuit Court of Appeals has placed a too restrictive interpretation upon Section 77 with respect to the Commission's part in the reorganization proceedings. It has failed to give recognition to the administrative function of the Commission. It has failed to give effect to the object sought in the 1935 amendment to Section 77, and in so doing, has needlessly created an impractical procedure entailing great delay and heavy expense both to the parties and the railroad estate. If the court's opinion means that the Commission must undertake a valuation of the whole estate of the debtor and of the several parts that may be the subject of the lien of different mortgages, using the same principles that are applicable in Section 19 (a) valuations, the effectiveness of reorganization proceedings has been destroyed.

Under the original provisions of Section 77, as enacted in 1933, no reorganizations were consummated. It was early found that the requirement that an elimination of the consent of a claimant

must be conditioned by a determination by the court that its interest was without value,[1] would lead to long delays and unwarranted expense by requiring the introduction of testimony on valuation of property and its segments applicable under section 19a in the determination of rate-making value. This, the Commission considered, was not a true test of value in the reorganization sense; rate-making value arrived at by conven-

[1] 48th Annual Report of the Interstate Commerce Commission, 1934, pp. 18, 19:

"It has become quite evident that the advantages hoped for in the enactment of section 77 of the Bankruptcy Act are not likely to be realized without substantial changes in its provisions. * * *

"Proceedings under section 77 could be further facilitated by a legislative definition of insolvency, as applied to operating railroads, and the designation of an agency and procedure whereby the fact of insolvency may be uniformly, speedily, and economically determined. * * * Further, the acceptance of a proposed plan of consolidation by the stockholders of a railroad corporation is not necessary where the court shall have determined that the corporation is insolvent; and an approved plan of reorganization is binding upon stockholders where a finding of insolvency has been made. The Supreme Court has provided in its rules that upon our application, prior to our approval of a plan of reorganization, the court, after a hearing, shall determine whether or not a corporation is insolvent. Apparently, the courts are regarded as the only present authority for the determination of this question. Considering that reorganizations will take place in many different jurisdictions, there is ground for the belief that better results might be obtained by the designation of a common agency for the performance of this duty."

tional means is not a true measure of value for reorganization purposes.[2]

In arriving at its findings in the case and in its consideration of the factors upon which they were based, the Commission deemed that it was following the prescription of the statute and the legislative intent as expressed by the 1935 amendment. It considered that the public interest in the preservation of the railroad as an operating concern and its ability to continue in that capacity was of equal importance to the private rights of existing creditors and stockholders. Its endeavors have been pointed to that objective, while at the same time it has sought to preserve the relative priorities of the several classes of claimants in their participation in the reorganized company. In applying the legislative mandate of the valuation provisions of subparagraph (e), it did not read in them a duty to make exact findings of value in order to reach findings of want of equity or to determine exactly in dollars the respective equities of the several classes of claimants. The Commission realized that at best it could only reach an approximation of value and that its findings would still be an approximation in fact, although clothed in terms of dollars and cents findings. It construed the provisions as a delegation of a duty to use its best judgment in arriving at a fair and

[2] See testimony of Mr. Craven in Hearing before the Committee on Judiciary on H. R. 6249, 74th Cong., 1st Sess. (1935), pp. 23 *et seq.*

equitable plan of reorganization based upon valuations that were the closest estimation of the commercial worth of the property securing liens, having in mind the necessity of giving principal weight to earning power. Observance of the rule of absolute priority was a consideration which had to be fitted into the legislative scheme of reorganization. This entailed a determination of what allotment of new securities would satisfy the rule. It was clear that the value of the property as a whole was not to be measured by liquidation value or realizable yield upon forced sale. When such value had to be translated into terms of allowable capitalization, economic principles as well as the legislative direction dictated that earning power be given great weight. But it was also recognized that other elements might have to be given consideration. So, too, in evaluating the component parts of a property in order to apply the rule of absolute priority, the value of the isolated item—which would be the limit of the security of the lien should it be reduced to cash—was not a true test since each item of property derived additional value by reason of its relation to the whole property as an operating unit. Faced with these conditions, the Commission has consistently determined the allowable capitalization, the kind and character of the new securities making up the total and the allocation of the new securities to the various classes of claimants upon a finding

that "the securities represent the equitable equivalent of the debtor's assets available for satisfaction of claims" and has made its allotment upon its finding "as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor." This method of treatment the Commission considers to be sufficient under Section 77 and to comply fully with the rule of absolute priority and the principles enunciated by this Court in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, and *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.

II

The fairness and equitableness of a plan of reorganization does not depend upon findings of absolute values even assuming they could be ascertained. That would be to assume a simplicity which does not and cannot exist. The formulation of a fair and equitable plan is not a mere matter of a mathematical calculation. This Court has repeatedly recognized that value is a judgment figure. Even where it is necessary to adopt a dollar value as a practical necessity, as in rate-making or taxation, this Court has recognized that the value so reached is more or less fictitious. Thus in *The Minnesota Rate Cases*, 230 U. S. 352, 434, it was said:

> The ascertainment of that [rate-making] value is not controlled by artificial rules. It is not a matter of formulas, but there

> must be a reasonable judgment having its basis in a proper consideration of all relevant facts. * * *

Mr. Justice Brandeis, dissenting in *Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, 292, said:

> It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. * * *

Again speaking of value of a railroad for tax purposes this Court in *Rowley* v. *Chicago & N. W. Ry.,* 293 U. S. 102, 109–110, said:

> The ascertainment of the value of a railway system is not a matter of arithmetical calculation and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property. * * * The determination is to be made in the exercise of a reasonable judgment based on facts so pertinent and significant as to be of controlling weight as indications of the value of the property.

In *Nashville, C. & St. L. Ry.* v. *Browning,* 310 U. S. 362, 370, which dealt with a tax assessment, this Court said:

> * * * railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a "full cash value" for a railroad is in many respects artificial. See 1 Bonbright, The Valuation of Property, pp. 511–632. Whatever may be the pretenses of exactitude in determining such a "value," to claim for it "scientific" validity, is to employ the term in its loosest sense. * * *

In railroad reorganizations the same obstacle to true findings of dollar value obtains. The exchange is not one of property or securities for cash, but of new securities for old securities or claims. A fair exchange is all that the law requires. And whether it is a fair exchange must be based upon the exercise of an informed judgment. If dollar value could be matched against dollar value there would be no need for an expert body. So if certainty cannot be attained the use of terms of certainty is illusive. But here the practical necessity does not exist. The rule of full compensatory provision should be applied realistically, and if the Commission's allocation of new securities—representing as it does its best judgment as to comparative values of both the new securities and the old securities to be surrendered—is supported by reasoned analysis of the evidence the plan should not be condemned simply because the Commission has not arbitrarily stated that the exact dollar values of the securities to be exchanged are absolutely equal.

With respect to making a precise finding of value of parts of the system the Commission recently has said in *St. Louis-S. W. Ry. Reorganization*, 252 I. C. C. 325, 361:

> The properties comprise one operating unit; a complete separation of values would necessarily have to be based on extensive assumptions of unprovable validity; and any attempt at such a separation would in the end serve no purpose except to present an apparent certainty in the formulation of the plan which does not exist in fact. The Act calls for valuations only where necessary and in our view further valuations are not necessary here.

III

From a practical standpoint a compliance with the decision here in issue will involve administrative difficulties without corresponding benefits. We do not advance the impracticability of complying with the decision as ground *per se* for its reversal. But where as here compliance will spell nothing in terms of accomplishment and will tend to defeat two of the main objectives in the enactment of Section 77, namely, the expediting of the reorganization process and curtailment of expenses (*Continental Bank v. Chicago, R. I. & P. Ry.*, 294 U. S. 648, 685), any interpretation which tends to circumvent these objectives should be viewed doubtfully.

The administrative difficulties are real if not so apparent in the case of the Western Pacific Railroad where the capital structure is comparatively simple. In the case of the larger systems undergoing reorganization, these difficulties will be greatly magnified. In the *Milwaukee Reorganization* there are sixteen classes of system securities outstanding as of December 31, 1938, of which eleven are bond issues having varying liens on different parts of the system.

The decision of the court below requires the Commission in the instant case to evaluate each of the claims of the Reconstruction Finance Corporation, the Railroad Credit Corporation, and other secured creditors including the holders of outstanding mortgage bonds. This would involve a valuation of the security for these claims. The opinion below asserts that there must be a finding of value of the pledged bonds and of the property securing the bonds. If a valuation of the bonds be made upon the basis of the value of the property securing them there arises the impracticability of reaching a separate value on various mortgage divisions operated as a part of a railroad system. If market value of the bonds be used no true value may be reached. A thin market for railroad securities, the presence of distress sales and the fact that the company is undergoing reorganization, leave little weight to the market quotations as a basis for valuing the bonds. Some issues

outstanding may not be listed on the exchange. The values of these bonds if they are to be determined on a market basis would have to be gauged from prices of securities of other railroads by a comparison of yields, earnings coverage, and the separate provisions of the various securities. There would be relatively few securities available for comparison and fewer still which would reflect liens and traffic conditions in any way similar to those of the debtor. A valuation on such a basis would be of little practical help in determining fairness of treatment under a plan of reorganization.

The opinion below asserts that the Commission must find in dollars and cents the value of the new securities which are to be exchanged for the old. Here the difficulties would be accentuated by the lack of information as to the demand on the market for the securities of a railroad just released from bankruptcy with no established credit. Ordinarily there is not even a "when issued" market at the time the plan is approved by the Commission. In the *St. Louis-S. W. Ry. Reorganization, supra,* the Commission said, p. 356:

> A reorganization based on expected value of the new securities on the immediate market would necessarily be much more drastic, and result in great and in our view unnecessary, hardship to the junior creditors.

Evidence in support of such values would merely be the expressions of opinion, and the ultimate finding of the Commission even though stated in terms of dollars and cents would be nothing more than informed guesswork.

IV

Section 77 was enacted principally as a procedural reform. Expedition and economy were among its chief objects. While rehabilitation of insolvent railroads was possible under equity receivership certain weaknesses, as for instance the use of foreclosure sale and inability to bind non-assenting security holders, as well as lack of control by the court over charges of committees for security holders, also impelled the legislation. Under equity proceedings certain principles had been developed to govern confirmation of plans of reorganization. These principles were not discarded by the enactment of reorganization procedures under the bankruptcy powers. On the contrary, the validity of a plan under Section 77 must be tested by the same principles as have obtained in equity proceedings. Particular reference to these principles has been incorporated in subsection (e) where it is provided that the plan shall "conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

The development of these requirements may be briefly recounted.

Northern Pacific Ry. v. *Boyd*, 228 U. S. 482, established the principle that a plan of reorganization was subject to judicial scrutiny as to its fairness. The exclusion of junior claims while permitting old stockholders to participate in the reorganization was condemned. If the value of the road justified the issuance of new stock in exchange for old shares, the creditors could not be foreclosed but were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control. Continuing, the opinion states (p. 508):

> This conclusion does not, as claimed, require the impossible and make it necessary to pay an unsecured creditor in cash as a condition of stockholders retaining an interest in the reorganized company. His interest can be preserved by the issuance, on equitable terms, of income bonds or preferred stock. * * *

Thereafter the courts undertook to pass upon the fairness of plans. Compare *Guaranty Trust Co.* v. *Missouri Pacific Ry. Co.*, 238 Fed. 812; *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456. But dollar findings of value were not considered as essential in order to adjudge the fairness and equitableness of the plan. This requirement was specifically rejected in the *Guaranty Trust* case, *supra*, the court saying (p. 818):

> Complaint is also made that the holders of the bonds on four other branch or subsidiary lines are offered the same or better terms, and comparisons are made between those lines and the Kansas City Northwestern as regards values of the properties and amounts of encumbrance. But there are other considerations than those. The relation of a particular railroad to the system as a whole, its value to the system on that account, and the advisability of including or excluding it, in view of the necessities of the reorganization, enter into the problem. A court cannot well review such matters, but must leave them largely to the business judgment of those in charge. It would, perhaps, be going too far to say a court should never interfere on a complaint of that kind; but clearly it should not do so unless in an exceptional instance of fraud or grossly inequitable discrimination. Generally the objection to a plan of reorganization should involve a definite principle, and not require a long complicated investigation of values, properties, etc. As to this an analogy may be found in the opinion of the Supreme Court on a phase of the Boyd Case.

In dealing with the reorganization of the Missouri-Kansas-Texas Railway this Court, in *Kansas City Ry.* v. *Central Union Trust Co.*, 271 U. S. 445, passed upon certain questions dealing with the comparative treatment accorded unsecured creditors and stockholders under the proposed

plan of reorganization. In holding upon principles enunciated in the *Boyd* case, *supra*, that a plan will be fair if it tenders to such creditors all that could reasonably be expected under all existing circumstances notwithstanding that it provides for stockholder participation, no suggestion was made that precise dollar findings of value are a prerequisite to a finding of fair treatment.

In *National Surety Co.* v. *Coriell*, 289 U. S. 426, the Court rejected the plan because the district court had before it only informal, inadequate and conflicting *ex parte* assertions unsupported by testimony. In discussing this deficiency the Court took occasion to say that (p. 436) "A trustworthy appraisal; an account showing the result of recent operations of the business; an accurate determination of the number of creditors, the amounts of their respective claims, and the extent to which collateral given or payments made to them might be deemed preferences; these were facts which might have influenced the court in deciding whether the plan should be approved or should be approved only upon a public sale."

But even here the decision does not assume to state what must comprise the record in order to sustain the fairness of the plan. Concededly there must be adequate and competent evidence upon which the fairness of the plan can be tested and the Court points out the kind and qual-

ity of evidence that will be sufficient for that purpose. But there is no holding that dollars and cents values of the items of property which go to make up the plan, and of the old and new securities, must be ascertained and set out in order to determine whether full compensatory treatment has been accorded.

In *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, a plan of reorganization under Section 77B of the Bankruptcy Act provided for the participation of the old stockholders to the extent of 23 percent of the assets and voting power of the new company in spite of a finding of insolvency by the lower court and a finding that the total of the new stock to be issued would exhaust the total value of all the assets of the debtor. In condemning the plan this Court reiterated and clarified the doctrine of absolute priority and held that the words "fair and equitable" as used in Section 77B were words of art which had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. But again there is no suggestion in the opinion that the rule of absolute priority must be tested by precise findings of dollar value.

We come then to *Consolidated Rock Products Co.* v. *Du Bois*, 312 U. S. 510, which the court below has said ruled its opinion. There the plan of reorganization under Section 77B provided for participation of stockholders of the debtor holding company when it did not appear that the un-

mortgaged assets of the subsidiaries had been exhausted, particularly in view of a claim of the subsidiaries under an operating agreement with the debtor. In the present case the court of appeals has seized upon an introductory paragraph in that opinion as laying down a rule that valuations are at all times necessary. It has, however, disregarded the context and the special circumstances involved in the decision. Thus the lower court says (R. 2671):

> Lacking the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" which appraisal of the fairness of a plan of reorganization entails.

The court below has interpreted the *Rock Products* decision as requiring the Commission to make sixteen specific dollars and cents findings of value as a condition to approving the plan proposed. But the corresponding paragraph of the *Rock Products* decision reads (p. 520):

> On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, the court was in no position to exercise the "informed, independent judgment" (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106. And see *First National Bank* v. *Flershem*, 290 U. S. 504, 525. * * *

The decision then proceeds to consider why in that case no appraisal of fairness could be made. It holds that under the absolute priority rule the bondholders of the subsidiaries were entitled to recourse against the unmortgaged assets of the subsidiaries before the stockholders of the holding debtor company could participate; that there was a claim against the holding company which if valid only to the extent of 25 percent of the book figure would have drawn the entire assets of the debtor down into the estates of the subsidiaries, that thus while the mortgaged assets were found by the district court to be insufficient to pay the mortgage debt, it was also necessary to find the amount of the deficiency and the amount of the unmortgaged assets in order to find that the bondholders would receive full compensation. This Court further held that it was also necessary to determine the fairness of the plan in respect to the subsidiary bondholders *inter sese* because the plan treated them equally while claim was made that the value of the assets of one subsidiary was greater than that of the other. In this connection the opinion states there should be "some appropriate formula for at least an approximate ascertainment of their respective assets."

We submit that this Court did not lay down any rule of exact determination in terms of dollars and cents of the values of the various items treated in formulating a plan of reorganization

in order to test its fairness. Indeed the opinion recognizes that the rule of full compensation is flexible and will yield to the practicalities of the case (pp. 529–530):

> Practical adjustments, rather than rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case. As indicated in the *Boyd* case (228 U. S. at p. 508) the creditors are entitled to have the full value of the property, whether "present or prospective, for dividends or only for purposes of control," first appropriated to payment of their claims. But whether in case of a solvent company the creditors should be made whole for the change in or loss of their seniority by an increased participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case. So long as the new securities offered are of a value equal to the creditors' claims, the appropriateness of the formula employed rests in the informed discretion of the court.

The decision of the court below in the instant case attempts to measure the adequacy of the Commission's treatment of the various claims upon the form in which its findings and conclusion were stated. In so doing it reads into the *Rock Products* case a rule that was not enunciated or intended. The inadequacy of the findings in the *Rock Products* case did not derive from the form which they

took but from a deficiency in the record. The decision declares that earning power is the dominant measure of present worth for reorganization purposes and any estimate of future earnings "must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth"; and "since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made."

The Commission's report gave dominant weight to earning power in determining total allowable capitalization and the allocation of the new securities. It had before it extensive studies of the Debtor's traffic and revenues and earnings as a whole and broken down, insofar as was possible, with respect to the several divisions of the system. The Commission's analysis of this and other elements of value supported its findings as to the fairness of the exchanges of securities provided by the plan. Its conclusions were expressed in terms of the new capital structure; it did not assume to ascribe absolute dollar values in order to give the appearance of certainty.

What the Commission has done is to provide a plan of reorganization which fully complies with the rule of full compensatory treatment based upon its opinion as to what allocation of new securities will constitute equitable treatment for the surrender of the entire "bundle of rights." This, we submit, is all that Section 77 and the decisions of this Court require.

CONCLUSION

The Commission's interest in this case lies primarily in working out a definite, well-understood procedure which will admit of prompt and efficacious railroad reorganizations. The procedure required by the decision of the Circuit Court of Appeals does not subserve this end. If the rights of all parties to the proceedings are protected, if their treatment in the plan of reorganization provides substantial justice having due regard to judicial determination of the nature and extent and the relation of such rights to those of other parties in interest, all of which has been provided in a plan based upon substantial evidence, no obeisance should be made to form at the sacrifice of what otherwise is a "fair and equitable" plan.

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded with directions to affirm the order of the District Court approving the plan of reorganization.

Respectfully submitted.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement	3
The Debtor and its Properties	4
Financial History of the Debtor	7
The Debtor's Earnings	8
Proceedings before the Commission	10
The Commission's Plan	11
Proceedings before the District Court	19
The Action of the Court Below	20
The Parties and Their Contentions	22
Specification of Errors to be Urged	24
Summary of Argument	25
Argument:	
I. The Findings of "No Value" are Sufficient to Exclude the Stockholder and Unsecured Creditors from Participation, and are Adequately Supported by the Record	28
The Record Supports the Findings of "No Value"	36
II. The Findings and Conclusions of the Commission are Sufficient to Support its Allocation of the Securities of the Reorganized Company Among Those Found to be Entitled to Share Therein	46
The Securities Available for Allocation	46
The Allocation of New Securities is Fair and Equitable	50
The Allocation of New Securities to Reconstruction Finance Corporation is Fair and Equitable	56
The Commission's Reports Met all Formal Requirements	62
III. The Circuit Court of Appeals Misconceived the Relative Functions of the Commission and the District Court	69
IV. Upon the Entire Record this Court Should Reverse the Decree of the Circuit Court of Appeals and Affirm the Order of the District Court Approving the Plan	89
Conclusion	91
Appendix A	92

CITATIONS

Cases

Akron, Canton & Youngstown Railway Co. v. *Hagenbuch*, 128 F. (2d) 932 (1942)	32, 43, 64, 71, 78
Assigned Car Cases, 274 U. S. 564 (1927)	71
Atlanta, Birmingham and Coast R. R. v. *United States*, 306, U. S. 33 (1935)	41, 71

Cases.—Continued. Page

Beaumont, S. L. & W. Ry. v. *United States*, 282 U. S. 74 (1930) 64, 84
Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939) 40
Chicago and Eastern Illinois Ry. Co. in re, unreported opinion (D. C. N. D. Ill. E. D., June 16, 1935) 35
Chicago & Eastern Illinois Ry. Co. Reorg., 230 I. C. C. 199 (1938) 34
Chicago and North Western Ry. Co., In re, 126 F. (2d) 351 (1942) 32, 42, 65, 84, 85, 86
Chicago and North Western Railway Company, In re, 35 F. Supp. 230 (1940) 35, 81, 84, 86
Chicago and North Western Railway Company, In re, 121 F. (2d) 791 (1942) 85
Chicago & North Western Ry. Co. Reorg., 236 I. C. C. 575 (1939) 34
Chicago Great Western R. Co., In re, 29 F. Supp. 149 (1939) .. 35, 86
Chicago Great Western R. Co. Reorg., 228 I. C. C. 585 (1938) 34
Chicago, Milwaukee, St. Paul and Pacific R. R. Co., In re, 124 F. (2d) 754 (1941) and unreported supplemental opinion January 12, 1942 ..... 32, 33, 46, 64, 81
Chicago, Milwaukee, St. Paul and Pacific Railroad Company, In re, 36 F. Supp. 193 (1940) 35, 82
Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 615 (1928) 72
Chicago, Milwaukee, St. Paul & Pacific R. Co., Reorg., 239 I. C. C. 485, 240 I. C. C. 257 (1940) 34
Cole v. *Ralph*, 252 U. S. 286 (1920) 90
Consolidated Rock Products Co. v. *DuBois*, 312 U. S. 510, (1941) 25, 31, 39, 40, 62, 66, 67, 68, 84
Denver and Rio Grande Western Railroad Co., In re, 38 F. Supp. 120 (1941) 81
Denver & Rio Grande Western Reorg., 90 I. C. C. 141 (1924) 72
Denver & Rio Grande Western R. Co. Reorg., 233 I. C. C. 515 (1939), 239 I. C. C. 583 (1940), Finance Docket No. 11002, July 13, 1942, not yet reported 34, 57
Diversey Building Corp., In re, 86 F. (2d) 456 (1936) 57
Erie Railroad Company, In re, 37 F. Supp. 237 (1940) 78
Florida v. *United States*, 282 U. S. 194 (1931) 64
Florida East Coast Railway Company Reorganization, not yet reported (Finance Docket No. 13170, April 6, 1942 and August 10, 1942) 43
Fort Dodge, Des Moines & Southern R. Co. Reorg., 244 I. C. C. 625 (1941) 34
Gray v. *Powell*, 314 U. S. 402 (1941) 71
Illinois Central Railroad Company v. *Interstate Commerce Commission*, 206 U. S. 441 (1906) 70, 71, 81
Interstate Commerce Commission v. *Illinois Central R. R. Co.*, 215 U. S. 452 (1910) 71

Cases—Continued. Page

Interstate Commerce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541 (1912) 71

Kansas City, Kaw Valley & Western R. Co., In re, unreported opinion (D. C. D. Kansas, 1st Div., Sept. 25, 1940) 35

Kansas City, Kaw Valley & Western R. Co. Reorg., 221 I. C. C. 15 (1937), 236 I. C. C. 137 (1939) 34

Manufacturers Ry. Company v. *United States*, 246 U. S. 457 (1918) 71

Meeker & Co. v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915) 63

Mills v. *Lehigh Valley R. R.*, 238 U. S. 473 (1915) 63

Missouri Pacific R. Co., In re, 39 F. Supp. 436 (1941) 35, 81

Missouri Pacific R. Co. Reorg., 239 I. C. C. 7 (1940) 34

Nashville, Chattanooga & St. Louis Railway Company v. *Browning*, 310 U. S. 362 (1940) 67

New York Central Securities Corporation v. *United States*, 287 U. S. 12 (1932) 71

New York, New Haven and Hartford Railroad Company, In re, not yet reported (D. C. Conn., December 8, 1941) 85

New York, New Haven & Hartford R. Co. Reorg., 239 I. C. C. 337 (1940), 244 I. C. C. 239 (1941) 34

Nine North Church Street, Inc., In re, 82 F. (2d) 186 (1936) 57

Oregon, Pacific & Eastern Ry. Co., In re, unreported opinion (D. C. D. Oregon, September 9, 1939) 35

Oregon Pacific & Eastern Ry. Co. Reorg., 233 I. C. C. 187 (1939) 34

Palmer v. *Massachusetts*, 308 U. S. 79 (1939) 73

Pennsylvania Steel Co. v. *New York City Ry. Co.*, 190 Fed. 609 (1911) 44

Quanah, A. & P. Ry. Co. v. *United States*, 28 F. Supp. 916 (1939) 64

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 (1939) 27, 71, 88

Rowley v. *Chicago & N. W. Ry. Co.*, 293 U. S. 102 (1934) 67

St. Louis-San Francisco Railway Co., In re, not yet reported (D. C. E. D. Mo., July 25, 1942) 81

St. Louis-San Francisco Ry. Co., Reorg., 240 I. C. C. 383 (1940), 242 I. C. C. 523 (1940) 34

St. Louis Southwestern Railway Company Reorganization, 249 I. C. C. 5 (1941), 252 I. C. C. 325 (1942) 43

Savannah & Atlanta Ry. Co., In re, unreported opinion (D. C. S. D. Ga., Feb. 5, 1938), C. C. H. Bankruptcy Law Service §51, 448 35

Savannah & Atlanta R. Co. Reorg., 224 I. C. C. 197 (1937) 34

Spokane International Ry. Co., In re, unreported opinion (D. C. E. D. Wash. N. D., March 2, 1940), C. C. H. Bankruptcy Law Service, §52, 567 35

Spokane International Ry. Co. Reorg., 228 I. C. C. 387 (1938), 233 I. C. C. 387 (1938) 34

620 Church Street Building Corp., In re, 299 U. S. 24 (1936) .. 25, 31

Cases—Continued Page

Story Parchment Co. v. *Paterson Parchment Co.*, 282 U. S. 555 (1931) 90

Union Trust Company v. *Illinois Midland Railway Company*, 117 U. S. 434 (1886) 44

United States v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454 (1935) 64

United States v. *Chicago, Milwaukee and St. Paul Railway Company*, 282 U. S. 311 (1931) 72

United States v. *Illinois Central Railroad Company*, 263 U. S. 515 (1924) 71

United States v. *Louisiana*, 290 U. S. 70 (1933) 63

Virginian Railway Company v. *United States*, 272 U. S. 658 (1926) 71

Visceglia v. *United States*, 24 F. Supp. 355 (D. C. S. D. N.Y., 1938) 64

Warren v. *Palmer*, 310 U. S. 132 (1940) 74

Western Pacific Railroad Company, In re, 38 F. Supp. 877 (1941) 41

Western Pacific Railroad Company, In re, 122 F. (2d) 807 (1941) 41

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268 (1926) 71

Yosemite Valley Ry. Co., In re, unreported opinion (D. C. S. D. Cal. N. D., October 28, 1941) 36

Yosemite Valley Ry. Co. Reorg., 244 I. C. C. 337 (1940), 244 I. C. C. 239 (1941) 35

Statutes:

Bankruptcy Act:

Sec. 24(c) 2

Sec. 77 (11 U. S. C., Sec. 205) 2, 11, 15, 16, 20, 23, 25, 27, 29, 30, 50, 63, 68, 72-78, 83, 84, 88

Act of August 27, 1935, c. 774, 49 Stat. 911 31

Interstate Commerce Act, 49 U. S. C.

Sec. 14 63

Sec. 19a 6

Sec. 20a 72

Judicial Code, Sec. 240(a) 2

Railroad Adjustment Act, 11 U. S. C. Sec. 1200-1255, 53 Stat. 1134-1141 85

Texts and miscellaneous:

Bourne, Findings of Value in Railroad Reorganizations, 51 Yale L. J. 1057 (1942) 65

Eastman, Joseph B., Address before National Association of Mutual Savings Banks, Philadelphia, Pa., May 7, 1941 44

76 Congressional Record 2924 72

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 33

RECONSTRUCTION FINANCE CORPORATION,

PETITIONER

v.

WESTERN PACIFIC RAILROAD CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The initial report and order of the Interstate Commerce Commission (R. 194) [1] are reported in 230 I. C. C. 61; its report and order on further consideration (R. 300) are reported in 233 I. C. C. 409; and its order denying the further petition of the Debtor, The Western Pacific Railroad Company, for modification of the plan approved by it (R. 884) is reported in 236 I. C. C. 1. The opinion of the District Court

[1] The full record in this case consists of the transcripts of the proceedings before the Interstate Commerce Commission, the District Court and the Court below, together with numerous exhibits, all of which have been certified and filed with this Court. In view of the voluminous character of the record, the parties have stipulated (R. 2625) for the printing of only selected portions thereof. Those portions have been consolidated into nine volumes, designated herein as "R".

(R. 1569) is reported in 34 F. Supp. 493. The opinion of the Circuit Court of Appeals (R. 2663) is reported in 124 F. (2d) 136.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 28, 1941 (R. 2675-2676). Petitions for rehearing were filed by Irving Trust Company, an indenture trustee, and by the Debtor, whose appeals had been dismissed by the decree of November 28, 1941. On February 12, 1942, a rehearing was granted. On February 16, 1942, an order was entered setting aside so much of the decree of November 28, 1941, as had dismissed the appeals of the Irving Trust Company and of the Debtor, but denying all further relief sought by the petitions for rehearing (R. 2681). The petition for a writ of certiorari was filed February 28, 1942, and was granted [2] on April 27, 1942. The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and on Sections 24(c) and 77 of the Bankruptcy Act.

QUESTIONS PRESENTED

On July 29, 1939 the Interstate Commerce Commission, in proceedings under Section 77 of the Bank-

[2] The other respondents below, Frederick H. Ecker, John W. Stedman, and Reeve Schley, constituting the Institutional First Mortgage Bondholders Committee; and Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under the First Mortgage of the Western Pacific Railroad Company, each filed petitions for writs of certiorari and the Western Pacific Railroad Company filed a cross petition. These petitions and the cross petition were also granted.

ruptcy Act, issued an order approving a plan of reorganization (R. 362-400) for the Western Pacific Railroad Company, Debtor. The principal questions are:

1. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the exclusion of the stockholders and unsecured creditors of the Debtor from participation, as provided in the plan.

2. Whether the findings and conclusions of the Interstate Commerce Commission were sufficient to support the allocation of the securities of the reorganized company among those found to be entitled to share therein, in the manner provided in the plan.

3. Whether, as the Circuit Court of Appeals indicated in its opinion, the District Court misconceived the respective functions of the Interstate Commerce Commission and the District Court in connection with plans of reorganization under Section 77 of the Bankruptcy Act.

STATUTE INVOLVED

The relevant portions of Section 77 of the Bankruptcy Act, 47 Stat. 1474, 11 U.S.C. §205, as amended, are set forth in Appendix A, *infra*, pp. 92 to 105.

STATEMENT

This case arises out of reorganization proceedings instituted over seven years ago. On August 2, 1935 the Western Pacific Railroad Company (hereinafter called the Debtor) filed its petition (R. 4) for reorganization under Section 77 of the Bankruptcy Act (hereinafter called Section 77) with the District

Court for the Northern District of California, Southern Division, and a copy thereof with the Interstate Commerce Commission (hereinafter called the Commission. Over four years later, after extended proceedings, the Commission, on September 28, 1939, certified to the District Court (R. 1034) a plan (R. 362) for the reorganization of the Debtor. The plan excluded the stockholders and unsecured creditors of the Debtor from participation, their equity and claims having been found to have "no value" (R. 269) and allocated new securities to the creditors found to be entitled thereto. The District Court, after hearing, approved the Commission's plan by its order of August 15, 1940 (R. 1569). Because the Commission had not made certain findings considered essential by the Circuit Court of Appeals, that court, without passing on the findings made and conclusions arrived at by the Commission or upon the merits of the plan, reversed and remanded the cause to the District Court with directions to dismiss it or, in the court's discretion, to refer it back to the Commission for further action (R. 2663).

THE DEBTOR AND ITS PROPERTIES

The Debtor was organized in 1916 to acquire and operate, pursuant to a plan of reorganization, the properties of Western Pacific Railway Company (R. 1043). At the time of filing its petition, the principal assets of the Debtor were 1207.51 miles of standard gauge railroad in the States of Utah, Nevada and California, rolling stock and equipment, and securities of certain small operating railway companies. The

Debtor's main line, 924.17 miles, runs from Oakland, California, to Salt Lake City, Utah (R. 1037). The balance of its mileage consists of branch lines springing from the main line and an additional segment of main line, known as the Northern California Extension, connecting the Debtor's line with the Great Northern (R. 1037). The Debtor also owned and operated a ferry service from Oakland to San Francisco and undivided interests in various pieces of track operated jointly with others (R. 1038-1039).

The Debtor's properties are subject to two mortgages, its First Mortgage, dated June 26, 1916, under which there are outstanding in the hands of the public $49,290,100 principal amount of 5% bonds (R. 1047) and its General and Refunding Mortgage, dated January 1, 1932, pursuant to which there have been issued $18,999,500 principal amount of bonds, all of which have been pledged to secure notes of the Debtor in the principal amount of $10,408,409.88 (R. 1053-1057). The annual fixed interest charges on said bonds and secured notes and other interest bearing obligations of the Debtor amounted to $3,177,302 (R. 9a). On August 2, 1935, the date of the filing of the petition, the accrued and unpaid interest on the Debtor's First Mortgage bonds amounted to $4,730,480.42 (R. 1022), interest having been last paid thereon on September 1, 1933 (R. 1022). On the Debtor's secured notes interest was last paid at varying dates in 1933 and 1934 so that at the time of the filing of the petition accrued and unpaid interest amounted to $396,511.92 on the notes

of the Debtor held by A. C. James Co. (R. 1023), $393,691.00 on those held by Reconstruction Finance Corporation (R. 1023-1024) and $57,307.94 on those held by The Railroad Credit Corporation (R. 1024-1025). The interest due on the First Mortgage Bonds in 1934 amounting to $2,133,800 was deferred to January 1, 1937, pursuant to an agreement to which the unsecured creditors of the Debtor were parties. That agreement provided for the subordination of the claims of the unsecured creditors [3] to the bondholders' deferred claims for interest (R. 1047-1048).

The book value of all of the Debtor's assets as of December 31, 1935, was $166,960,037.15 (R. 1062). Its investment in road and equipment and that of its subsidiaries (excluding one abandoned in 1939) less accrued depreciation on equipment as of December 31, 1938 was $144,978,559 (R. 1062-1063). The rate making valuation [4] of the Debtor's properties and that of its subsidiaries (excluding the one which was abandoned in 1939) as of December 31, 1938, was $150,907,623.49 (R. 1061-1062).

FINANCIAL HISTORY OF THE DEBTOR

Upon commencing operations in 1916, the capital liabilities of the Debtor consisted of $20,000,000 of first mortgage bonds, $27,500,000 par value of preferred stock and $47,500,000 par value of common

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[3] Western Pacific Railroad Corporation and Western Realty Company, respectively the parent and an affiliate of the Debtor.

[4] Determined under Section 19 (a) of the Interstate Commerce Act, 29 U.S.C.A., Sec. 19(a).

stock, or a total of $95,000,000. Its annual fixed charges were $1,000,000, the interest on the first mortgage bonds (R. 1044-1045).

Beginning in 1921, the First Mortgage indebtedness was increased from time to time until 1931. As of January 1, 1939, there were outstanding $49,290,100 principal amount of First Mortgage Bonds (R. 1047). In addition to the increase of its indebtedness through the issuance of First Mortgage Bonds, the Debtor in 1930 issued $5,000,000 principal amount of debentures, all of which (except $200 principal amount) were refunded in 1932 (R. 1054) by the issuance of notes in the principal amount of $4,999,800 (R. 1054). The indebtedness of the Debtor was further increased in 1932 and 1933 in the amount of $5,408,609.88 for money borrowed to meet First Mortgage bond interest and for other purposes (R. 1055-1057). At the time of filing its petition, the Debtor was also indebted to its parent corporation, Western Pacific Railroad Corporation, in the amount of $5,818,791, for advances on open account and had outstanding equipment obligations of $2,994,065 (R. 9). The increase in indebtedness between 1916 and 1933 resulted in the Debtor's annual fixed interest charges increasing from $1,000,000 to $3,177,302 (R. 9a).

While the increase in indebtedness above outlined was going on, the Debtor during part of the period (1921-1926) appeared to be prosperous. A 6% dividend was regularly paid in those years on its preferred stock and in 1925 a 5% dividend was paid on the common. The total dividend payments during those years

amounted to $13,115,920 (R. 1050-1051). In 1925 when the largest dividend payment, $4,453,420 (R. 1050), was made, the Company increased its First Mortgage indebtedness by $4,000,000 for "General Corporate Purposes" (R. 1046). In the following year, the increase in First Mortgage indebtedness for the same purposes was $2,600,000. At the same time "a substantial amount of deferred maintenance had been permitted to accrue on the Debtor's property" (R. 218) so that in 1927 dividend payments were stopped and "an Improvement Program initiated which contemplated the expenditure of approximately $18,000,000 to rehabilitate the Debtor's property" (R. 1052). $8,000,000 of the $18,000,000 Improvement Program was completed by the Debtor. The balance was undertaken by the Debtor's Trustees and the indebtedness against the property was increased by $10,000,000 through the issuance of Trustees' certificates to finance the program (R. 1028).

THE DEBTOR'S EARNINGS

The consolidated earnings of the Debtor and its subsidiaries, available for interest, for the years 1922 to 1938, as reported by the Debtor and as adjusted "to take into account (a) rehabilitation expenditures in the years 1927-1931 and 1934-1938, (b) amortization of discount on First Mortgage Bonds of the Debtor in the years 1922-1938, and (c) deductions and credits in the years 1931-1934 made by the Commission to accord with its Accounting Rules and Regulations," were (R. 1064-1066):

Year	Earnings available for Interest Reported	As Adjusted
1922	$2,306,124	$2,404,890
1923	3,313,976	3,412,234*
1924	3,144,124	3,241,823
1925	4,454,352	4,557,798
1926	4,759,282	4,868,390
1927	2,674,494	3,470,861
1928	2,964,371	4,376,972
1929	2,529,846	3,718,436
1930	1,552,487	2,381,529
1931	186,708 (D)	220,494 (D)
1932	252,706	283,912
1933	674,007	474,365
1934	1,084,244	1,396,353
1935	805,589	1,377,026
1936	181,102	1,901,423
1937	903,113 (D)	1,077,407
1938	1,243,916 (D)	255,431

(D) Deficit.

* The adjusted figure for 1923 shown (R.1065) as $4,412,234 is a typographical error for $3,412,234. See R. 2063.

For the seventeen-year period, 1922-1938, inclusive, the average earnings available for interest as adjusted were $2,292,844. For the ten years 1929-1938, inclusive, the average was $1,265,539 and for the five years 1934-1938, inclusive, the average was $1,195,528. As previously stated, the annual fixed interest charges of the Debtor at the time of the filing of its petition were $3,177,302 (R. 9a) and the then accrued and unpaid interest amounted to $5,577,991.28 (R. 1022-1025).

Although probably not significant in the determination of the questions involved (see discussion, *infra*, pp. 41-45), it may be noted that the earnings from the

properties of the Debtor have increased very substantially in the last two or three years as the result of the national defense program and later of our war effort, being greater in 1941 than the amount of the Debtor's annual fixed interest charges and running at a higher rate in 1942.

PROCEEDINGS BEFORE THE COMMISSION

Hearings on a plan of reorganization for the Debtor were held before the Commission on March 23, April 21, May 13, July 1, September 28, October 26, November 19 and December 9, 1936, at which all the parties were given an opportunity to be heard. Briefs were then filed. On August 1, 1937, the Bureau of Finance of the Commission issued a proposed report and recommended a plan (R.116). Exceptions thereto were filed and oral argument was had thereon before the full Commission on November 17, 1937. On October 10, 1938, the Commission issued its report and order (R. 194) approving a plan of reorganization of the Debtor. Petitions for rehearing and for modification of the October 10, 1938 report and order and the plan of reorganization therein approved were filed with the Commission on December 9, 1938 and on December 30, 1938 a rehearing was granted. Oral argument was had before the Commission on January 20, 1939 on the petitions for modification. On June 21, 1939 the Commission issued its "Report on Further Consideration" (R. 302-362) and made an order approving a plan of reorganization for the Debtor (R. 362-400) differing in certain respects from the plan ap-

proved in the order of October 10, 1938. On August 2, 1939, the Debtor petitioned the Commission for a rehearing and modification of the plan approved in the report and order of June 21, 1939. That petition was denied (R. 884) on September 19, 1939 and on September 28, 1939 the Commission certified (R. 1034-1035) its plan to the Court as required by Section 77.

THE COMMISSION'S PLAN

The claims against and interests in the property of the Debtor dealt with in the Commission's plan, including accrued interest to January 1, 1939, the effective date of the plan, are as follows (R. 1022-1027):

Claim or Interest	*Principal of claim or interest*	*Accrued Interest*	*Total Claim*
Trustees' Certificates	$10,000,000.00	$ ——	$10,000,000.00
Equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Notes	2,963,000.00	899,869.98	3,862,869.98
Railroad Credit Corporation Notes	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Notes	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$72,448,559.88	$15,533,112.87	$87,981,672.75
Advances on Open account[a]	5,818,791.00	1,992,096.00	7,810,887.00
Total debt	$78,267,350.00	$17,525,208.87	$95,792,559.75
Preferred stock, par value $100 per share[a]	28,300,000.00	——	28,300,000.00
Common stock, par value $100 per share[a]	47,500,000.00	——	47,500,000.00
Totals	$154,067,350.88	$17,525,208.87	$171,592,559.75

[a] All owned by Western Pacific Railroad Corporation, except a small part of the open account advances owned by Western Realty Company, its wholly-owned subsidiary.

The Debtor's note indebtedness to Reconstruction Finance Corporation shown in the foregoing schedule is secured by $10,750,000 principal amount of its General and Refunding Mortgage Bonds, its indebtedness to The Railroad Credit Corporation by $4,000,000 principal amount of such Bonds and its indebtedness to A. C. James Co. by $4,249,500 principal amount thereof. These amounts aggregate $18,999,500, the entire outstanding issue of the Debtor's General and Refunding Mortgage Bonds.

The approved plan provides for a capital structure of the reorganized company as follows (R. 310, 364):

Title of issue	*Amount*	*Annual interest, dividends or other charges*
Undisturbed Equipment Obligations	$ 2,750,050	$ 94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total Annual Fixed Charges		$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise non-cumulative	21,219,075	954,858
Total funded debt	$33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund		106,095
Participating 5% Preferred Stock ($100 par value). Dividends non-cumulative, participating share for share with Common Stock in dividends declared in any year after dividends have been declared on Common Stock at rate of $3 per share	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shs.	

The plan provides for the distribution of securities of the reorganized company among existing claimants as follows (R. 317, 390-393):

Claimants	*New First Mortgage 4% Bonds Series A*	*New Income Mortgage 4½% Bonds Series A*	*New 5% Preferred Stock Series A ($100 Par)*	*New Common Stock (No Par)*
First Mortgage Bondholders		$19,716,040	$29,574,060	230,593 shs.
Reconstruction Finance Corporation (in exchange for Trustees' Certificates and Notes)	$10,000,000	1,185,200	1,777,800	15,788 shs.
Railroad Credit Corporation		154,111	241,681	35,425 shs.
A. C. James Co.		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

Under the plan holders of the Debtor's First Mortgage 5% bonds receive new 4½% income mortgage bonds in an amount equal to 40% of the principal of their claims, new preferred stock in an amount equal to 60% thereof and 4.67 shares of new common stock in respect of the $266.67 accrued interest per thousand dollar bond (R. 317, 390). For its claim based on the Debtor's secured notes, Reconstruction Finance Corporation receives the same treatment as the First Mortgage bondholders, in consideration of exchanging its Trustees' certificates for an equal principal amount of new first mortgage bonds. The Railroad Credit Corporation and A. C. James Co. are allotted new securities on the basis of the General and Refunding Mortgage Bonds of the Debtor securing their respective claims. The unsecured claim of Western Pacific Railroad Corporation and its interest as the owner of all of the preferred and common

stock of the Debtor were not accorded participation because they were found to have "no value" (R. 392-393).

The Commission found that the securities, $21,219,075 principal amount of income bonds, $31,850,297 par value of preferred stock and 319,441 shares of no par value common stock, allocable to the creditors of the Debtor other than holders of equipment obligations and Trustees' certificates, "represent the equitable equivalent of the debtor's assets, available for the satisfaction of claims" (R. 316). The Commission also found that "the securities remaining available for distribution after satisfying the claims of the first mortgage bondholders * * * will be inadequate in value to satisfy" the claims of "the other creditors" (R. 269). With respect to a second lien held by The Railroad Credit Corporation on the Reconstruction Finance Corporation collateral, the Commission found that "the allocation of reorganization securities to" Reconstruction Finance Corporation "exhausts the value of the collateral pledged" and that the equity "in such collateral has no value" (R. 316).

The Commission's initial report of October 10, 1938 and its report on further consideration of June 21, 1939, contain the Commission's findings, conclusions and reasons therefor. The October 10, 1938 report (R. 194-284) states the proceedings which had been had before the Commission up to that time and proceeds to an exhaustive study of (1) the "Location and General Description of the Property" (R. 197), (2)

the "Owned or Controlled and Jointly Affiliated Railroad Companies" (R. 198), (3) the "Corporate and Financial History" of the Debtor (R. 199-203); (4) the Debtor's "Present Financial Structure" (R. 203-207), (5) the Debtor's "Traffic and Revenue" (R. 207-215), (6) the "Traffic and Revenue of Subsidiaries" of the Debtor (R. 215-218), (7) the Debtor's "Earnings Available for Charges" (R. 218-224), (8) "Value for Rate Making Purposes" (R. 224), and (9) "Classes of Creditors and Stockholders" (R. 224-227). On the basis of the factual discussion under the above headings and a detailed consideration of plans of reorganization filed by the Debtor and other parties (R. 227-241), the Commission stated its findings, "conclusions and reasons therefor" (R. 241-281) as required by Section 77. As to the existing stock interest the Commission found "that the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan" (R. 269). The Commission also found that "the claims of the unsecured creditors, of the Western Pacific Railroad Corporation and of the Western Realty Company, have no value, and hence no securities or cash should be distributed under the plan in respect to those claims" (R. 269-270).

On the basis of the Commission's conclusions as to fixed charges, total charges, etc. of the reorganized company (R. 246-257), the Commission, in its initial report of October 10, 1938, stated the capitalization and the fixed, contingent and total charges of the new company as follows:

> "... the total capitalization, excluding 313,703 shares of no-par value common stock, would be $62,356,217, consisting of $3,066,117 of equipment obligations, $10,000,000 of first mortgage 4-per cent bonds, $19,716,040 of income mortgage 4-per cent bonds, and $29,574,060 of 5-per cent preferred stock. Treating the no-par-value common stock at $100 per share, the total capitalization would be $93,726,517. Total fixed interest charges would be $511,001, total fixed and contingent interest charges, plus the payments into the capital fund, and sinking fund would be $1,898,223, and preferred dividends would be $1,478,703, a grand total of $3,376,926 per annum" (R. 259).

Having set up a capital structure for the reorganized company, the Commission proceeded to consider the distribution of the new securities (R. 261-279). The first problem was a determination of the properties subject to the liens of the Debtor's two mortgages and the priorities thereof. It was admitted that the Debtor's first mortgage was a first lien "on the main line of the Debtor's railroad and the securities physically pledged under that mortgage" (R. 261). However, there was a dispute as to the Northern California Extension, various branches and spurs of the Debtor's line, as to the equity in rolling stock subject to equipment obligations and as to certain non-carrier real estate. The Commission considered the pertinent provisions of the granting clauses of the two mortgages and other relevant factors and concluded that the Debtor's First Mortgage bondholders "should be con-

sidered as having a first lien upon practically all of the assets of the debtor" [6] (R. 264-267). In deciding the lien questions, the Commission stated that the final adjudication thereof must be made by the court but that nevertheless it was necessary to determine them "preliminarily for the purpose of consideration of the plans before us" [7] (R. 262).

The October 10, 1938 report and order allocated all of the income bonds and preferred stock and 154,241 shares of the new no par common stock therein authorized to the holders of the existing First Mortgage Bonds (R. 270). The balance of the common stock, 159,462 shares, was allotted to the secured noteholders on the basis of the General and Refunding Mortgage Bonds held by them as collateral.

In its "report upon further consideration" of the October 10, 1938 report, which was issued by the Commission on June 21, 1939 after rehearing, the Commission concluded that certain modifications should be made in the plan previously approved (R. 300). Those modifications included (1) the increasing of the amount of income bonds to $21,219,075, the preferred

[6] Upon reconsideration the Commission found that certain items subject to the first lien of the General and Refunding Mortgage were of such a value as to justify the allocation of new income mortgage bonds therefor. (See *infra*, p. 53.)

[7] The District Court was wholly in accord with the Commission's conclusions on the lien questions (R. 1597) and this brief proceeds on the assumption that they were decided correctly. They will be the subject matter of briefs filed by the two Mortgage Trustees.

stock to $31,850,297 and the common stock to 319,441 shares, (2) increasing the rate of interest on the income bonds from 4% to 4½%, (3) a reallocation of securities, including an increase in the common stock allocable to the First Mortgage bondholders from 154,241 shares to 230,593, (4) allocating income bonds, preferred and common stock to Reconstruction Finance Corporation on the same basis as to First Mortgage bondholders, in consideration of the funding into new first mortgage bonds at par of the Trustees' certificates held by it, and (5) allocating income bonds, preferred and common stock to The Railroad Credit Corporation and the A. C. James Co. on the basis of the securities found on reconsideration to be allocable to the General and Refunding Mortgage Bonds securing these claims.

As the Commission expressly stated in its report of June 21, 1939, its allocation of new securities in the approved plan was "based upon our conclusion as to the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor" (R. 317). And in accordance with the statutory requirement, the Commission in the same report and order specifically made the over-all finding "that the plan of reorganization approved in our report and order of October 10, 1938, *supra*, modified as herein indicated, will meet with the requirements of Section 77(b) and (e) of the Bankruptcy Act, as amended, and will be compatible with the public interest" (R. 354). Section 77(e), quoted in full in Appendix A hereto, requires the determination by the Com-

mission [8] that the approved plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders." This specific finding the Commission expressly declined to modify upon consideration of a petition of the Debtor for further modification of the approved plan (R. 889-890).

PROCEEDINGS BEFORE THE DISTRICT COURT

Following the certification of the plan to the District Court, that court by its order of November 8, 1939 (R. 1035) required the parties to file their objections to the plan and claims for equitable treatment on or before December 8, 1939, and set January 22, 1940 for a hearing thereon (R. 1274). In order to simplify the issues, the District Judge called a pre-trial conference which was held on December 18th to 20th, 1939. At that time, a stipulation (R. 1017-1272) of facts not in dispute was filed. On January 22, 1940 a hearing (R. 1280-1569) was had in the District Court at which witnesses were called by various of the parties in support of their objections and claims for equitable treatment. In the proceedings before the District Court, Reconstruction Finance Corporation, the Institutional Bondholders Committee and the First Mortgage Trustees supported the Commission's plan. The other parties, the A. C. James Company, The Railroad Credit Corporation, Irving Trust Company, Western Pacific

[8] See Section 77(d).

Railroad Corporation and the Debtor, objected to its approval.

On August 15, 1940 the District Court handed down its opinion (R. 1569-1600) and entered its order (R. 1600-1607) overruling the objections to and approving the Commission's plan. The District Court affirmed the finding of the Commission that the pre-preferred and common stock of the Debtor had no value and likewise affirmed the Commission's finding that the claims of the unsecured creditors had no value. The court also found that the plan was fair and equitable and complied with all the requirements of Section 77.

THE ACTION OF THE COURT BELOW

From the District Court's order of approval, the objectors in the District Court appealed to the Circuit Court of Appeals for the Ninth Circuit. That court reversed the order of the District Court and remanded the proceeding to the District Court "with directions to dismiss it, or in the court's discretion and on motion of any party in interest, refer it back to the Commission for further action" (R. 2674).

The Circuit Court of Appeals did not purport to pass upon the merits of the plan or upon the accuracy of any of the Commission's findings or conclusions. The court took the view that other and different findings and conclusions than those made and arrived at by the Commission were necessary. The court said:

> "In this case, as has been seen, it was necessary to determine the value of (1) the debtor's

entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed.

"Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails." (124 F.(2d) at 139; R. 2671.)

The Circuit Court of Appeals also indicated that the District Court had overstated the expert character of the Commission and had misconceived the weight to be

given to the Commission's determinations. The District Court, in its opinion, said:

> "It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." (R. 1588; 34 F. Supp. at 501.)

Referring to that statement, the Circuit Court of Appeals said:

> "The statement indicates a possible misconception * * *
>
> "In determining whether a plan of reorganization satisfies the requirements of subsection e, the Court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court." (124 F.(2d) at 140; R. 2672-2674.)

THE PARTIES AND THEIR CONTENTIONS

Reconstruction Finance Corporation, the Institutional Bondholders Committee, holders of the Debtor's First Mortgage bonds, and Crocker First National

Bank of San Francisco and Samuel Armstrong, as Trustees under the Debtor's First Mortgage, support the Commission's plan as complying with all the requirements of Section 77 of the Bankruptcy Act and challenge the holding of the court below that the Commission should have made findings other than and additional to the findings and conclusions appearing in its reports and orders embodying the plan.

The Commission's plan is objected to by (1) the Debtor, (2) Western Pacific Railroad Corporation, the Debtor's parent company, (3) A. C. James Company,[9] (4) the trustee of the Debtor's General and Refunding Mortgage and (5) The Railroad Credit Corporation. In general, the objections go to the total capitalization of the reorganized company, the contention being that the value of the Debtor's properties is sufficient to permit a larger one than that provided for in the Commission's plan. In particular the stock and unsecured creditor interests object to their claims and interests having been found to have "no value," and contend that the Commission's findings of "no value" with respect to their claims and interest are insufficient to deny them participation. The Trustee of the Debtor's General and Refunding Mortgage, together with A. C. James Company and The Railroad Credit Corporation, holders of the Debtor's General and Refunding Bonds as collateral, object to the find-

[9] A. C. James interests hold over 61% of the common stock and 40.36% of the total stock of Western Pacific Railroad Corporation, which is in turn the sole stockholder of the Debtor (R. 1051, 1528-1529).

ings of the Commission as to the liens of the Debtor's two mortgages. The Debtor joins in that objection. The same parties also object to the amount of new securities allocated with respect to the Debtor's General and Refunding Bonds. The Debtor also objects to January 1, 1939 as the effective date of the plan since it involves the accrual of interest to that date in determining the amount of creditors' claims. The Debtor would avoid interest accruals on creditors' claims by making the date of filing of the petition the effective date of the plan. A. C. James Company and The Railroad Credit Corporation object to the secured note claim of Reconstruction Finance Corporation against the Debtor being treated on the same basis as the Debtor's First Mortgage bonds, such treatment being in consideration of Reconstruction Finance Corporation exchanging the Trustees' certificates which it holds for an equal principal amount of new First Mortgage bonds. Objections are also made by some of the respondents to numerous details of the plan.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding inadequate as a basis for excluding stockholders and unsecured creditors from participation in the reorganization the Commission's findings that (1) "the equity of the existing stock has no value," and (2) "the claims of the unsecured creditors * * * have no value."

2. In deciding that the findings, "conclusions and reasons therefor" of the Commission regarding the

allocation of new securities to those entitled to share are insufficient to support that allocation.

3. In deciding that the allocation of new securities in a reorganization under Section 77 should and must be based on exact dollars and cents valuations of all claims, properties and new securities.

4. In deciding that the functions of the Interstate Commerce Commission in Section 77 proceedings are confined within narrow limits and in general misstating the relative functions of the Commission and the District Court in such proceedings.

5. In failing to affirm the decision of the District Court.

SUMMARY OF ARGUMENT

1. In excluding the stockholder and unsecured creditors from participation in the distribution of new securities, the Commission found that these claims had no value, and that the securities allocable to the junior secured creditors will be insufficient to satisfy their claims. That these findings are adequate is attested by the terms of Section 77(e), as well as by the approval of plans based on similar findings in ten recent railroad reorganization proceedings in seven district courts. See also *In re 620 Church Street Building Corp.*, 299 U.S. 24, 27 (1936). The findings, moreover, are supported by the record. Giving proper weight to the earnings and financial history of the Debtor, the Commission could not well have reached a different conclusion. *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510 (1941). The contention that a new plan is required because of wartime earnings is dangerously un-

sound, as has been recognized by the Commission and by two Circuit Courts of Appeals.

2. The requirement in the decision below of sixteen dollars and cents findings of value is excessively formalistic, unnecessary and impracticable. The findings and conclusions of the Commission are adequate to support its allocation of new securities among those entitled to participate. The First Mortgage Bonds were found to be a first lien on substantially all the Debtor's properties. The General and Refunding Bonds, held as collateral by noteholders, were found to be a first lien on a relatively small portion of the Debtor's assets, including the note and stock of a subsidiary and certain other securities, and a junior lien on the properties as a whole. Their participation was considered in the light of the assets subject to the first lien of this mortgage, the earnings, properties and traffic of the subsidiary and the dependence of its earnings on the Debtor, and in relation to the treatment of the First Mortgage Bondholders. In relation to each other, the participation of the secured noteholders, apart from the RFC, was fixed in proportion to the collateral held, since it was found that the collateral was inadequate to satisfy their claims. A practical adjustment was made for the RFC, as compensation for its exchange of Trustees' certificates, admittedly the equivalent of cash, for an equal face amount of new first mortgage bonds.

3. In stating that the District Court must exercise its independent, *de novo* judgment on all matters in reviewing a plan approved by the Commission, and

apparently that it must disregard even the expert character of the Commission as an administrative body long experienced in the railroad field, the court below misconceived the respective functions of the District Court and the Commission. Such a conception is at variance with the statutory scheme and the historical background of Section 77, with the well-established doctrine of this Court regarding the administrative finality of the Commission's decisions, and with the practical realities of railroad reorganization procedure.

Under Section 77 Congress has delegated the primary responsibility for the development of the reorganization plan to the Commission, and it is submitted that "having found that the record permitted the Commission to draw the conclusion that it did a court travels beyond its province to express concurrence therein as an original question." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145-146 (1939). Certainly, the findings and conclusions of the Commission, in the performance of the task delegated to it by Congress, are entitled to great weight as the determinations of the expert administrative body long charged with the protection of the public interest in the railroad field. Only thus can the intent of Congress be made effective, and Section 77 rendered a workable statute for the consummation of railroad reorganizations.

Since the District Court had expressed independent approval of the plan, the statement of the Circuit Court of Appeals as to the functions of the District Court and the Commission was in any event uncalled for; but

in the interest of indicating proper and workable principles and procedure and of dispelling confusion, correction by this Court is important.

4. In view of the length of time for which these proceedings have been pending, and of the thoroughness with which all of the problems involved have been explored and determined by the Commission and the District Court, the issues here in controversy should be definitively disposed of by affirming the decree of the District Court.

ARGUMENT

I

THE FINDINGS OF "NO VALUE" ARE SUFFICIENT TO EXCLUDE THE STOCKHOLDER AND UNSECURED CREDITORS FROM PARTICIPATION, AND ARE ADEQUATELY SUPPORTED BY THE RECORD

The Commission found that the equity of the preferred and common stock had "no value" (R. 269) and likewise found that the claims of the unsecured creditors had "no value" (R. 269-270). The District Court affirmed those findings (R. 1605), and on the basis thereof decreed that "the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the Debtor" (R. 1605). It would seem to be elementary that if a claim or interest in a corporation undergoing reorganization has no value the holder thereof would not be entitled to par-

ticipation. However, the effect of the decision of the court below is that findings of "no value" are insufficient to establish as a fact that the claims or interests with respect to which such findings are made in fact have no value. The Circuit Court of Appeals did not discuss the Commission's "no value" findings nor, as a matter of fact, did it discuss any of the other numerous findings or the voluminous valuation data contained in the Commission's reports. With respect to the participation of the stockholders, that court, in its discussions of the objections of the Western Pacific Railroad Corporation, the owner of all of the stock of the Debtor, said:

> "The objection states that the debtor is not insolvent, but has property of a value greatly in excess of its liabilities. Obviously, if the statement is true, the holding company is entitled to participate in the reorganization, and its exclusion therefrom is unfair and inequitable. Thus, to determine the question raised by the holding company's objection, it was necessary to determine the value of the debtor's property as of the effective date of the plan—January 1, 1939" (124 F.(2d) at 138; R. 2668).

The Court seems to have overlooked the provisions of Section 77(e) for the exclusion of both stockholders and creditors from participation in a plan which are as follows:

> "*Provided,* That submission to any class of stockholders shall not be necessary if the Com-

> mission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation was insolvent, or that at the time of the finding the equity of such class of stockholders has no value, * * * *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, * * * that at the time of the finding the interests of such class of creditors have no value * * *." [10]

The unambiguous language of the above provisions would seem to make it perfectly clear that any class of stockholders may be excluded from participation either by (1) a finding that—"the corporation is insolvent" or (2) a finding that—"the equity of such class of stockholders has no value," and that a class of creditors may likewise be excluded from participation on a finding of "no value." That alternative courses in excluding stockholders from participation were intended by Congress is emphasized by the fact that the second alternative was written into subsection

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[10] The subsection further provides that: "the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection * * *." The following subsection (*f*) provides that upon confirmation:

> "the plan * * * shall, * * * be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors, secured or unsecured, whether or not adversely affected by the plan * * *, including creditors who have not, as well as those who have, accepted it."

(e) of Section 77 by the 1935 amendments [11] to Section 77.

In addition to overlooking the Commission's findings of "no value" regarding the claims and interests of unsecured creditors and stockholders, the court below apparently overlooked a confirmatory finding. With respect to the securities allocable to the secured creditors other than to the First Mortgage bondholders, the Commission found that "they will be inadequate in value to satisfy the claims" of such creditors (R. 269). Furthermore the court seems to have overlooked the decision of this Court in *In re 620 Church Street Building Corp.*, 299 U. S. 24 (1936). In that case the Supreme Court stated:

> "* * * Petitioners insist that their consent to the plan of reorganization was necessary or that their claims should have been accorded 'adequate protection'. But the adequate protection to which the statute refers is 'for the realization of the value of the interests, claims or liens' affected. *Here the controlling finding is not only that there was no equity in the property above the first mortgage but that petitioners' claims were appraised by the court as having 'no value.'* There was no value to be protected." (299 U. S. at 27; italics supplied.)

The court below, in holding that a valuation of all of the Debtor's property was necessary, relied upon the decision of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941). Under

[11] Act of August 27, 1935, c. 774, 49 Stat. 911.

the plan in that case, stockholders were participating although it appeared probable from the record that claims of creditors were not being satisfied. Obviously, as between stockholders and creditors, if stockholders are to participate in a reorganization, it would have to appear affirmatively that there was value in the properties in reorganization over and above that necessary to satisfy creditors. On the other hand if creditors cannot be satisfied in full, the making of a finding of the value of all of the Debtor's properties could serve no useful purpose other than to determine how far the stock was under water. In terms of mathematical accuracy, such a finding would only prove by how much the claims of creditors could not be satisfied, and would add no information of legal significance.

Since the decision of the court below was announced, the Circuit Court of Appeals for the Seventh Circuit has passed upon plans of reorganization for the Chicago, Milwaukee, St. Paul and Pacific Railroad Company [12] and for the Chicago and North Western Railway Company [13] and the Circuit Court of Appeals for the Sixth Circuit has affirmed a decree confirming a plan of reorganization for the Akron Canton and Youngstown Railway Company.[14] In all three cases the plans excluded stockholders from

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[12] 124 F. (2d) 754 (C.C.A. 7th, 1941), and unreported supplemental opinion (C.C.A. 7th, January 12, 1942).

[13] 126 F. (2d) 351 (C.C.A. 7th, 1942).

[14] *Akron Canton & Youngstown Railway Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C. C. A. 6th, 1942).

participation on findings of "no value," except that in the Akron case the stockholders were given warrants entitling them to purchase new securities. In the North Western case the Circuit Court of Appeals sustained the District Court which had confirmed the plan certified by the Commission. In the Milwaukee case the Circuit Court of Appeals reversed the District Court which had approved the Commission's plan. However, both these cases, the findings by the Commission that the equity of the stockholders had no value were sustained as sufficient to exclude stockholders from participation. In the Milwaukee case, the court said in part:

> "We are well satisfied that the evidence supports the finding of the Commission approved by the District Court 'that the equity of the holders of the debtor's preferred stock and its common stock has no value'." (124 F. (2d) at 764.)

On a motion to modify the opinion, insofar as it approved the Commission's finding of "no value" in the stock, the court reaffirmed its previous position:

> "Now, to make our position entirely clear, we add this memorandum and hold that the finding of the I.C.C. as to absence of value of old common and preferred stock is specific, definite and certain, and fully meets the rule which requires finding on values of assets." [15]

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[15] *In re Chicago, Milwaukee, St. Paul & Pacific Railway Company*, unreported supplemental opinion (C.C.A. 7th, January 12, 1942).

In the North Western case the Commission's finding of "no value" of the preferred and common stock was likewise approved:

> "There are three vital, determinative questions, (and numerous less important questions) presented by this appeal.
>
> "(a) The finding, and the sufficiency of the evidence to support it, that the common and preferred stock of the old company are without value."
>
> * * * *
>
> "The finding which determined the absence of value in the common and preferred stock must be, and is, approved as fair to the creditors, to the stockholders, and to the public." (126 F. (2d) at 360, 364.)

Plans for the reorganization of other railroads approved [16] and certified by the Interstate Commerce

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[16] *Chicago & Easton Illinois Ry. Co. Reorg.*, 230 I.C.C. 199, 233 (1938); *Chicago & North Western Ry. Co. Reorg.*, 236 I.C.C. 575, 637 (1939); *Chicago, Great Western R. Co. Reorg.*, 228 I.C.C. 585, 626 (1938); *Chicago, Milwaukee St. Paul & Pacific R. Co. Reorg.*, 239 I.C.C. 485, 571 (1940), 240 I.C.C. 257, 273 (1940); *Denver & Rio Grande Western R. Co. Reorg.*, 233 I.C.C. 515, 580 (1939), 239 I.C.C. 583 (1940); *Fort Dodge, Des Moines & Southern R. Co. Reorg.*, 244 I.C.C. 625, 646 (1941); *Kansas City, Kaw Valley & Western R. Co. Reorg.*, 221 I.C.C. 15, 24 (1937), 236 I.C.C. 137, 139 (1939); *Missouri Pacific R. Co. Reorg.*, 239 I.C.C. 7, 132 (1940); *New York, New Haven & Hartford R. Co. Reorg.*, 239 I.C.C. 337, 418 (1940), 244 I.C.C. 239, 242 (1941); *Oregon Pacific & Eastern Ry. Co. Reorg.*, 233 I.C.C. 187, 194 (1939); *Savannah & Atlanta R. Co. Reorg.*, 224 I.C.C. 197, 215 (1937); *Spokane Intern'l Ry. Co. Reorg.*, 228 I.C.C. 387, 403 (1938), 233 I.C.C. 157 (1939); *St. Louis-San Francisco Ry. Co. Reorg.*, 240 I.C.C.

Commission and excluding stockholders from participation on findings of "no value" [17] have been approved by the District Courts in:—

In re Chicago and Eastern Illinois Ry. Co., unreported opinion, (D.C.N.D. Ill. E.D., June 16, 1935);

In re Chicago & North Western Ry. Co., 35 F. Supp. 230, 247 (D.C.N.D. Ill. E.D., Sept. 11, 1940), affirmed 126 F.(2d) 351 (C.C.A. 7th, 1942).

In re Chicago Great Western R. Co., 29 F. Supp. 149, 160 (D.C.N.D. Ill. E.D., Sept. 9, 1939);

In re Chicago, Milwaukee, St. Paul & Pacific R. R. Co., 36 F. Supp. 193, 204 (D.C.N.D. Ill. E.D., 1940), reversed on other grounds but with approval of the holding mentioned, 126 F. (2d) 351 (C.C.A. 7th, 1941) and unreported supplemental opinion (C.C.A. 7th, January 12, 1942);

In re Kansas City, Kaw Valley & Western R. Co., unreported opinion, (D.C.D. Kansas, 1st Div., Sept. 25, 1940);

In re Missouri Pacific R. Co., 39 F. Supp. 436, 443, (D.C.E.D. Mo. E.D., June 20, 1941);

In re Oregon Pacific & Eastern Ry. Co., unreported opinion, (D.C.D. Oregon, Sept. 9, 1939);

In re Savannah & Atlanta Ry. Co., unreported opinion, (D.C.S.D. Ga., Feb. 5, 1938), C.C.H. Bankruptcy Law Service §51,448:

383, 424 (1940), 242 I.C.C. 523, 525 (1940); *Yosemite Valley Ry. Co. Reorg.* 244 I.C.C. 337, 418 (1940), 244 I.C.C. 239, 242 (1941).

[17] No plan has been disapproved for this reason.

In re Spokane International Ry. Co., unreported opinion, (D.C.E.D. Wash. N.D., March 2, 1940), C.C.H. Bankruptcy Law Service, §52,567;

In re Yosemite Valley Ry. Co., unreported opinion (D.C.S.D. Cal. N.D., Oct. 28, 1941).

THE RECORD SUPPORTS THE FINDINGS OF "NO VALUE"

In the court below and in the District Court, the stock interests [18] took the position that there was in fact value for the stock of the debtor and that the stock was entitled to participation. That position was taken despite the fact that the plan submitted to the Commission by the A. C. James Company provided (R. 101, 106-108) for the surrender by Western Pacific Railroad Corporation of all of the stock of the Debtor for distribution to creditors, the Reorganization Committee, and for retention in the treasury of the Company, and despite the fact that the plan submitted by the Debtor provided for the cancellation of an unsecured claim of over $5,000,000 held by Western Pacific Railroad Corporation (R. 19, 22).

The Commission's initial report (R. 194) and its report on further consideration (R. 300) are replete with factual data regarding the Debtor's property and its earnings. It appears that for the years 1926 to 1935, inclusive, the operating ratio of the Debtor—that is, the percentage of gross revenues consumed in operations—increased from 70.3% in 1926 to 83.7% in 1935 (R. 139-140). As a result the Debtor's earn-

[18] The Debtor, the Western Pacific Railroad Corporation, the owner of all stock of the Debtor, and the A. C. James Company. See *supra*, p. 23, footnote 9.

ings available for charges were decreasing and as previously pointed out (page 8) the Debtor began borrowing money to pay interest approximately two years before the filing of its petition. In no year between 1930 and 1938 were the earnings of the Debtor equal to the amount of its fixed charges at the time of the filing of its petition (R. 1064-1066). The average for those years is $1,265,539 or somewhat less than one-half the fixed charges under the present capital structure. Furthermore even the Debtor's estimates before the Commission of income available for interest for the years 1936-1940, inclusive, averaged $2,715,306 (R. 221).[19] The Commission also had before it the financial history of the Debtor (pp. 6-8 *supra*). In addition to failing to earn its interest charges, the Debtor had not been meeting its obligation to the public of maintaining its properties (R. 202-203). The financial history of the Debtor was one of debt, dividends and deferred maintenance. In addition to earnings and financial history the Commission had before it and gave consideration to the value of the Debtor's prop-

[19] The amounts forecast by witnesses for the Debtor as being available for fixed charges in the years 1936 to 1940, inclusive (I.C.C. Ex. 29; R. 221-222, 2027), together with the actual amounts so available (R. 1065-1066, 2629, 2635), were as follows:

	Estimated by Debtor	*Actual (as adjusted)*
1936	$1,524,086	$1,901,423
1937	2,342,586	1 077,407
1938	2,929,586	225,431
1939	3,652,486	1,519,916
1940	4,056,486	2,648,492

erties for rate making purposes (R. 224), book values and liabilities (R. 203-207), the Debtor's traffic (R. 207-215), traffic and revenues of subsidiaries (R. 215-218) and other factors too numerous to mention without quoting pages of the Commission's reports, particularly pages 195-224 of the record.

Throughout the proceedings the stock interests have contended that either the capitalization of the reorganized company should be larger so that there will be more securities to distribute, or the claims of the various classes of creditors, except the unsecured creditors (who received nothing under the plan), should be cut down so as to leave something over for distribution to stockholders. The increase would be brought about by disregarding earnings, or, if earnings were to be considered at all, the argument appears to be that earnings in these abnormal war years, after the close of the Commission's hearings, should be the basis rather than earnings in normal years. As for a decrease in the creditors' claims, the Debtor argued in its brief in the court below with respect to interest after the filing of the petition:

> "there are no interest *accruals* after that date. Interest actually earned, however, belongs to the lien upon which it was earned."

That argument of the Debtor apparently was not taken seriously by the Circuit Court of Appeals since in referring to claims throughout its opinion accrued and unpaid interest to the effective date of the plan was

included. In the light of this Court's decision that "interest is entitled to the same priority as principal" (*Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 527 (1941)) the question of the accrual of interest is not now open to dispute.

The Debtor's contention that there is value in the property for the stockholders has been based on the assertion that the Commission considered only depression earnings and that the present earnings, the facts with respect to which were not before the Commission, should be given such weight as to justify a scrapping of the Commission's plan and making provision for participation by the stockholders. That the Commission did not consider only depression earnings is evidenced by the Commission's reports themselves in which every relevant fact regarding the Debtor and its properties was weighed. These facts included the Debtor's own estimates of future earnings (R. 221). The Commission also had before it plans suggested by the Debtor (R. 19), by the First Mortgage Bondholders (R. 48) and by the A. C. James Co. (R. 101). Each of those plans substantially reduced fixed charges. Under the Debtor's plan, fixed interest would be $905,321 (R. 245). Under the Bondholders' plan, fixed interest would be $905,322 (R. 245). Under the James' plan, fixed interest would be $511,001 (R. 245). It will be recalled that the fixed charges on the Debtor's existing capitalization are over $3,000,000 (R. 9). In other words, not one of the interested parties even suggested that a reorganized Western Pacific could meet

the fixed charges under the present capitalization. Thus, even the opponents of the Commission's plan have agreed that creditors must make sacrifices, for they cannot be fully satisfied. In that situation the participation of stockholders is an impossibility. *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939); *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941).

Furthermore, the contention that the plan is based on depression earnings is answered by the fact that $1;181,528, the average system earnings available for interest for the five years ending December 31, 1938 (R. 1548), would not be sufficient to meet full interest on the new income mortgage bonds ($1,949,060 required) and there would be nothing for that part of the creditors' claims to be exchanged for preferred and common stock. In order to meet the fixed and contingent charges under the new capitalization, pay a 5% dividend on the preferred stock and a $3.00 dividend on the common stock, the reorganized company would have to show earnings after taxes of $4,499,898. That amount is in excess of the Debtor's earnings for any year since 1926 for which the figures were before the Commission. In other words, the Commission, in providing a capitalization of the new company, took an optimistic view of the future and provided for the issuance of securities beyond anything that could have been thought of if depression earnings had been the prime consideration. The Debtor's average earnings, as adjusted, for the ten years 1929-

1938, inclusive, were $1,265,539. If that figure were capitalized on a 5% [20] basis, the amount would be $25,230,780. In fact, the Commission's total capitalization is $65,829,422, plus 319,441 shares of no par common stock. The contention that depression earnings were the basis of the plan will not hold water.

The present high earnings, resulting from wartime traffic, were carefully considered by the District Court in these proceedings on a motion to use $3,000,000 of the Trustees' cash to retire an equal amount of Trustees' certificates. In denying the motion, the court said:—

> "The increased earnings lately reported may disappear as rapidly as they have accumulated. In these grave and uncertain times, there is no knowing what may happen in the matter of increased cost of maintenance and operation. Recently the President of the railroad has called the attention of the Trustees to the necessity for the expenditure of about $4,000,000 for necessary new equipment, and the Court will soon be asked to approve the program." [21]

Early this year the Circuit Court of Appeals for the Seventh Circuit in considering the decree of the District Court, which had confirmed the plan of reorgan-

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[20] See *Atlanta, Birmingham and Coast R. R. Co.* v. *United States*, 296 U. S. 33 (1935).

[21] *In re Western Pacific Railroad Company*, 38 F. Supp. 877 (D.C.N.D. Calif., 1941), appeal dismissed 122 F. (2d) 807 (C.C.A. 9th, 1941).

ization for the Chicago and North Western Railway Company, was confronted with the same argument by the stockholders there as was made below in this case. In dealing with the question, that court said:—

> "The unusual and extraordinary increases in revenue of carriers during the last year have made the Commission's estimate the subject of determined and vigorous attack by the stockholders. This has caused us no end of anxiety and concern. This radical change (for the better) in the past year can not and should not be ignored. Nor can we dismiss it as undisclosed by the record which deals with a more distant past. It is something we can, and should, and do, take judicial notice of. It is, we believe, temporary, and like a crop failure year, in the Northwest—which this Debtor serves—not to be taken too seriously when viewing the long future of this railroad. In making this statement we are aided by the experiences of railroads during and after the last war." *In re Chicago and North Western Railway Co.*, 126 F. (2d) 351, 364 (C.C.A. 7th, 1942).

The question of the effect to be given to the abnormal earnings of railroads in these war years was also considered by the Circuit Court of Appeals for the Sixth Circuit in an appeal from the order of confirmation of the Commission's plan for the reorganization of the Akron, Canton & Youngstown Railway Company. The Circuit Court of Appeals in that case

took the long term view as was done by the Circuit Court of Appeals for the Seventh Circuit and in disposing of the question said:

> "Appellants lay great stress on the fact that for 1940 the debtors earned $498,029.00 and that for twelve months ending October 31, 1941, the earnings available for interest and dividends were $732,190. It is conceded that these abnormal increases are solely attributable to the prosecution of the war effort of the Government. These abnormalities are not proper tests by which to measure the Commission's determination of the somewhat imponderable prospective earnings in 1937. Subsequent earnings due to unforeseeable circumstances may not be used to check the correctness of prospective earnings as determined by the Commission under the Act." [22]

The Commission in approving two recent plans of reorganization has specifically rejected the war earnings as a basis for a permanent capitalization of the reorganized company. *St. Louis Southwestern Railway Company Reorganization*, 249 I.C.C. 5 (1941), 252 I.C.C. 325 (1942); *Florida East Coast Railway Company Reorganization*, not yet reported (Finance Docket No. 13170, April 6, 1942 and August 10, 1942). In the latter decision the Commission stated:

> "In the report of April 6, 1942, Division 4 recognized the fact that 1941 earnings were influenced by the extraordinary conditions exist-

[22] *Akron, Canton & Youngstown Railway Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942).

> ing as the result of the war and in the report stated fully all considerations leading to its conclusions as to justifiable amounts of capitalization and of new general mortgage bonds. Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases sought."

The present Director of the Office of Defense Transportation, when he was still Chairman of the Interstate Commerce Commission, issued a timely warning:

> "Let me suggest, however, that those who regard these present earnings as evidence of the unsoundness of our reorganization plans may well give heed to the source from which these earnings spring and to the future conditions which are likely to flow from the same source. * * * All this in the end means burden and sacrifice for all concerned." [23]

To base a capitalization on the inflated earnings of a war economy would not only be to invite but also to guarantee future financial disaster for the reorganized company. There is an important public interest in sound capitalizations for railroad companies. If railroads are to perform the function to which their properties are primarily dedicated,[24] namely, providing safe

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[23] Hon. Joseph B. Eastman, Address before National Association of Mutual Savings Banks, Philadelphia, May 7, 1941.

[24] *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U.S. 434, 455-456 (1886); *Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 190 Fed. 609, 618 (C.C.S.D. New York, 1911).

and efficient transportation for the public, they must be so capitalized when created as to avoid, as far as possible, being involved in financial difficulties within the foreseeable future. Their capital structures should be such that new money for necessary improvements would be readily available. Otherwise, they will fail in the performance of their duty to the public. Aside, however, from the public interest in sound capitalizations the fact is that the Debtor has an unsupportable debt structure and there is no alchemy for changing a debt-ridden property into a solvent going concern which does not at the same time change its ownership unless the stockholders supply the catalytic agent—a substantial number of dollars. The dollars that might have left the Debtor a going concern went as dividends in 1921 to 1926. The stockholders took their "value" out of the properties then—if not also some properly belonging to creditors. The debt, dividends and deferred maintenance of the 1921-1926 period sapped the Debtor's vitality and spelled its eventual financial disaster. True, upon the acquisition of the stock of the Debtor by Western Pacific Railroad Corporation in 1927 the policy of paying dividends while maintenance was being deferred was changed (R. 1052). However, the damage had been done and the company was not able to make up the deferred maintenance in its properties.

The Commission was therefore unquestionably correct in finding, and the District Court in approving the findings, that the equity of the stockholders and the

claims of the unsecured creditors of the Debtor were without value; and such determination required the exclusion of these interests from participation in the reorganized company. As the Circuit Court of Appeals for the Seventh Circuit pointed out in *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754, 763 (1941):

> "* * * Neither the Commission nor the court is authorized or permitted to give these stockholders anything, if the Debtor's assets are of a value less than the aggregate of its debts. Consolidated Rock Products Co. v. DuBois, 312 U. S. 510, 61 S. Ct. 675, 685, 85 L. Ed. 982; Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 60 S. Ct. 1, 84 L. Ed. 110; Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 23 S. Ct. 554, 57 L. Ed. 931. It is not a matter of discretion. The absolute priority principle forbids it."

II

THE FINDINGS AND CONCLUSIONS OF THE COMMISSION ARE SUFFICIENT TO SUPPORT ITS ALLOCATION OF THE SECURITIES OF THE REORGANIZED COMPANY AMONG THOSE FOUND TO BE ENTITLED TO SHARE THEREIN.

THE SECURITIES AVAILABLE FOR ALLOCATION

The Commission found that the securities provided for in the plan for distribution to creditors of the Debtor "represent the equitable equivalent of the debtor's assets available for the satisfaction of claims"

(R. 316). Those securities consist of $21,219,075 of income mortgage bonds, $31,850,297 of preferred stock and 319,441 shares of no-par-value common stock (R. 316). In addition, the plan provides for the issuance of $10,000,000 principal amount of first mortgage bonds, exchangeable in part consideration for a like principal amount of Trustees' certificates, and the assumption of existing equipment obligations.

As previously pointed out, pp. 14-15, *supra*, the Commission's reports show an exhaustive study of the Debtor and its properties from every angle. Based on those studies, the Commission arrived at a number of subsidiary conclusions, which in turn form the basis for the above finding. The principal of those subsidiary conclusions, in its initial report, are:

1.

"the fixed charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and to secure 'necessary new capital in the future' " (R. 246).

2.

"We conclude, therefore, after a consideration of the debtor's past, present, and probable future earnings, that the plan of reorganization should provide for the immediate issue and sale of not to exceed $10,000,000 of new first mortgage bonds, the proceeds of which should be used to retire outstanding trustees' certificates." (R. 246-247.)

3.

"To avoid embarrassment in the securing of funds, especially for future routine additions and betterments, which are estimated by the debtor $500,000 annually, we find that the plan should provide for the creation of a capital fund out of the available net income remaining after the payment of fixed charges." (R. 250.)

4.

"On the basis of the facts heretofore recited with respect to traffic and earnings, we find that the total annual fixed and contingent interest charges of the reorganized company, plus requirements for the capital fund and sinking funds should not exceed $2,000,000 per annum." (R. 253.)

5.

"In order to allot as large an amount of new bonds as possible to present creditors, we find that the new income bonds should bear interest at the rate of 4% per annum. We further find that the principal amount of such bonds should not exceed $19,716,040." (R. 254.)

6.

"As hereinbefore stated, the debtor's estimate of income available for interest averaged $2,715,306 per year for the period 1936-40, inclusive, the maximum amount for any one year in the period (1940) being $3,769,836. That amount, with prior charges of $1,898,-

223, would permit the payment of dividends at the rate of 5% on only $37,432,000 of stock. It is obvious, therefore, that based on the most optimistic estimate of earnings of record, the capitalization of the reorganized company must be maintained within strict limits if any material return on its capital stock is to be expected and the shares of its stock are not to become mere tokens for stock market speculation. It is true that considered alone, the data pertaining to the rate-making value of the debtor's property, and its investment, would support capitalizations approximating those proposed in the three plans. We have hereinbefore stated, however, the reasons why, in our opinion, those factors can not be of controlling importance in a determination of the capital structure for the reorganized company. Considering all relevant data of record, we find that the approved plan should provide for the immediate issue by the reorganized company of not to exceed 295,740-3/10 shares of preferred stock of the par value of $100 per share, and not more than 313,703 shares of no-par-value common stock." (R. 257.)

Following a rehearing, the Commission approved an increase in the amount of income bonds from $19,716,040 to $21,219,075 and provided that the interest rate thereon should be 4½% instead of 4% as specified in its initial report. The amounts of preferred stock and common stock also were increased from 295,740-3/10 to 318,502-97/100 and

313,703 to 319,441 shares, respectively (R. 254, 257, 310).

The court below, in its opinion, does not mention any of the above quoted conclusions and very little of the great mass of factual data contained in the Commission's reports. The Court apparently thought that there was some requirement of formalism with respect to the Commission's reports. That phase of the case is discussed later (pp. 62 to 68, *infra*). True, the Commission's conclusions are not stated as "findings" would be stated in the decree of a court but there is no difficulty either in understanding them or in working from them in the setting up of a capital structure for the reorganized company. And the above quoted parts of the Commission's reports are not merely conclusions; they are, as required by Section 77, "conclusions and reasons therefor." True, those parts do not contain the full statement of the reasons for the conclusions. That would require the quotation of the Commission's reports almost *in toto*.

THE ALLOCATION OF NEW SECURITIES IS FAIR AND EQUITABLE

On the basis of its many other conclusions[25] and its consideration (R. 241-244) of the requirements of Section 77 the Commission in its report on further consideration concluded:—

> "We find that the plan of reorganization approved in our report and order of October 10,

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[25] See, for example, R. 241-281, 307, 309, 312, 315, 317, 324, 329, 336, 340, 345, 347, 353.

1938, supra, modified as herein indicated, will meet with the requirements of section 77 (b) and (e) of the Bankruptcy Act, as amended, and will be compatible with the public interest" (R. 354).

Under the plan approved by the Commission $2,750,050 principal amount of equipment obligations were to be left undisturbed, and $10,000,000 of new first mortgage bonds issued to fund the $10,000,000 of Trustees' certificates held by Reconstruction Finance Corporation. These two allocations having exhausted the fixed interest securities available under the new capitalization, the Debtor's old First Mortgage Bondholders, in recognition of their first lien upon substantially all of the Debtor's properties, were allocated $19,716,040 principal amount of new income bonds, $29,574,060 par value of new preferred stock and 230,593 shares of new common stock without par value, and Reconstruction Finance Corporation, in consideration of its exchange of the Trustees' certificates held by it for new first mortgage bonds on a par for par basis, was given in respect of its claim on the Debtor's secured notes treatment on the same basis as the old First Mortgage Bondholders.[26] While the Debtor's First Mortagage bondholders were thus required to make substantial sacrifices, compensation thereof was provided in the allocation of the new stock to them at a lower price than that at which it was allocated to junior interests, in the opportunity to share through stock

[26] The practical adjustment involved in this procedure is discussed *infra*, pp. 56-62.

ownership in possible earnings of the reorganized company, and in the control of that company through the ownership of a substantial majority of its preferred and common stock.

In consideration of their first lien upon certain assets of the Debtor, and of their junior claims upon the Debtor's assets as a whole, the Commission under its approved plan determined that there was allocable in respect of the Debtor's General and Refunding Mortgage Bonds $732,010 principal amount of new income bonds, $1,147,955 par value of new preferred stock and all of the new common stock remaining after prior allocations. All of the General and Refunding Mortgage Bonds were pledged with the Debtor's three note creditors. The Commission found that the securities allocable to such Bonds were inadequate in value to satisfy the claims of the note-holders and that the value of each of the claims was accordingly proportionate to the collateral securing it (R. 271). The new securities —except for the separate treatment of the claim of Reconstruction Finance Corporation explained below [26a] —were therefore divided between the Debtor's noteholders in proportion to the amount of General and Refunding Mortgage Bonds held by them as collateral for their respective notes.

[26a] See pp. 56-62, *infra*. The income bonds and preferred stock which Reconstruction Finance Corporation would have received had it been solely a noteholder were included in those allocated to it on the basis described below, and the shares of common stock allocable to it as a noteholder in excess of those in fact allocated to it were in effect reallocated to the other noteholders.

Other than the expedient that was necessarily resorted to from practical considerations to provide for the taking care of the outstanding Trustees' certificates, the allocation of the new securities was comparatively simple because of the fact that the claims (other than those found to have no value, the equipment obligations, which were to be assumed, and the Trustees' certificates) were based on First Mortgage Bonds of the Debtor and on notes of the Debtor, secured by its General and Refunding Mortgage Bonds. The first step, therefore, involved a determination of the properties subject to the liens of the two mortgages.

In its original report the Commission, after considering the granting clauses of the two mortgages, concluded that the Debtor's First Mortgage bondholders "should be considered as having a first lien upon practically all of the assets of the Debtor." (R. 267). Upon rehearing, the question of the liens of the two mortgages was reargued and upon reconsideration the Commission determined that certain assets, subject to the Debtor's General and Refunding Mortgage as a first lien, required "a re-examination of the allocation of new securities to the holders of the debtor's notes secured by the general and refunding bonds." (R. 312-313). In general, the First Mortgage was determined to be a first lien on the Debtor's lines of railroad. The Refunding General and Mortgage was determined to be a first lien on:

1. The funded debt ($508,278) and 97.5% of the capital stock of Tidewater Southern

Railway Company, an operating railway company,

2. $270,000 principal amount of bonds and $360,834 par value of the stock of Central California Traction Company.

3. $465,300 par value of capital stock of Alameda Belt Line, and

4. Cash in the amount of $223,732 (R. 313).

The Debtor's holdings in the Central California Traction Company represent a one-third ownership along with the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Company (R. 314). The Debtor's holding in the Alameda Belt Line is a one-half interest, the other half being owned by the Atchison, Topeka & Santa Fe Railway Company (R. 315).

Much was made in the court below of the contention that the earnings of the Tidewater Southern Railway Company, in effect wholly owned by the Debtor, justified a larger participation by the General and Refunding Mortgage bondholders in the income bonds of the reorganized company. This subsidiary and the character of its earnings and properties, the nature of its traffic and its dependence upon the Debtor, were carefully considered by the Commission, which concluded that the allocation of additional securities to those provided in its report on further consideration would not be justified. Such a contention also overlooks the fact that Central California Traction Company and Alameda Belt Line, whose securities are likewise subject to the first lien of the General and Refunding Mort-

gage, are poor relations and that it is necessary for them to be supported. For example, in 1934 and 1935, although the Central California Traction Company reported net income of $48,690 and $6,314 respectively, the parent companies at the same time were called upon to contribute to its support $91,638 in 1934 and $61,373 in 1935 (R. 315). During the same years the contributions of the two parent companies of the Alameda Belt Line were $18,305 and $27,727 while the Company was reporting no net earnings in 1934 and $480.00 in 1935. For the ten year period 1929-1938, inclusive, the portions of the income and profit and loss deficits of the Central California Traction Company absorbed by the Debtor, amounted to $319,194, an average of $31,919 per year (R. 1101). For the eleven year period 1928-1938, inclusive, the portions of the deficits of the Alameda Belt Line, absorbed by the Debtor, aggregate $243,035, an average of $22,095 per year (R. 1105). If the allocation of the income bonds had been made on the basis of the average earnings applicable to the properties determined to be subject to the two mortgages as first liens, reducing the earnings of the Tidewater by the average contributions of the Debtor to the support of the other two companies and allowing 4% interest on the cash in the hands of the mortgage trustee, the allocation would be within a hair's breadth of that made by the Commission.

On the basis of a complete statement of the elements of value, other factual data and earnings of the assets securing the General and Refunding Bonds (R. 313-

315), the Commission concluded in its report on further consideration that "the creditors secured by the general and refunding mortgage bonds should be awarded new income mortgage bonds in the amount of $732,010, and new participating preferred stock of a par value of $1,147,955" (R. 315), as well as the shares of new common stock available after satisfying prior claims. In view of the inadequacy of their security, and subject to the practical provision with respect to RFC's claim, these securities, as pointed out above, were then allocated to the secured noteholders in proportion to their collateral.

THE ALLOCATION OF NEW SECURITIES TO RECONSTRUCTION FINANCE CORPORATION IS FAIR AND EQUITABLE

The allocation of new securities to Reconstruction Finance Corporation is one of the subjects of attack on the Commission's plan.

At the time the plan was approved, Reconstruction Finance Corporation (hereinafter sometimes called RFC) held and now holds certificates of indebtedness issued by the Trustees, in the then principal amount of $10,000,000 (reduced to $9,625,000 as of August 15, 1942). These certificates are secured by a first lien on all the property of the Debtor, rank as expenses of administration and are entitled to payment in cash. That is not in dispute. RFC also holds notes of the Debtor which, with accrued interest to the effective date of the plan, January 1, 1939, amounted to $3,862,869 (R. 391). Those notes are secured by $10,-

750,000 principal amount of the Debtor's Refunding and General Mortgage Bonds (R. 225)."[27]

The plan treats the RFC position (Trustees' certificates and secured notes) as a whole by providing:

> "3. The Reconstruction Finance Corporation shall receive in respect of the $10,000,000 of new money provided for in subdivision O (or the surrender of trustees'-certificates at their principal amount and accrued interest, to a like amount) and its existing claim in the principal amount of $2,963,000, together with $899,870 of interest accrued and unpaid thereon to Janu-

[27] The notes are also secured by all right, title and interest of the Western Pacific Railroad Corporation in 150,000 shares of the common capital stock of The Denver & Rio Grande Western Railroad Company (R. 226). The stock of The Denver & Rio Grande Western Railroad Company has been found to have no value in the reorganization proceedings of that Company (*Denver & Rio Grande R. R. Reorganization*, 233 I.C.C. 515, 580 (1939), 239 I.C.C. 583 (1940), (Finance Docket No. 11002, July 13, 1942, not yet reported). The Railroad Credit Corporation also holds some collateral put up by Western Pacific Railroad Corporation (the Debtor's parent company) and it was argued below that the plan was defective in not making provision for the disposition of the so-called "third party" collateral. The answer is so obvious that we merely mention it and point out that the confirmation of a plan is court action with respect to property and under Section 77 the jurisdiction of the court extends only to "the debtor and its property" (Section 77(a)). If the plan had attempted to deal with the "third party" collateral, the confirmation of the plan would have been beyond the jurisdiction of the court. *Cf. In re Diversey Building Corp.*, 86 F. (2d) 456 (C.C.A. 7th, 1936), *certiorari* denied 300 U. S. 662 (1937); *In re Nine North Church Street, Inc.*, 82 F. (2d) 186 (C.C.A. 2d, 1936). Accordingly, the plan provides for the surrender only of collateral "pledged by the Debtor." (R. 345, 394.)

ary 1, 1939, approximately $10,000,000 of new first-mortgage 4 percent bonds, series A (being 100 percent of said new money); $1,185,200 of income-mortgage 4½-percent bonds, series A (being 40 percent of the principal of said claim); $1,777,800 of 5-percent preferred stock, series A (being 60 percent of the principal of said claim); and 15,788 shares of common stock (being common stock taken at the price of $57 a share for 100 percent of said accrued and unpaid interest)" (R. 391).

If the treatment of the Trustees' certificates and the Debtor's secured notes held by RFC could be separated, as the respondents have contended they should be, and the new first mortgage bonds considered as allocated alone to the Trustees' certificates and the income bonds, preferred and common stock which RFC receives under the plan, allocated to the secured claim alone, three things would be clear:

1. That the RFC as the holder of the Trustees' certificates, with their inherent right of payment in cash, was not being fully compensated,

2. That the allocation of income bonds and preferred stock in respect of the General and Refunding Mortgage Bonds held by RFC as collateral to the Debtor's notes is on a more favorable basis than the allocation of those securities to The Railroad Credit Corporation and A. C. James Co., likewise holders of the General and Refunding Mortgage Bonds as collateral for the Debtors' notes held by them, and

3. That the allocation of common stock to

RFC is not on as favorable a basis as the allocation to The Railroad Credit Corporation and A. C. James Co.

The reason for the treatment of the RFC position as a whole was the necessity of either providing for $10,000,000 of new money to retire the Trustees' certificates or providing in some way adequate compensation for the surrender of the senior rights inhering in the Trustees' certificates. The payment in cash was not possible other than through the sale of new first mortgage bonds, and obviously, first mortgage bonds of a comparatively small railroad such as the Debtor, with a rather unfavorable financial history, would not sell at par. Also there were only $10,000,000 of such bonds available. That the new bonds would not sell at par was recognized by all parties. The Debtor's original plan provided that $10,000,000 of new money should be furnished by RFC and in consideration thereof RFC would receive for its claim on the secured notes of the Debtor held by it, the same treatment as that accorded to the holders of the Debtor's First Mortgage Bonds (R. 22, 28-29). The first plan (R. 85) filed by the Institutional Bondholders Committee provided for a stock bonus of 150,000 shares of new common stock to the purchaser of $10,000,000 principal amount new first mortgage bonds. The A. C. James Co. plan (R. 104) contemplated a similar bonus and a second plan filed by the Institutional Bondholders Committee suggested the very treatment of the RFC position provided for in the Commission's plan. The suggestion of the Bondholders Committee was:—

"In consideration of R.F.C.'s providing said new money by so purchasing said First Mortgage Bonds, Series A, R.F.C.'s existing claim against the Company, amounting as of January 1, 1939, to $3,862,870 ($2,963,000 principal and $899,870 interest) and represented by notes secured by General and Refunding Mortgage Bonds of the Company and other collateral, shall be provided for under the Plan in like securities and in like proportions as those given holders of the Company's existing First Mortgage Bonds;" (R. 806-807).

If no other consideration were involved, RFC, The Railroad Credit Corporation and A. C. James Co. would be entitled to treatment in proportion to the General and Refunding Bonds held by each as collateral. On that basis, RFC would receive, for its secured notes:—

$414,175 new income mortgage bonds
$649,518 new preferred stock
45,148 shares, new common stock

The Commission's plan, as has been noted, treats as a whole the claims of RFC on the secured notes and on the Trustees' certificates. If the allotment of new income bonds and stock to RFC under the plan were considered as being in exchange *only* for the Debtor's notes and the General and Refunding Bonds securing them, the effect of the Commission's plan would be to allot therefor:—

$1,185,200 new income mortgage bonds
$1,777,800 new preferred stock
15,788 shares, new common stock

The difference is $771,025 *more* income bonds, 11,282.82 *more* shares of preferred stock and 29,360 shares *less* of common stock. That difference has been referred to as the "RFC preference."

The record before the Commission was full and complete and it is submitted that on the basis of the facts with regard to the Debtor, its earnings, properties, and future prospects hereinbefore described, and of the proposals of various of the parties themselves, the Commission was well justified in concluding that the new first mortgage bonds were not on a parity with the Trustees' certificates now held by RFC and that the provision contained in the approved plan represented a reasonable adjustment of RFC's total rights. In addition to the detailed record before the Commission, testimony was introduced through two expert witnesses at the hearing in the District Court as to the factors to be taken into consideration in determining the market value of the proposed new securities. The testimony conclusively established that the new first mortgage bonds would have a market value substantially less than par and would probably sell for approximately 85 or 90 (R. 1530-1536). Assuming that the new first mortgage bonds would sell at 90, RFC would receive $1,000,000 less than that to which it is entitled for the Trustees' certificates, if the certificates were to be surrendered in consideration of the same principal amount of new first mortgage bonds alone. The value of $771,025 principal amount of new income bonds and of 11,282.82 shares of new preferred stock less the value of 29,360 shares of new common stock

would have to be $1,000,000 in order that RFC be fully compensated for the surrender of its rights as holder of the Trustees' certificates. The value may well be less and upon the argument we will ask the Court to take judicial notice of the prices at which similar securities of comparable railroad companies are actually selling on the market.

The treatment of the position of RFC is one of those "practical adjustments" which are part and parcel of the reorganization process. As this Court said in *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 529 (1941):

> "Practical adjustments, rather than a rigid formula, are necessary. The method of effecting full compensation for senior claimants will vary from case to case."

The practical nature of the adjustment is rather conclusively established by the fact that, as above pointed out, it is in accordance with the suggestion of the Debtor and the Institutional Bondholders Committee, consisting of owners of the Debtor's First Mortgage Bonds. The adjustment is still supported by the Institutional Bondholders Committee.

THE COMMISSION'S REPORTS MET ALL FORMAL REQUIREMENTS

The court below, in requiring some sixteen separate findings of dollars and cents values, sets up requirements of formalism with respect to the Commission's reports which are not warranted, we submit, by the statute or applicable decisions of this Court. On the

contrary, the statutory provisions and the applicable principles of law as determined by this Court require simply that valuations should be made in such instances and to such extent as the practical necessities of the particular case may require. Impracticable formality in the statement of the Commission's conclusions in this connection is not required.

Section 77 contains no requirement that findings shall be made by the Commission on all matters, but on the contrary provides broadly that in its report "the Commission shall state fully the reasons for its conclusions." This is in accordance with the general requirements for action by the Commission in other matters subject to its jurisdiction, as to which Section 14 of the Interstate Commerce Act now requires only, except in cases where damages are awarded, that the Commission shall file a written report stating "the conclusions of the Commission together with its decision." [28]

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[28] Prior to 1906 Section 14 required that the Commisison's report "shall include the findings of fact upon which the conclusions of the Commission are based," and was amended in that year to eliminate this requirement.

Even in damage cases impractical formality in the Commission's findings is not now required. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412 (1915); *Mills* v. *Lehigh Valley* R. R., 238 U. S. 473, 481 (1915). In the former case this Court stated "True, the findings in the original report are interwoven with other matters and are not expressed in terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings of fact from the other matter or in fully understanding them." (236 U. S. 428.)

Thus in *United States* v. *Louisiana*, 290 U. S. 70 (1933), a rate case, this Court stated that "there are no formal requirements for the findings to be made by the Commission in this type of case"; and while not commending the form of the particular report, the Court further held:

> "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (290 U. S. at 80)

This decision, and the long line of cases in accord [29] have been specifically followed in Section 77 reorganizations by the Circuit Court of Appeals for the Sixth Circuit in *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942), and in numerous District Court cases in which plans of reorganization based upon essentially the same character of report as that in the present case have been approved.[30]

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[29] *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74 (1930); *Florida* v. *United States*, 282 U. S. 194 (1931); *United States* v. *Baltimore and Ohio Railroad Co.*, 293 U. S. 454 (1935); *Pisceglia* v. *United States*, 24 F. Supp. 355 (D. C. S. D. N. Y., 1938); *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 916 (D. C. Texas, 1939).

[30] See cases cited *supra*, pp. 34-36.

Although in *In re Chicago, Milwaukee, St. Paul and Pacific*

The contention of the Circuit Court of Appeals that findings of dollar valuation on all questions of allocations are for some reason necessary is clearly untenable. It is understood, of course, that the findings and conclusions of the Commission with respect to the interests and claims among which allocation of new securities is to be made, and with respect to the allocation itself, must be adequate for a fair and equitable allocation, and to enable the District Court, when the plan is certified to it to determine whether the statutory standard has been applied. It is submitted, however, that insistence upon universal dollar valuations in this connection is not only unnecessary but impracticable, and indeed that such valuation would in many circumstances tend to complicate rather than simplify the problems involved.[31]

We have demonstrated elsewhere in this brief that the finding of the Commission, approved by the District Court, that the equity and interests of the unsecured creditors and stockholders of the Debtor had

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Railroad Company, 124 F.(2d) 754 (C.C.A. 7th, 1941), the Circuit Court of Appeals for the Seventh Circuit appeared to agree with the Court below as to the necessity of further findings of value for the allocation of the new securities among the creditors (but not with respect to the exclusion of stockholders upon the basis of the finding that their interests were without value), the same Court in *In the Matter of Chicago and North Western Railway Company*, 126 F.(2d) 351, (C.C.A. 7th, 1942), recognized that its objection presented only "a procedural question," which it is submitted cannot stand in the light of the statutory provisions and decisions above referred to.

[31] See Bourne, *Findings of "Value" in Railroad Reorganizations*, 51 Yale L. J. 1057 (1942).

no value was unquestionably adequate to support their exclusion from participation in the reorganized company, and that an additional attempted finding of the exact dollar value of the Debtor's assets would have served no useful purpose. Similar situations may well exist as between senior and junior creditors. Conversely, where it is not controverted that a senior issue is fully satisfied, or that a junior issue has received all that remains after such satisfaction, is it not unnecessary to place a dollar valuation upon the property or securities received by the junior issue? And where the contributions of different mortgage divisions to the earning power of the total enterprise are clearly shown, may not the new securities, in the application of the determination of this Court in *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510 (1941), that "the criterion of earning capacity . . . is the essential one," be distributed essentially on the basis of such contributions without attempting the intermediate formality of a dollar valuation?

This is not to say that dollar valuations, where it is practicable to make them, may not be desirable or helpful under some circumstances. On the other hand, differences in the source and stability of the earnings capitalized, differences in the relative contribution of particular mortgage divisions to the total income of the enterprise at various earnings levels, controversies over the rate of capitalization to be applied and other circumstances may result in attempted dollar valuations, particularly of parts of a railroad system, in effect adding additional complications rather than constituting a help

toward the solution of the problem of allocating the securities of the reorganized company. The desirability and usefulness of an attempted dollar valuation is also affected by the type of the enterprise involved and the practicability of making such a valuation. This is particularly applicable to railroads, as to which this Court has expressly recognized that "* * * railroads, unlike farms and city lots and stocks and bonds, are not objects of exchange. The very notion of a 'full cash value' for a railroad is in many respects artificial. See 1 Bonbright, *The Valuation of Property*, pp. 511-632. Whatever may be the pretenses of exactitude in determining such a 'value', to claim for it 'scientific' validity, is to employ the term in its loosest sense." *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U. S. 362, 370 (1940).[32]

The decision of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510 (1941), contains nothing to the contrary and indeed supports the conclusions just stated. The essential difficulty in the *Consolidated Rock Products* case was not the form of the opinion of the District Court approving the plan, but the absence of the essential evidence required to

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[32] "The ascertainment of the value of a railway system is not a matter of arithmetical calculations and is not governed by any fixed and definite rule. Facts of great variety and number, estimates that are exact and those that are approximations, forecasts based on probabilities and contingencies have bearing and properly may be taken into account to guide judgment in determining what is the money equivalent—the actual value—of the property." *Rowley* v. *Chicago & N. W. Ry. Co.*, 293 U. S. 102, 109 (1934).

sustain it. In the present case the Commission has rendered a detailed report and a supplemental report on further consideration in which, on the basis of the full and complete record made before it, it has "stated fully the reasons for its conclusions" on all matters here in question. Both in determining the aggregate capitalization of the reorganized company and in allocating new securities the Commission, recognizing the principle later definitely established by this Court in the *Consolidated Rock Products* case, gave dominant weight to the earning capacity of the system and of the property subject to its mortgages. In allocating on this fundamental basis the Commission, as has been demonstrated in our discussion of the fairness of the plan, made and applied all determinations of value necessary to assure a fair and equitable allocation without the necessity of making the formalistic dollars and cents valuations demanded by the Circuit Court of Appeals. The Commission has also specifically found in accordance with the statutory requirements (Section 77(d)) that the plan approved by it is fair and equitable and otherwise complies with the requirements of subsection (d) and (e) of Section 77, and will be compatible with the public interest. There is nothing in the statutory provisions or the requirements of due process which demands more.

III

THE CIRCUIT COURT OF APPEALS MISCONCEIVED THE RELATIVE FUNCTIONS OF THE COMMISSION AND THE DISTRICT COURT.

The Circuit Court of Appeals' view of the relative functions of the Commission and the District Court was stated to correct what the Circuit Court of Appeals considered "a possible misconception" on the part of the District Court regarding the expert character of the Commission in railroad matters. The District Court, in its opinion, had said:

> "It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." (R. 1588; 34 F. Supp. at 501.)

This statement, said the Circuit Court of Appeals, "indicates a possible misconception" (R. 2672; 124 F. (2d) at 140), and after quoting the provisions of Section 77(e) the Circuit Court of Appeals stated its views as follows:

> "In determining whether a plan of reorganization satisfies the requirements of subsection e, the court is not concluded by any determination made by the Commission, but may, and

> must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under §77 rests on the Commission, not on the court." (R. 2674; 124 F. (2d) at 140.)

In effect the position of the Circuit Court of Appeals is that the Commission on the record before it should make detailed dollar and cents valuations of properties, claims, new securities, etc., and that upon receiving the record certified to it by the Commission the District Court should independently and *de novo*, disregarding even the expert character of the Commission, again make detailed dollar and cents valuations of the same properties, claims, new securities, etc. If the determinations thus made by the Court should happen to agree with those made by the Commission, then and only in that event would the Court be in a position to approve the plan.

Obviously this view of the relationship between the Commission and the District Court is utterly inconsistent with the repeated decisions of this Court, which have recognized that the determinations of the Interstate Commerce Commission are entitled to "the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company* v. *Interstate Commerce Commission*, 206 U.S. 441, 454 (1906). Indeed, it hardly seems necessary to cite to the Court at this date

the long line of cases [33] in which as summarized in *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139 (1939) this Court has held that "even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrowed. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestible." And in the very recent case of *Gray* v. *Powell*, 314 U.S. 402, 412 (1941), this Court has warned that "It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." The view of the court below as to the functions of the Commission in railroad reorganizations would not only reduce that agency to a "mere fact-finding body," but would permit the courts then to disregard the facts which the Commission had found.

[33] E. g., *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441 (1906); *Interstate Commerce Commission* v. *Illinois Central R. R. Co.* 215 U. S. 452, 471 (1910); *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541 (1912); *Manufacturers Ry. Company* v. *United States*, 246 U. S. 457 (1918); *United States* v. *Illinois Central Railroad*, 263 U. S. 515 (1924); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271 (1926); *Virginian Railway Company* v. *United States*, 272 U. S. 658, 665 (1926); *Assigned Car Cases*, 274 U. S. 564 (1927); *New York Central Securities Co.* v. *United States*, 287 U. S. 12, 29 (1932); *Atlanta, Birmingham and Coast R. R. Co.* v. *United States*, 296 U. S. 33 (1935); *Rochester Telephone Corp* v. *United States*, 307 U. S. 125 (1939).

That the view of the Circuit Court of Appeals was erroneous is established by the provisions of Section 77 itself, and its historical background. Section 77, under which railroad reorganizations were brought for the first time within the provisions of the Bankruptcy Act, was enacted in order to remedy a long series of abuses in prior equity receivership proceedings relating to railroads, which had resulted in unsound capital structures, excessive allowances of fees and lack of consideration of the public interest. While under Section 20a of the Interstate Commerce Act (49 U.S.C., Sec. 20a(2)), the Commission had jurisdiction over the issuance of securities by railroads, it had no direct power over the plan of reorganization itself, and was frequently placed in a very embarrassing position by the practice of reorganizers not to make application under Section 20a until substantially all other steps in the reorganization had been completed and the plan was on the verge of final consummation.[34] This situation was brought particularly to public attention during the 1925-1928 reorganization of the Chicago, Milwaukee and St. Paul Railway Company.[35]

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[34] See *Denver & Rio Grande Western Reorganization*, 90 I.C.C. 141, 158 (1924); *Chicago, Milwaukee and St. Paul Reorganization*, 131 I.C.C. 615, 671 (1928).

[35] *United States* v. *Chicago, Milwaukee and St. Paul Railway Company*, 282 U. S. 311 (1931). Section 77 was avowedly intended to write into law the dissenting opinion in that case. See the remarks of Representative La Guardia, the manager of bill, upon the floor of the House in 76 Cong. Rec. 2924.

In enacting Section 77 Congress sought to remedy these evils by the introduction in the public interest of an administrative agency into railroad organizations and the strengthening of the power of that agency to deal with the abuses which had previously existed. The Interstate Commerce Commission was utilized as the appropriate administrative tribunal because of its specialized knowledge of railroad problems and its long experience in the field. Indeed, when Section 77 was under consideration there was a considerable body of opinion in favor of entirely withdrawing control of railroad reorganizations from the Courts and lodging such control with the Interstate Commerce Commission. This was recognized by this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79, 86-87 (1939), in which the Court stated:

> "Until the amendment of March 3, 1933, railroads were outside the Bankruptcy Act. But the long history of Federal railroad receiverships, with the conflicts they frequently engendered between the federal courts and the public, left an enduring conviction that a railroad was not like an ordinary insolvent estate. Also an insolvent railroad, it was realized, required the oversight of agencies specially charged with the public interest represented by the transportation system. Indeed, when, in the depth of the depression, legislation was deemed urgent to meet the grave crisis confronting the railroads, there was a strong sentiment in Congress to withdraw from the courts control over insolvent rail-

roads and lodge it with the Interstate Commerce Commission. Congress stopped short of this remedy. But the whole scheme of §77 leaves no doubt that Congress did not mean to grant to the district courts the same scope as to bankrupt roads that they may have in dealing with other bankrupt estates.

"The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission. From the requirement of ratification by the Commission of the trustees appointed by the court to the Commission's approval of the court's plan of reorganization the authority of the court is intertwined with that of the Commission." [36]

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[36] Accordingly, as summarized by this Court in the footnote to the statement quoted in the text: "Section 77(c)(1) requires the appointment of trustees to be ratified by the Commission; §77(c)(2) gives the Commission supervision over the compensation paid to trustees and their counsel; §77(c)(3) permits the issuance of trustees' certificates only with the Commission's approval; §77(c)(9) permits the Commission, on request of the court, to investigate facts pertaining to mismanagement of the debtor; §77(c)(10) empowers the Commission to set up accounts for the allocation of earnings among the various portions of the debtor's lines; §77(c)(11) empowers the Commission to file reports as to the debtor's property, prospective earnings, etc., and gives to the facts stated in such reports a presumption of correctness; §77(c)(12) gives the Commission a supervision over allowances for the expenses of various parties in interest in connection with the reorganization proceedings; §77(d) and 77(e) give to the Commission control over any proposed plan of reorganization; §77(p) gives to the Commission control over the solicitation of proxies or deposit agreements."

To the same effect is *Warren* v. *Palmer*, 310 U. S. 132, 138 (1940) where this Court stated that "the judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."

With regards to plans of reorganization, the debtor's plan is required to be filed simultaneously with the Court and the Commission. Other plans may be filed by specified percentages of creditors and stockholders, or by any party in interest with the consent of the Commission. If a plan filed with the Commission is considered by it to be prima facie impracticable, it receives no further consideration. Except in this event, public hearings on the proposed plan of reorganization are held before the Commission at which opportunity is given to any interested party to be heard and following which the Commission renders a report and order approving a plan (which may be different from any proposed in the proceedings) which will in its opinion meet the requirements of sub-sections (b) and (e) of Section 77 and will be compatible with the public interest.

Sub-section (b) describes broadly what the plan of reorganization may contain. In finding that the plan meets the requirements of sub-section (e) the Commission is required to find that it "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of

the law of the land regarding the participation of the various classes of creditors and stockholders." [37] Subsection (e) also provides that if it shall be necessary to determine the value of any property for any purpose under Section 77, such value shall be determined by the Commission in the manner there provided. Under the same sub-section the Commission is authorized to find that the interests of any class of creditors or stockholders are not adversely and materially affected by the plan, or (as alternatives to a specific finding of insolvency) that the equity or interests of such class of creditors or stockholders has no value, or that the plan provides for the payment to such creditors or stockholders of an amount not less than the value of their equity or interests. If any such finding be affirmed by the court, as hereinafter described, submission of the plan to such class of creditors or stockholders for acceptance or rejection is not to be required. In addition to the foregoing findings under sub-sections (b) and (e) the Commission, as has been pointed out, is required to find that the plan approved by it "will be compatible with the public interest."

When the plan so approved by the Commission is certified to the court objections and claims for equitable treatment may be filed by all parties in interest and a hearing, as was done in the present case, is to be held

[37] In addition, subsection (e) contains certain requirements as to expenses and costs of administration of the proceedings, and regarding the provisions made in the plan for claims of the United States.

thereon. Following such hearing the court is to approve the plan, if satisfied that it meets the requirements next to be described. If the court for any reason should disapprove the plan, it is not authorized to make changes or modifications therein, but has as its only alternatives the reference of the proceedings back to the Commission or the dismissal thereof.

In approving the plan certified to it by the Commission the Court is required to find that it complies with the provisions of sub-section (b) above referred to and "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."[38] No provision is made, it will be noted, for a finding by the court that the plan "will be compatible with the public interest"; nor is the court, as distinguished from the Commission, specifically authorized to pass upon the valuation of the property of the Debtor for reorganization purposes. In the event of findings by the Commission that a particular class of creditors or stockholders is not materially adversely affected by the plan, or that the equity or interests of such creditors or stockholders is without value, the statute provides that if such determination is "affirmed" by the court

[38] The findings with reference to the expenses and allowances involved in the proceeding, and with respect to provision for the claims of the United States, are applicable to the court as well as to the Commision.

submission of the plan to such creditors or stockholders will not be required.

In two decided cases the Commission's determinations of capitalization and value under Section 77 have been held conclusive where not arbitrary or exceeding constitutional limitations. *Akron, Canton & Youngstown Railway Company* v. *Hagenbuch*, 128 F. (2d) 932 (C.C.A. 6th, 1942); *In re Erie Railroad Company*, 37 F. Supp. 237, 243-245 (D.C.N.D. Ohio, 1940). In the *Akron, Canton & Youngstown* case the Circuit Court of Appeals for the Sixth Circuit stated:

> "The duties imposed on the courts and the powers conferred on the Interstate Commerce Commission under this Section of the Act, when construed in relation to other Sections, are separate and distinct. As to some matters under the Act, such as the determination of value, a broad discretion is lodged in the Interstate Commerce Commission and the court does not sit as a board of revision to substitute its judgment for that of the Commission. In such matters, the judicial inquiry into the facts goes no further than to ascertain whether there is substantial evidence to support the findings of the Commission and the question of the weight of the evidence in determining such matters lies with the Commission when acting within its statutory authority. *Palmer* v. *Massachusetts*, 308 U. S. 7, 87, 60 S. Ct. 34, 84 L.Ed. 93. Section 77, sub. d., 11 U. S. C. A. §205, sub. d., provides that the Commission 'shall approve a plan . . . that will in its opinion meet with the requirements of subsections (b) and (e) of

this section, and will be compatible with the public interest.' Similar terms are found in paragraph (2) of Section 20(a) and paragraph (3) of Section 5 of the Interstate Commerce Act, 49 U. S. C. A., §§(5) (3), 20a(2), which were in effect before the passage of the Act in question. The validity of the Act conferring such power on the Commission was approved in New York Central Securities Corporation v. United States, 287 U. S. 12, 24, 53 S. Ct. 45, 77 L. Ed. 138. Historically, the power to value railroad properties for rate making and capitalization purposes has always been lodged in the Interstate Commerce Commission.

"There is nothing in the present Act which would indicate that the Congress intended to deprive the Commission of any of the powers it had so long exercised in valuing railroad properties for capitalization purposes.

"The determination of the value of the properties, and the amount and character of capitalization, are legislative functions affecting the public interest and are exclusively within the province of the Commission under the Act. The only qualification is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly within the bounds of the Constitution and not arbitrarily." (128 F. (2d) at 940.)

This appears also to have been the view of the District Court in the present case (R. 1596-1597; 34 F. Supp. at 501, 504), although the District Court in addition made expressly clear (R. 1597; 34 F. Supp. at 504-505) that it was itself wholly in accord with the

conclusions reached by the Commission upon all issues. Whether applied to all matters passed upon by the Commission or considered as particularly applicable to determinations of capitalization and value and other matters directly affecting the public interest, it is also directly in line with the numerous decisions of this Court above referred to in which findings of the Interstate Commerce Commission upon a controversy within its jurisdiction, supported by substantial evidence, have been held to constitute a determination by an administrative tribunal not open to review. Naturally, as all of the cases recognize and the opinion of the District Court in the present proceedings expressly points out, this interpretation of the relative functions of the Court and the Commission is subject to the qualification that the Court "shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily." (R. 1596; 34 F. Supp. at 504). The District Court found, and we have demonstrated elsewhere in the present brief, that these requirements were fully complied with.

In numerous other cases under Section 77 the lower courts, without directly passing upon the exact weight to be given the Commission's findings, have repeatedly emphasized that, directly contrary to the views of the Circuit Court of Appeals in the present case, the Commission's determinations are entitled to great weight as those of an expert administrative body

"appointed by law and informed by experience."[39] *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 124 F. (2d) 754 (C.C.A. 7th, 1941); *In re Chicago and North Western Railway Company*, 35 F. Supp. 230 (N.D. Ill., 1940), affirmed 126 F(2d) 351 (C.C.A. 7th, 1942); *In re Denver and Rio Grande Western Railroad Company*, 38 F. Supp. 120 (D.C., Colo., 1941); *In re Missouri Pacific Railroad Company*, 39 F. Supp. 436 (D.C.E.D., Mo., 1941); *In re St. Louis-San Francisco Railway Company*, not yet reported (D.C.E.D., Mo., July 25, 1942).

Thus in the *Milwaukee* case the Circuit Court of Appeals stated:

> "* * * While question-arousing arguments have been advanced for and against the plan, which invite lengthy discussion by us, the outstanding, unchallenged fact is that the conclusions of the I. C. C., approved by the District Court, are entitled to great weight, and we are hardly justified in substituting our judgment for that of those tribunals, save where clearly satisfied that their judgment is erroneous, or is based upon incorrect assumptions, or where an incorrect rule or principle is applied."[40] (124 F. (2d) at 762.)

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[39] *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 441, 454 (1906).

[40] The District Court in the Milwaukee case, whose decision was reversed on other grounds by the Circuit Court of Appeals, stated in this connection:

> "It is apparent that it was intended by the law that the bankruptcy court and the Interstate Commerce Com-

The Interstate Commerce Commission has through long experience acquired a highly specialized knowledge of railroad problems, and has for many years been charged with the protection of the public interest in this field. Obviously the Commission, through the training and experience of its members and its specialized knowledge and facilities, is peculiarly qualified for the consideration of questions of the character here involved, and was specially charged with their consideration by Congress under the provisions of Section 77. These qualifications of the Commission, as has been seen, were directly recognized by the District Court in the present case (R. 1588; 34 F. Supp. at 501), and it is submitted that far from indicating, as

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mission should cooperate to the end that a fair and equitable plan of reorganization might be provided. Such purpose has been declared in a recent decision of the Supreme Court of the United States in Warren v. Palmer, 310 U.S. 132, 60 S. Ct. 865, 85 L. Ed. 1118.

"That Court has not yet determined just what weight should be given by the court to the findings and conclusions of the Commission. Clearly, the court has power to correct errors of law into which the Commission may have fallen and to set aside findings of fact which are not supported by the record or conclusions which violate constitutional rights. On the other hand, the initial determinations of the questions bearing on the soundness and reasonableness of a plan of reorganization is the responsibility of the Commission which is peculiarly fitted for the consideration of such questions and its findings and conclusions, made and reached after extended hearings and exhaustive study, as in this case, should be given great weight." *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 36 F. Supp. 193, (D.C.N.D. Ill., 1940).

the Circuit Court of Appeals stated, " a possible misconception" (R. 2672; 124 F.(2d) at 140), such recognition constituted the least possible weight which could be given to the Commission's determinations.

The Circuit Court of Appeals' strictures may possibly have resulted from an unexpressed acceptance of an argument made by the objectors to the plan that because Section 77(e) requires the judge to be "satisfied" that the plan is fair and equitable, they were entitled to an independent, *de novo* judgment by the District Court on all points, disregarding the Commission's determinations. The record suggests, indeed, that the objectors would be satisfied that the "independent judgment" of the District Court had been exercised only if it disagreed on all points with the Commission, and agreed entirely with their own contentions. In any event, it is submitted that the statutory language will not bear the construction sought to be placed upon it. Having in mind the well established doctrine of this Court as to the administrative finality of the Commission's decisions, the expertness of the Commission in the field and the practical reality that no two persons acting fully independently would ever arrive at an identical plan,[41] the

[41] There is no requirement under Section 77 that the Court should find that a plan of reorganization approved by the Commission is *the* plan which the Court would have written. Nor is it necessary for the Court to find that it is the best plan. As was said by the District Court in approving the Commission's plan for the reorganization of the Chicago and North Western:

"It has been observed that the Interstate Commerce

Congress presumably contemplated that the District Court in becoming "satisfied" that the plan was fair and equitable should proceed upon the basis of the factual determinations and the conclusions of the Commission, where these were supported by substantial evidence, do not involve errors of law and are within constitutional limits.[42] Certainly the recognition by the District Court of the expert administrative character of the Commission, and the according of great weight to its conclusions, are in no way inconsistent with the District Court itself being fully and completely "satisfied" with the fairness and equity of the plan. That a builder should be satisfied with the architect's plan before undertaking construction in accordance therewith does not mean that the builder must make, or

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Commission is not required to formulate the best possible plan of reorganization and that the Court is not limited to the approving of the best possible plan of reorganization." *In re Chicago and North Western Railway Company*, 35 F. Supp. 230, 256 (D.C.N.D. Ill., 1940).

[42] One court, referring to the observation of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 113-114 (1939) that the question whether on predetermined facts a plan was fair and equitable was a question of law, has suggested that this required the Court to exercise its independent judgment on questions of fact, specifically, the soundness of the estimated revenues in a normal year as determined by the Commission. *In re Chicago and North Western Railway Company*, 126 F. (2d) 351, 364 (C.C.A. 7th, 1942). Obviously, no such implication is justified. In addition, Section 77B reorganizations involved no such determinations by an expert administrative body as are provided for in railroad reorganizations under Section 77.

would consider himself competent to make, all the detailed calculations made by the architect in arriving at the plans and specifications. And when Congress, as in the Railroad Adjustment Act of 1939,[43] desired to provide that the Court should consider certain plans of reorganization independently of the findings of the Commission, it made express provision to that effect.

In a few cases in the lower courts some emphasis has been laid upon the exercise of an independent judgment by the District Court, but even these decisions, with the exception of that of the Circuit Court of Appeals in the present case, have repeatedly emphasized the great weight to be accorded the conclusions of the Commission. *In re Chicago and North Western Railway Company*, 121 F.(2d) 791 (C.C.A. 7th, 1941); *In re Chicago and North Western Railway Company*, 126 F.(2d) 351 (C.C.A. 7th, 1942); *In the Matter of New York, New Haven and Hartford Railroad Company*, not yet reported (D.C. Conn., December 8, 1941). Thus in the Chicago and North Western decision first cited the Circuit Court of Appeals for the Seventh Circuit, although referring to "jurisdiction" as in the Court and "judicial action" as

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[43] 53 Stat. 1134-1151; 11 U.S.C. Secs. 1200-1255. In the Railroad Adjustment Act Congress provided that in passing upon the fairness and equity of the plan "the Court shall scrutinize the facts independently * * * of the fact that the Commission under Section 20a of Title 49, has authorized the issuance or modification of securities as proposed by such plan, and of the fact that the Commission has made such or similar findings." 11 U.S.C. Section 1225(3).

required, also described matters "such as relate to financial set-up, meeting of obligations, determinations of value, etc." as particularly entrusted to the I.C.C., and stated:

> "In the field wherein it exercises the powers expressly given it, the findings of the I.C.C. are well nigh conclusive. True, it may not be said that the orders of the I.C.C. are unassailable if wholly lacking in evidentiary support. But where, in matters relating to plans of reorganization, earning power of the debtor, its operations, having in view the greatest service to the public and the greatest net earnings for its security holders, the findings of the I.C.C. should be, as they are, accepted almost as verities by the Court." (121 F.(2d) at 796.)

Several cases in the lower courts have also recognized that the question of the precise weight which should be accorded to the determinations of the Commission arises only where disagreement with such findings might otherwise exist. *In re Chicago Great Western Railroad Company*, 29 F. Supp. 149, 160 (D.C.N.D. Ill., 1939); *In re Chicago and North Western Railway Company*, 35 F. Supp. 230, 237, 253 (D.C.N.D. Ill., 1940), affirmed 126 F. (2d) 351 (C.C.A. 7th, 1942). In its opinion approving the plan of reorganization in the present case the District Court made clear that it was not in disagreement but wholly in accord with the findings of the Commission. After discussion of the two issues of the amount and character of capitalization and the dis-

tribution of the new securities provided for under the plan, the District Court emphatically stated that:

> "I have read the record and carefully considered all of the objections offered by the respective objectors to the Commission plan. I have also read the briefs of respective counsel in support of the objections. *I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidental thereto.* It seems to me that further discussion would be superfluous. * * * *
>
> *"Upon a consideration of the entire record I am of the opinion* that the Commission plan complies with the provisions of subsection b of Section 77 and is supported by the evidence; that it is fair and equitable; that it affords due recognition to the rights of each class of creditors and stockholders; that it does not discriminate unfairly against any class of creditors or stockholders; that it will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; and that it provides for payment of all costs of administration and other allowances made or to be made by this court." (R. 1597, 1599-1600; 34 F. Supp. at 504-505; italics supplied.)

Accordingly, since the District Court was entirely in agreement with the determinations made by the Commission, it properly approved its findings regardless of the technical weight to be given to them.

Under these circumstances definite determination by this Court of the relative functions of the Commission

and the District Court in railroad reorganizations under Section 77 is not absolutely essential in the present case. Nevertheless, in view of the conflicting theories which have been argued at length in these proceedings, and of the number of railroads in reorganization under Section 77, we urge the Court to pass upon this matter, and to give to the provisions of Section 77 a construction which will make the statute a workable one.

As a practical matter, there are only two avenues of approach in the doing of any job in which two people or two bodies have responsibility, but in which neither has authority to change what the other has done. Either each must do parts of the job independently of the other with questionable results in fitting together their finished products or one must take the initiative and do the job, leaving it to the other to check the results against required standards and on the basis of that check to approve or disapprove it. Under Section 77 Congress has delegated the taking of the initiative—the "doing of the job"—to the Commission, and it is submitted that "having found that the record permitted the Commission to draw the conclusion that it did a court travels beyond its province to express concurrence therein as an original question." *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145-146 (1939). Certainly, the findings and conclusions of the Commission, in the performance of the task delegated to it by Congress, are entitled to great weight as the determinations of the expert administrative body long charged with the protection of the public

interest in the railroad field. Only thus can the intent of Congress be made effective, and Section 77 rendered a workable statute for the consummation of railroad reorganizations.

IV

UPON THE ENTIRE RECORD THIS COURT SHOULD REVERSE THE DECREE OF THE CIRCUIT COURT OF APPEALS AND AFFIRM THE ORDER OF THE DISTRICT COURT APPROVING THE PLAN

Instituted in 1935, these reorganization proceedings have now been pending for more than seven years. In accordance with the provisions of Section 77 the Interstate Commerce Commission, the administrative body experienced in the field, has held lengthy hearings in which the full record hereinbefore described was developed, including all requisite valuation data and all other information necessary for the reorganization of the Debtor.

Upon the basis of this complete record and after hearing all of the parties the Commission developed a plan of reorganzation for the Debtor which, as modified after again hearing all of the parties on petitions for modification, became the plan of reorganization approved by the Commission and certified to the District Court, and now under consideration here. This plan the Commission found to be compatible with the public interest, fair and equitable, and in all respects in accordance with the provisions of Section 77. In the District Court further evidence was taken and all parties again heard both on brief and in oral argument, and the District Court thereafter likewise ap-

proved the plan and declared its provisions to be fair and equitable and in all respects in accordance with law.

The Circuit Court of Appeals, as has been pointed out, failed to pass definitely upon the controversies involved, and on the basis of a misinterpretation of the decision of this Court in the *Consolidated Rock Products* case demanded that numerous formalistic dollars and cents valuations should be made by the Commission, and independently made again by the District Court, before it would pass thereon.

That the Commission in its reports and orders stated fully its conclusions and the reasons therefor in accordance with the statutory requirement, and made all necessary findings and conclusions, has been hereinbefore fully established. Under these circumstances, and in view of the full and complete record, we urge this Court in the public interest and in the interest of the conclusion of these long drawn out proceedings not to remand the case to the Circuit Court of Appeals for further action but to dispose finally and conclusively of the problems involved."

As hereinbefore pointed out, the same general principles and procedure followed by the Commission in this case have been followed by it in numerous other reorganizations under Section 77 now pending either before the Commission or the courts. The aggre-

" The jurisdiction of this Court to make such final disposition notwithstanding the failure of the Circuit Court of Appeals to pass upon the merits, is unquestionable. *Story Parchment Co.* v. *Paterson Parchment Co.*, 282 U. S. 555, 567-568 (1931); *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920).

gate principal amount of the outstanding loans of Reconstruction Finance Corporation itself to railroads or their trustees in cases where the plans of reorganization may be affected by the decision in the present case exceeds $125,000,000. In order that the parties in these various proceedings, as well as the Commission and the courts, may be advised of the proper principles and procedure to be followed in reorganizations under Section 77, it is respectfully requested that the Court in its decision in the present case clear away the misconceptions which, it is believed, have arisen about the decision in the *Consolidated Rock Products* case, and indicate practicable principles and procedure to be followed in railroad reorganizations on the matters herein involved.

CONCLUSION

It is submitted that the decree of the Circuit Court of Appeals should be reversed, and that the order of the District Court should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1942

APPENDIX A

The provisions of Section 77 of the Bankruptcy Act (11 U. S. C., Section 205) pertinent in this case are the following:

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction such corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the *Interstate Commerce Commission* (hereinafter called the *"Commission"*).

* * * * *

(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the re-

organized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, the amendment of the charter of the debtor, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or

in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are exccutory in whole or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section.

* * * * *

(c) After approving the petition:

* * * * *

(10) The judge may direct the debtor or the trustee or trustees to keep such records and accounts, in addition to the accounts prescribed by the *Commission*, as will permit of such a segregation and allocation, as the necessities of the case may require, of the earnings and expenses between and to the divisions and parts of the railroad or other property of the debtor which are separately subject to the liens of the various mortgages or deeds of trust, or are separately subject to lease, and may refer to the *Commission* for its recommendations after hearings thereon if the parties shall so request and/or the *Commission* determine necessary or desirable, as to the method or formula by which such segregation and allocation shall be made; and thereafter such segregation and allocation may be made at the expense of the debtor's estate.

(11) The *Commission* may direct such of its agencies as it may designate to file in the proceedings before the *Commission* a report, and additional or sup-

plemental reports at such time or times as the *Commission* shall designate, of such data with reference to the property, business, earnings, and corporate organization of the debtor and such other facts as the *Commission*, after hearing if it deems necessary, shall determine to be necessary or helpful information for the purposes of the preparation of reorganization plans, and for the purpose of aiding in determining the method or formula of allocating earnings permitted by subdivision (10) of this subsection (c). Such report or reports shall be prima facie evidence of the facts therein stated in any proceeding under this section. The actual cost of preparing said report or reports shall be certified by the *Commission* and shall be borne by the debtor's estate.

* * * * *

(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, or if heretofore approved, then within six months of August 27, 1935, and not thereafter unless such time is extended by the judge from time to time for cause shown, no single extension at any one time to be for more than six months. Such plans shall also be filed with the *Commission* at the same time. Such plans may likewise be filed at any time before, or with the consent of the *Commission* during, the hearings hereinafter provided for, by the trustee or trustees, or by or on behalf of the creditors being not less than

10 per centum in amount of any class of creditors, or by or on behalf of any class of stockholders being not less than 10 per centum in amount of any such class, or with the consent of the *Commission* by any party in interest. After the filing of such a plan, the *Commission*, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the *Commission* shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the *Commission* shall state fully the reasons for its conclusions.

The *Commission* may thereafter, upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem necessary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The *Commission*, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved

or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the *Commission* and certified to the court.

* * * * *

(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the *Commission*, hear all parties in interest is support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets,

for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable; are within such maximum limits as are fixed by the *Commission*, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the *Commission* for further action, in which event he shall transmit to the *Commission* a copy of any evidence received. If the proceedings are referred back to the *Commission*, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the *Commission*. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and

allowed in accordance with the requirement of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the *Commission* shall specify, together with the report or reports of the *Commission* thereon or such a summarization thereof as the *Commission* may approve, and the opinion and order of the judge: *Provided,* That submission to any class of stockholders shall not be necessary if the *Commission* shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further,* That submission to any class of creditors shall not be necessary if the *Commission* shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of

their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the *Commission* and shall be borne by the debtor's estate. The *Commission* shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholder of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured

by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further*, That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further*, That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order

and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the *Commission* for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the *Commission*, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the *Commission* shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

(f) Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, sub-

ject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it. Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, the laws of any State or the decision or order of any State authority to the contrary notwithstanding. The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the

debtor to join in any such transfer or conveyance made by the trustee or trustees. Upon the termination of the proceedings a final decree shall be entered discharging the trustee or trustees, and making such provisions as may be equitable, by way of injunction or otherwise, and closing the case. Upon confirmation of a plan the *Commission* shall, without further proceedings, grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and not inconsistent with the provisions and purposes of chapter 1 of Title 49 as on August 27, 1935, or thereafter amended.

* * * *

(g) If in the light of all the existing circumstances there is undue delay in a reasonably expeditious reorganization of the debtor, the judge, in his discretion, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the *Commission*, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order.

* * * *

(q) The provisions of section 12 of Title 49 shall be applicable to enable the *Commission* to perform its duties under this section and the provisions of such

section shall apply to the debtor, any subsidiary or affiliated company, or any other person as herein defined.

* * * *

March 3, 1933, c. 204, §1, 47 Stat. 1474; August 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969; August 11, 1939, c. 689, 53 Stat. 1406. [Italicization of the word "Commission" added.]

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~989~~ 33

In the Matter
of
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor,

RECONSTRUCTION FINANCE CORPORATION
Petitioner,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a Corporation; A. C. JAMES CO., a Corporation; THE RAILROAD CREDIT CORPORATION, a Corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation; IRVING TRUST COMPANY, a Corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; FREDERICK H. ECKER, JOHN W. STEDMAN, and REEVE SCHLEY, constituting the INSTITUTIONAL FIRST MORTGAGE BONDHOLDERS COMMITTEE; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company,
Respondents.

ANSWER OF THE RAILROAD CREDIT CORPORATION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD G. BUCKLAND
WILLIAM J. KANE
Attorneys for The Railroad Credit Corporation, Respondent.

Baltimore, Maryland,
March 24, 1942.

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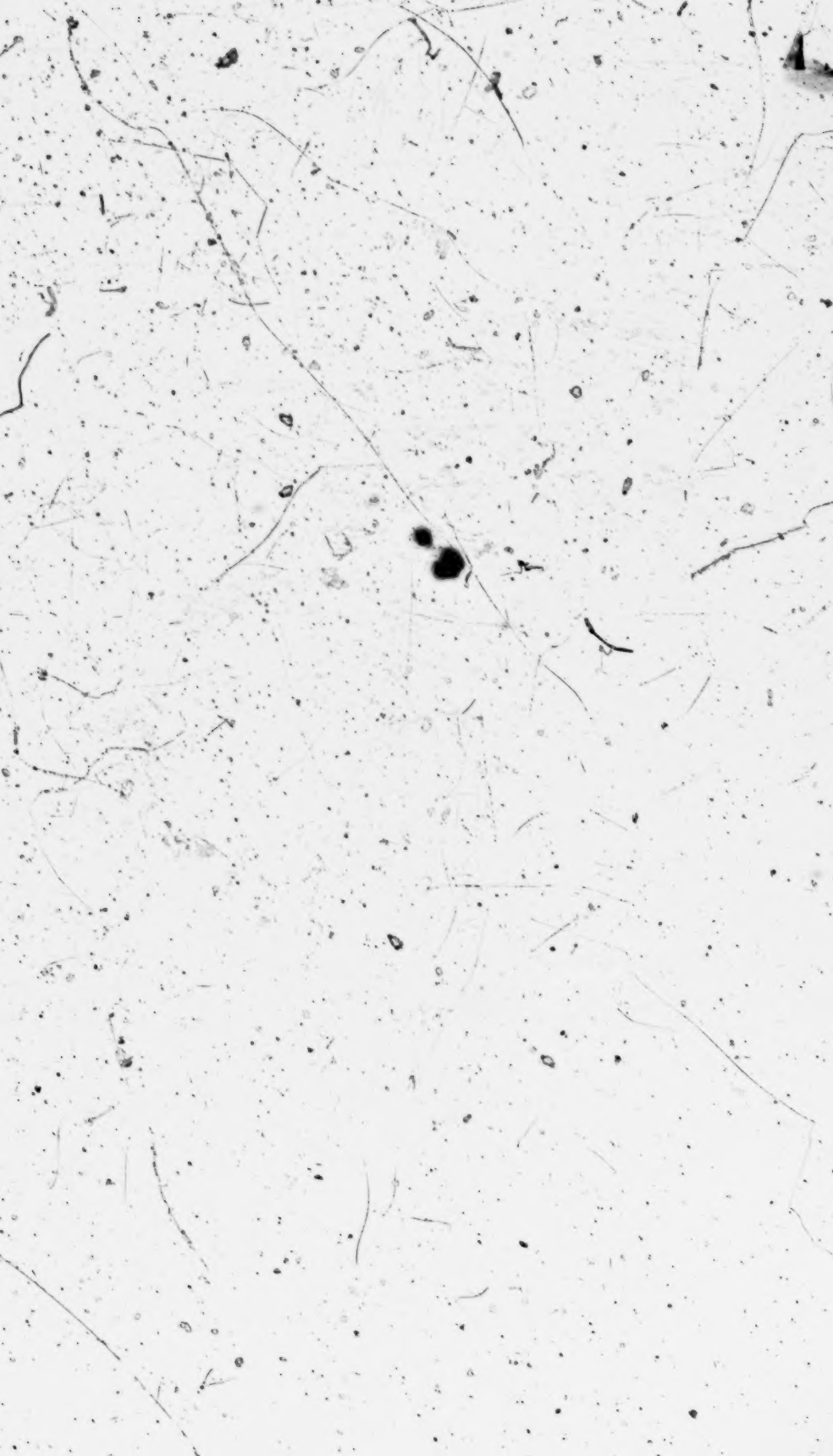

Supreme Court of the United States

OCTOBER TERM, 1941

No. 989

In the Matter
of

THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor,

RECONSTRUCTION FINANCE CORPORATION

Petitioner,

v.

WESTERN PACIFIC RAILROAD CORPORATION, a Corporation; A. C. JAMES CO., a Corporation; THE RAILROAD CREDIT CORPORATION, a Corporation; THE WESTERN PACIFIC RAILROAD COMPANY, a Corporation; IRVING TRUST COMPANY, a Corporation, as substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company; FREDERICK H. ECKER, JOHN W. STEDMAN,, and REEVE SCHLEY, constituting the INSTITUTIONAL FIRST MORTGAGE BONDHOLDERS COMMITTEE; and CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under the First Mortgage of The Western Pacific Railroad Company,

Respondents.

ANSWER OF THE RAILROAD CREDIT CORPORATION TO PETITION FOR A WRIT OF CERTIORARI

INDEX

PAGE

Reasons assigned by petitioner for granting the writ of certiorari 2

Conclusion 7

TABLE OF AUTHORITIES

Cases

Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 115 3

Chicago, Milwaukee, St. Paul & Pacific R. R. Co., *In the Matter of*, 124 F. (2d) 754 ..... 2, 5

Chicago and North Western Ry. Co., *In the Matter of*, (unreported) 5

Continental Illinois Natl. Bank & Trust Co. v. Chicago R. I. & P. Ry. Co., 294 U. S. 648, 676 4

Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510 ..... 3, 5, 7

First National Bank v. Flershem, 290 U. S. 504, 525 3

National Surety Co. v. Coriell, 289 U. S. 426, 436 3

Palmer v. Massachusetts, 308 U. S. 79, 87 4

Western Pacific Railroad Co., *In the Matter of the*, 124 F. (2d) 136 1

Western Pacific Railroad Co., *In re*, 34 Fed. Supp. 493 1

STATUTES

Bankruptcy Act, Section 77 1

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This respondent respectfully states that the grounds upon which Petitioner bases its application for a writ of certiorari to review the opinion of the United States Circuit Court of Appeals for the Ninth Circuit (reported in 124 F. (2d), 136) (R. 2663), entered November 28, 1941, reversing an order of the United States District Court for the Northern District of California, Southern Division (34 F. Supp. 423), (R. 1600), which had approved a plan of reorganization for The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act (11 U. S. C. A. § 205) are in substance like those enumerated in Petitions Nos. 819 and 820, in this cause.

In its answering brief filed with this Court on January 16, 1912, respondent urged that the requests sought by Petitions Nos. 819 and 820 in these proceedings for the issuance of writs of certiorari be denied for the reasons that said petitions contained no grounds justifying the issuance of said writ; that the opinion of the Court below was not only in accordance with the requirements of Section 77 of the Bankruptcy Act (11 U. S. C. A. § 205), but was not in conflict, as asserted, with any decision of this Court or any Circuit Court of Appeals and, further, that there was no special or important reason for granting the petitions for certiorari. Since the grounds upon which the present petitioner predicates its request for certiorari are in substance similar to those recited in Petitions Nos. 819 and 820, it is the opinion of respondent that its brief of January 16, 1942, sufficiently answers the questions presented in Petition No. 989 and, therefore, respectfully urges that the request for certiorari be denied.

REASONS ASSIGNED BY PETITIONER FOR GRANTING THE WRIT OF CERTIORARI

On pages 5 to 9, inclusive, of its petition, petitioner sets forth under Paragraphs (1) and (2) its reasons for granting the writ of certiorari.

Paragraph (5) of Rule 38 of this Court clearly outlines the reasons which this Court will consider in a petition for review on writ of certiorari. Upon analysis, it becomes apparent that most of the "reasons" assigned by petitioner amount to nothing more than a statement showing how the Interstate Commerce Commission arrived at its conclusions embodied in the plan of reorganization; the adoption by the District Court of the Commission's findings; and the reversal by the Court below of the order of the District Court approving the plan of reorganization. These are not "special and important reasons" which Rule 38, paragraph (5), prescribes as grounds or causes for issuance of the writ.

In addition to these general statements of petitioner under this caption, it also alleges the following grounds for the exercise of this Court's judicial discretion in granting the writ:

(a) ". . . The court below, however, reversed on the ground that the Commission had not made findings of fact as to the value of the railroad as a whole, the value of the securities held by each class of creditors, and the value of the new securities to be issued. . . .". (Page 6).

(b) ". . . The decision below is in square conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Matter of Chicago, Milwaukee, etc., Railroad Company*, decided December 4, 1941, . . . upon the question of whether stockholders can be excluded from participation in the reorganized company upon a finding that their equity is without value because the earnings

of the Debtor would not support a capital structure large enough to include them. . . ." (Page 8),

(c) ". . . If the opinion of the court below is to be construed as requiring an independent determination by the District Court of all questions of valuation, despite an initial determination of such questions by the Commission, it constitutes, we believe, a serious misconstruction of the provisions of Section 77. . . ." (Page 9).

In its opinion approving the plan of reorganization certified by the Commission, the District Court (34 F. Supp. 493, 504), said:

> "The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court. . . . I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidentally related thereto. . . ." (R. 1597).

The District Court thereupon summarily adopted the conclusions of the Commission. The opinion of the Court below held that the duty of determining the values of certain items of property by the Commission had not been performed, in consequence of which "Lacking the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' which appraisal of the fairness of a plan of reorganization entails", (R. 2671) citing *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510; *National Surety Co. v. Coriell*, 289 U. S. 426, 436; *First National Bank v. Flershem*, 290 U. S. 504, 525; *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, 115. The opinion of the Court below is altogether consistent with the statute, Subsection (e) of which provides that "If it shall be necessary to determine the value of any property for any purpose under this section,

the Commission [Interstate Commerce] shall determine such value and certify the same to the court in its report on the plan." The opinion of the Circuit Court of Appeals, Ninth Circuit, recognizes that the duty of determining the value of any property for any purpose under Section 77 rests initially on the Commission, and not on the court, but such determination must, however, include a valuation of the entire enterprise, after which the court must "exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject." Such clear-cut findings or values are essential to the intelligent approval of the plan.

The Court below has no quarrel with the findings of the Commission so far as it has gone, its opinion intimating that it failed to go far enough in valuing all items of property, some sixteen of which the opinion enumerates, which under the statute it is its duty to determine and which the court found was not performed. Furthermore, the opinion of the Court below is not, as alleged by petitioner, contrary to the views expressed by this Court in *Palmer v. Massachusetts*, 308 U. S. 79, 87. Admittedly, a proceeding under Section 77 is not an ordinary proceeding in bankruptcy, but "is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised." *Continental Illinois Natl. Bank & Trust Co. v. Chicago R. I. & P. Ry. Co.*, 294 U. S. 648, 676. Insisting, as it does, upon a finding of values by the Commission before the District Court can exercise an "informed, independent judgment" the decision of the Court below does no more than to follow the principle enunciated by this Court in the *Palmer* case that "The judicial process in bankruptcy proceedings under § 77 is, as it were, brigaded with the administrative process of the Commission."

From the foregoing this respondent claims there is no special or important reason for granting the writ to review the issues raised in (a) and (c) above which are not among those reasons outlined in paragraph (5) of Rule 38.

In paragraph (b) above, petitioner contends that the decision below is in square conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Matter of Chicago, Milwaukee, etc., Railroad Company*, 124 F. (2d) 754. The decisions of both Courts were arrived at in the light of the *Consolidated Rock Products* case, *supra*, resulting in disapproval of both plans because of lack of findings by the Commission on "all vital issues, controverted and uncontroverted" which must include "values of properties separately considered and also of Debtor's property as a whole. Findings must cover values of liens to be surrendered and values of securities given in exchange. . . . The findings must be sufficiently complete on these matters, that the court may, from its examination, ascertain whether full compensation has been made for the entire bundle of rights which each of the creditors is called upon to surrender." *Matter of Chicago, Milwaukee, etc., Railroad Company, supra.*

The only difference between the two decisions is that in the *Milwaukee* case the Court was "satisfied that the evidence supports the finding of the Commission approved by the District Court 'that the equity of the holders of the debtor's preferred stock and its common stock has no value'." The fact that in the *Milwaukee* case the Court was satisfied with the Commission's findings as to a lack of equity for the stockholders, it does not follow that because the Court below left this question open until the Commission had determined the value of those units of property which it felt it had not done there is necessarily a conflict in the decisions of the two cases. Likewise with respect to the decision of the Court in *Matter of Chicago and North Western Ry. Co.* (unreported) (referred to on Page 8 of petitioner's application) where the same Court as in the *Milwaukee* case affirmed the order of the District Court confirming the plan of reorganization. In the *Northwestern* decision the Court affirmed the order of the District Court

confirming the plan not because the Commission had made specific findings of value, but

> "It is a question of whether the report of the I.C.C., which was full and complete, fair and open, but lacking in one respect, — failure to make specific findings of values, — may, or should, be approved without said findings. In fact, the issue may be stated even more strongly against the minority. Does not the vote of approval supply the proof that the report of the Commission contained the evidence, and the Commission's finding sufficiently states the facts, to justify us in holding that separate and more detailed findings are unnecessary? We think it does."

Because the creditors had almost unanimously voted approval of the plan the Court differentiated between the two cases by holding that said vote of approval

> ". . . was an equivalent of a waiver of more specific findings by all who approved the plan. . . ."

While respondent may disagree with the reasoning of that Court, and, therefore, its conclusion, in the matter of approving the plan as fair and equitable because "all the creditors of each group who have voted, are overwhelmingly in favor of it", and obviously offered as a means of terminating these lengthy proceedings, the soundness or unsoundness of the reasoning does not present a conflict with the decision of the Court below. Here we have decisions of two Circuit Courts of Appeal both holding a lack of specific findings by the Commission, one of which waives the requirement of specific finding because the creditors voted acceptance of the plan, a situation which did not obtain with respect to the other. Where then is the conflict with respect to the duties of the Commission under the statute?

The decision admits that there was a failure by the Commission "to make specific findings of values." Being realistic because the various groups of creditors had agreed to support the plan, it does not follow that the decision is in conflict with that of the Court below.

Contrary to what petitioner alleges to be a conflict, the decisions in all these cases follow the provisions of the statute with respect to the duties and obligations imposed upon the Commission and the District Courts. Nor is there any other ground in petitioner's application which may not have been answered herein that would justify this Court in granting the writ of certiorari.

CONCLUSION

It is respectfully submitted, therefore, that the questions raised in Petition No. 989 have been answered with finality by the decisions of this Court in *Consolidated Rock Products Co. v. Du Bois, supra*; that no conflict exists between the decisions of any of the Circuit Courts of Appeal under Section 77; that there is no special or important reason for granting petition for certiorari and, therefore, petitioners application should be denied.

Respectfully submitted,

EDWARD G. BUCKLAND,
WILLIAM J. KANE,
Attorneys for The Railroad Credit Corporation, Respondent.

Dated: March 24, 1942.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

No. 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,
Petitioner.

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, et al.,
Respondents.

BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE.

H. C. McCOLLOM,
Attorney for Petitioner,
IRVING TRUST COMPANY,
As Trustee under
Debtor's Refunding Mortgage.

ORRIN G. JUDD,
Of Counsel.

Dated: September 14, 1942.

INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Statement of the case	2
The Reorganization Plan	3
Action of the courts below	5
The properties in dispute	7
Specification of errors intended to be urged	9
Summary of argument	10
I. Determination of the property on which creditors respectively hold liens is fundamental to the enforcement of the absolute priority doctrine laid down by this Court	11
II. The rolling stock acquired under lease or equipment-trust agreement is free from the First Mortgage and subject to the prior lien of the Refunding Mortgage	16
The equipment-trust clause	18
The general rule of strict construction of after-acquired property clauses	20
The First Mortgage clearly does not cover the equipment-trust rolling stock	21
The Commission's interpretation of the equipment-trust clause was erroneous	23

PAGE

The practical interpretation shows that the First Mortgage was not considered to cover equipment-trust rolling stock 26

Other cases on equipment-trust clauses confirm the Refunding Mortgage Trustee's contention 27

III. The First Mortgage Trustees can sustain no claim under the replacement clauses of the First Mortgage which materially affects the rights of Refunding Mortgage Trustee in the equipment-trust rolling stock 32

The equipment covenants apply only to equipment that has been worn out, destroyed or disposed of 34

The equipment covenants cannot be satisfied by rolling stock subject to equipment-trusts 35

The equipment covenants relating to replacement are not self-executing 36

IV. The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage Bonds used in the acquisition thereof. Otherwise it is subject to the prior lien of the Refunding Mortgage..... 40

Facts 40

No supplemental indenture subjecting Extension to First Mortgage 43

Limitations on after-acquired property clauses 44

Argument 45

There is no equitable basis for giving the First Mortgage a lien on the Extension beyond the amount which it contributed towards its construction 46

PAGE

V. The Refunding Mortgage creditors are entitled to additional securities in recognition of their interests in free assets of the Debtor 51

Facts 51

Argument 53

Conclusion 55

CASES CITED

PAGE

Adair v. *Beverly Hills Petroleum Corp.*, 59 F. (2d) 94 (S. D. Calif.) 20

Alabama v. *Montague*, 117 U. S. 602, 609 54

American Brake Shoe and Foundry Company v. *New York Railways Co.*, 277 Fed. 261, 271-72 (S. D. N. Y.) 53

Bibend v. *L. & L. F. & L. Insurance Co.*, 30 Calif. 78, 86 47

Boston & New York Air Line R. R. Co. v. *Coffin*, 50 Conn. 150, 153 54

Calhoun v. *Memphis & P. R. Co.*, 4 Fed. Cas. No. 2309, page 1047 (C. C. W. D. Tenn.) 54

Canadian Northern Ry. Co. v. *Northern Mississippi Ry. Co.*, 209 Fed. 758, 761-2 (C. C. A. 8) 26

Case v. *Los Angeles Lumber Co.*, 308 U. S. 106, 122 .. 13, 55

Chase National Bank v. *Mobile & Ohio R. R. Co.* (S. D. Ala., Civil Action No. 56) 35

Citizens Savings and Trust Co. v. *First Cincinnati & Dayton Traction Co.*, 106 Ohio St. 577; 140 N. E. 380 50

Cleveland Trust Co. v. *Consolidated Gas, E. L. & P. Co.*, 55 F. (2d) 211 (C. C. A. 5) 20

Consolidated Rock Products Co. v. *duBois*, 312 U. S. 510 ..... 13, 54

PAGE

Continental Illinois National Bank v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 685 . . 13, 15, 30, 38
Continental Ins. Co. v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 283 Fed. 276, 278 (D. Minn.) 27
Continental Insurance Co. v. *United States*, 259 U. S. 156, 180 26
Cunningham v. *Pressed Steel Car Co.*, 238 App. Div. (N. Y.) 624, 627; 265 N. Y. Supp. 256, 260 27

Davis v. *Modern Industrial Bank*, 279 N. Y. 405, 411 20
Delk v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588-89 15
Donovan v. *Pennsylvania Company*, 199 U. S. 279, 292 15

E. I. Du Pont de Nemours & Co. v. *Claiborne-Reno Co.*, 64 F. (2d) 224, 228 (C. C. A. 8) 26
Equitable Trust Co. v. *Denney*, 24 F. (2d) 169, 170 (C. C. A. 7) 12
Equitable Trust Co. v. *Wabash Railroad Co.*, (In Equity No. 3977)—unreported 27

Fletcher v. *Los Angeles Trust etc. Bank*, 182 Calif. 177, 183-84 20

Grant v. *Leach & Co.*, 280 U. S. 351 14
Graselli Chemical Co. v. *Aetna Explosives Co.*, 252 Fed. 456, 459-60 (C. C. A. 2) 49
Great Northern Railroad Co. v. *Central Hanover Bank and Trust Co.*, 12 F. Supp. 846 (W. D. Wash.) 46
Guaranty Trust Co. of New York v. *Minneapolis & St. L. R. Co.*, 36 F. (2d) 747 (C. C. A. 8) 21, 36, 50
Guaranty Trust Co. v. *New York & Queens Co. Ry. Co.*, 253 N. Y. 190; 170 N. E. 887 39

Hascall v. *Wilcox*, 115 U. S. 598, 599-600 12
Harris Trust & Savings Bank v. *Chicago Railways Co.*, 56 F. (2d) 942, 947 (C. C. A. 7) 53
Humphreys v. *McKissock*, 140 U. S. 304, 313-14 45

PAGE

Lux v. *Haggin*, 69 Calif. 355, 379-380, 384-85 20

Mason v. *Citizens National Trust and Savings Bank*, 71 F. (2d) 246 (C. C. A. 9) 47
Merchants Insurance Co. v. *Allen*, 121 U. S. 67, 71 .. 13
Metropolitan Trust Co. v. *Chicago & E. I. R. Co.*, 253 Fed. 868, 879 39

National Bank of Commerce v. *Lock*, 17 Washington 528, 532-33; 50 Pac. 478, 480 54
New Orleans Pacific Railway Co. v. *Parker*, 143 U. S. 42 ..... 45, 46, 54
New York, N. H. & H. R. Co., In Re, 27 F. Supp. 392, 395, aff'd 104 F. (2d) 1018 (C. C. A. 2) 27
Northern Pacific Railway Company v. *Boyd*, 228 U. S. 482 ..... 13, 55

Old Colony Trust Co. v. *Standard Beet Sugar Co.*, 150 Fed. 677 (N. D. Neb.) 46
Old Colony Trust Co. v. *Wichita*, 123 Fed. 762, 767 (C. C. Kans.), aff'd. 132 Fed. 641 (C. C. A. 8) 12

Pardee v. *Aldridge*, 189 U. S. 429 54
Pennock v. *Coe*, 23 How. 117 47
Powlowski v. *Mohawk Golf Club*, 204 App. Div. (N. Y.) 200, 204; 198 N. Y. Supp. 30, 34 49

Safety Car Heating & Light Co. v. *U. S. Light & Heating Co.*, 2 F. (2d) 384, 388 (W. D. N. Y.) 53
Seaboard Nat. Bank v. *Rogers Milk Products Co.*, 21 F. (2d) 414, 418-19 (C. C. A. 2) 12
Seymour v. *Tonawanda & Niagara Falls R. R. Co.*, 25 Barb. (N. Y.) 284, 312 54
Shirley v. *Waco Tap Railway Co.*, 78 Texas 131, 146; 10 S. W. 543, 550, 551 54
State v. *Gleen*, 18 Nev. 34, 48; 1 Pac. 186, 193-94 54
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-68 15

PAGE

The Bay of Naples, 48 Fed. 737 (C. C. A. 2) 13
The "Francis Wright", 105 U. S. 381, 387 13

United States Trust Co. v. *Wabash Western Ry. Co.*, 38 Fed. 891 (C. C. S. D. Iowa) 37

Westinghouse Electric and Mfg. Co. v. *Brooklyn R. T. Co.*, 263 Fed. 532, 536 (C. C. A. 2) 21
Westinghouse Electric and Mfg. Co. v. *Brooklyn R. T. Co.*, 276 Fed. 152, 158 (S. D. N. Y.) 26

STATUTES CITED

Bankruptcy Act
Section 77 2
Section 77 (c) (13) 12
Section 77 (e) 48

Judicial Code, Section 240-a (28 U. S. C. §347-a) 2

Restatement of Contracts, Sec. 236 (a) 49

Rules of Civil Procedure for District Courts—Rule 17 (a) 12

2 Williston, Contracts (Rev. Ed.) Sec. 619 26

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,

Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, et al.,

Respondents.

BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE

This case is before this Court on writ of certiorari granted April 27, 1942, directed to the United States Circuit Court of Appeals for the Ninth Circuit, to review the decree of said Circuit Court of Appeals rendered November 28, 1941 (R. 2675), as amended by decree on rehearing rendered

February 16, 1942 (R. 2681), which decree reversed an order of the United States District Court for the Northern District of California entered August 15, 1940 (R. 1569) approving a plan of reorganization for the Debtor under Section 77 of the Bankruptcy Act.

Opinions below

The opinion of the District Court, dated August 15, 1940 (R. 1569), is reported in 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals, dated November 28, 1941 (R. 2663), is reported in 124 F. (2d) 136. No opinion was rendered on rehearing.

Jurisdiction

The jurisdiction of the Court is invoked under Section 240-a of the Judicial Code, as amended by Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 347-a).

Statement of the case

The decree under review was entered in a proceeding for reorganization of the Debtor, a railroad company, pursuant to Section 77 of the Bankruptcy Act.

Petitioner, Irving Trust Company, is Trustee under the Debtor's General and Refunding Mortgage dated as of January 1, 1932, having been substituted as such Trustee on November 13, 1936 (R. 1053) during the course of hearings before the Interstate Commerce Commission on various proposed plans of reorganization. (Such mortgage is hereinafter called the "Refunding Mortgage", and petitioner is hereinafter called the "Refunding Mortgage Trustee".)

This petition relates to the relative liens of the Refunding Mortgage and the First Mortgage of the Debtor upon

very important properties—the extent of their relative liens being essential in determining the proper allocation of new securities to be issued under the reorganization plan.

The lien questions were not passed on by the Circuit Court of Appeals, although they were presented by the Refunding Mortgage Trustee's appeal. The review on this petition therefore relates both to the question whether the Circuit Court of Appeals erred in failing to decide the lien questions, and to the question whether the District Court erred in respect of the merits of the lien questions.

Bonds outstanding under the Refunding Mortgage aggregate $18,999,500 principal amount (R. 1053), and all of them are pledged, in varying amounts, with three creditors of the Debtor, namely, A. C. James Company, Railroad Credit Corporation, and Reconstruction Finance Corporation.

The Refunding Mortgage is a lien on substantially all the property of the Debtor (R. 1231-46).[1] The lien of the Refunding Mortgage is subject "in so far, *but only in so far*[2] (in extent, degree of priority or otherwise), as in law the same respectively may attach" (R. 1245) to the First Mortgage of the Debtor dated June 26, 1916, under which there are outstanding approximately $50,000,000 principal amount of bonds (R. 1047).

The Reorganization Plan

Evidence respecting the relative liens of the two mortgages on various parcels of property was introduced before the Interstate Commerce Commission. This evidence gave

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[1] The granting clauses of the Refunding Mortgage are printed in the record at the pages indicated. The balance of the Mortgage (I. C. C. Ex. 6) is not printed, but constitutes part of the record, which may be referred to, by stipulation (R. 2612-25).

[2] Italics throughout the brief are supplied by counsel, unless otherwise indicated.

rise to legal issues, which had not been presented to the court for decision before the Commission hearings, the present Refunding Mortgage Trustee not having been appointed until after the proceedings in the Commission were under way.

The Commission made a preliminary decision of the legal issues presented by such evidence, although stating that "final adjudication of this and similar questions must be made by the court" (R. 262). Its original report overruled all the Refunding Mortgage Trustee's contentions and stated that the First Mortgage bondholders should be "considered as having a first lien upon practically all the assets of the Debtor" (R. 267). In consequence, such Report provided for the issuance of nothing but common stock to the creditors secured by Refunding Mortgage bonds (R. 278)—except as the R. F. C. was offered special treatment, on a parity with First Mortgage Bondholders, in consideration of its purchase of new bonds of the reorganized company.

Following a petition for modification filed by the Refunding Mortgage Trustee, the Commission, in a supplemental report, recognized that cash deposited with the Refunding Mortgage Trustee, and certain securities of Tidewater Southern Railway Company (a subsidiary of the Debtor) which were admittedly subject to the Refunding Mortgage as a first lien, had substantial value, and directed that the holders of Refunding Mortgage bonds be awarded, in consideration thereof, new income mortgage bonds in the amount of $732,010 and new participating preferred stock of a par value of $1,147,955 (R. 315).

Under the Plan as so modified, the three pledgees of Refunding Mortgage bonds would thus receive, in addition to cor mon stock, varying amounts of such new income mortgage bonds and new participating preferred stock, the allocation of such new securities being made in proportion to the amount of Refunding Mortgage bonds which each creditor holds in pledge (R. 315),—subject to the aforesaid special provisions for the R. F. C. in consideration of its purchase of new bonds (R. 312, 316).

The total principal amount of debts secured by Refunding Mortgage bonds aggregates $10,257,580.76 (R. 1953-57), so that the new income mortgage bonds awarded by the Commission amount to approximately 7% of the principal debt, and the new participating preferred stock to approximately 11% of such debt; these ratios are still far below those allotted to First Mortgage bondholders, namely 40% of the principal of their debt in new income mortgage bonds and 60% of such debt in new participating preferred stock (R. 390-91).

The Refunding Mortgage Trustee is not concerned with the distribution of the new income mortgage bonds and participating preferred stock as between the three Refunding Mortgage creditors, but only with its claim that the Refunding Mortgage is a first lien on additional properties, in respect of which senior securities should also be issued. On this lien question the Refunding Mortgage creditors have relied upon the Trustee, and at least two of them have specifically requested it to obtain review of the decision by this Court.

The Reconstruction Finance Corporation, although it supported the Plan proposed by the Interstate Commerce Commission, has waived none of its rights as a holder of Refunding Mortgage bonds in the event of a favorable determination concerning the relative liens of the First Mortgage and the Refunding Mortgage (R. F. C. Brief in Circuit Court of Appeals, p. 8).

Action of the courts below

The Refunding Mortgage Trustee filed, in the District Court, objections to the Plan (R. 974-79), alleging that the Plan was unfair in failing to award any senior securities to the Refunding Mortgage creditors in recognition of the prior lien which the Trustee claimed upon:

> (1) The Debtor's equity in rolling stock subject to lease, conditional sale agreement or equipment trust; and

(2) A proportionate interest in the Debtor's newly constructed Northern California Extension; and

(3) The undisputed first lien of the Refunding Mortgage upon securities of Central California Traction Company and Alameda Belt Line; and

(4) Their additional rights, in common with general creditors, against non-carrier real estate.

The detailed basis of these objections is left for a later portion of the brief.

The District Court made no independent discussion of the merits of the Refunding Mortgage Trustee's objections with respect to the distribution of new securities, but simply stated, with reference to the capitalization of the new Company as well as the distribution of new securities, that "I am wholly in accord with the conclusions reached by the Commission upon both issues and all matters incidentally related thereto. It seems to me that further discussion would be superfluous" (R. 1597). The Refunding Mortgage Trustee appealed from the District Court's decree approving the Plan, and set forth in its Statement of Points all the lien issues already mentioned (R. 1652-53). The Circuit Court of Appeals, in its opinion, did not discuss the legal questions of conflicting lien and made no determination of the merits of the Refunding Mortgage Trustee's appeal. On the contrary, it ruled that the Refunding Mortgage Trustee was not adversely affected by the Plan, and consequently that it was not entitled to appeal (R. 2668; 124 F. (2d) at 138).

The decree of the Circuit Court of Appeals, entered November 28, 1941, accordingly dismissed the appeal of the Refunding Mortgage Trustee without consideration of the issues presented (R. 2675).

Thereafter, on petition for rehearing filed by the Refunding Mortgage Trustee, the Circuit Court of Appeals set aside (R. 2681) that portion of the decree holding that

the Refunding Mortgage Trustee was not entitled to appeal, but still failed to decide the questions raised by its appeal.

As appears from the other petitions filed in this proceeding, the Circuit Court of Appeals, on the appeals of other creditors, reversed the judgment of the District Court approving the Plan of reorganization, and suggested that the proceeding be referred back to the Interstate Commerce Commission for further action (R. 2674) to determine necessary questions concerning valuation, including

> "The value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage" (R. 2670; 124 F. (2d) at 139).

The properties in dispute

The issues presented by the Refunding Mortgage Trustee in the Circuit Court of Appeals related to the following four major items of property:

1. The Debtor's equity, amounting to approximately $6,000,000 (R. 1074), in equipment purchased under lease, conditional sale, or equipment trust (R. 1244-45). Petitioner's contention is that a proper construction of the two mortgages shows that such equity is expressly free from the lien of the First Mortgage and expressly subject to the lien of the Refunding Mortgage.

2. The Northern California Extension, a branch line running from Keddie to Bieber, which was built at a cost of more than $10,000,000 (R. 1053) and is one of the most profitable portions of the Debtor's road. Petitioner's contention is that the Extension is subject to the First Mortgage only to the extent of the $5,000,000 of First Mortgage money which was used in its construction, and that otherwise it is subject to the prior lien of the Refunding Mortgage, under which the balance of its cost was financed.

3. The securities of Central California Traction Company and Alameda Belt Line, on which it is not disputed

that the Refunding Mortgage is a first lien. The Interstate Commerce Commission did not find the value of these securities, but stated that, because of apparent operating deficits of the companies, the lien on the securities had "no material value" (R. 315). Petitioner's contention is that under the undisputed evidence the Interstate Commerce Commission and the District Court were wrong in treating the lien on these securities as having no value, and that the Refunding Mortgage creditors are entitled to compensation for being deprived of their right to foreclose on and sell these securities.

The Circuit Court of Appeals stated that the Interstate Commerce Commission should find the value of the property subject to the Refunding Mortgage (R. 2670). This will compel a specific valuation of the Central California Traction and Alameda Belt Line securities, which the Commission has not yet undertaken. Consequently, if the decision of the Circuit Court of Appeals stands, the error in respect of these securities will be corrected. If this Court, however, should adopt any different principle of decision from that laid down by the Circuit Court of Appeals, it would become necessary to consider the effect of the lack of findings concerning the value of these securities, as well as the Trustee's claim that the evidence shows that they have substantial value.

4. Non-carrier real estate of the Debtor, together with cash and receivables on hand at the date of the institution of the reorganization proceedings. Petitioner claims that these items are free from both the First Mortgage and the Refunding Mortgage, and must be given consideration, as unmortgaged property, in the allocation of securities to the Refunding Mortgage creditors as well as the First Mortgage creditors in the event it is found that they are not fully secured.

If the contentions advanced by the Refunding Mortgage Trustee with respect to the first 3 items above are sustained, however, the Refunding Mortgage will be fully

secured, and the Refunding Mortgage creditors should receive the same treatment as the First Mortgage creditors.

The facts relating to the several lien questions are so distinct from each other and from the primary question of the error of the Circuit Court of Appeals in leaving the lien questions undecided that the interest of clarity will be served by reserving the statement of such facts to the separate points in the argument.

Specification of errors intended to be urged

The Circuit Court of Appeals erred:

1. In remanding the proceeding to the Interstate Commerce Commission for determination of the value of the property subject to the liens of the various mortgages without making a final adjudication of legal questions squarely and properly presented to it concerning the extent of the liens of such mortgages;

2. In leaving undetermined, upon review of objections to the reorganization plan, questions of law squarely and properly presented to it affecting the priority of lien on over $12,000,000 worth of the Debtor's property;

3. In failing to hold that rolling stock acquired by the Debtor with free funds under equipment-trust agreements was free from the lien of the Debtor's First Mortgage and subject to the prior lien of the Refunding Mortgage;

4. In failing to hold that the Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage bonds used in the acquisition thereof, and that otherwise it is subject to the prior lien of the Refunding Mortgage; and

5. In failing to hold that the non-carrier real estate (including the Islais Creek property) is free from both the First Mortgage and the Refunding Mortgage and should be given consideration, as unmortgaged property, in the allocation of securities to the Refunding Mortgage creditors.

Summary of Argument

I. Determination of the property on which creditors respectively hold liens is fundamental to the enforcement of the absolute priority doctrine laid down by this Court.

II. The rolling stock which was acquired under lease or equipment-trust agreement is free from the First Mortgage and subject to the prior lien of the Refunding Mortgage.

The general rule of strict construction is applied to after-acquired property clauses.

The First Mortgage clearly does not cover the equipment-trust rolling stock.

The Commission's interpretation of the equipment-trust clause of the First Mortgage was erroneous.

The practical interpretation shows that the First Mortgage was not considered to cover equipment-trust rolling stock.

Other cases on equipment-trust clauses confirm the Refunding Mortgage Trustee's contention.

III. The First Mortgage Trustee can sustain no claim under the replacement clauses of the First Mortgage which materially affects the rights of the Refunding Mortgage Trustee in the equipment-trust rolling stock.

The equipment covenants apply only to equipment that has been worn out, destroyed or disposed of.

The equipment covenants cannot be satisfied by rolling stock subject to equipment-trusts.

The equipment covenants relating to replacement are not self-executing.

IV. The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First

Mortgage Bonds used in the acquisition thereof. Otherwise it is subject to the prior lien of the Refunding Mortgage.

No supplemental indenture subjecting Extension to First Mortgage.

Limitations on after-acquired property clauses.

There is no equitable basis for giving the First Mortgage a lien on the Extension beyond the amount which it contributed towards its construction.

V. The Refunding Mortgage bondholders are entitled to additional securities in recognition of their interest in free assets of the Debtor.

I

Determination of the property on which creditors respectively hold liens is fundamental to the enforcement of the absolute priority doctrine laid down by this Court.

The dismissal of the Refunding Mortgage Trustee's appeal was not requested by any party in the Circuit Court of Appeals. The standing of the Trustee to appeal was not questioned either in the briefs or in the argument before that Court. Nor, when the Court of its own motion had dismissed the appeal, did any party file a brief in opposition to the Refunding Mortgage Trustee's petition for rehearing.

It therefore appears necessary at this point only to outline the argument concerning the standing of a mortgage trustee and the duty of an appellate court to decide the issues presented by the mortgage trustee's appeal.

Not only does the Refunding Mortgage expressly authorize the Trustee "to take all steps needful for the protection and enforcement of its rights and the rights of the holders of the General and Refunding Bonds * * *" (I. C. C. Ex. 6, p. 136; see also pp. 135, 142-43, 148-49), but Section

77 of the Bankruptcy Act expressly provides that a mortgage trustee "shall have the right to be heard on all questions arising in the proceedings" (Section 77(c)(13)). Moreover, Rule 17(a) of the Rules of Civil Procedure for the District Courts of the United States permits a trustee to be a party in its own name to any action.

The power and duty of mortgage trustees to protect the mortgage security has been recognized also in many court decisions.

> *Hascall* v. *Wilcox*, 115 U. S. 598, 599-600;
> *Old Colony Trust Co.* v. *Wichita*, 123 Fed. 762, 767 (C. C. Kans.), aff'd. 132 Fed. 641 (C. C. A. 8);
> *Equitable Trust Co.* v. *Denney*, 24 F. (2d) 169, 170 (C. C. A. 7th);
> *Seaboard Nat. Bank* v. *Rogers Milk Products Co.*, 21 F. (2d) 414, 418-19 (C. C. A. 2nd).

The holders of Refunding Mortgage bonds expressly relied upon the Refunding Mortgage Trustee in this case to present the issues respecting the relative liens of the First Mortgage and the Refunding Mortgage. Thus, counsel for the Railroad Credit Corporation stated at the hearings before the Interstate Commerce Commission in 1936:

> "We have relied on counsel for the Trustee to make the case. We have not made the effort to do it ourselves, as to priority." (I. C. C. Min. 550-51)

The A. C. James Co., in its objections in the District Court, referred only briefly to the lien questions, stating (R. 911):

> "In this connection your petitioner concurs in the objections filed herein by the Irving Trust Company as substituted Trustee under the General and Refunding Mortgage."

And the R. F. C., in its brief in the Circuit Court of Appeals, pointing out that it waived none of its rights as a holder of Refunding Mortgage bonds in the event of a favorable determination of the lien questions, stated:

"This will be presented in the briefs of the respective Mortgage Trustees." (Brief, p. 8)

The Circuit Court of Appeals, therefore, should have determined the lien questions on the merits, under the rule stated in *The Bay of Naples*, (48 Fed. 737, 738 C. C. A. 2nd):

> "When the law gives a party a right to appeal, he has the right to demand the conscientious judgment of the appellate court on every question in the case."

This Court has held that it is reversible error to refuse to make a finding one way or another on a question of fact material to the determination of the case. (*The "Francis Wright"*, 105 U. S. 381, 387; *Merchants Insurance Co.* v. *Allen*, 121 U. S. 67, 71.) The same principle should apply to the decision of questions of law raised on appeal.

Determination of the property on which each group of creditors holds liens is fundamental to the enforcement of the doctrine of absolute or full priority pronounced by this Court in *Northern Pacific Railway Company* v. *Boyd*, 228 U. S. 482, and reaffirmed in *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 122.

In one of this Court's most recent decisions on the fairness of reorganization plans (*Consolidated Rock Products Co.* v. *duBois*, 312 U. S. 510), the necessity of such a decision was emphatically stated in the following language:

> "In the first place, there must be a determination of what assets are subject to the payment of the respective claims. This obvious requirement was not met" (p. 520).

And again (pp. 524-25):

> "There is another reason why the failure to ascertain what assets are subject to the payment of the Union and Consumers bonds is fatal. There is a question raised as to the fairness of the plan as respects the bondholders *inter sese*. * * * some appropriate formula for at least an approximate ascertainment of their respective assets must be designed in spite of the difficulties occasioned by the commingling."

The opinion of the Circuit Court of Appeals in this very case recognizes the principle of the *Rock Products* opinion, and expressly points out that the determination of the property on which each mortgage is a lien is an essential preliminary to the findings of value which it held the Commission should have made. The opinion below on this point reads as follows:

> " * * * to determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. *This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage.* Consolidated Rock Products Co. *v.* duBois, supra" (R. 2670).

Clearly, and beyond dispute, the lien questions are questions of law, which should have been decided by the Court and not remanded to the Commission. The Commission recognized this when it stated, in its report on the present Plan:

> "While final adjudication of this and similar questions must be made by the Court, it becomes our duty, in the absence of such adjudications, to determine them preliminarily for the purpose of consideration of the plans before us" (R. 262).

The District Court likewise recognized it when it stated (R. 1597):

> " * * * The determination of the questions relating to the distribution of the new securities, including legal priorities and allocations, involves private rights and is a judicial function, within the province of the court."

We are confident, therefore, that this Court will rule that the lien question should be decided before any further proceedings are had with respect to the reorganization plan. The only question is whether this Court will decide the questions itself or remand them to the Circuit Court of Appeals (*cf. Grant* v. *Leach & Co.*, 280 U. S. 351).

This Court has power, on certiorari, to dispose of all questions presented by the record

Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-68;

Donovan v. *Pennsylvania Company*, 199 U. S. 279, 292;

Delk v. *St. Louis & San Francisco R. R.*, 220 U. S. 580, 588-89.

While this Court might remand the case to the Circuit Court of Appeals for further hearing, even on the same briefs which were submitted previously, this would create delay that can be obviated if this Court itself decides the lien questions,—as its general grant of certiorari indicates a willingness to do. The policy of expediting railroad reorganization (*Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648, 685) likewise supports this request.

The principal respondents on this petition, the First Mortgage Trustees, are in agreement with us, we believe, in requesting this Court to decide the lien issues itself. This is indicated by the statement in their petition (October Term, 1941, No. 820):

> "6. In omitting to discuss all of the issues which were before the Circuit Court of Appeals, the decision of the Circuit Court of Appeals has left unanswered many important questions, affecting virtually every feature of the Commission Plan. An authoritative determination of all of these questions is essential to the final approval of a plan of reorganization. Unless these questions are settled by this Court, they are likely to become the subject of further litigation, which will result in further and unnecessary delay and expense to the parties concerned.
>
> * * * * *
>
> To the end that these reorganization proceedings, which have been pending since 1935, may be speedily determined, the petitioners respectfully pray that this Court review the entire case upon the entire record and determine all of the questions involved" (pp. 9-10).

II

The rolling stock acquired under lease or equipment trust agreement is free from the First Mortgage and subject to the prior lien of the Refunding Mortgage.

Neither the initial payment nor any subsequent payment for the rolling stock claimed by the Refunding Mortgage Trustee (hereinafter called "equipment-trust rolling stock") was made out of proceeds of First Mortgage bonds or out of cash deposited under the First Mortgage; all such payments were made either from free funds of the Debtor or from funds derived by pledge of Refunding Mortgage bonds (R. 1073-74).

The equipment-trust rolling stock includes 27 locomotives, 3,626 freight cars of various types, and 48 passenger cars (R. 1071-73). This equipment was originally purchased under, and was subject at the time of the institution of the reorganization proceedings to, Equipment Trust Agreements Series B, C, and D and the Baldwin Locomotive lease (R. 1068-69). Each equipment-trust agreement stated that the equipment was "let and leased * * * to the railroad company" by the trustee under the agreement, and that title was vested in said trustee (Ex. 108, lease p. 2—not printed*), but that it would become the Debtor's property upon final payment. The Baldwin Locomotive lease (Ex. 109) similarly provided that the locomotives covered thereby were leased to the Debtor with title reserved in the Lessor until the covenants of the lease were fully per-

* Pursuant to stipulation (R. 2612-26), which has been approved by this Court, certain exhibits and other papers which constitute part of the record on appeal were omitted from the printed record, with the understanding that they might nevertheless be referred to by any party in brief or argument. Exhibits which were printed are referred to herein by page in the record, unprinted exhibits by the number given them in the Commission or the District Court.

formed. Although there was no trustee under the Baldwin Locomotive lease, the equipment covered by it is included, for simplicity of expression, in the phrase "equipment-trust rolling stock" as used in this brief.

The amounts originally payable under the equipment-trust agreements and Baldwin Locomotive lease amounted to approximately $10,430,000 (R. 1048-49). Application of free funds and of money obtained from Refunding Mortgage creditors (R. 1055) had reduced the indebtedness to $2,682,598 (R. 1074) at the institution of the reorganization proceeding.

The value of the Debtor's equity in the equipment-trust rolling stock at the date of the institution of the proceedings was $6,163,838, after allowance for accrued depreciation (R. 1074).

Although the equipment-trust rolling stock was acquired for use on all the Debtor's lines of railroad, including those specifically described in the granting clauses of the First Mortgage, it was consistently described by the Debtor as not subject to the First Mortgage. In a series of listing statements filed with the New York Stock Exchange in connection with issues of First Mortgage bonds between 1926 and 1932, the Debtor, after describing the property on which the First Mortgage constituted a first lien, stated:

> "The foregoing equipment does not include additional *unmortgaged equipment* covered by equipment trust agreements Series B, Series C and Series D, as follows" (R. 1074).

On the other hand, the equipment-trust rolling stock was included each year in the lists of equipment subject to the Refunding Mortgage, which were furnished to the Refunding Mortgage Trustee in compliance with Article Five, Section 16 of the Refunding Mortgage (R. 1073).

Lists of mortgaged equipment were required by the First Mortgage to be furnished to the First Mortgage Trustees upon request (I. C. C. Ex. 5, p. 77). No evidence was of-

fered by the First Mortgage Trustees that the equipment-trust rolling stock had ever been described as subject to the First Mortgage in any statement furnished to them.

The equipment-trust clause

A specific exception, in the granting clauses of the First Mortgage, permits the acquisition of rolling stock by lease, conditional sale or equipment trust, free from the lien of the First Mortgage. This equipment-trust clause is significantly placed at the very end of the free funds paragraph (R. 1229). The free funds paragraph states that nothing in the mortgage shall limit the power of the company, by use of its credit or of free funds, to acquire equipment or other property free from the lien of the First Mortgage, provided such property does not come within one of four categories: (a) property acquired with the proceeds of First Mortgage bonds, (b) integral parts of the mortgaged railroad, (c) property acquired for use on the mortgaged railroad, or (d) stock of certain subsidiaries; and then concludes with the words, separated by a semi-colon into a complete and final clause, as follows:

> "*and* the Company may, *unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same*, purchase and acquire equipment, *free from the lien hereof*, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

It will be noted that this equipment-trust clause repeats only one of the four provisos of the preceding free funds paragraph, namely, that First Mortgage bonds or their proceeds shall not have been paid out for the purchase of the equipment.

The equipment-trust clause of the Refunding Mortgage, on the other hand, although it begins in the same way, *is followed by a statement, without counterpart in the First Mortgage, placing the equity in such equipment under the Refunding Mortgage.* This statement reads:

> "*provided*, however, that, when and as and to the extent that the title to or any interest, legal or equitable, in rolling stock or equipment, however acquired, for use or used upon or in connection with the lines of railroad and property now or hereafter subject to this indenture, shall vest in the Company or in any successor company operating said lines of railroad and property free in whole or in part from such trust, mortgage or pledge, then the rolling stock or equipment or such interest therein as it becomes vested in the Company or such successor company shall become subject to the lien of this indenture" (R. 1244-45).

Comparing these two clauses, we find that equipment-trust rolling stock was freed in the first instance from the lien of both mortgages, but that immediately afterward, in the case of the Refunding Mortgage, the *equity* was placed back under the mortgage lien, whereas this was not done in the case of the First Mortgage. There would have been no point in expressly placing back the equity in equipment-trust rolling stock under the lien of the Refunding Mortgage if the preceding language of the equipment-trust clause as contained in the Refunding Mortgage (being the same language as contained in the First Mortgage) did not exclude it.

The facts outlined above are not open to controversy, and are not disputed. None of the equipment-trust rolling stock was owned by the Debtor at the time the First Mortgage was created. None of it was financed in any part with First Mortgage funds. No instrument or act of the Debtor ever expressly subjected it to the First Mortgage.

The question is therefore entirely one of the construction of the free funds clause and the equipment-trust clause

of the First Mortgage as applied to after acquired property. In deciding this question of construction the Court is free to draw on arguments from the logical meaning of the mortgage provisions as well as on canons of interpretation laid down by the courts of any jurisdiction.

The mortgage was executed in New York (I. C. C. Ex. 6, pp. 188-97). The mortgagor is a California corporation, and both the original Trustee and the substituted trustee are domiciled in New York. The mortgaged property is located or used within the States of California, Nevada and Utah (Ex. 6, p. 1). Neither party relies on any rules of law or construction which are peculiar to any of these jurisdictions.

In both New York and California the courts will look to the decisions of other common-law jurisdictions for a statement of the applicable law, where no controlling local decision exists:

Davis v. *Modern Industrial Bank*, 279 N. Y. 405, 411;
Lux v. *Haggin*, 69 Calif. 355, 379-380, 384-85;
Fletcher v. *Los Angeles Trust etc. Bank*, 182 Calif. 177, 183-84;
Adair v. *Beverly Hills Petroleum Corp.*, 59 F. (2d) 94 (S. D. Calif.).

The general rule of strict construction of after-acquired property clauses.

If there were room for doubt that the equipment-trust rolling stock is free from the First Mortgage, the doubt would be resolved by the rule that after-acquired property clauses must be strictly construed, and that property acquired after the execution of a mortgage will not be brought under its lien unless the intention so to do is expressed beyond dispute.

This rule was stated in *Cleveland Trust Co.* v. *Consolidated Gas, E. L. & P. Co.*, 55 F. (2d) 211 (C. C. A. 4) in the following words:

> "The great weight of authority sustains the rule of strict construction in interpreting 'after acquired property' clauses in a mortgage. To use the words of the court, in the case of Smith *v.* McCullough, 104 U. S. 25, 26 L. Ed. 637, the terms employed in describing the property mortgaged must 'imperatively demand' the construction contended for" (p. 214).

To the same effect are

Guaranty Trust Co. v. *Minneapolis & St. L. R. Co.*, 36 F. (2d) 747, 751 (C. C. A. 8);
Westinghouse Electric and Mfg. Co. v. *Brooklyn R. T. Co.*, 263 Fed. 532, 536 (C. C. A. 2).

Mr. Swaine, counsel for the Institutional First Mortgage Bondholders, recognized this rule when he stated before the Commission that it was part of his affirmative case to show what the First Mortgage lien is (R. 2303).

The First Mortgage clearly does not cover the equipment-trust rolling stock.

Not only has the burden resting upon the First Mortgage not been sustained, but the granting clauses of the two mortgages clearly and affirmatively show that the Refunding Mortgage (as is not disputed) is a lien on the equipment-trust rolling stock and that the First Mortgage is not.

The principal argument advanced by the First Mortgage Trustees for claiming that the equipment-trust rolling stock is subject to their Mortgage is that it was acquired for use on the mortgaged railroad and therefore should be excluded from the operation of the equipment-trust clause. However, this argument is not based on any express language of the equipment-trust clause, which, on the contrary, expressly fails to make any exception for equipment used on the mortgaged line. As a practical matter, the First Mortgage Trustees' argument would severely limit the

operation of the equipment-trust clause, since the only equipment to which the clause could apply, under their argument, would be equipment bought for use exclusively on after-acquired branches or extensions not financed with First Mortgage funds and which was never used on the main line. Such a limitation would be unreasonable, and also contrary to sound railroading practice, for efficient use of equipment requires that it be available for use on any portion of the railroad's property.

It will be noted that in the first part of the free funds clause (R. 1228-29) there are *four* limitations, one of which—(c)—is the limitation upon which the First Mortgage Trustees rely. However, it will also be noted that before the last sentence of the paragraph, and separated by a semicolon and the correlative conjunction "and" from the preceding clause, appears the separate clause covering equipment acquired under lease or equipment trust, and that this clause has only *one* limitation, relating to the use of First Mortgage bonds or deposited cash.

There would have been no point in repeating this one exception in the equipment-trust clause if it had been intended that all four of the limitations in the earlier paragraph apply to property acquired under the equipment-trust clause. Conversely, the statement of this one limitation makes it as clear as language can make it that the other limitations (including limitation (c), upon which the First Mortgage Trustees rely) do not apply to property acquired under the equipment-trust clause.

The absence of a provision, such as is contained in the Refunding Mortgage, to put the equity of the equipment-trust rolling stock under the lien of the First Mortgage only serves to emphasize what the language of the equipment-trust clause in the First Mortgage clearly expresses, namely, that "the Company may * * * acquire equipment, free from the lien hereof * * * under any form of equipment trust", provided only that it is not bought with proceeds of First Mortgage bonds.

The Commission's interpretation of the equipment-trust clause was erroneous.

The reason given by the Commission (R. 266), and adopted without comment by the District Court, for rejecting the Refunding Mortgage Trustee's claim was that treating such equipment as free from the lien of the First Mortgage would be inconsistent with the paragraph in the habendum clause of the First Mortgage which reads:

> "SUBJECT, HOWEVER, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby * * *."

The Commission argued (R. 266) that "If all equipment acquired under equipment trusts was to be entirely free of the first mortgage", the reference in the subject clause to a permitted lien on equipment-trust rolling stock could not be explained.

The basic error in this reasoning lies in the Commission's use of the word "all". The Refunding Mortgage Trustee has never argued that *all* equipment acquired under equipment trusts must be entirely free of the First Mortgage, but only that it is free of the First Mortgage if acquired without the use of First Mortgage Bonds or cash. As already quoted, the First Mortgage provides that such equipment-trust rolling stock should be free from the Mortgage

> "* * * *unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same* * * *" (R. 1229).

The Commission overlooked that the First Mortgage contemplates that rolling stock may be acquired under equipment trust either (1) with First Mortgage funds—

in which event the First Mortgage will be a lien thereon "subject * * * to the equipment trust or conditional sale agreements * * * permitted hereby", or (2) with free funds —in which event it will be "free from the lien hereof".

Other provisions of the First Mortgage (in clauses subsequent to the granting clause) expressly cover the use of First Mortgage funds for the purchase of property which is subject to equipment-trust or other prior liens. Purchase of equipment is one of the purposes for which First Mortgage Bonds or cash are expressly permitted to be used (Ex. 5, Art. Second, Sec. 2, Par. A, Clause (b), p. 41). Paragraph E of the same Section which covers issuance of Bonds for new equipment provides (Ex. 5, pp. 57, 58) that whenever the certificate delivered to the Trustees to draw down cash or bonds for the purchase of additional property "shall state the existence of any lien, charge or indebtedness", there shall be reserved from delivery First Mortgage bonds or cash equal to the face amount of such liens or charges, and provides that these shall be delivered only after the payment or redemption of such "liens, charges or indebtedness".

The "liens" or "charges" subject to which property may be purchased with First Mortgage funds include the lien of equipment-trust agreements, for paragraph G of the same Section defines the words "lien" and "charge" as used in that Section to include

> "deferred instalments of the purchase price of property in every case where title thereto has not been vested in the purchaser or, having so vested, is subject to a vendor's lien or any right of the seller to retake or enforce a charge upon such property upon default in the payment of such deferred instalments of the purchase price and also the *deferred payments to be made or rentals to be paid under any conditional sale agreement or lease or trust agreement covering equipment*" (Ex. 5, p. 60).

At least one example appears in the record of First Mortgage funds being drawn down for the purchase of prop-

erty subject to liens, with the First Mortgage Trustees withholding the amount of such lien until satisfied that the lien had been discharged (R. 2549-2550).

In other words, there is a class of equipment-trust rolling stock to which the First Mortgage may attach, that is, equipment on which the down payments are made from First Mortgage funds.

Therefore the "Subject, however" clause can and should be given meaning without detracting from the plain language of the equipment-trust clause, which excludes equipment-trust rolling stock from the lien of the First Mortgage if not financed with First Mortgage funds.

The interpretation urged by the Refunding Mortgage Trustee gives effect to every part of the First Mortgage granting clauses. Property may be acquired under equipment trust or conditional sale by the use of First Mortgage funds, and it will then be under the First Mortgage, but subject to the prior lien of the equipment trust "as permitted hereby" (First Mortgage, I. C. C. Ex. 5, p. 22). Or it may be acquired by equipment trust or conditional sale without the use of First Mortgage funds, and then it will be "free from the lien" of the First Mortgage.

On the other hand, the interpretation which the District Court approves gives no effect to the provision of the First Mortgage that equipment-trust rolling stock is free from the Mortgage lien "unless First Mortgage Bonds shall have been authenticated * * * against the same", for it makes the lien applicable to all equipment-trust rolling stock whether or not it is purchased with First Mortgage funds. Furthermore, such an interpretation would make unnecessary the express language of the Refunding Mortgage which subjects the equity in such equipment to the Refunding Mortgage.

The Refunding Mortgage Trustee's interpretation is therefore supported not only by the rule of strict construction of after-acquired property clauses, but also by the rule laid down in the following authorities, that a construction

which gives effect to all provisions of an instrument is preferable to one which nullifies the meaning of any portion:

Westinghouse Electric & Mfg. Co. v. *Brooklyn R. T. Co.*, 276 Fed. 152, 158 (S. D. N. Y.);
Canadian Northern Ry. Co. v. *Northern Mississippi Ry. Co.*, 209 Fed. 758, 761-2 (C. C. A. 8);
E. I. Du Pont De Nemours & Co. v. *Claiborne-Reno Co.*, 64 F. (2d) 224, 228 (C. C. A. 8);
2 Williston, Contracts (Rev. Ed.), Sec. 619.

The practical interpretation shows that the First Mortgage was not considered to cover equipment-trust rolling stock.

As shown in the statement of facts, the Debtor repeatedly indicated its understanding that the equipment-trust rolling stock was subject to the Refunding Mortgage but free from the lien of the First Mortgage, not only by listing it as so subject in reports furnished to the Refunding Mortgage Trustee and omitting any similar reports to the First Mortgage Trustees, but by express description thereof in listing statements, prior to the issuance of the Refunding Mortgage, as "additional *unmortgaged* equipment covered by equipment trust agreement" (R. 1074).

The First Mortgage Trustees have disputed the relevancy of the listing applications, on the theory that they are not binding upon the First Mortgage bondholders. This position is not justified. Stock Exchange listing applications are prepared contemporaneously with the issuance of the bonds covered thereby, are filed as the basis for obtaining a nation-wide market for such bonds, and constitute a public summary of the conditions affecting such bonds, which are available to every bondholder and which are among the sources of general information concerning such bonds.

The use of listing statements as a source of interpretation was approved by this Court in *Continental Insurance Co.* v. *United States*, 259 U. S. 156, 180, where it stated that not only was the corporation which filed the statement the

representative of the security holders (stockholders in that case), but that the statement

> "has the additional weight of a representation to future purchasers of the two classes of stock as to the kind of interests they were buying in the Company" (259 U. S. at 181).

See also

In Re New York, N. H. & H. R. Co., 27 F. Supp. 392, 395, affd. on op. below, 104 F. (2d) 1018 (C. C. A. 2);

Cunningham v. *Pressed Steel Car Co.*, 238 App. Div. (N. Y.) 624, 627; 265 N. Y. Supp. 256, 260;

Continental Ins. Co. v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 283 Fed. 276, 278 (D. Minn.).

Other cases on equipment-trust clauses confirm the Refunding Mortgage Trustee's contention.

In two other cases similar mortgage covenants have been construed, and in both cases the result clearly supports the claim of the Refunding Mortgage Trustee. One case is a decision by Judge Sanborn in the first *Wabash Receivership* (unreported, but printed in the record herein—R. 1721-34), and the other is a recent decision by Judge Wilkerson in the *Rock Island Reorganization* (also unreported).

1. The decision of Circuit Judge Sanborn, rendered November 7, 1921, in the United States District Court for the Eastern District of Missouri in *The Equitable Trust Co.* v. *Wabash Railroad Co.* (In Equity No. 3977), held that certain after-acquired locomotives purchased under equipment-trust agreements did not come within the language of the granting clauses of the Wabash Refunding Mortgage; and then went on to hold that even if they were covered they were taken out from under the mortgage by the exception clause. The Wabash Refunding Mortgage included by reference the property which was subject to

underlying mortgages, one of which, like the First Mortgage in this case, covered all after-acquired property "used" "in connection with" the mortgaged railroads (R. 1725). Judge Sanborn held that in spite of this language the Wabash Refunding Mortgage was not intended to include the interest of the mortgagor in locomotives which were purchased after the date of such mortgage through equipment trusts. After so holding he stated:

> "But supposing that the paragraph quoted from the mortgage of July 1, 1889, is broad enough to cover the interest which the mortgagor secured in the seventy locomotives in October 1907 and thereafter under the equipment agreement; * * *. Nevertheless, it was competent for the parties to that mortgage, by a stipulation therein, to except that interest from the lien thereof." (R. 1727).

The free funds clause in that case read:

> "'But it is hereby covenanted and agreed that the Railroad Company reserves the right, except as in this indenture expressly otherwise provided * * * to acquire any stocks, bonds, securities and other property of any kind and description free from the lien of this indenture and any railroad, branch or extension and any stocks, bonds, securities and other property of any kind or description, acquired by the Railroad Company without the use of bonds or proceeds of bonds issued hereunder * * * shall, except as in this Indenture expressly otherwise provided, be free from the lien of this Indenture unless specifically subjected thereto by an instrument in writing * * *'." (R. 1728).

The discussion of this clause in the opinion attaches particular significance to its location at the end of the granting clause (the same position occupied by the equipment-trust clause of the Western Pacific First Mortgage). Judge Sanborn further stated:

> "But (1) if the granting parts of the mortgage fail to evidence an intention of the parties to subject after acquired locomotives, procured through equip-

ment trust agreements, to the lien of the refunding mortgage, they were not subjected thereto by the reservation paragraph, and the question presented by this contention becomes immaterial; (2), if, on the other hand the granting clauses do evidence such an intention, the position of the reservation paragraph in the mortgage after all the descriptions of the property granted and just before the habendum paragraph, its independent, clear and sweeping covenant in these terms 'but it is hereby covenanted and agreed that the railroad company reserves the right, except as in this indenture expressly otherwise provided, to acquire or construct any railway, branch, or extension and to acquire any stock, bonds and other property' not other property of the kinds therein described, but 'of any kind and description free from the lien of this indenture' etc., and the evident purpose of this paragraph to carry out thereby the intention expressed in the authorizing resolution seem to the court, to converge with almost compelling force to persuade that the construction which this contention seeks to apply to the reservation never was intended by the parties to it, * * *" (R. 1732-33).

The foregoing reasoning applies directly to the Western Pacific First Mortgage. It was competent for the parties to except the interest in equipment-trust rolling stock from the lien of the mortgage; and the position of the equipment-trust paragraph in the mortgage after all the description of the property and just before the habendum paragraph, together with its independent statement of the only exception to such freedom—namely, the use of First Mortgage funds in the acquisition of such equipment—prove with compelling force that the construction which the First Mortgage Trustees now claim was never intended by the parties to the Mortgage.

Judge Wilkerson's opinion was rendered on October 31, 1939, in the United States District Court for the Northern District of Illinois, in the *Chicago, Rock Island and Pacific Railway Company* reorganization. (See record in that case, pp. 2807-38.) It involved the construction of two

separate mortgages, each of which resembled the Western Pacific First Mortgage in important particulars. The first, the General Gold Bond Mortgage, referred in its granting clauses to equipment "*hereafter acquired* * * * *for use upon*" the mortgaged Railway, which is substantially the language upon which the First Mortgage Trustees here rely. It also contained a proviso in the following language, which closely resembles the general proviso in the Western Pacific First Mortgage:

> "'And *Provided,** further, that nothing in this indenture contained shall be construed to limit the right or power of the Railway Company, hereby expressly reserved, to own and hold, or in any manner, *except by the use of bonds secured by this indenture*, to construct or to acquire, by purchase or by lease, other lines of railway, branches or extensions, *or** equipment or interest therein, *or** new terminals, and to hold and to dispose of, any line or property so acquired, and to retain the proceeds thereof free from the lien of this indenture'" (CRI&P rec., p. 2817).

The Court overruled a contention that the words "or equipment or interest therein" in the proviso must be held to relate only to equipment not intended for use on the mortgaged railway, stating, among other things:

> "If the parties intended that only after-acquired equipment, obtained by the railway company on its own credit for use upon lines of railway not subject to the mortgage, should be excluded from the mortgage lien, there was no reason why that intention could not have been stated in clear and unmistakable terms. The intention should not be left to be determined by conjecture or inference if two provisions or clauses, not harmonious on their face, can be reconciled by allocating to each a separate field of operation that will not be in conflict with the other. That result follows by a determination that the after-acquired property clauses apply to equipment later

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* Words followed by asterisk are italicized in the mortgage.

acquired to replace equipment no longer fit for service, and equipment acquired by the use of general mortgage bonds; and that equipment later acquired by the railway company on its own credit, without further qualification, is not subject to the mortgage lien." (CRI&P rec., p. 2821).

The other mortgage interpreted in the *Rock Island* case, was known as the First and Refunding Mortgage. The granting clauses covered equipment "appurtenant to" any of the mortgaged lines of railway (Opinion, CRI&P rec., p. 2822); and also property of every kind and description "acquired for use" upon the mortgaged lines (Opinion, CRI&P rec., p. 2826). It contained the following free property clause:

> "But nothing expressed or implied in this indenture is intended, or shall be construed, (a) to limit the right or power of the Railway Company, hereby expressly reserved, by the use of its credit, * * * or *in any manner other than by the use of bonds issued or to be issued under the provisions of * * * this indenture*, or their proceeds, to construct or acquire lines of railway, branches or extensions, or interests therein, or other property, free from the lien hereof:" (p. 2827).

The Court again held that the application of the free property clause was not limited to property acquired for use on lines free from the mortgage, stating:

> "But the suggestion is made that the words 'or other property' in the free property clause, if those words include equipment, should be construed to include only that equipment, acquired by the railway company with free money, that is purchased for use on other lines of railway, branches or extensions that have been acquired with free money, and are not, therefore, subject to the mortgage lien. No such limitation or restriction is to be found in the free property clause. * * *" (p. 2829).
>
> "* * * If the parties had so intended, there were numerous specific words and sentences that could have been used clearly to express such intention.

Without clear expression of such intention it is not proper to supply it by judicial determination where the language in dispute can be otherwise applied" (p. 2831).

The equipment-trust rolling stock has been shown to be free from the First Mortgage by the language of that Mortgage, by analysis of well-considered decisions, and by the practical interpretation of the properties. It is not disputed or disputable that it is subject to the Refunding Mortgage. Its value is so substantial that the creditors secured by Refunding Mortgage bonds are plainly entitled, on the basis of their lien on $6,000,000 worth of such equipment, to far better treatment than is given by the Plan,—which is based on their having only a second lien thereon.

III

The First Mortgage Trustees can sustain no claim under the replacement clauses of the First Mortgage which materially affects the rights of the Refunding Mortgage Trustee in the equipment-trust rolling stock.

The First Mortgage Trustees contended in the District Court (although no such contention had been made before the Commission) that even if the equipment-trust clauses excepted the equipment-trust rolling stock from the First Mortgage, it became subject to the First Mortgage by reason of the replacement provisions thereof.

Again the facts are undisputed. The net book value of equipment subject to the First Mortgage which has been retired or otherwise disposed of is only $442,287.* The

* The gross retirals to March 1, 1932, when the Refunding Mortgage became a lien, amounted to $690,912 (next-to-the-last sheet of Exhibit G to Stipulation of Facts not in Dispute—not printed), while equipment acquired with free funds (other than equipment-trust rolling stock), together with additions and betterments to the First Mortgage equipment from free funds, aggregated $248,625, (Exhibit G, 3d and 6th to 16th sheets).

First Mortgage Trustees, however, assert that they are entitled under the replacement clauses to have allocated to them from any free equipment a total book value equal to the aggregate accrued depreciation on equipment subject to the First Mortgage, which depreciation aggregates over $5,000,000 (Exhibit G to Stipulation of Facts not in Dispute).

The only two covenants in the First Mortgage imposing any obligation to acquire new equipment are restricted to equipment worn out, destroyed or disposed of. Article Fourth, Section 9 of the First Mortgage (Ex. 5, p. 76—not printed), contains a covenant (herein termed the "maintenance covenant") that all equipment subject to the Mortgage shall be marked so as to identify the same as subject thereto, and that the Company

> "will at all times keep such equipment in good order and condition, reasonable wear and tear excepted, * * * and will replace such of said equipment as shall be worn out or destroyed with other equipment of at least equal value on which this indenture shall constitute a first lien" (p. 76).

In Article Seventh, Section 5 of the First Mortgage (p. 111), there is also a provision (herein termed the "replacement covenant") permitting the Company "to dispose of" mortgaged equipment "free from the lien" of the Mortgage if it has "become unsuitable or unnecessary for use",

> "first or simultaneously replacing the same by new * * * equipment * * * of substantially equal value to the Company, which shall become subject to the lien of this indenture in like degree * * *" (p. 111).

The issue therefore is whether the replacement covenant or the maintenance covenant requires Debtor to supply new equipment annually to the extent (in cost) of the book-keeping charge made in that year for depreciation of existing equipment or only to the extent that existing equipment has been disposed of, worn out or destroyed. We believe the language of the instrument and the authorities clearly support the latter conclusion.

The equipment covenants apply only to equipment that has been worn out, destroyed or disposed of.

The maintenance covenant does not require any guarantee against depreciation, but on the contrary states only that the equipment is to be kept "in good order and condition, *reasonable wear and tear excepted*". This statement clearly relates to the repair of existing equipment, not the acquisition of new equipment. There is no allegation or proof of failure to comply with the covenant to keep the First Mortgage equipment in good repair. The second clause of the maintenance covenant contains a provision requiring replacement of such equipment "as shall be worn out or destroyed". This is not a covenant to provide new equipment before the old is worn out or destroyed; in fact it is clear evidence that no equipment need be acquired to satisfy the First Mortgage until the old equipment has been worn out or destroyed.

The replacement covenant relates to a case where the company has undertaken "to dispose of" mortgaged equipment which has "become unsuitable or unnecessary for use". There is no evidence that any First Mortgage equipment has been so disposed of, or has become unsuitable or unnecessary for use. Consequently, there is nothing to bring the replacement covenant into play.

From the above it is obvious that nothing in the equipment covenants justifies an interpretation that, to the extent of annual depreciation charges against equipment, the railroad must acquire new equipment in which it has an equity equal to the amount of such depreciation. Yet the substance of the First Mortgage Trustees' argument is that these carefully drafted covenants should be treated as if they imposed such an obligation.

The equipment covenants cannot be satisfied by rolling stock subject to equipment trusts.

Another feature of the covenants defeats the construction which the First Mortgage Trustees attempt to place on them. Both covenants require that the replacement items shall be subject to the first lien of the mortgage, which cannot be true in the case of rolling stock acquired under lease or equipment trust.

The maintenance covenant states that equipment that is worn out or destroyed must be replaced with other equipment "on which this indenture shall constitute a first lien". The replacement covenant requires that equipment which has been disposed of be replaced by new equipment "which shall become subject to the lien of this indenture in like degree". The company could not give anything better than a second lien on equipment-trust rolling stock, and therefore could not satisfy those covenants except by equipment which was bought free and clear. The First Mortgage Trustees could not properly (assuming, contrary to the fact, that any deficiency existed in respect of equipment) have accepted equipment-trust rolling stock as replacement of items worn out, destroyed or disposed of. *A fortiori*, they cannot claim such items after the lien of a new mortgage has attached to them.

Maintenance and replacement covenants similar to those in the Western Pacific First Mortgage were interpreted in accordance with our argument herein in *Chase National Bank* v. *Mobile & Ohio R. R. Co.* (S. D. Ala., Civil Action No. 56, Special Master's report filed March 25, 1940, confirmed June 14, 1940—not officially reported) where the special master stated:

> "* * * From my construction of the Montgomery Divisional Mortgage, the security demanded, insofar as it concerned rolling stock, was sufficient rolling stock to amount in value to the rolling stock orignally purchased, subject to wear and tear. The reason I

say subject to wear and tear is that *it was the intention of the parties replacements should not be made until items of rolling stock became unfit for use*, and the evidence shows that this happened at various times over a long period."

"I believe that the parties to the Montgomery Division Mortgage intended to provide, and did provide for a lien upon all equipment originally purchased and the replacements that later were purchased, and I have so found. The latter lien would be on the rolling stock of Mobile and Ohio in valued amount sufficient to replace the original equipment *in its depreciated condition. Guaranty Trust Company* v. *Minneapolis & St. L. Ry. Co., supra.*"*

The equipment covenants relating to replacement are not self-executing.

Neither the Debtor nor the First Mortgage Trustees had taken any steps to subject the equipment-trust rolling stock to the First Mortgage prior to the time when the Refunding Mortgage became a lien thereon. In fact, no steps were taken by either party prior to the filing of the Debtor's petition for reorganization,—or for that matter, prior to the filing in 1940 of the First Mortgage Trustees' brief in the District Court.

Under such circumstances, even if there were any basis for a different interpretation of the extent of the equipment covenants, they could not bring the equipment-trust rolling stock under their lien. The First Mortgage provides a definite method to determine what property, if any, is allocated as replacements. This method—the marking of the equipment "so as to identify the same as equipment subject to this indenture"—was not followed. Nor was any of the equipment-trust rolling stock described in any list of mortgaged equipment furnished to the First Mortgage Trustees under the provisions of the Mortgage (p. 77).

* 36 F. (2d) 747 (C. C. A. 8).

As against a subsequent mortgagee, the First Mortgage Trustees clearly have no right to claim that equipment which was acquired as free equipment must be treated as if it had been subjected to their Mortgage as replacements. There would be no way, in the absence of marking or other specific allocation, of knowing what equipment was thus mortgaged.

Similar replacement covenants were held not to give a lien on free rolling stock in a decision of Justice (then Judge) Shiras, in *United States Trust Co.* v. *Wabash Western Ry. Co.*, 38 Fed. 891 (C. C. S. D. Iowa). A covenant in a divisional mortgage there required that a certain amount of rolling stock be assigned to the division and appropriately marked, and that the company at all times keep a definite amount of rolling stock designated as belonging to the division. The Court held that a deficiency in complying with this covenant could not be made good by subjecting to the mortgage cars taken from the railway's general equipment, stating:

> "The findings of the master show that the covenant in the mortgage, that the mortgagor would equip the Omaha Division with rolling stock proportionately equivalent in amount to that used upon the other portions of the system, has not been performed, and it is claimed on behalf of the present purchasers that the deficiency should be made good by assigning a sufficient number of cars out of the general equipment of the Wabash, St. Louis & Pacific Railway to make the equipment equal to what it would have been had the covenant been performed. If this were done, the cars so taken would reduce to that extent the security of other mortgagees, who are not in fault. If no other interests were involved, save those of the mortgagor and the mortgagees of the Omaha Division, it might be that specific performance of the covenant in this particular could be decreed, but whether the decree would be for the assignment of specific rolling stock already in the possession of the company or for the purchase of other stock would be an open question, and it is doubtful whether a court of equity would undertake to give relief in

this form. But however this may be, it is clear that when the question is presented, as it now is, upon this record, the court is not justified in attempting to enforce the covenant in the manner indicated. *The liens of other mortgages have attached to the equipment in question, and the court is not justified in attempting to displace or defeat these liens, in order to make good to the mortgagees of the Omaha Division the loss resulting from the breach of the covenant in their mortgage.* Practically it is a question of lien, and the mortgagees under the latter mortgage are entitled to assert a claim only to such rolling stock as *in fact* became subject to the lien of the mortgage of February 15, 1879" (pp. 892-3).

The First Mortgage Trustees have cited Judge Wilkerson's unreported opinion in the *Rock Island* case (mentioned above, p. 29) as being to the contrary. The opinion there held that each mortgage was entitled to credit against the "disputed equipment" for the amount necessary to "*replace*" original equipment. In fixing a formula for calculating the rights in "disputed equipment" the Court charged "disputed equipment" with the difference between the original cost of mortgaged equipment and the original cost, less depreciation, of such equipment which was in service at the date of the reorganization. The effect of this may be said to be the recognition of a lien equal to the dollar amount of depreciation, but the distinction between depreciation of existing equipment and replacement of equipment which was worn out, destroyed or disposed of does not appear to have been argued before him. Clearly, the obligation stated in the opinion to "replace" original equipment does not support a decree which requires the addition of equipment which does not replace non-existent equipment.

In any event the covenants in the Western Pacific First Mortgage clearly require only the replacing of equipment which has been removed from the Mortgage lien and not the addition to the mortgaged property of new units where the mortgaged units are still in service, having merely suffered *depreciation* through normal use.

Moreover, the interpretation which the First Mortgage Trustees urge would be contrary to the rulings of the Circuit Court of Appeals for the Seventh Circuit, which are controlling on Judge Wilkerson's Court. That circuit has followed the *Wabash Western* case in *Metropolitan Trust Co.* v. *Chicago & E. I. R. Co.*, 253 Fed. 868, 879, where, after holding that a covenant similar to that in Article Seventh, Section 5 of the Western Pacific First Mortgage, was not a replacement covenant, the Court ruled that a replacement covenant would not be effective in any event to impose a lien as distinguished from a general claim for breach of contract, stating:

> "* * * But if it were there, or if the provisions present were properly to be construed as such a covenant, no lien would attach merely because of the mortgagor's breach of the covenant through its failure to maintain and replace the Coal Company equipment in 1894. United States Trust Co. *v.* Wabash W. Ry. Co. (C. C.) 38 Fed. 891; Fosdick *v.* Schall, 99 U. S. 235, 25 L. Ed. 339" (p. 879).

Thus it appears that nothing in the First Mortgage covenants placed under said Mortgage any equipment-trust rolling stock acquired with free funds which had not become subject to the First Mortgage by March 1, 1932, the effective date of the Refunding Mortgage. None of the equipment-trust rolling stock having become subject to the First Mortgage up to that time, it became expressly subject to the Refunding Mortgage on that date and could not, under any theory, be taken out from under the Refunding Mortgage to replace First Mortgage equipment because of events occurring after March 1, 1932.

A similar principle was applied in *Guaranty Trust Co.* v. *New York & Queens Co. Ry. Co.*, 253 N. Y. 190, 170 N. E. 887. In that case an underlying mortgage made by Steinway Railway Company covered a powerhouse and a car-barn. Later, after these properties had partly deteriorated, the Steinway Company was merged into New York & Queens County Railway Company. The merged company made a new ("consolidated") mortgage, and acquired a new par-

cel of land for a new carbarn and new powerhouse, continuing to use the old carbarn as a repair shop and the old powerhouse for a time, and then scrapping them.

The claim of the Steinway bondholders that the new carbarn and powerhouse should be considered subject to the after-acquired property clause of the Steinway mortgage was denied in an opinion by Judge Cardozo, who stated in part (253 N. Y. at 210-11, 170 N. E. at 894):

> " * * * At all events, the line was not a shell when the newly-acquired property came under the lien of the consolidated deed of trust. During a substantial period thereafter, it was maintained not only with its own power house and barn, but with equipment and machinery properly kept up. For any loss that has been suffered through the removal at a later time of this equipment and machinery, the plaintiff had its remedy, equitable or legal. Even now it does not show the relation between the value of the equipment and machinery and the value of the land and buildings, part of the old line. The failure of the Steinway bondholders or of the plaintiff as their spokesman to take advantage of remedies, preventive or reparative, did not divest a lien in favor of the consolidated bondholders attaching in the interval."

IV

The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage Bonds used in the acquisition thereof. Otherwise it is subject to the prior lien of the Refunding Mortgage.

Facts

Less than half the total cost of the Northern California Extension was supplied from proceeds of First Mortgage bonds (R. 1078). Much less than half the cost of the land on which it was built was paid from proceeds of First Mortgage bonds (R. 1082-84). It is not described in the First

Mortgage, or covered by any supplemental indenture subjecting it to the lien of the First Mortgage (R. 1077); on the other hand, it is specifically mentioned as one of the branches mortgaged under the Refunding Mortgage (R. 1236).

The inequity of the First Mortgage Trustees' assertion of an exclusive prior lien on the Extension to the extent of the entire $50,000,000 of First Mortgage bonds outstanding, and to the complete exclusion of the Refunding Mortgage creditors who supplied more than half its construction cost, is emphasized by the fact that the Extension has proved to be the most valuable part of the Debtor's entire road.

The cost of construction of the Northern California Extension was $10,183,641.90 up to May 31, 1932 (R. 1078). Some additional amounts were spent after that date, although it was placed in operation for freight service on June 1, 1932 (R. 1077). Of such total cost, the sum of $5,000,000 was supplied by A. C. James Company, under debentures which were subsequently exchanged for notes secured by Refunding Mortgage bonds; the sum of $4,875,000 was supplied from the proceeds of sale of First Mortgage bonds (R. 1047); and the sum of $559,408 was supplied by Reconstruction Finance Corporation under notes secured by Refunding Mortgage bonds (R. 1088). Were it not for the application of the funds advanced by Refunding Mortgage creditors, the line could not have been completed, for not only did it cost over twice as much as the $5,000,000 originally contemplated (R. 2321), but, as was stated in the Debtor's petition to the Interstate Commerce Commission for authority to borrow from the Reconstruction Finance Corporation the sums necessary to complete contract obligations, "failure by the carrier to make the payments under its contract renders the carrier subject * * * to the enforcement of a lien upon its property" (Ex. 52, p. 647).

The Extension is probably worth much more than it cost. At any rate, there has been no suggestion that it is worth less than it cost.

The Northern California Extension, in conjunction with the Great Northern Railway, furnished a new route to the north and a source of entirely new traffic, which increased tremendously after the first full year of operation (R. 1935). The Interstate Commerce Commission's report stated that further increased traffic over the Extension could be reasonably expected (R. 215). All the traffic estimates indicated a greater percentage increase for traffic over the Northern California Extension, than over the balance of the system (R. 1980, 1942-48).

Although the Northern California Extension represents less than 10% of the total system mileage, it has produced approximately 20% of the total system revenue, an average of over $3,000,000 of freight traffic per year since 1936 (R. 1268), and nearly $3,500,000 in 1939 (R. 1306). Figures for later years are not in the record, but the predictions in the testimony were that it would increase in relation to the balance of the road. The figures just given include the revenue for carrying Northern California Extension traffic over other parts of the system, but it appears that practically none of this traffic would accrue to the system if it were not for the existence of the Extension (R. 1316). The cost of operation of the Extension is less than $400,000 (R. 2195), and its net earnings available for interest are estimated at approximately $500,000 (R. 220).

Moreover, the Northern California Extension was in first-class condition when the reorganization proceedings began, and required no improvements of any importance (R. 2224), whereas considerable amounts had to be spent on the improvement of the system as a whole during the period of reorganization.

It is no wonder that counsel for the First Mortgage bondholders described the Extension as "a very important piece of line" (R. 2438), and conceded that the decision of the question of the lien on the Extension would have a direct bearing upon the fairness of the Plan treatment.

No supplemental indenture subjecting Extension to First Mortgage.

No supplemental indenture was ever executed subjecting the Extension to the First Mortgage (R. 1077). It was not part of the line which the Debtor was authorized to operate at the time of its incorporation, but was first mentioned in an amendment to the certificate of incorporation in 1929 (R. 1076-77). Thus there was no evidence of an intention in 1916, when the First Mortgage was executed, that it should cover any such new line of railroad. It is inconceivable that such an important acquisition as the Northern California Extension would not have been expressly subjected to the First Mortgage if it had been intended to be entirely subject to the entire First Mortgage.

The First Mortgage permits the Debtor to draw down $1,000 worth of First Mortgage bonds for every $1,000 spent on additions or extensions (Ex. 5, pp. 44 to 45). This lends added significance to the fact that, out of the total cost of land for transportation purposes for the Northern California Extension of $504,590.66 (R. 1084), the requests for First Mortgage moneys show an expenditure therefrom of an aggregate of only $196,805.73 (R. 1082-83), *or less than 40% of the cost of land supplied from First Mortgage money.*

Even the "specifications of the securities offered for sale" at the time of the issue of the First Mortgage bonds (Ex. 93) which were used in financing the Extension did not promise a first lien upon the entire Extension. They read:

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. Upon the completion

> of the construction and/or acquisition of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed."

It would have been simple to state definitely, and it would have been definitely stated if so intended, that "upon the completion of the Northern California Extension the First Mortgage will constitute a first lien thereon". The Refunding Mortgage, it will be recalled, does not describe the property covered thereby as being entirely subject to the First Mortgage, but states that its lien is "subject, however, in so far, but *only in so far* (in extent, degree of priority or otherwise), as in law the same respectively may attach to any part or parts of the trust estate * * *".

Limitations on after-acquired property clauses.

The after-acquired property clauses of the First Mortgage are so phrased as to subject only limited classes of property thereto. These classes are described in paragraph Third of the granting clauses (R. 122-24). They are expressly limited to:

(a) Properties "acquired or constructed by the use of First Mortgage bonds or proceeds thereof or cash deposited" thereunder, "or on account of the purchase, acquisition or construction" whereof First Mortgage bonds or proceeds or deposited cash were used;

(b) Property or facilities "constituting an integral part" of the mortgaged property;

(c) Property or facilities "used or acquired for use in or for the maintenance or operation of or appertaining to" the mortgaged property;

(d) Certain securities or properties of specified "subsidiary" companies.

The free funds paragraph, already mentioned in Point II (see page 18, *supra*), includes a right "to construct or acquire *free from the lien hereof* lines of railroad, extensions or branches or interests therein" provided they do not fall in any of the four classes which were described in paragraph Third above mentioned.

Argument

In view of the absence of any supplemental indenture or other recorded instrument expressly subjecting the Northern California Extension to the lien of the First Mortgage, the only basis for the First Mortgage Trustees' claim of lien thereon must be that the after-acquired property clause of the First Mortgage compels such a result.

Any claim of the First Mortgage Trustees to the Northern California Extension must be based on clause (a), relating to the use of First Mortgage bonds or proceeds in the construction or acquisition thereof. The other clauses may be ruled out at the outset.

Clause (b), relating to property "constituting an integral part" of the mortgaged property, is obviously of extremely narrow effect, and cannot cover a new branch extending one hundred miles from the main line. Certainly it cannot have a broader meaning in this connection than the succeeding appurtenance clause (Clause (c)).

Clause (c), relating to property "appertaining to the mortgaged premises", also has a very limited application. It cannot cover other real estate or branches.

In *New Orleans Pacific Railway Co.* v. *Parker*, 143 U. S. 42, 55, the Court said:

> "Property, however, not connected with what is ordinarily termed the plant, or not forming a part of the organic structure of the road, is never treated as appurtenant to it."

See also *Humphreys* v. *McKissock*, 140 U. S. 304, 313-14, where the Court said:

"A thing is appurtenant to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris* v. *Elliott*, 10 Pet. 25, 54; *Jackson* v. *Hathaway*, 15 Johns. 447, 455; *Linthicum* v. *Ray*, 9 Wall. 241. Of two parcels of land one can never be appurtenant to the other."

* * * * * * *

"Under the term 'appurtenances,' as used in the mortgage in question, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is indispensable to the operation of a railway and what would be only convenient. *Bank* v. *Tennessee*, 104 U. S. 493, 496."

The same principle of construction was applied in *Great Northern Railroad Co.* v. *Central Hanover Bank and Trust Co.*, 12 F. Supp. 846 (W. D. Wash.), and *Old Colony Trust Co.* v. *Standard Beet Sugar Co.*, 150 Fed. 677 (N. D. Neb.).

Clause (c) also refers to property "for use in or for the maintenance or operation of" the mortgaged property. This cannot apply to the Extension, for such a covenant is restricted in application to property strictly necessary for such maintenance or operation. *New Orleans Pacific Railway Co.* v. *Parker*, 143 U. S. 42, 54-57.

There is no equitable basis for giving the First Mortgage a lien on the Extension beyond the amount which it contributed towards its construction.

From the foregoing rules, it follows that the First Mortgage Trustees cannot claim a lien on any portions of the Northern California Extension which were not acquired with the proceeds of their bonds. Since they have shown no evidence as to the portions of the Extension on which

their money was used, it is only fair that their lien be restricted to the proportion which the $5,000,000 of First Mortgage Bonds issued for the Extension bear to the total cost of over $10,000,000.

Under the provisions of the First Mortgage there could be no question that, if First Mortgage money had been applied to the acquisition and construction of the Extension northwardly from its beginning at Keddie until it was exhausted, and money from other sources then applied to the acquisition and construction of the remainder of the line, the northerly portion would be free from the lien of the First Mortgage and subject to the Refunding Mortgage. The proof does not indicate whether this took place or whether funds from all sources were spent indiscriminately over the whole mileage.

In a court of equity, which looks to substance rather than form, it should be of no consequence which method was used or who has the burden of proof—although it is conceded that the burden is on the First Mortgage Trustees. A court of equity should decree either that the First Mortgage is a first lien on a portion of the total Extension mileage equal to the proportion that its contribution bears to the total cost, or that it has a first lien on an undivided interest in the whole Extension in the same proportion, and that the Refunding Mortgage has a first lien on the remaining undivided interest.

Equitable principles are the only basis for enforcing after-acquired property clauses at all (*Pennock* v. *Coe*, 23 How. 117), since a mortgage cannot create a legal lien on non-existent property. Substantially this view of after-acquired property clauses is upheld in the California decision of *Bibend* v. *L. & L. F. & L. Insurance Co.*, 30 Calif. 78, 86, quoted in *Mason* v. *Citizens National Trust and Savings Bank*, 71 F. (2d) 246 (C. C. A. 9), which discusses the general rule that assignments of things having no present actual existence are not recognized at law, but are given effect only by courts of equity.

Equitable treatment of the Refunding Mortgage creditors, who supplied the major portion of the money necessary to place the Extension in operation, is required also by the provisions of Section 77, which authorizes creditors affected by a plan to file their "claims for equitable treatment" (Section 77(e)).

Moreover, after-acquired property clauses, as set forth in Point II (pp. 20-21), are strictly construed, and enforced only to the extent that their terms "imperatively demand".

Within these rules the First Mortgage Trustees have failed to prove that the entire Extension ever became subject to their entire mortgage as a first lien.

There is no unfairness to the First Mortgage Bondholders in limiting their lien to $5,000,000. All that they contributed to the construction of the line was $5,000,000. All that their mortgage entitled them to in respect of property financed with First Mortgage funds was dollar for dollar value, that is, $5,000,000 of new property for $5,000,000 of First Mortgage money. In seeking to obtain the entire $10,000,000 value of the Northern California Extension for a $5,000,000 investment, and to make the Refunding Mortgage creditors junior in lien on the Extension to the $45,000,000 of First Mortgage bonds which were outstanding before the Extension was built, the First Mortgage bondholders are demanding a gift at the expense of the creditors whose money made possible the completion of the Extension.

The position of the First Mortgage Trustees and bondholders is that since part of the cost of the Extension was financed with First Mortgage money the entire Extension comes under the entire lien of their mortgage. No limits to this contention are, or could be, suggested. It would make the whole $10,000,000 Extension subject to the entire mortgage if only the most trivial amount of First Mortgage moneys were used thereon. The First Mortgage Committee even argued in the Circuit Court of Appeals that they were entitled to a $50,000,000 lien on the Extension if "one penny" of First Mortgage money were spent thereon (Brief in C. C. A., p. 60)—a result which would be in the highest

degree inequitable. The language of the First Mortgage does not require any such inequitable result, and courts will always refrain from adopting a construction which works injustice if another one is available. *Graselli Chemical Co.* v. *Aetna Explosives Co.*, 252 Fed. 456, 459-60 (C. C. A. 2d); *Pavlowski* v. *Mohawk Golf Club*, 204 App. Div. (N. Y.) 200, 204; 198 N. Y. Supp. 30, 34; *Restatement of Contracts*, Section 236(a).

The only possible method of imposing equitable limits upon the theory that the First Mortgage Trustees advance is, as we suggest, to limit the lien of the First Mortgage to, or make it proportionate with, the amount of First Mortgage money used.

The decisions which the First Mortgage Trustees have heretofore cited, and will doubtless cite in this Court, in opposition to the existence of any lien for Refunding Mortgage creditors, all involve a question of a claimed exclusive prior lien—that is, an effort entirely to displace a first mortgage. That is not what we seek in this case at all. The Refunding Mortgage Trustee's position is that, in arriving at an equitable distribution of the new securities, the creditors whose money made possible the completion of a line which is worth much more than the amount of First Mortgage money spent thereon, are entitled to receive securities of a higher rank than common stock in recognition of the very real contribution which they have made to the system. Even if the Refunding Mortgage creditors were to be treated as having only a second lien, subject to $5,000,000 of First Mortgage bonds, upon the Northern California Extension, they would be entitled to receive new income mortgage bonds and new preferred stock in recognition of this second lien. However, their lien is entitled to equal rank with that of the First Mortgage bondholders.

Although few decisions have been found which involve a similar situation, equity will not be precluded from granting proper relief even though the circumstances may be unusual. *Graselli Chemical Co.* v. *Aetna Explosives Co.*, *supra.*

The right to a coordinate or *pari passu* lien was recognized in the well considered case of *Citizens Savings and Trust Co.* v. *First Cincinnati & Dayton Traction Co.*, 106 Ohio St. 577; 140 N. E. 380. In that case three companies had made mortgages each containing after-acquired property clauses. These companies were later consolidated to form the Southern Ohio Traction Corporation which, of course, acquired the property subject to all existing liens. The new corporation made a mortgage on the consolidated property, covering properties received from the three underlying companies and also other properties. The three underlying companies had each owned a separate power plant and transmission lines. Upon consolidation it was decided to discontinue the separate power plants and build a general power plant to furnish energy for the operation of the entire consolidated system. The Court held that the three underlying mortgages were entitled to liens of equal rank upon the central power plant in proportion to the power requirements of each.

This result is almost identical in substance with what we have suggested with respect to the Northern California Extension. First Mortgage creditors and Refunding Mortgage creditors have both contributed to its construction. Neither can claim that it could have been completed without the contribution of the other. Both should be held entitled to liens of equal rank thereon.

In the present case the equities are even stronger than in the *Cincinnati & Dayton* case, for the creditors secured by the Refunding Mortgage bonds contributed actual new money, which was certainly a more valuable contribution than the old individual power plants which were contributed to the common enterprise in the *Cincinnati & Dayton* case.

In *Guaranty Trust Co. of New York* v. *Minneapolis & St. L. R. Co.*, 36 F. (2d) 747 (C. C. A. 8), the Court went so far in protecting a later mortgage as to hold that it was the first lien upon a bridge described therein, although an earlier mortgage covered one line terminating on the east-

erly bank of the river and another line terminating on the westerly bank—between which lines the bridge was the only connection.

The Plan fails to give equitable treatment to the Refunding Mortgage creditors insofar as it refuses to accord them any securities senior to common stock in recognition of their lien on the Northern California Extension.

V

The Refunding Mortgage creditors are entitled to additional securities in recognition of their interests in free assets of the Debtor.

Facts

The items of non-carrier real estate which are in dispute herein are valued on the Debtor's books at over $1,850,000. The major item consists of acreage in the Islais Creek district of San Francisco (R. 1090), which is described in the printed record. The other items, together with certain facts respecting each, are listed on an exhibit (Ex. H to the Stipulation of Facts Not in Dispute) which is not printed as part of the record.

Portions of such non-carrier real estate have been sold from time to time during the course of the reorganization proceedings, and the proceeds deposited in escrow pending determination of the lien thereon. Up to December 20, 1939, the total of such proceeds amounted to over $204,000 (R. 1093-94).

The Islais Creek property is a tract of land and land under water bordering on San Francisco Bay, which was acquired by Debtor's predecessor in the hope that it could be developed into a great industrial center, which might produce traffic for the Debtor (R. 2528). When the Commission, in 1929, valued the Western Pacific property pursuant to Section 19-a of the Interstate Commerce Act, it

ruled, after analyzing the history of the property and acquisition, that the Islais Creek tract was not carrier property (Ex. 104, p. 276):

> "It thus appears that these lands were not used for common carrier purposes on June 30, 1914, and that their use for such purpose cannot be said to have been imminent."

The present First Mortgage bonds were issued pursuant to a reorganization plan in 1915, which contemplated that they should be a lien only upon "*railway properties*". The 1915 plan, in describing the new issues, states as follows:

> "First Mortgage Gold Bonds (the new bonds) Authorized Issue $50,000,000.
>
> To be secured by First Mortgage upon all of the *existing railway properties* of the old company and all property hereafter acquired by the operating company *integrally connected therewith* and all property *acquired by means of the use of the proceeds of the new bonds* or against which new bonds shall be issued" (R. 1141).

The properties in dispute were not integrally connected with the Debtor's railway property, and were not acquired from proceeds of First Mortgage bonds. In fact, an examination of the schedule of uncapitalized expenditures (Ex. 31) reveals that no part of the moneys used for payment of benefit assessments or other expenditures in connection with the Islais Creek properties was ever made the subject of withdrawal of First Mortgage moneys.

The Islais Creek property was originally included in account 701 on the Debtor's books, entitled "Investment in Road and Equipment", and was transferred in 1935 to the account entitled "Miscellaneous Physical Property" (R. 1090).

Argument

Although there is some language in the First Mortgage which may be broad enough to cover pre-existing non-carrier real estate, the Mortgage must be read in the light of the 1915 reorganization plan, which constituted a contract between the stockholders of the Debtor (who were bondholders of the predecessor company) and the new First Mortgage bondholders, as was expressly ruled in the case of *American Brake Shoe and Foundry Company* v. *New York Railways Co.*, 277 Fed. 261, 271-72 (S. D. N. Y.). See also

Safety Car Heating & Light Co. v. *U. S. Light & Heating Co.*, 2 F. (2d) 384, 388 (W. D. N. Y.);
Harris Trust & Savings Bank v. *Chicago Railways Co.*, 56 F. (2d) 942, 947 (C. C. A. 7).

Any interpretation of the First Mortgage as granting a lien on property in excess of the lien provided under the 1915 reorganization plan would violate the terms under which the old bondholders agreed to take stock in the new company (the Debtor herein) in exchange for their claims.

Moreover, the First Mortgage contains no description of the Islais Creek real estate or the other non-carrier real estate then owned. *Property of the size and importance of the Islais Creek real estate would certainly have been included in the First Mortgage by specific description if it had been intended to cover it thereby.* An interpretation of the general language in the First Mortgage with respect to the mortgaging of lands, etc., "whether or not for use in connection with the railroad" (R. 1217-18) as covering this property would be inconsistent with the later provision of the First Mortgage by which the lien upon land is limited to such thereof as is appurtenant to the railroad lines (R. 1226).

The attempt by the First Mortgage Trustees to impose a lien upon non-carrier real estate is also met by the rule

that non-carrier real estate owned at the date of a railroad mortgage will not be considered subject to the lien thereof unless expressly described.

Alabama v. *Montague*, 117 U. S. 602, 609;
New Orleans Pacific Railway Co. v. *Parker*, 143 U. S. 42;
Pardee v. *Aldridge*, 189 U. S. 429;
Seymour v. *Tonawanda & Niagara Falls R. R. Co.*, 25 Barb. (N. Y.) 284, 312;
Calhoun v. *Memphis & P. R. Co.*, 4 Fed. Cas. No. 2309, page 1047 (C. C. W. D. Tenn.);
Boston & New York Air Line R. R. Co. v. *Coffin*, 50 Conn. 150, 153;
State v. *Gleen*, 18 Nev. 34, 48; 1 Pac. 186, 193-94;
Shirley v. *Waco Tap Railway Co.*, 78 Texas 131, 146; 10 S. W. 543, 550, 551;
National Bank of Commerce v. *Lock*, 17 Washington 528, 532-33; 50 Pac. 478, 480.

The fact that items of non-carrier real estate were listed until comparatively recent years on the railroad's books under the account "Investment in Road and Equipment" carries no inference as to their nature or as to whether they were subject to the First Mortgage, and in any event could not alter their character or create a lien on them which the reorganization plan forbade and the First Mortgage did not impose.

It requires much more definite language than anything the First Mortgage Trustees can point to in order to bring these substantial parcels of real estate under its lien.

The necessity of recognizing the rights of creditors in unmortgaged assets was pointed out by this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, where it was held that bondholders of a subsidiary would have, to the extent that they were general creditors of the parent company, "prior recourse against any unmortgaged assets" of the parent company, under the rule of absolute

priority laid down in the cases of *Northern Pacific R. Co.* v. *Boyd*, 228 U. S. 482 and *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106.

The distribution of any new securities granted in lieu of the free assets should depend on the rights of the various parties as general creditors; that is, for any difference between the total debt and the value of their security the First Mortgage creditors and the Refunding Mortgage creditors would share in these assets with Western Pacific Railroad Corporation (or Railroad Credit Corporation, as pledgee of the latter's claim) and Western Realty Company.

There has been no precise determination of the amount of the assets subject to the payment of the respective claims or of the extent of the deficiency of mortgaged assets to pay the mortgage debt. However, a practicable and equitable method for such determination here would be to base the participation of the secured creditors on the difference between the total amount of their claims and the par value of income bonds and preferred stock otherwise issuable to each—the exact figures being subject to computation after the other objections to the Plan have been determined.

CONCLUSION

1. The issues relating to the extent of the Refunding Mortgage lien must be determined before the reorganization plan is sent back to the Commission.

2. This Court should adjudge that the Refunding Mortgage constitutes a first lien on the equipment-trust rolling stock and a first lien to the extent of $5,000,000 (subject to a *pari passu* first lien of $5,000,000 by the First Mortgage) upon the Northern California Extension.

3. The non-carrier real estate, and the cash proceeds, now held in escrow, of non-carrier real estate which has been sold during the reorganization proceedings, should be decreed to be free from the lien of the First Mortgage.

4. The Commission should be instructed, in passing upon any substitute plan of reorganization, to give due recognition to the lien of the Refunding Mortgage upon the equipment-trust rolling stock and the Northern California Extension, and should also be instructed to fix the value of the Central California Traction and Alameda Belt Line securities, on which the Refunding Mortgage is admittedly a first lien, and give recognition to such value in the allocation of new securities.

The decrees of the Circuit Court of Appeals should be modified in accordance with the foregoing brief, and the proceeding referred back to the Interstate Commerce Commission for appropriate modification of the reorganization plan.

New York, September 14, 1942.

Respectfully submitted,

H. C. McCOLLOM,
Attorney for Petitioner,
IRVING TRUST COMPANY, as
Trustee under Debtor's
Refunding Mortgage.

ORRIN G. JUDD,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM—1942

No. 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,
Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,
Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916, et al.,
Respondents.

REPLY BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE.

H. C. McCOLLOM,
Attorney for Petitioner,
IRVING TRUST COMPANY,
As Trustee under
Debtor's Refunding Mortgage.

ORRIN G. JUDD,
Of Counsel.

Dated: October 10, 1942.

INDEX

PAGE

I. Rolling stock acquired under conditional sale or equipment trust agreement is "free from the lien" of the First Mortgage and subject to the prior lien of the Refunding Mortgage 2

The "exception clause" makes equipment-trust rolling stock "free from the lien" of the First Mortgage 3

The only limitation upon the "exception clause" is the one limitation stated therein—that is, the case where First Mortgage Bonds or First Mortgage cash are used in the acquisition 7

The absence from the First Mortgage of such a provision as is contained in the Refunding Mortgage, expressly subjecting the equity in equipment-trust rolling stock to the mortgage lien, strongly supports the position of the Refunding Mortgage Trustee 8

The "Subject, However," clause does not have the effect of placing under the First Mortgage equipment-trust rolling stock which under the "exception clause" is to be "free from the lien" of the Mortgage 10

There is nothing "whimsical" about the Refunding Mortgage Trustee's interpretation of the "exception clause" 13

The listing applications should not be disregarded. 14

PAGE

Equipment which is "free from the lien" of the First Mortgage is not made subject to its lien by any covenant in the First Mortgage ... 15

II. The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage money used in the acquisition thereof ... 21

III. The First Mortgage is not a lien on non-carrier real estate ... 31

IV. Answering the "practical interpretation" claimed by the Institutional Bondholders Committee ... 33

Conclusion ... 34

CASES CITED

Chase National Bank v. *Mobile & Ohio R. R. Co.* (unreported) ... 18, 19

Chicago, Rock Island & Pacific Railway Co., 108 F. (2d) 410 ... 4, 5, 9, 18 and 20

Continental Co. v. *U. S.* 259 U. S. 156, 181 ... 14

Metropolitan Trust Co. v. *Chicago and E. I. R. Co.*, 253 Fed. 868, 879 ... 20

Minneapolis & St. Louis case, 36 F. (2d) 747 (C. C. A. 8) ... 18, 19

United States Mortgage & Trust Co. v. *Chicago & A. R. Co.*, 40 F. (2d) 386 ... 12

Wabash Railroad Company Reorganization ... 4, 6

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REPLY BRIEF OF PETITIONER, IRVING TRUST COMPANY, AS REFUNDING MORTGAGE TRUSTEE

This brief is confined, as in the case of our main brief, to the question of relative priority of lien, as between Debtor's Refunding Mortgage and its First Mortgage.

Since the three principal lien questions are separate and distinct in nature, we deal with the arguments advanced by the respondents on each question in a separate Point.

The respondent, Institutional Bondholders Committee, says (Brief, p. 3) that the facts were not stated with sufficient fullness in our Main Brief, but that they are stated in the answering brief of the respondent, First Mortgage Trustees, "in most complete detail". It may be debatable whether our statement should have been longer or whether the statement by the First Mortgage Trustees is unnecessarily long. However, the important consideration is that the facts are singularly free from dispute although, of course, we disagree with various conclusions of fact drawn by the respondents.

I

Rolling stock acquired under conditional sale or equipment trust agreement is "free from the lien" of the First Mortgage and subject to the prior lien of the Refunding Mortgage.

(Answering Points I and II of the brief of the Institutional Bondholders Committee, and Points I and II of the brief of the First Mortgage Trustees.)

The respondents do not dispute that in order to bring any of the after-acquired property which is in question under the lien of the First Mortgage they must meet the test laid down in the decisions cited in our main brief (pp. 20-21) to the effect that after-acquired property clauses are to be strictly construed, and that the terms employed must "imperatively demand" the construction contended for by those asserting the lien. The respondents have fallen far short of meeting such test. In the case of the equipment purchased under conditional sale or equipment trust agreements (which equipment herein and in our main brief is sometimes termed "equipment-trust rolling stock"), the

language of the First Mortgage clearly leads to the opposite of the conclusion from that which the respondents seek.

The "exception clause" makes equipment-trust rolling stock "free from the lien" of the First Mortgage.

The clause which in our main brief is termed the "equipment trust clause", but in the brief of the First Mortgage Trustees and in the present brief is termed the "exception clause", reads as follows[1]:

> ... • • • the Company may, *unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same*,[2] purchase and acquire equipment, *free from the lien* hereof, by *lease, conditional sale agreement or* under any form of *equipment trust*, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

The respondents state, in effect, that the words "free from the lien hereof" do not mean what they plainly say. The Institutional Bondholders Committee argues (Brief, p. 16) that the foregoing clause was not intended to create an exception "to *any* coverage by the First Mortgage" but "only to the *first lien character* of that First Mortgage coverage". The First Mortgage Trustees argue (Brief, p. 16), that the purpose was "not to free the Debtor's equity from the lien of the First Mortgage but merely to enable the Debtor to vest an *unencumbered security title* in the equipment lienor".

The respondents make many complicated arguments in their attempt to avoid the clear language of the "exception clause". While we are compelled to follow these arguments, to some extent, into their devious by-paths, we hope that

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[1]First Mortgage Trustee's brief, bottom of p. 114.

[2]Italics throughout the brief are supplied by counsel unless otherwise stated.

these arguments will not be permitted to obscure the real and very simple issue—which is whether the mortgage is to be read as it is written, or is to be read as rewritten by the respondents.

We have here a mortgage which in its earlier clauses contains language broad enough to cover the equipment in question; but such language is qualified by the final provision (the "exception clause") stating that unless First Mortgage cash or bonds have been used in the acquisition the Company may acquire equipment "free from the lien hereof" by conditional sale agreement or equipment trust.

In addition to the broad and plain words thus used, it is noteworthy that the respondents cite no decisions sustaining their position, while the position of the Refunding Mortgage Trustee is strongly sustained by the only two pertinent decisions which we have seen—i. e., the decision of Circuit Judge Sanborn in the first *Wabash Railroad Company* case (opinion printed in Record—R. 1721-34) and the decision of Judge Wilkerson in the *Chicago, Rock Island & Pacific Railway Company* case (printed as Appendix B to brief of respondents First Mortgage Trustees, pp. 116-144)—which decisions are referred to in our main brief (pp. 27-32).

The briefs of both respondents attempt to distinguish these decisions; but an examination of them will show that they are not distinguishable. We are unable to follow the respondents' argument[1] that those decisions are distinguishable because the provisions cutting down the broad coverage of the granting clauses in those cases were "free funds" clauses, whereas in the present case the cutting-down provision is termed an "exception clause". In the *Wabash* case, the language which it was assumed would place the equipment under the mortgage lien covered after-acquired property owned or used in connection with the mortgage lines of railroad (R. 1726); but nevertheless it

[1] Institutional Bondholders Committee brief, p. 8; First Mortgage Trustees' brief, p. 36.

was held that the clause which respondents term the "free funds" provision (and which, as in the present case, was the final clause) eliminated equipment not acquired by the use of the bonds issued under the Refunding Mortgage (R. 1728).

Similarly, in the *Chicago, Rock Island & Pacific* case, Judge Wilkerson said:[1]

> "Granting Clause Third, as noted above, conveys to the mortgage trustee all locomotives, cars and other rolling stock and equipment 'now held * * * or hereafter acquired * * *, and appertaining to or provided for use upon' said railway. On its face, this language, if not qualified by other language in the indenture, would seem to be broad enough to include additional rolling stock or equipment of the kind defined in the preceding paragraph. But, at the end of Granting Clause Fourth, a proviso will be noted that may materially qualify or circumscribe the broader language in Granting Clause Third."

It was then held that the proviso did cut down the broad language used in the prior clause and excluded the equipment claimed to be covered thereby.

The respondents endeavor to avoid the "exception clause" in the present case by arguing that the mortgage language must mean that the equipment in question is to be "free from the lien" of the mortgage, but also subject to the lien of the mortgage. It could not be both—unless, as was done in the case of the Refunding Mortgage, the equipment was first excluded from the lien, and then the equity in the equipment was placed back under the mortgage lien by the specific additional provision contained in the Refunding Mortgage (our Main Brief, p. 19).

The First Mortgage expressly purported to cover equitable as well as legal interests.[2] If it were not for the

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[1] See Appendix B to First Mortgage Trustees' brief, p. 125.

[2] See Appendix A to First Mortgage Trustees' brief, pp. 109, 110, 113.

"exception clause", the granting clauses of the First Mortgage would have covered the interest from time to time acquired by the Railroad Company in the equipment; but by the "exception clause" such equipment, as in the decisions just cited, was taken out from the lien unless acquired by the use of First Mortgage bonds or moneys. It cannot be asserted, even plausibly, that the equitable interest still remains under the lien.

The exclusion is perfectly clear; and the language used by Judge Sanborn in the *Wabash* case (R. 1724) is extremely pertinent:

> "* * * The natural, reasonable, more obvious meaning of a mortgage or contract should be preferred to a curious recondite signification discovered by ingenuity and study."

The Institutional Bondholders Committee asserts (Brief, p. 10) that it would be inequitable to enforce what we believe to be the plain language of the "exception clause". Such an argument has no force against the clear wording of the mortgage.

Moreover, if any inequity is involved it is on the part of the Institutional bondholders, who are trying to obtain property to which they made no contribution. It may also be noted that, so far from there having been any decrease in the amount of equipment subject to the First Mortgage, the mortgaged equipment has increased from 1,589 units, with a book value of $3,550,748, at the date of execution of the First Mortgage, to 7,032 units, with a book value (before depreciation) of $15,034,389 (First Mortgage Trustees' brief, p. 14)—not including the equipment-trust rolling stock here in dispute.

The only limitation upon the "exception clause" is the one limitation stated therein—that is, the case where First Mortgage Bonds or First Mortgage cash are uesd in the acquisition.

The First Mortgage Trustees attempt (Brief, pp. 21-25) to avoid the plain and compelling implications of the fact that four limitations are contained in the "free funds" clause and only one of the four limitations (that is, the case where First Mortgage bonds or cash are used) is contained in the "exception clause". They argue that the function of this limitation in the "exception clause" is different from the function of the identical limitation in the "free funds"; and therefore that the limitation contained in the "exception clause" should be disregarded in determining whether the equipment in question is excluded from the mortgage lien and that all four of the limitations contained in the "free funds" clause should be imported bodily into the "exception clause", including particularly the limitation in respect of property acquired for use upon the mortgaged lines.

In effect, they say that the function of this limitation (that is, the case where First Mortgage bonds or cash are used) in the "free funds" clause is to limit what would otherwise be a complete exclusion of all interest in the equipment, but that the function of the same limitation in the "exception clause" is to limit what otherwise would be only an exclusion of the legal title, not of the equitable title; and this argument is made in the face of the fact that in both the "free funds" clause and the "exception clause" the exclusion is worded in identical language: to-wit, "free from the lien hereof". Having thus established to their satisfaction that the limitation has no pertinent function in the "exception clause", because the words "free from the lien hereof" as used therein do not prevent the lien of their mortgage from attaching to the equitable title, they then argue that—there being no applicable limitation at all in the "exception clause"—all four of the limitations

(including the limitation in respect of property acquired for use upon the mortgaged lines) must carry over into the "exception clause".

This argument—that is, that the existence of only one limitation in the "exception clause" is immaterial—is built upon the assumption that the words "free from the lien hereof", as contained in said clause, do not mean (as in the case of the "free funds" clause) that the equipment in question is totally excluded. They propose that such words, as used in the "exception clause", be construed as if they read "free from the lien hereof to the extent (but only to the extent) necessary to vest an unencumbered security title in the equipment lienor, but otherwise to remain subject to the lien hereof". Obviously, the language of the "exception clause" does not "imperatively demand", or even suggest, that such a meaning be given. If the First Mortgage Trustees could rewrite their mortgage we have no doubt that they could devise language sustaining their claim. What we request is that the Court interpret the mortgage as it is.

The absence from the First Mortgage of such a provision as is contained in the Refunding Mortgage, expressly subjecting the equity in equipment-trust rolling stock to the mortgage lien, strongly supports the position of the Refunding Mortgage Trustee.

As is stated in our main brief (pp. 18-19), the First Mortgage, after excluding from the lien thereof equipment-trust rolling stock not acquired from First Mortgage cash or bonds, does not place back under the mortgage lien the equitable interest from time to time acquired by the Railroad Company in such rolling stock—although it is placed back under the lien of the Refunding Mortgage by the paragraph quoted in our main brief (p. 19). The First Mortgage Trustees urge (Brief, p. 29) that the inclusion of this clause in the Refunding Mortgage was due to a "meticulous" and unnecessary caution on the part of its

draftsman; and the Institutional Bondholders Committee state (p. 17) that the inclusion of such a provision in the First Mortgage would have been "surplusage" and its inclusion in the Refunding Mortgage was due to the "increasing excess of care taken by draftsmen of corporate documents". Apart from the fact that the First Mortgage is manifestly a very carefully drawn instrument, and the fact that there is nothing to indicate that later mortgages were drawn with greater care than was the First Mortgage, we do not see how the respondents—in the light of the law which existed at the date of the First Mortgage and long prior thereto—can assert that it would have been unnecessary caution on the part of the draftsman of the First Mortgage if, after excluding in plain and broad terms ("from the lien hereof") equipment-trust rolling stock, he had added a provision embodying the supposed intention to place the equity back under the mortgage lien.

In the *Chicago, Rock Island & Pacific* case, above mentioned, Judge Wilkerson was considering the meaning of an exception clause which took out from the mortgage lien after-acquired equipment not purchased by the use of the bonds issued under the mortgage. The mortgage trustee claimed that the broad language of the exclusion should be limited to equipment not acquired for use upon the mortgaged lines. The Court overruled this contention, saying (Appendix B to First Mortgage Trustees' Brief, p. 129):

> "If the parties intended that only after-acquired equipment, obtained by the railway company on its own credit for use upon lines of railway not subject to the mortgage, should be excluded from the mortgage lien, there was no reason why that intention could not have been stated in clear and unmistakable terms. The intention should not be left to be determined by conjecture or inference . . ."

There was nothing novel, when the First Mortgage was made in 1916, in the principle thus stated.

Therefore, it would have been far from an excess of caution if the draftsman of the First Mortgage had expressed the intention to subject the equity to the First Mortgage, assuming such intention. On the contrary, if such intention existed and was not expressed—particularly when the rolling stock was stated to be "free from the lien" of the mortgage—the draftsman was highly incompetent—which is not indicated by the manner in which the mortgage was drawn.

The "Subject, However," Clause does not have the effect of placing under the First Mortgage the equipment-trust rolling stock which under the "exception clause" is to be "free from the lien" of the Mortgage.

The "Subject, However," clause—so far as material in this connection—reads as follows:

> "SUBJECT, HOWEVER, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, * * * ."

We pointed out in our main brief that the "subject, however," clause (referred to on page 25 of the First Mortgage Trustees' brief) does not have the effect given to it in the Commission's tentative decision of the lien question—which decision was accepted without discussion by the District Court. The Commission reasoned (R. 266) that, since the "subject, however," clause must refer to property covered by the mortgage and subject to prior liens, and since such clause refers to the prior liens of equipment trusts, the implication must be that the equity in *all* rolling stock acquired under equipment trusts would be under the First Mortgage. This reasoning is unsound because if over-

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First Mortgage Trustees' Brief, p. 115.

looks the fact that some of such rolling stock is certainly subject to the First Mortgage, to wit; the rolling stock in which the equity was acquired by the use of First Mortgage moneys. Such rolling stock would be subject to the equipment trusts and to the First Mortgage; but, if not financed by First Mortgage moneys, it would be "free from the lien" of the mortgage, as expressly stated in the "exception clause".

In order to support their interpretation of the "subject, however," clause as a modification—which would be, in fact, a complete abrogation—of the "exception clause", and to meet our argument that the "equipment trust or conditional sale agreements * * * permitted hereby" refer to equipment financed with First Mortgage moneys, the First Mortgage Trustees argue (Brief, pp. 25-37) that First Mortgage funds could not be used to finance down payments or installments on equipment trust rolling stock.

This argument requires them to say in effect (Brief, pp. 26-27) that the words "liens or charges" in the clause of the First Mortgage relating to draw-down of cash (Ex. 5, p. 54) do not have the definition given to those same words in that very section of the First Mortgage (Ex. 5, p. 60).

The First Mortgage requires that, for bonds or deposited cash to be taken down, there must have been delivered to the Company, all documents necessary "to vest the title to such property in the Company subject only to liens or charges certified as required * * * this Section 2" (Ex. 5, p. 54—clause (a) of paragraph Sixth). By definition (Ex. 5, p. 60) the words "lien" and "charge" include "deferred payments * * * under any conditional sale agreements or lease or trust agreement covering equipment".

To avoid the evident meaning of these provisions the First Mortgage Trustees argue (Brief, pp. 25-28) that the existence of a conditional sale agreement or equipment trust makes it impossible for the Company to be vested with the "title" called for by the first quotation; but the

very case which they previously cited (*United States Mortgage & Trust Co.* v. *Chicago & A. R. Co.*, 40 F. (2d) 386; Brief, p. 16) shows that such interest as the Debtor has in equipment-trust rolling stock, whether constituting *legal* title or not, constitutes a title which may become subject to the mortgage. It is specious to argue that a clause which requires only "title * * * subject * * * to liens or charges", which latter are defined as including deferred installments under equipment trusts, can not be applied to equipment-trust rolling stock. How could the permitted "liens" and "charges" include, as specifically they do, equipment trusts, if the "title" did not include the interest acquired under the equipment trusts? The First Mortgage Trustees again resort to rewriting of the Mortgage to suit their purposes, by stating that "title" in clause (a) of paragraph Sixth must mean "legal title".

The words "lien" and "charge" are defined (Ex. 5, p. 60) as including deferred installments of purchase price of property "where title thereto has not *then* vested in the purchaser". Since clause (a) of paragraph Sixth refers to "title * * * subject only to liens or charges", it must include the equitable title or interest which is conferred by an equipment-trust agreement covering rolling stock "where title thereto has not *then* vested in the purchaser".

The First Mortgage Trustees argue (Brief, pp. 17-18) that First Mortgage bonds or cash could not be used toward the purchase of chattel-mortgaged equipment unless the lien of the chattel mortgage is subordinate to the lien of the First Mortgage; and, therefore, that it was not intended to permit the use of First Mortgage bonds or cash toward the purchase of equipment-trust rolling stock. This is one of the many involved, indirect and immaterial arguments contained in their Brief. We do not agree with their assumption regarding chattel mortgages; but we are not dealing here with chattel mortgages. We are dealing with equipment trust agreements, in respect of which the language is as plain as it could be.

There is nothing "whimsical" about the Refunding Mortgage Trustee's interpretation of the "exception clause".

The Institutional Bondholders Committee (Brief, p. 11) urges that, under the Refunding Mortgage Trustee's claim, the failure of the First Mortgage to obtain a lien on the equipment-trust rolling stock will result from the "chance circumstance" that the property was bought under equipment trusts rather than through some other form of financing. The First Mortgage Trustees assert (Brief, p. 20) that an interpretation of the Mortgage which makes its lien depend on whether equipment was purchased under an equipment trust or was purchased in some other way imputes to the draftsman "a whimsical intent which is not consistent with any intelligent purpose".

We believe that the language of the instrument should be given effect even if the respondents consider it whimsical; and we do not believe that, when clear language was used, it is necessary—or even appropriate—to speculate as to the reason. Whatever the reason for the distinction was, and whether or not the reason commends itself to the respondents as sensible, there cannot be the slightest question that the distinction was made. Where, as in the present case, the parties to a mortgage have used language plainly expressing their intention, the mortgagees cannot be heard to say some 26 years later that they do not consider that the intention expressed was sensible. As one of the judges in the Circuit Court of Appeals pointed out during the oral argument, it would have been perfectly competent for the Mortgage to provide that all locomotives bought from Baldwin Locomotive Works should be free from the lien thereof; and the enforcement of such a provision would not depend on the parties' ability many years later to explain the reason why such a provision had been agreed on.

The listing applications should not be disregarded.

The meaning of the "exception clause" is sufficiently clear without the Court's being required to rely on the statements in the First Mortgage Bond Listing Applications which refer to this very equipment-trust rolling stock as "additional *unmortgaged* equipment * * *" (R. 1074); but we maintain that such listing applications, submitted, at the time of issue of First Mortgage Bonds, to the stock exchange which furnished the principal market for such bonds, are entitled to substantial weight.

The same statement, that equipment-trust rolling stock was unmortgaged, was contained in every listing application for First Mortgage bonds from July 16, 1925 (R. 1325-1335) to December 21, 1931 (R. 1074). Regardless of whether the First Mortgage bondholders made the statement, it constituted, in the language of this Court "a representation to future purchasers" as to the limitations of their lien (*Continental Co.* v. *U. S.*, 259 U. S. 156, 181). The relevance of the listing applications does not depend exclusively on their character as an admission against interest, as the First Mortgage Trustees seem to argue. They constitute a source of information for investors inquiring concerning the lien of the bonds, and are entitled to the same weight which would be given to a prospectus. The assertion by the Institutional Bondholders Committee that the listing statements are self-serving declarations by holders of Refunding Mortgage bonds (Brief, pp. 18-19) is wholly unjustified. As a matter of fact, the last listing application was issued some months before the Refunding Mortgage was executed.

The only First Mortgage bonds ($27,000,000 in principal amount) which had been issued before the 1925 listing application was filed were the original issue ($20,000,000) in 1916, an issue in 1921 used to purchase the Sacramento Northern Railroad properties, and an issue in 1922 to retire outstanding equipment trust certificates (R. 1046). Obvi-

ously none of the holders of these issues had relied on the equipment-trust rolling stock here in dispute, which was acquired under the agreements of 1923, 1924 and 1929, and the Baldwin lease of 1931. It follows that there is no injustice to them—as is claimed by the First Mortgage Trustees (Brief, p. 35)—in considering the listing applications as evidence of the meaning of the "exception clause."

There is no evidence that any prospectus inconsistent with the listing statements was ever distributed to purchasers of First Mortgage bonds. On the contrary, the only preliminary information concerning First Mortgage bonds which the record contains (I. C. C. Ex. 93) clearly indicates that substantial equipment was free from the First Mortgage lien. The "Specifications of Securities Offered for Sale", in connection with the issue of $1,000,000 of First Mortgage bonds in January, 1931 (before the Refunding Mortgage was created), stated (third page of Exhibit 93):

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities of San Francisco, Oakland and elsewhere, and *certain* of its rolling stock and equipment * * *."

Equipment which is "free from the lien" of the First Mortgage is not made subject to its lien by any covenant in the First Mortgage.

In Part V of Point II of the First Mortgage Trustees' brief (pp. 37-50), they try to bring the equipment-trust rolling stock within their mortgage lien by arguing that the rolling stock is made subject to the First Mortgage by the provision of the granting clauses which covers, among other things, "additions", and by the covenant in Article Fourth of the Mortgage to keep the railroad supplied with "replacements and * * * additions".

In the face of the specific provision in the final paragraph (the "exception clause") of the granting clauses that equipment-trust rolling stock shall be "free from the lien hereof", the general reference to "additions" in an earlier part of the granting clauses is limited, as are the other general granting clause provisions, by the "exception clause"—so that the granting clauses need not be further considered.

The position of the First Mortgage Trustees with respect to the mortgage covenants represents a new shift of ground, abandoning the contentions on which they previously relied. Their present brief, filed 5½ years after the conclusion of the Commission hearings, is the first time that the present argument has appeared in the case. In the Commission, both before the Examiner and on objections to the Examiner's report, the First Mortgage Trustees omitted any suggestion that they relied on any part of the First Mortgage except the granting clauses. In the District Court and the Circuit Court of Appeals they introduced a claim that the maintenance covenant and the replacement covenant, referred to in our main brief in this Court (pp. 32-40), gave them a lien on so much in value of the equipment-trust rolling stock as was necessary to equal the bookkeeping entries made for depreciation on First Mortgage equipment up to the date when the Refunding Mortgage lien attached. They now virtually abandon the claim formerly made under the *second* part of the maintenance covenant and under the replacement covenant, and say that our answers to that claim (which, we believe, conclusively disposed of it) "have no bearing" (Brief, p. 45) because the real question is the effect of the word "additions" in the *first* part of the maintenance covenant.

The covenant on which they now rely significantly omits the language of the replacement covenant which states that the First Mortgage "shall constitute a first lien" on replacements of equipment which is "worn out or destroyed". The reason for this omission is apparent. They are seek-

ing not only the replacement of equipment "worn out or destroyed", but also an amount in new equipment equivalent to the book depreciation on the equipment actually in use. The entire maintenance covenant is as follows:[1]

> "Section 9.—The Company will diligently preserve all of the rights and franchises to it granted and upon it conferred and will at all times maintain, preserve and keep its railroad system and property in good repair, working order and condition and will from time to time make all needful and proper repairs, renewals and replacements and alterations, additions, betterments and improvements; and will cause each subsidiary company to preserve its rights, franchises and property in like manner and to like extent.
>
> All equipment upon which this indenture is or shall be a first lien shall be marked so as to identify the same as equipment subject to this indenture as a first lien thereon, and the Company will at all times keep such equipment in good order and condition, *reasonable wear and tear excepted*, and marked distinctively as aforesaid, and will replace such of said equipment as shall be worn out or destroyed with other equipment of at least equal value on which this indenture shall constitute a first lien.
>
> The Company will, at such times as the Trustees may request, furnish to them a complete list of all equipment upon which this indenture is or shall be a first lien; but the fact that any such equipment shall not be marked or included in such list shall not create any presumption that the same is not subject to this indenture as a first lien thereon."

When the covenant is read as a whole it is clear that the language in the first part of the covenant with regard to "additions", on which the First Mortgage Trustees rely, relates to the railroad property generally and does not apply to equipment, concerning which there is a specific provision in the succeeding paragraph of the covenant. An

[1] I. C. C. Ex. No. 5, p. 76.

argument that the use of the words "alterations, additions, betterments and improvements" means that the Railroad Company must subject to the mortgage equipment equivalent in value to the accrued depreciation is very far-fetched indeed.

One section of the First Mortgage Trustees' brief (pp. 40-43) is given over to a discussion of the *Minneapolis & St. Louis* case (36 F. (2d) 747—C. C. A. 8) and the unreported *Rock Island* decision of Judge Wilkerson (First Mortgage Trustees' brief, pp. 116-144).

These cases relate to maintenance and replacement covenants but not to the claim respecting "additions". Neither of those cases contains any discussion of the question whether maintenance or replacement covenants are brought into play by mere depreciation—particularly where, as in the present case, replacement for reasonable "wear and tear" is specifically not required. So far as appears from the language in the *Minneapolis & St. Louis* case, which interprets a replacement covenant to require that "the same value amount" of equipment be kept under the lien of the Mortgage, the holding should receive the same interpretation which we assert herein—namely, that equipment which is worn out, destroyed or disposed of be replaced with equipment of corresponding value and amount. The covenant which was being interpreted in the *Minneapolis & St. Louis* case related to the disposal and replacement of equipment which had "become unfit for such use" (36 F. (2d) at 756). There is no suggestion that the covenant required equipment to be supplemented by the amount of depreciation charged on the books of the railroad against equipment in use.

The opinion in *Chase National Bank* v. *Mobile & Ohio R. R. Co.*, (unreported—cited at page 35 of our main brief) interprets the *Minneapolis & St. Louis* case as meaning only that equipment which has become unfit for use must be replaced with new equipment of equal value. In that

case there were maintenance and replacement covenants[1] in a divisional mortgage, very similar to the covenants contained in the First Mortgage in this case.

After citing the *Minneapolis & St. Louis* case with approval, the Special Master (whose report was confirmed by the Court) stated (Report, pp. 139, 138):

> "* * * From my construction of the Montgomery Division Mortgage, the security demanded, insofar as it concerned rolling stock, was sufficient rolling stock to amount in value to the rolling stock originally purchased, subject to wear and tear. The reason I say subject to wear and tear is that *it was the intention of the parties that replacements should not be made until items of rolling stock became unfit for use*, and the evidence shows that this happened at various times over a long period."

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[1] The covenants in the *Mobile & Ohio* case read as follows (Special Master's report, p. 132):

> "The mortgagor shall and will, until all the Montgomery Division Bonds are fully paid and satisfied, well and thoroughly keep up and maintain as fast as the same shall be constructed and opened for operation, the mortgaged line of railway as a first-class railway, and will keep the same in all respects well and sufficiently equipped, and make all necessary repairs and replacements, so to keep up in good order the mortgaged railway property, rolling-stock and equipment."

> "The mortgagor, its successors and assigns, may from time to time, dispose, according to its or their discretion, of such portion of the equipment, machinery and implements at any time held or acquired for the use of the said line of railway, as may have become unfit for such use, replacing the same by new, which shall at once be subject to the lien of this indenture without any further conveyance or mortgage; and if the Trustee so desire, the same shall be conveyed and transferred to it for the purposes and upon the trusts herein declared, in such manner as it shall be advised by counsel."

> "I believe that the parties to the Montgomery Division Mortgage intended to provide, and did provide for a lien upon all equipment originally purchased and the replacements that later were purchased, and I have so found. The latter lien would be on the rolling stock of Mobile and Ohio in valued amount sufficient to replace the original equipment *in its depreciated condition. Guaranty Trust Company* v. *Minneapolis & St. L. Ry. Co.*, supra."

The complicated formula of Judge Wilkerson in the *Rock Island* case, from which the First Mortgage Trustees attempt to spell out a requirement that *additional* equipment be placed under their mortgage to compensate for depreciation, cannot be relied upon for that purpose. In the first place, there is nothing in the opinion to indicate that the extent of replacement claims (as distinguished from the question of lien, with which the opinion was primarily concerned) was contested or, if so, the grounds upon which it was contested. In the second place, the Court refers in three successive clauses to credit for equipment necessary "to *replace*" mortgaged equipment; and, we repeat, "replace" does not mean "add equipment equal in value to book charges for depreciation on equipment in use."

Moreover, as we showed in our main brief (pp. 36-40), maintenance and replacement covenants are not self-executing, and do not create a lien on equipment not otherwise placed under a mortgage. If Judge Wilkerson's decision were construed as creating a lien on otherwise free equipment as a replacement of mortgaged equipment[1], it would be contrary to the rule of the Seventh Circuit (controlling on Judge Wilkerson) as established in *Metropolitan Trust Co.* v. *Chicago and E. I. R. Co.*, 253 Fed. 868, 879 (our main brief, p. 39), and to the other cases set forth in our main brief.

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[1]The only First Mortgage equipment which there can be any obligation to "replace" is the net retirements, aggregating not more than $641,886 in original book value (First Mortgage Trustees' brief, p. 14).

In effect, the First Mortgage Trustees are attempting to import another limitation into the "exception clause" so that, for equipment to be "free from the lien" of the First Mortgage, it must not only not have been acquired with First Mortgage funds, but also there must be no existing depreciation of mortgaged equipment.

III

The Northern California Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage money used in the acquisition thereof.

(Answering Point III of First Mortgage Trustees' brief and Point III of Institutional Bondholders Committee's brief.)

The Northern California Extension, built at a cost of over $10,000,000, was financed only to the extent of less than half of its cost by First Mortgage money. No Supplemental indenture placing the extension under the First Mortgage lien was ever executed. It was not even a part of the line which the Debtor was authorized to operate at the time the First Mortgage was created (although later authorized); and it was not built until some 15 years after the date of such mortgage.

The brief of the First Mortgage Trustees indicates (pp. 67-68, 78-81) a misunderstanding of our argument in respect of the absence of a supplemental indenture. We do not assert that, if the Extension can be said to be covered to any extent by the after-acquired property clauses contained in the First Mortgage, a supplemental mortgage was necessary in order to perfect such coverage. The question is whether the Extension was covered by the First Mortgage to the extent of the entire issue of $50,000,000, or only to the extent of the First Mortgage money expended thereon. What we do assert is that it would be inconceivable for a supplemental mortgage to be omitted when so important an item of uncontemplated property was acquired so many

years after the date of the original mortgage, if it was intended that the Extension should come under the full $50,000,000 lien of the original mortgage—rather than under the mortgage lien to the extent of the First Mortgage money expended thereon—in spite of the fact that more than one-half of its cost was financed outside of the mortgage.

We suggest that the omission of such a supplemental indenture may well be explained by the fact that ever since the second offer by the A. C. James Company in June, 1929 (I. C. C. Ex. 46) to finance a part of the cost of the Extension, it had been known that the Extension would be built in part by First Mortgage moneys and in part by other moneys, and the relative rights were controversial. However that may be, if it had been the intention to subject the Extension to the entire $50,000,000 First Mortgage lien, it seems certain that a supplemental indenture would have been executed so providing.

Otherwise the First Mortgage bondholders would have to rely on the counsel's opinions (next mentioned) which accompanied the requests for the drawdown of cash, all of which simply stated that (see I. C. C. Exhibit 62):

> "In my opinion title to those portions of this Company's new line of railroad known as its 'Northern California Extension' * * * as to which reimbursement for deposited cash is sought by this requisition for expenditures in the matter of construction and/or acquisition, has vested in the Western Pacific Railroad Company, subject only to liens or charges certified in said certificate and to liens or charges of the character not required to be certified * * * and all said portions of said extension and said property are subject to the lien of this Company's First Mortgage, and no supplemental indenture or instruments of further assurance are necessary to subject said property, or any part thereof, to the lien of said First Mortgage, subject only to the liens and charges aforesaid."

It is no answer to suggest, as does the brief of the Institutional Bondholders Committee (pp. 26-27), that the sup-

plemental indenture was omitted because of counsel's said opinions. We do not dispute that the First Mortgage attached to the Extension; but there is nothing in the counsel's opinions (I. C. C. Exs. 61-73)—or in anything else which we have seen—which states that the First Mortgage would become a lien beyond the amount of the First Mortgage moneys expended on the property.

The Extension has been a major factor in producing revenue for the Debtor, and has shown itself to be worth at least the amount of its cost. The Refunding Mortgage Trustee asks that the creditors secured by Refunding Mortgage bonds, who supplied more than half of the money required for the construction of the Extension, and whose money enabled the Extension to be completed, be recognized as having a lien on the Extension coordinate with the lien of the First Mortgage for First Mortgage funds expended thereon, or even a second lien but subject only to the $5,000,000 which the First Mortgage creditors contributed to its construction.

In our appellant's brief before the Circuit Court of Appeals we pointed out that the argument made by the First Mortgage Trustees, if correct, would lead to the conclusion that the whole of the $10,000,000 Extension would be subject to the $50,000,000 mortgage if, for example, only $5,000 of First Mortgage moneys had been expended thereon, and that such an argument completely disregards the equities in a case wherein the First Mortgage Trustees—in asking the enforcement of after-acquired property clauses—are seeking equitable relief. In answering, the brief of the First Mortgage Trustees asserted that the Extension would be thus subject even if only "one penny" of First Mortgage money had been expended thereon. Nothing could bring out more clearly the extreme results to which their argument leads. There is no stopping point between a substantial expenditure and an expenditure of "one penny".

We do not argue for any such breaking up of the extension into scattered pieces as the First Mortgage Trustees state (Brief, pp. 75-78) under what they term our "separate segment theory". The First Mortgage Trustees, who admittedly had the burden of showing on what property their mortgage was a lien, did not undertake to show what portions of the "land for transportation purposes" were acquired with their money. It is unjustified, we believe, for the First Mortgage Trustees to assume, as they do in their brief (p. 51), that the Extension had come into existence "as a continuous right of way" before any of the Debentures (which were later converted into debt secured by the Refunding Mortgage) had been issued; or to assume, as their brief does (p. 76), that "it is a fair inference that" by December 31, 1930 "the right of way for the entire line had by then been acquired." Our argument is that, especially where it appears that the acquisition of the entire right of way was not financed under the First Mortgage, a court of equity should treat the Extension as subject to the First Mortgage only in proportion to the amount which was financed with First Mortgage money, and that this gives the First Mortgage all that it is entitled to.

Incidentally, the Institutional Bondholders' Committee is incorrect in asserting (Brief, p. 21) that the Extension was completed and put into operation on November 10, 1931. Although the tracks were laid so that trains could be run over the Extension at that time, it was still under the jurisdiction of the construction department, and was not placed in commercial operation until June 1, 1942 (Stipulation of Facts not in Dispute, R. 1077)—a fact which is recognized in the brief of the First Mortgage Trustees (p. 50).

The brief of the First Mortgage Trustees quotes (at pp. 70-71) granting clause Third, paragraph (a) of the First Mortgage. The First Mortgage Trustees' brief argues (p. 70) that this clause

> "is stated in the alternative: an after-acquired extension falls within the scope of the after-acquired

property clause, if either (1) the extension be 'acquired or constructed' by the use of First Mortgage Bonds or deposited cash, or (2) First Mortgage Bonds or deposited cash be taken down 'on account of the purchase, acquisition or construction thereof or work thereon.'

The difference between the two alternatives is apparent from the words used. The first alternative must contemplate a financing entirely by the use of First mortgage Bonds or deposited cash; the second alternative, with the words 'on account of', and the words 'or work thereon', must contemplate a financing in part by such means. In either case, the extension falls within the scope of the after-acquired property clause, and there is no language which suggests an intent that the lien of the First Mortgage should attach to an extension financed in part by the use of First Mortgage Bonds or deposited cash to a lesser extent than would be the case if the extension were financed entirely by such means."

The question immediately arises as to why there were alternative provisions. If it was intended that the extension should be subject to the entire First Mortgage lien independent of the amount of First Mortgage moneys expended, there would have been no reason for the alternative. If the extension would have been thus subject to the entire First Mortgage lien in the event that First Mortgage bonds or deposited cash be taken down "on account of the purchase, acquisition or construction thereof or work thereon", this would have taken care of the entire situation. It certainly would not have been necessary to provide also that the Extension would be subject to such lien if totally financed by First Mortgage bonds or deposited cash.

We agree with their argument to the extent that we make no assertion that extensions financed in part by First Mortgage bonds or deposited cash are wholly free from the First Mortgage. Our argument is that such an extension is entirely subject to the First Mortgage if wholly financed by

First Mortgage bonds or deposited cash; that if financed only in part by such bonds or cash it is subject to the First Mortgage lien to the extent so financed; and that the mortgage itself shows the intention to differentiate between the case where the financing is done entirely by the use of such bonds or cash and the case where it is only partially so done. We suggest that the reason for the differentiation may well have been to recognize that the money extent of the mortgage lien would depend upon the amount of First Mortgage moneys used in the financing.

In this connection, we again refer to the authorities cited in our main brief (pp. 20-21) holding that, in order to extend the coverage of a mortgage by its after-acquired property clauses, the terms employed must "imperatively demand" the construction contended for. This test has not been met.

Both the First Mortgage Trustees and the Institutional Bondholders' Committee make much of Mr. A. C. James' connection with the financing of the Extension, the Committee stating (Brief, p. 27) that the James interests are "in equity estopped" to make any claim that the Extension is not subject to the entire First Mortgage issue. No such claim is made against the other Refunding Mortgage creditors. This statement is not justified, even against the James interests. The most that can be said is that Mr. James knew that $5,000,000 of First Mortgage money was going into the Extension, and that such money was entitled to a lien which could not be displaced; but there is nowhere any proof that he understood that the Extension would be subject to the Mortgage lien beyond the amount of the First Mortgage moneys expended. It is significant that, as the figures set forth in the First Mortgage Trustees' brief (pp. 46-47) show, the total amount of expenditure certified to the First Mortgage Trustees was only $5,000,000. There was thus no representation to the First Mortgage Trustees that they were obtaining a lien in excess of the First Mortgage funds expended. And, as we have pointed out in our main

brief (pp. 37-38), the "specifications of the securities offered for sale" when the First Mortgage Bonds were issued carefully avoided stating that the First Mortgage debt would be a first lien on the Extension. It is true that the specifications under which the Debentures were purchased by A. C. James Company referred to the Extension as to be a part of the "main" line, and that the Specifications contained the statement set out in the First Mortgage Trustees' brief (p. 60) and in the Institutional Bondholders Committee brief (p. 23) as follows:

> "The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than $50,000,000 thereof may be outstanding at any one time, is a first lien on said main line of railroad."

We believe that the words "whereunder not more than $50,000,000 thereof may be outstanding at any one time" are merely descriptive of the First Mortgage, and fall far short of establishing that the entire $50,000,000 lien would fasten to the Extension independent of the amount of First Mortgage moneys expended thereon. The "main line" referred to in said Specifications was stated as aggregating 1956.5 miles (prior to the construction of the Extension of 112 miles (R. 1076)), so that as to most of the railroad it was correct to refer to the $50,000,000 lien. However, there was no necessity, in generally-worded specifications of this nature, to define the money extent of the First Mortgage lien on the Extension, provided always that the First Mortgage lien, to such extent as it should attach, should not be displaced.

As illustrative of the loose manner in which the lien of the First Mortgage on the Extension was described, it should be noted that in its application to Reconstruction Finance Corporation, dated February 5, 1932, for the loan which included the first R. F. C. advance of $259,000 on account of the Northern California Extension (I. C. C. Ex. 82), the Debtor stated (I. C. C. Ex. 82, sheet 6 in Schedule

P) that $259,000 was required to pay contractors for work in constructing the "branch line", that is, the Northern California Extension (see First Mortgage Trustees' brief, p. 65), and furthermore, the property of the Debtor was described as consisting of 925.706 miles of main line with various branches, including the Northern California Extension, "making a total of main line and branch line mileage of approximately 1163 miles". Thus, in spite of the earlier description of the Northern California Extension as a part of the "main line", it was later classified not as "main line" but as "branch line". This gives point, we believe, to our statement that the extract just quoted from the specifications was a general description and was not intended to settle such controversy as might later arise as to the extent of the First Mortgage lien.

Whatever may have been the situation prior to the time and at the time (February 27, 1931—First Mortgage Trustees' brief, p. 62) when the first of the Debentures were issued, it should be noted that the situation changed materially by the time when the Refunding Mortgage was executed (February 29, 1932—R. 1022).

While it is true that the $5,000,000 originally advanced for the completion of the Extension was advanced in return for the Debentures (Stip., par. 99, R. 1078), it is not entirely accurate to say that they were "unsecured". In the original proposal of the A. C. James Company (I. C. C. Ex. 45), which was not acted upon, it was stated that its advance of $5,000,000 was to be secured by a "first lien" upon the Extension, and that the new trust indenture should expressly provide:

> "* * * you will not place any additional mortgage indebtedness upon any other real property owned by you, over and above the bonds authorized under your present existing first mortgage of June 26, 1916, without providing, from the proceeds of such additional financing, for the redemption of these bonds."

The subsequent proposal (I. C. C. Ex. 46), which was acted upon, omitted the demand for a "first lien"; but it continued the requirement for the redemption of the Debentures in case that any further lien (other than authorized first mortgage bonds) should be placed upon the Railroad Company's real property. The last mentioned provision was embodied in the indenture under which the Debentures were issued (I. C. C. Ex. 50, p. 32). Not only was this provision embodied in the indenture, but it came into full force and effect because the First Mortgage bonds and the Debentures were not sufficient to finance the Extension, and it was necessary to borrow an additional amount of over $500,000 from the Reconstruction Finance Corporation and to secure said loan by a lien (i. e. the Refunding Mortgage) on the property (Stip., pars. 99, 112-123, R. 1078, 1084-1089). Therefore, the Debentures were in effect redeemed (Refunding Mortgage, I. C. C. Ex. 6, pp. 2-3); but the holder thereof, instead of receiving cash, accepted a new note secured by Refunding Mortgage bonds (Stip. pars. 116, 117, R. 1085-1086).

The retirement of the Debentures and the simultaneous issuance of a new note secured by the Refunding Mortgage bonds created a new transaction—just as if the holder of the Debentures had received cash in redemption and then had reloaned the cash upon the security of the Refunding Mortgage. Thus, not only the other creditors but also the A. C. James Company, as the holder of the originally-issued Debentures, have come into their existing position in proper reliance upon the lien of the Refunding Mortgage; and there is no estoppel against A. C. James Company except to prevent it from asserting—what never has been asserted—that the first lien of the First Mortgage, to the extent of the First Mortgage moneys expended thereon, has been displaced.

The First Mortgage Trustees rely (Brief, p. 57) on statements, in the resolutions accompanying the requests for draw-down of First Mortgage cash, that "all portions

of said extension which have been constructed and/or acquired being subject to the lien of said First Mortgage and now in the possession of this Company" (I. C. C. Ex. 62, sheet 10). However, the opinions of Debtor's counsel which accompanied said resolutions carefully described as subject to the First Mortgage not all portions constructed or acquired, but only "those portions as to which reimbursement from deposited cash is sought by this requisition" (I. C. C. Ex. 62, sheets 8-9). The language of the resolutions must be interpreted in the light of the opinions of counsel which accompanied them, and should not be given any broader effect.

The First Mortgage Trustees also rely (Brief, p. 57) on statements in the officers' certificates that "so far as known or believed by us the property so constructed or acquired as aforesaid, is not subject to any lien or charge, except (a) necessarily undetermined liens or charges ordinarily incident to construction and (b) the lien of said First Mortgage" (I. C. C. Ex. 62, sheet 11). These certificates can have no relation to the lien of the Refunding Mortgage since they were all executed *before the date of execution of the Refunding Mortgage* (Stip. Par. 109, R. 1081). They contain no assurance that the First Mortgage was a lien for $50,000,000 upon an Extension to which it contributed $5,000,000.

The First Mortgage Trustees also rely (Brief, p. 66) on the following statement contained in the application to the Reconstruction Finance Corporation for a loan on May 23, 1932 (I. C. C. Ex. 87, p. 15):

> "The General and Refunding Mortgage is a first lien on certain securities having a book value of $2,374,655, and a second lien on all of the remaining property of the Railroad Company, subject only to $49,290,100 First Mortgage Bonds now outstanding and $4,550,000 of Equipment Trust Certificates."

Upon its face this is merely a loose and general statement. It is true as to most of this large railroad property:

but it is slim ground upon which to rely for a contention that the Refunding Mortgage was thus excluded from a *pari passu* lien on the Extension. The careful specification in the Refunding Mortgage that it was subject to the First Mortgage "only in so far (in extent * * * or otherwise)" as the same attached to any of the Debtor's property, may not be nullified by such a statement.

III

The First Mortgage is not a lien on non-carrier real estate.

(Answering Point IV of the First Mortgage Trustees' Brief, and Point IV of the Institutional Bondholders Committee's brief).

The Institutional Bondholders Committee set up a straw man in the first part of their Point IV, in arguing concerning the effect of the 1934 subordination agreement on the cash and receivables which the Debtor had on hand when the reorganization proceedings began. No claim to those items has been made by the Refunding Mortgage Trustee in this Court or in the court below.

In respect of the non-carrier real estate, the Institutional Bondholders Committee asserts (Brief, p. 33) that First Mortgage money has been spent on the Islais Creek property. This statement is extremely misleading, for the property which was acquired with the First Mortgage moneys referred to by the Committee is not the same property which the Refunding Mortgage Trustee claims. No First Mortgage money was used on the portions of the Islais Creek property which were owned at the date of the First Mortgage. Although substantial amounts were spent for improvement or benefit assessments on such property, the Debtor carefully refrained from making any of them the

subject of requisitions against First Mortgage bonds or cash, and all of them remained on the list of uncapitalized expnditures (I. C. C. Ex. 31—lines 1565, 1694, 1715, 1752 etc—R. 2694) at the time of the reorganization.

The Islais Creek property which the Debtor owned in 1916, and which is the principal real estate item in dispute, was never carrier property. Its description as "non-carrier" property was not a mere change in accounting classification by the Interstate Commerce Commission, as the First Mortgage Trustees suggest (Brief, p. 99), but a recognition of what had always been true. It was based upon a finding by the Commission (Ex. 104, p. 276) that the lands were not used for carrier purposes on June 30, 1914 (prior to the date of the First Mortgage), and that there was then no prospect of their use for such purposes.

Although the First Mortgage Trustees argue (Brief, pp. 99-103) that the First Mortgage provisions are broader than the description of the First Mortgage lien in the 1915 reorganization plan and that the plan language does not control, it is significant that the only prospectus for First Mortgage bonds which is in the record (Ex. 93, p. 3) repeats substantially the language of the 1915 plan with respect to the extent of coverage, stating:

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other *railroad* properties in the cities of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. * * *"

The claim to a lien on the non-carrier real estate is not altogether consistent with what the First Mortgage Trustees argue (in their Point I) was the "underlying purpose" of the First Mortgage, to give a lien on the "*railroad* enterprise as an *operating* entity". In the absence of a clearer reason for including it than is stated in the respondents' briefs, it should be treated as unmortgaged property.

IV

Answering the "practical interpretation" claimed by the Institutional Bondholders Committee.

The Institutional Bondholders Committee argue (Brief, pp. 37-38) that the Refunding Mortgage Trustee's claims of priority are entitled to little weight because of the concession of the First Mortgage priority in various plans which were proposed during the course of the proceedings. Their brief neglects to state that the plans proposed by A. C. James Company, Reconstruction Finance Corporation, and the Debtor (which proposals, of course, represent compromises rather than statements of legal position) each provide for a substantial *quid pro quo* in return for the concession of priority. Each of the plans referred to provided for a capitalization adequate to satisfy the claims of the Refunding Mortgage creditors in full and leave something over for the Debtor's general creditors and stockholders (of which A. C. James Company is one).

The willingness of parties to concede one position in order to gain another one in no way deprives them of their right to insist on the original position if the compromise fails, and should not be referred to as an admission any more than any unconsummated settlement negotiations.

In asserting "practical interpretation" as against the Refunding Mortgage creditors, the brief of the Institutional Bondholders Committee states (p. 38):

> "No specific provision for the relative participation of the First Mortgage Bondholders and the collateral noteholders was made in any proposed plan which did not recognize such priority, until the filing before the District Court of the ACJ objections on December 8, 1939, containing the suggestion by ACJ of a wholly new plan never therefore discussed."

This statement may well carry the inference that the A. C. James interests and the other Refunding Mortgage creditors did not dispute the priority of the First Mortgage until they came before the District Court. Such an inference would be entirely contrary to the fact. The priority of the First Mortgage in respect of the properties now in question was disputed during the taking of testimony before the Commission and in the briefs filed with the Commission.

Conclusion

The decrees of the Circuit Court of Appeals should be modified in accordance with the prayer of petitioner's main brief, and the proceeding referred back to the Interstate Commerce Commission for appropriate modification of the reorganization plan.

New York, October 10, 1942.

Respectfully submitted,

H. C. McCOLLOM,
Attorney for petitioner, Irving Trust Company, as Trustee under Debtor's Refunding Mortgage.

ORRIN G. JUDD,
Of Counsel.

Supreme Court of the United States

October Term, 1942

No. 61

IN THE MATTER

of

THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,

Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION.

Respondents.

ANSWERING BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, RESPONDENT

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Respondent.

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

October 2, 1942.

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement	3
Argument:	
I. The Granting Clauses of the First Mortgage	4
II. The First Mortgage Lien on Equipment	11
III. The Northern California Extension	20
1. Authorization and Construction—Change of Original Intent	20
2. The Sale of Debentures to ACJ	21
3. Sale of $5,000,000 First Mortgage Bonds and Withdrawal of Cash Proceeds	24
4. The Creation of the Refunding Mortgage After the Lien of the First Mortgage Had Attached to the Extension	27
5. The Alleged "Inequity" of the First Mortgage Lien on the Northern California Extension "to the Complete Exclusion of the Refunding Mortgage Creditors"	29
IV. The Alleged Refunding Mortgage Deficiency Claim Against Unmortgaged Assets	30
1. The 1934 Subordination Agreements	30
2. "Non-carrier Property"	33
3. The Alleged Right to a Deficiency Judgment Under the Refunding Mortgage	35
V. Another "Practical Interpretation"	37
VI. Conclusion	38
Appendix I	i

CASES CITED

PAGE

Butterfield v. *Woodman*, 223 Fed. 956 (C. C. A. 1st, 1915) 36

In re Chicago, Rock Island & Pacific Ry. (unreported, D. C. Ill., 1939) 8

Equitable Trust Co. v. *Wabash Railroad Co.* (unreported, D. C. Mo., 1921) 8

Hitner v. *Diamond States Steel Co.*, 176 Fed. 384 (C. C. Del., 1910) 36

Jones v. *Third Nat. Bank of Sedalia*, 13 F. (2d) 86 (C. C. A. 8th, 1926) 37

Merrill v. *National Bank of Jacksonville*, 173 U. S. 131 (1899) 36

Mississippi Valley Trust Co. v. *Railway Steel Spring Co.*, 258 Fed. 346 (C. C. A. 8th, 1919) 36

New York Trust Co. v. *Palmer*, 101 F. (2d) 1 (C. C. A. 2nd, 1939) 37

Taylor v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939) 18

Union National Bank v. *People's Savings & Trust Co.*, 28 F. (2d) 326 (C. C. A. 3rd, 1928) 37

Worth v. *Marshall Field & Co.*, 240 Fed. 395 (C. C. A. 4th, 1917) 36

TEXT AUTHORITY

Hatch. *A Form of Depression Finance—Corporations Pledging Their Own Bonds* (1934) 47 Harv. L. Rev. 1093, 1103 *et seq.* 37

STATUTE

Judicial Code, Sec. 240(a) [28 U. S. C. § 347(a)] 2

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IN THE MATTER

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THE WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,

Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

ANSWERING BRIEF FOR INSTITUTIONAL BONDHOLDERS COMMITTEE, RESPONDENT

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinion of the District Court, dated August 15, 1940, is reported at 34 F. Supp. 493.[1] The opinion of the Circuit Court of Appeals, dated November 28, 1941, is reported at 124 F. (2d) 136.[2]

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[1] R. 1569.

[2] R. 2663.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 [28 U. S. C. § 347(a)].

QUESTIONS PRESENTED

The issue upon the writ of certiorari granted to Irving Trust Company, as Refunding Mortgage Trustee, is whether the Interstate Commerce Commission (hereinafter called the Commission) and the United States District Court for the Northern District of California, Southern Division, were correct in denying the Refunding Mortgage Trustee's claims

(1) that the Refunding Mortgage is the sole lien on the Debtor's equity in equipment bought for use and used on First Mortgage lines, the purchase of which was financed by the Debtor under equipment trust agreements;

(2) that the lien of the First Mortgage upon the Northern California Extension is limited to either (a) a lien upon only a part of the mileage of the Northern California Extension, the Refunding Mortgage being a first lien upon the remainder of the Extension, or (b) a lien only upon an undivided interest in the entire Extension *pari passu* with a lien of the Refunding Mortgage upon the remaining undivided interest; and

(3) that neither Mortgage is a lien on certain so-called non-carrier real estate, or on cash or current assets on hand at the date of the institution of this proceeding, and that, therefore, the Refunding Bonds

are entitled to new securities representing an interest therein on the basis of an alleged deficiency judgment on the Refunding Mortgage Bonds.

As indicated in the main brief of the Institutional Bondholders Committee (hereinafter called the Committee) upon its own writ of certiorari (No. 7), the Committee agrees with the Refunding Mortgage Trustee that, notwithstanding the failure of the Circuit Court of Appeals to pass upon these issues properly raised before it, this Court should determine the issues in order to expedite the Western Pacific reorganization.

STATEMENT

The Committee will rely on the answering brief of the Trustees under the First Mortgage for a detailed statement of the facts and the law establishing the fallacy of the Refunding Mortgage Trustee's contentions.

On the one hand, the brief of the Refunding Mortgage Trustee omits to state most of the material facts upon which determination of the three claims must depend. On the other hand, in order to avoid any failure to disclose any of the material facts the non-disclosure of which would make those disclosed misleading, the answering brief of the First Mortgage Trustees has stated the relevant facts in most complete detail. The Committee therefore believes that it will be of assistance to this Court to accent, from among the many relevant facts, those which, in the Committee's opinion, conclusively negative any basis for the three contentions.

ARGUMENT

I

THE GRANTING CLAUSES OF THE FIRST MORTGAGE

The Granting Clauses of the First Mortgage[1] strikingly evidence the intent of its draftsman to accomplish two major purposes:

(1) that the First Mortgage should in the first instance constitute a first lien upon the entire venture taken over by the Debtor from its predecessor in the 1916 reorganization; and

(2) that the First Mortgage should draw to itself, through its after-acquired property clauses, a first lien on all property of every character thereafter acquired by the Debtor for use in connection with the mortgaged property or on account of the acquisition or construction of which, or any work thereon, any First Mortgage Bonds or proceeds thereof were expended.

The draftsman made it abundantly clear that this First Mortgage was to be and remain a first lien for the aggregate amount of Bonds at any time outstanding upon that enterprise as an entirety and that no loopholes were to be left whereby the effective lien upon the enterprise might be whittled away by the Debtor, whether intentionally or unintentionally, for the benefit of subsequent creditors.

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[1]These Granting Clauses are set forth in full at R. 1215-29.

Granting Clause First covers both in detail and by a general statement all "real and personal property and interests and rights in property" which had been owned by the Debtor's predecessor in title, "or to which it may be entitled," except only cash items. Paragraphs I to VI, inclusive, cover in detail the specific railroad lines and classes of property. Paragraph VII covers "All and singular the property, interests and rights" [except cash items] "which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by" the Debtor's predecessor in title.

To make certain that there was no mistake of the purport of Paragraph VII, Granting Clause Second subjected to the Mortgage

> "All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or equitable) now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses."

This probably is the language to which the Refunding Mortgage Trustee's brief refers in its cautious concession that "there is some language in the First Mortgage which may be broad enough to cover pre-existing non-carrier real estate" (p. 53). That characterization is a considerable understatement. The language above quoted makes it clear that as to all property which the Debtor owned or to which it was entitled on the date of the execution of the First Mortgage, June 26, 1916, (whether or not such property

was of a character which by subsequent accounting practice later became known as "carrier" or "non-carrier" property) the First Mortgage became and remains a first lien.

Granting Clause Third covers "Any and all property and facilities of any and every kind and description * * * which may from time to time hereafter be acquired or constructed by or belong to" the Debtor if such after-acquired property falls within one of four specified categories:

(1) If any "First Mortgage Bonds or proceeds thereof or cash deposited" under the First Mortgage have been authenticated or paid out "*on account of* the purchase, acquisition or construction thereof or work thereon;"[1] or

(2) If the property constitutes "an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien" of the First Mortgage "or some other integral portion whereof is * * * subject to the lien hereof;" or

(3) If the property is "used or acquired for use in or for the maintenance or operation of or appertaining to" any of the property subject to the lien of the First Mortgage; or

(4) If the property consists of securities of named companies or of any subsidiary company, as defined.

Granting Clause Fourth covers all properties which might thereafter be specifically mortgaged or pledged with

[1]All italics in quoted matter throughout this brief have been supplied, unless the contrary is indicated.

the First Mortgage Trustees, and is not relevant to any of the issues here in controversy.

Granting Clause Fifth covers, with a multiplicity of verbiage, substantially every kind of property and facility used or useful in the operation of a railroad (including, expressly, *equipment*) and

> "all other property of every description and *all rights and interests in or with respect to the use of property* * * * whether now owned by the Company or *at any time hereafter acquired* by it * * * appurtenant to or *used* or held for use as, or as a part or as parts of, or *to facilitate* or safeguard the *maintenance or operation of, any lines of railroad, extensions*, branches, * * * or other properties now or at any time hereafter subject to the lien of this indenture—whether the same exclusively appertain to or be used as parts of or in or for the maintenance or operation of lines of railway or other properties subject to the lien hereof or appertain to or be so used as parts of or in or for the maintenance or operation of such lines of railroad or other properties in common with lines of railroad or property not subject to the lien hereof; * * * also any and all *replacements* * * * of and *additions* to * * * any property or rights of whatsoever description now or at any time hereafter subject to the lien of this indenture, whensoever and by whomsoever such replacements * * * or additions may be made."

Granting Clause Sixth covers all possible "estates, rights, titles, interests, possession, claims and demands, whatsoever, *as well at law as in equity*," of the Debtor in or to any property, including expressly equipment and lands.

There then follows a proviso permitting the Debtor by the use of free funds to acquire property free of the lien

of the First Mortgage, *but only if such property is not of the character described in one of the four sub-divisions of Granting Clause Third* (see p. 6, *supra*). This, it will be noted, is not one of those "free funds" provisions, such as were involved in the mortgages construed in the *Wabash*[1] and *Rock Island*[2] cases discussed by the Refunding Mortgage Trustee at pages 27 to 32 of its brief, under which all equipment purchased with free funds, whether or not for use upon the mortgaged lines of railroad, was to be excluded from the lien of the mortgage.

It will thus be seen that, by the express provisions of these Granting Clauses, all property and rights in property which the Debtor acquired after June 26, 1916, became subject to the First Mortgage,—except only property which was in substance of a character wholly independent from the Debtor's properties owned at the time of the creation of the Mortgage or thereafter subjected to it, and even then only if no First Mortgage Bonds or proceeds thereof were used "*on account of* the purchase, acquisition or *construction* thereof *or work thereon.*"

In the light of these Clauses it is clear that all the Debtor's property (except only the Tidewater Southern stock and note, the Central California Traction stock and bonds, the Alameda Belt Line stock, and cash) is subject to the lien of the First Mortgage.

Following the so-called "free funds" proviso is a clause permitting the financing of equipment purchases by purchase money liens prior to the lien of the First Mortgage either through the device of "lease, conditional sale agree-

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[1] *Equitable Trust Co.* v. *Wabash Railroad Co.*, (unreported, D. C. Mo., 1921).

[2] *In re Chicago Rock Island & Pacific Ry.*, (unreported, D. C. Ill., 1939).

ment * * * or equipment trust" under which legal title would be retained by the vendor, the Debtor obtaining only an "equity," or by chattel mortgage permitted to be "superior to the lien of" the First Mortgage. These latter clauses, which will be discussed later in greater detail, thus permitted the lien of the First Mortgage upon new equipment so acquired by the Debtor to be subordinated to the lien of the financing media, as was made doubly clear by the Habendum Clause,

> "Subject, However, * * * as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, * * *."[1]

The grant and conveyance under the First Mortgage is expressed to be "in order to secure the payment of *all of said bonds* * * * at any time issued and outstanding * * *."

The grant in trust is expressed to be "for the equal and proportionate benefit and security of all present and future holders of First Mortgage Bonds * * * without preference, priority or distinction as to lien or otherwise of one bond over any other bond * * * so that each and every bond hereby secured shall have the same right, lien and privilege * * * and * * * be equally and proportionately secured hereby, as if all the First Mortgage Bonds had been made, * * * delivered and negotiated simultaneously * * *."

The Granting Clauses thus make the First Mortgage a lien for the full amount of the debt thereunder upon all the Debtor's initially acquired property, upon all property and rights in property thereafter acquired for use in connection with any of the First Mortgage property and upon all property "on account of the purchase, acquisition or con-

[1]R. 1230.

struction thereof or work thereon" First Mortgage Bonds or their proceeds are used. Not a shadow of foundation can be found for the suggestion that upon any specific piece of property the First Mortgage is a lien only to the amount of the First Mortgage Bonds or proceeds thereof spent on that particular piece of property. It is doubtful that any responsible issuer has ever imposed on the public any such financial monstrosity as would result from this suggestion of the Refunding Mortgage Trustee.

This First Mortgage is clear that, if any proceeds of First Mortgage Bonds have been spent in connection with the acquisition or construction of any piece of property, or any work thereon, that piece of property, *as an entirety*, must be subjected to the First Mortgage as security for the First Mortgage debt *as an entirety*. The Refunding Mortgage Trustee's attempted "interpretation" of the First Mortgage would produce the absurdities (1) that it was the intent of the First Mortgage to permit its security gradually to be frittered away as property existing in 1916 was replaced by new property, particularly in respect of equipment, and (2) that upon a foreclosure of the First Mortgage the Court would have to go up and down the lines of the system, find the specific bits of property in respect of which First Mortgage moneys had been expended, and, if such property had not been acquired entirely by the use of First Mortgage funds, grant to the First Mortgage Bonds security only in the proportion which their funds had contributed to the cost of the particular bits of property. The accounting problems involved in giving effect to any such construction, quite apart from the injustice to the First Mortgage Bondholders, demonstrate the unrealistic character of the suggestions of the Refunding Mortgage Trustee.

II

THE FIRST MORTGAGE LIEN ON EQUIPMENT

Admittedly, every unit of equipment owned by the Debtor, whether acquired through equipment trusts or otherwise, was in fact used on the lines of railroad subject to the First Mortgage as a first lien.[1]

This equipment, it is also conceded, would be subject to the First Mortgage as a first lien, notwithstanding no issue of First Mortgage Bonds in connection with its acquisition, if its acquisition had been financed by cash payments out of earnings or by chattel mortgage or by a combination of those two methods. But because of the chance circumstances that three lots of equipment necessary to the operation of the First Mortgage properties were purchased under Philadelphia Plan equipment trusts in 1923, 1924 and 1929, and a fourth lot was purchased under the Baldwin Lease of 1931 (the vendor in each case reserving legal title and the Debtor immediately obtaining only a right of use and ultimate acquisition), the Refunding Mortgage Trustee claims a prior lien under the Refunding Mortgage created in 1932.

It is submitted that by the terms of the Granting Clauses of the First Mortgage (Clauses Third, Fifth and the proviso relating to free funds), all right and interest of the Debtor to use and ultimately acquire title to that equipment, *i. e.*, the equity of the Debtor, is subject to the lien of the First Mortgage in priority to the Refunding Mortgage. The payments, from time to time as they become due, of instalments of equipment trust certificates

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[1]R. 1075.

(both those prior to the creation of the Refunding Mortgage in 1932, and those since the creation of the Refunding Mortgage), have operated to feed the security afforded by the First Mortgage to the extent of the Debtor's increasing equity in the equipment resulting from such payments. Those additions to the security more or less offset the constant depreciation in value of all the equipment upon which the First Mortgage is a first lien.

The Refunding Mortgage Trustee's answer is that the Court should wrench from its context the equipment financing clause at the end of the Granting Clauses of the First Mortgage which permits subordination of the First Mortgage lien to equipment obligations issued to finance new equipment, and should then construe that clause to negative the effect of all the other provisions of the First Mortgage with respect to equipment. The clause, which is a part of the "free funds" proviso, reads as follows:

> "and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, *free from the lien hereof,* by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment *superior to the lien of this indenture.*"[1]

To this contention of the Refunding Mortgage Trustee the Commission and the District Court correctly accepted as a complete answer the fact that the clause must be construed, not only in the light of the language which pre-

[1] R. 1229.

cedes it in the same paragraph evidencing the intent that the First Mortgage should be a lien upon a railroad venture as an entirety (*i. e.*, not only the rails but all rights in respect of equipment used on the rails), but also in the light of the subsequent paragraph of the Habendum Clause which reads:

> "SUBJECT, HOWEVER, * * * as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, * * *."[1]

As the Commission concisely stated in its Original Report:

> "If all equipment acquired under equipment trusts was to be entirely free of the lien of the first mortgage, it is not apparent why the words 'equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby' were made part of the last quoted provision."[2]

The Refunding Mortgage Trustee urges, in reply to the Commission, that the quoted reference is to a provision of the First Mortgage claimed by the Refunding Mortgage Trustee to permit financing of an equipment purchase by the use of both First Mortgage Bonds and equipment trust certificates at the same time. The difficulty with the Refunding Mortgage Trustee's reply is, as pointed out in the brief of the First Mortgage Trustees,[3] that there is no such provision in the First Mortgage, and, as a matter of reasonable and sound financing, there couldn't be.

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[1]R. 1230.
[2]R. 266.
[3]Answering brief of the First Mortgage Trustees, pp. 25-28.

The Refunding Mortgage Trustee appeals to what it calls a "practical interpretation" of the First Mortgage.[1] The Committee agrees that a "practical interpretation" must be made of the equipment financing clause in the light of the customary methods of purchasing railroad equipment. The purpose of the clause becomes simple and clear, despite the efforts of the Refunding Mortgage Trustee to becloud it, when the practical methods of purchasing railroad equipment are kept in mind. Upon buying equipment, the Debtor might (1) pay for it in cash out of so-called free funds; (2) finance it by the issue of First Mortgage Bonds; (3) finance it by chattel mortgage; or (4) finance it by "* * * lease, conditional sale agreement or under any form of equipment trust * * *."

While legal title to the purchased equipment would vest in the Debtor under the first three enumerated forms of acquisition, under the fourth form of acquisition the technical legal title would remain in the lessor, conditional vendor or equipment trustee as security, the Debtor having only the rights of use and of ultimate acquisition of technical legal title upon full payment of the equipment obligations. These rights are commonly referred to as the "equity" of the purchaser.

It is undisputed that as to all equipment purchased by the Debtor under either the first or second of the above enumerated forms of financing, the First Mortgage would become a first lien, in both cases because of the lien of the First Mortgage upon all Debtor-owned railroad property, including equipment, and in the second case, also because of financing the purchase out of the proceeds of First Mort-

[1]Refunding Mortgage Trustee's brief, p. 26.

gage Bonds. It is equally undisputed that had the Debtor purchased any equipment under the third form of financing (chattel mortgage), the First Mortgage would have become a lien thereon subject only to the superior lien of the chattel mortgage upon the purchased equipment. This is expressly provided by the last few words of the very equipment financing clause which the Refunding Mortgage Trustee attempts to misconstrue. The Refunding Mortgage Trustee's position therefore is that, merely because the equipment here in question happened to be financed by the fourth specified method, not only the legal title thereto, but all rights of the Debtor therein, are wholly free from the lien of the First Mortgage.

With the practical facts in mind, analysis of the clause itself evidences that the words upon which the Refunding Mortgage Trustee relies, viz., "free from the lien hereof," were used in the technical sense that the legal title to the equipment could be vested in the trustee of an equipment trust and that *such legal title* would be free from the lien of the First Mortgage.

The fact that the clause goes on to provide that obligations created by the Debtor in the purchase of such equipment might be "secured by mortgage or pledge of such equipment superior to the lien of this indenture" clearly indicates an intent that the equity or rights of use and acquisition of the Debtor in equipment subject to such "lease, conditional sale agreement or * * * form of equipment trust," as contrasted with the legal title, should be subject to the lien of the First Mortgage. That right of use and acquisition is expressly subjected to the lien of the First Mortgage by Granting Clause

Fifth, which covers "all rights and interests in or with respect to the use of property * * * at any time hereafter acquired * * * for use * * * to facilitate or safeguard the maintenance or operation of" any of the property subject to the lien of the First Mortgage.

The purpose of the equipment financing clause, therefore, was not to create an exception to *any* coverage by the First Mortgage of all equipment used upon the lines of railroad subject to that Mortgage, but to create an exception only to the *first lien character* of that First Mortgage coverage. The purpose of that exception was to permit the financing of new equipment either by the conventional form of equipment trust under which the legal title is not immediately vested in the purchaser, or by the chattel mortgage form of equipment obligation under which the purchaser gets legal title subject to a purchase money lien. Any other construction would produce the highly strained result that whether the rights and interests of the Debtor in equipment purchased for use on lines of railroad subject to the First Mortgage became (a) subject to the lien of that Mortgage or (b) wholly free from the lien of that Mortgage would depend upon the pure accident of the method which the Debtor chose for financing the purchase, or, worse, upon design of the Debtor hostile to the interests of the First Mortgage Bondholders.

Since the lien of the First Mortgage, by its express terms, attached to all the Debtor's rights of use and acquisition in all such equipment trust equipment immediately upon its being acquired by the Debtor, notwithstanding that the legal title was technically in an equipment trustee, there was no necessity of incorporating in the First Mortgage any express provision that, as the senior lien of the equipment

obligations disappeared through payment, the lien of the First Mortgage on the Debtor's rights in the equipment should thereby increase. Three times in its brief,[1] however, the Refunding Mortgage Trustee urges that the inclusion of such an express provision in the Refunding Mortgage in 1932 must be taken as indicating that its omission from the First Mortgage in 1916 left in the First Mortgage a gap through which all the equipment on the First Mortgage lines could be drained away from the First Mortgage Bondholders. But the inclusion of such an express provision in the First Mortgage in 1916 would have been clearly surplusage in the light of all the provisions of the Granting Clauses already quoted. Indeed, it was surplusage in the Refunding Mortgage in 1932. That provision is but an illustration of the increasing excess of care taken by draftsmen of corporate documents over the period between 1916 and 1932 in working out provisions to lay the ghosts of such unfounded contentions as that of the Refunding Mortgage Trustee.

The Refunding Mortgage Trustee also seems to make a point of the fact that "application of * * * money obtained from Refunding Mortgage creditors" had reduced the indebtedness under the equipment obligations outstanding under the equipment trusts and lease in question.[2] The term "Refunding Mortgage creditors" must have been carefully chosen by the Refunding Mortgage Trustee to avoid any misleading implication that any payments of the equipment obligations were funded under the Refunding Mortgage, either through the issue of Refunding Mortgage Bonds or the use of cash deposited under that Mortgage. The facts are that no such moneys were so provided, that of

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[1]Pages 19, 22 and 25.

[2]Brief of Refunding Mortgage Trustee, p. 17.

the three pledgees of Refunding Mortgage Bonds, ACJ[1] and RCC provided no such moneys, and that out of moneys borrowed against the RFC Notes secured by the pledge of Refunding Mortgage Bonds and other collateral, $406,466 was applied in 1935 to one maturity of the 1923 equipment trust obligations and one maturity under the Baldwin Lease.[2] These payments could not operate to divest any part of the lien of the First Mortgage upon the Debtor's rights in the equipment.

Reference has been made to the Refunding Mortgage Trustee's argument for a "practical interpretation" of the First Mortgage. It bases its argument upon certain of the Debtor's Listing Applications for First Mortgage Bonds.[3] When the facts, omitted from the Refunding Mortgage Trustee's brief, with reference to these Listing Applications are appreciated, the argument becomes a somewhat weird reversal of the general doctrine enunciated by this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (1939).

In those Listing Applications, the first in 1925 and the last in 1931, the Debtor, one of the James Interests corporate entities,[4] described the equipment in question as "un-

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[1]Hereinafter the following abbreviations are used: ACJ—A. C. James Co.; RCC—Railroad Credit Corporation; RFC—Reconstruction Finance Corporation; WP Corp.—Western Pacific Railroad Corporation.

[2]R. 1055.

[3]Refunding Mortgage Trustee's brief, p. 26.

[4]As noted in the Committee's main brief (p. 50), the interests controlled by Mr. A. C. James (now his estate) own, in addition to the ACJ Notes, more than $8,000,000 of the First Mortgage Bonds of the Debtor and 8.76% of the outstanding Preferred Stock and 61.2% of the outstanding Common Stock, or 40.36% of all the outstanding capital stock, of WP Corp. WP Corp., with its 100% owned subsidiary, Western Realty Company, in turn owns all the unsecured debt, Preferred Stock and Common Stock of the Debtor.

mortgaged." The statement was far from an admission against the interests of the Debtor in favor of the First Mortgage Bonds. It was a self-serving declaration of one James Interests corporate entity, the Debtor itself, first in its own interest, and then in the interest of two other James Interests corporate entities, WP Corp. and ACJ as holders of substantially all of the Debtor's unsecured debt. Now after ACJ has converted its then unsecured Debentures into the ACJ Notes,[1] the self-serving declaration is asserted in the interest of the Refunding Mortgage Bonds pledged to secure the ACJ Notes. With these facts in mind, it is submited that it is unnecessary for the Court to give any great thought to the problem of when a Listing Application is or is not binding upon the holders of securities to which it relates.

In the light of all the foregoing facts, the first lien of the First Mortgage, as against the Refunding Mortgage, upon the Debtor's rights of use and acquisition of the equipment trust and Baldwin Lease equipment need not depend upon the three separate replacement covenants contained in the First Mortgage or the replacement and additions grant contained in the Granting Clauses. As pointed out in the brief of the First Mortgage Trustees,[2] however, the First Mortgage, as a result of those provisions, had attached as a first lien to all rights of the Debtor in the disputed equipment long before the Refunding Mortgage was created in 1932.

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[1]Referred to in the next section of this brief.

[2]Pages 37 *et seq.*

III

THE NORTHERN CALIFORNIA EXTENSION

The omissions from the Refunding Mortgage Trustee's brief of the material facts respecting the Northern California Extension are so many and so vital that their omission causes the statements of fact which are contained in the Refunding Trustee's brief to be wholly misleading.

1. Authorization and Construction—Change of Original Intent

Application for authority to construct the so-called Northern California Extension was made to the Interstate Commerce Commission by the Debtor on February 8, 1929.[1] At that time it was estimated that the cost would be $5,000,000. On May 14, 1929, ACJ offered to provide the necessary funds against the issue to ACJ of bonds and notes to be secured by a first lien on the Extension.[2]

Later, upon making a change in the route and new estimates, it was found that the construction would approximate $10,000,000. This necessitated new arrangements for financing. Under a superseding offer dated June 19, 1929, ACJ offered (as its intervening petition before the Commission in this proceeding recognizes) to furnish $5,000,000 "upon evidences of debt which were junior to the First Mortgage."[3] ACJ agreed to purchase

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[1] I. C. C. Ex. 79 (see R. 2433-34) not printed. All such unprinted exhibits hereinafter referred to are before this Court pursuant to the Stipulation filed July 23, 1942.

[2] I. C. C. Ex. 45 (see R. 2316), not printed.

[3] ACJ Petition for Intervention before I. C. C., verified April 18, 1936, p. 6 (not printed); I. C. C. Ex. 46 (see R. 2319, 1079), not printed.

$5,000,000 of unsecured 5% Debentures, provided $5,000,000 of First Mortgage Bonds were also sold to provide construction funds.[1]

The indenture, under which the Debentures to be acquired by ACJ were issued, was executed on January 6, 1931.[2] It was wholly without mortgage or pledge of any property, and made no pretense of constituting a lien on any of the property of the Debtor.

Construction had been commenced in August, 1930. The Extension was substantially completed and put into operation for freight service on November 10, 1931,[3] not June 1, 1932, as stated by the Refunding Mortgage Trustee.[4]

2. The Sale of Debentures to ACJ

The $5,000,000 of Debentures were sold to ACJ in February, 1931, pursuant to published notice inviting bids, specifications describing the Debentures, and receipt of bid.[5]

The Refunding Mortgage Trustee's brief contains the following argument (at pp. 43-44):

> "Even the 'specifications of the securities offered for sale' at the time of the issue of the First Mortgage bonds (Ex. 93) which were used in financing the Extension did not promise a first lien upon the entire Extension. They read:
>
> "'Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to

[1] I. C. C. Ex. 46 (see R. 2319, 1079); not printed.
[2] I. C. C. Ex. 50 (see R. 2335), not printed.
[3] R. 1863, 1942. See also R. 1077.
[4] Brief, p. 41.
[5] R. 1078; I. C. C. Exs. 48 and 49 (see R. 2325-27), not printed.

> Salt Lake City, Utah, and branches, aggregating 1050.5 miles * * *. Upon the completion of the construction and/or acquisition of the Company's Northern California Extension its main line of railroad will aggregate 1198.5 miles * * *.'
>
> It would have been simple to state definitely, and it would have been definitely stated if so intended, that 'upon the completion of the Northern California Extension the First Mortgage will constitute a first lien thereon.'"

It will be remembered that the language thus quoted by the Refunding Mortgage Trustee was used in connection with the sale of First Mortgage Bonds for the express purpose of financing *half* of the construction cost of the Northern California Extension. We submit that, even if the quoted language were the sole evidence, no court should sanction the weasel interpretation suggested by the Refunding Mortgage Trustee, that the First Mortgage Trustees and Bondholders were warned by the quoted language that the First Mortgage, in violation of its express terms, was not to constitute a lien upon the entire Northern California Extension for the benefit of the entire First Mortgage debt.

Be that as it may, the Refunding Mortgage Trustee's brief omits to draw to the attention of the Court the specifications above referred to, inviting bids for the unsecured Debentures sold to ACJ to provide the remaining half of the cost of the Extension. Those specifications were publicly issued on the same day as the specifications quoted in the Refunding Mortgage Trustee's brief.[1]

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[1] R. 2324, 2327.

The Debenture specifications stated:

> "The main line of railroad of the Company extends from San Francisco, California, to Salt Lake City, Utah, with branches, and aggregates 1050.5 miles, more or less of first track. Upon the completion of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. * * *
>
> "The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than *$50,000,000 thereof may be outstanding* at any one time, *is a first lien on said main line* of railroad."[1]

These specifications would seem to put the intent that the First Mortgage was to be a first lien upon the entire Extension sufficiently clearly to escape even the Refunding Mortgage Trustee's meticulous criticism of the First Mortgage specifications.

The bid, dated January 22, 1931, of ACJ[2] stated that it was made "in accordance with and subject to all the terms of the notice * * * and in accordance with the specifications referred to in said notice."

Deliveries of the Debentures were made from time to time to ACJ against payment therefor in cash, such cash being used to reimburse the Debtor for a portion of the expenditures made in connection with the construction of the Extension. The first lot of Debentures was issued and delivered on February 27, 1931, and the last lot on May 31, 1932.[3]

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[1] I. C. C. Ex. 48 (see R. 2326), not printed.

[2] I. C. C. Ex. 49 (see R. 2327), not printed.

[3] I. C. C. Exs. 95 and 97 (see R. 2463-75), not printed.

In the spring of 1932, after the Northern California Extension had been substantially completed and put into operation, the entire $5,000,000 of Debentures were exchanged by ACJ for $200 in cash and the $4,999,800 ACJ Notes secured by the pledge of Refunding Mortgage Bonds.[1]

3. Sale of $5,000,000 First Mortgage Bonds and Withdrawal of Cash Proceeds

During the period when the Debentures were being issued, the $5,000,000 of First Mortgage Bonds which were to provide that part of the Northern California Extension construction costs not provided for by the Debentures, were sold for cash pursuant to the specifications against which the Refunding Mortgage Trustee leveled the unfounded criticism above quoted from its brief.[2]

The cash proceeds were drawn down from time to time in compliance with the provisions of the First Mortgage, the Trustees having been furnished with certified copies of resolutions of the stockholders and Executive Committee of the Debtor, certificates of officers of the Debtor covering expenditures and opinions of counsel.[3]

Mr. A. C. James (the controlling interest in all the corporate entities in which the James Interests hold their various Western Pacific claims) was a member of the Executive Committee of the Debtor and attended all meetings of the Executive Committee at which the necessary resolutions were adopted authorizing the withdrawal

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[1] I. C. C. Ex. 56, p. 3 (see R. 2341), not printed.

[2] R. 1079; I. C. C. Exs. 61-73, 93 (see R. 2359-80, 2459), not printed.

[3] R. 1081; I. C. C. Exs. 61-73, 86 (see R. 2359-80, 2455), not printed.

of cash for the purpose of reimbursing the Debtor for expenditures made by it in connection with the construction of the Extension.[1] Each of these resolutions stated, among other things, that "all portions of said extension which have been constructed and/or acquired" are "subject to the lien of said First Mortgage and now in the possession of this Company."[2]

The first withdrawal of cash was made on February 11, 1931, and the last withdrawal on January 29, 1932.[3] The resolutions delivered to the First Mortgage Trustees in connection with such last withdrawal were adopted on January 29, 1932, and contained the above-quoted statement with reference to the lien of the First Mortgage on the Extension.[4] At that time the Northern California Extension had been substantially completed and was being operated for freight traffic.

The certificates of expenditures furnished to the First Mortgage Trustees in accordance with the provisions of the First Mortgage in each case stated that the expenditures had been made within a certain period and specified the particular items of property or of work in respect of which expenditures had been made by the Debtor. For example, the certificates covered land, engineering, grading, bridges, tunnels, rails, ties, ballast, stations, buildings and various other items of property and facilities ordinarily required in the construction of a railroad. The certificates further stated that, so far as known or believed by the officers executing the respective certificates, the

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[1]R. 1081; 2344-46; I. C. C. Ex. 86 (see R. 2455), not printed.
[2]I. C. C. Ex. 86 (see R. 2455), not printed.
[3]R. 1081; I. C. C. Exs. 62-73 (see R. 2366-80), not printed.
[4]I. C. C. Ex. 86 (see R. 2455), not printed.

property described in such certificates was not subject to any lien or charge except "(a) necessarily undetermined liens or charges ordinarily incident to construction and (b) the lien of said First Mortgage;" and that all deeds, conveyances and other instruments necessary to vest title to the property in the Debtor had been executed and delivered to the Debtor.[1]

The Refunding Mortgage Trustee's brief makes much of the absence of a supplemental indenture expressly subjecting the Northern California Extension to the lien of the First Mortgage and argues that "it is inconceivable that such an important acquisition as the Northern California Extension would not have been expressly subjected to the First Mortgage if it had been intended to be entirely subject to the entire First Mortgage." (pp. 43, 45)

The Refunding Mortgage Trustee's brief fails, however, to point out to this Court that the opinions of counsel delivered to the First Mortgage Trustees in accordance with the requirements of the First Mortgage were given by the then general counsel of the Debtor, Mr. F. M. Angellotti. The opinions, after referring to the officers' certificate of expenditures, stated that, in the opinion of said general counsel, the properties referred to in the certificate were subject to the lien of the First Mortgage as a first lien thereon, and that no supplemental indenture or instruments of further assurance were necessary to place said property or any part thereof under the lien of the First Mortgage.[2] These opinions (which were clearly correct) were by an officer of the Debtor, one of the James Interests corporate entities. They were acted upon by the First Mortgage

[1] I. C. C. Exs. 61-73 (see R. 2359-80), not printed.

[2] I. C. C. Exs. 61-73 (see R. 2359-80), not printed.

Trustees. They fully explain the absence of supplemental indentures. They destroy any possible basis for the Refunding Mortgage Trustee's contention that the absence of such indentures resulted in the strange 50% limitation on the First Mortgage lien for the benefit of another James Interests corporate entity, ACJ.

It was the clear purpose and intent of all the parties, and all their action was designed to the end, that the First Mortgage as an entirety should be a lien upon the entire Northern California Extension and that all funds required for the Extension, other than those realized from the First Mortgage Bonds, should not only have no lien upon the Extension itself, but should be wholly unsecured obligations of the Debtor. Mr. A. C. James actively participated in the expression of this purpose and intent.

The facts as to the Northern California Extension, taken in connection with the Granting Clauses of the First Mortgage, establish that the First Mortgage became in law and in fact a first lien upon every part of the Northern California Extension and for the entire First Mortgage debt, during every stage of the construction of the Northern California Extension. They further establish that, even if that were not so, the James Interests are in equity estopped to make any contrary claim as against the First Mortgage Bondholders.

4. The Creation of the Refunding Mortgage After the Lien of the First Mortgage Had Attached to the Extension

The Refunding Mortgage was not executed and delivered until February 29, 1932,[1] several months after the

[1] R. 1067; I. C. C. Ex. 6, pp. 168-197 (see R. 1872), not printed.

Extension had been substantially completed on November 10, 1931, and put into freight operation, and more than a year after the lien of the First Mortgage had attached.

Notice of the attachment of the lien of the First Mortgage and the priority thereof on the Extension was brought home to ACJ, RFC and RCC not only constructively but actually.

The Extension is wholly within Lassen and Plumas Counties, California.[1] The First Mortgage was recorded in those counties on July 17, 1916[2] long before the Refunding Mortgage had been created.

The fact of the priority of the First Mortgage over the Refunding Mortgage was actually brought to the attention of ACJ, RCC and RFC, not only as to ACJ by the facts heretofore recited, but also as to all three pledgees of Refunding Mortgage Bonds by the Report of the Commission,[3] approving the making to the Debtor by RFC of the first loan on the RFC Notes. In describing the bonds to be pledged as collateral for that loan the Commission said:[4]

> "The carrier offers to pledge as collateral security for the loans its general and refunding mortgage * * * bonds * * *. These bonds * * * are to be issued under a proposed new general and refunding mortgage and will be a second lien upon all the carrier's property, including personal property * * *."

After describing the collateral now physically pledged with the Refunding Mortgage Trustee, the Report con-

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[1] R. 1076.

[2] R. 1066.

[3] 180 I. C. C. 645. This Report is also I. C. C. Ex. 52 (see R. 2340), not printed.

[4] 180 I. C. C. 645 at 648.

tinued that the new bonds would be a "first lien" upon that collateral and "a lien upon substantially all the remainder of the carrier's property subject only to a first mortgage securing $50,000,000 of first mortgage bonds and about $5,000,000 of equipment-trust certificates."

By reason of transactions between RCC and RFC, in connection with the making of this loan, it is apparent that RCC had actual notice of this Commission Report.[1]

In the Debtor's application dated May 23, 1932, to RFC for a further loan it described the Refunding Mortgage as follows:[2]

> "The General and Refunding Mortgage is a first lien on certain securities having a book value of $2,374,655, and a second lien on all of the remaining property of the Railroad Company * * *."

5. The Alleged "Inequity" of the First Mortgage Lien on the Northern California Extension "to the Complete Exclusion of the Refunding Mortgage Creditors"

The brief of the Refunding Mortgage Trustee complains bitterly of the inequity of giving to the First Mortgage a lien for the entire First Mortgage debt upon the Extension as an entirety, "to the complete exclusion of the Refunding Mortgage creditors who supplied more than half its construction cost * * *" (p. 41).

Again, this expression "Refunding Mortgage creditors" carefully avoids any misrepresentation that Refunding Mortgage Bonds, or their cash proceeds deposited with the Refunding Mortgage Trustee, were issued or paid out to finance any part of the construction of the Northern

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[1] 180 I. C. C. 645 at 646-647.

[2] I. C. C. Ex. 87, p. 15 (see R. 2456), not printed.

California Extension. None of the cost was so provided, the facts as to contributions by the "Refunding Mortgage creditors" being these:

(1) ACJ, as heretofore shown, provided for half the cost of the construction against *unsecured* Debentures, the other half being financed with First Mortgage Bonds. After the Extension had been completed and the First Mortgage had become a first lien thereon, ACJ exchanged its unsecured Debentures for the ACJ Notes secured by the pledge of Refunding Mortgage Bonds expressly declared in all the contemporaneous descriptive material to constitute a second lien on the Extension.

(2) Out of the funds provided by RFC in 1932 against the RFC Notes, secured in part by the pledge of these expressly declared second lien Refunding Mortgage Bonds, $559,408 were expended upon the Extension to provide for final items not covered by the original $10,000,000 financing.[1]

(3) RCC, the other "Refunding Mortgage creditor," provided no funds used in connection with the Northern California Extension.

IV

THE ALLEGED REFUNDING MORTGAGE DEFICIENCY CLAIM AGAINST UNMORTGAGED ASSETS

1. The 1934 Subordination Agreements

The Refunding Mortgage Trustee contends that the so-called "Refunding Mortgage creditors" are entitled to

[1]R. 1055-56.

better treatment in the reorganization because of alleged rights in cash and receivables of the Debtor at the inception of the reorganization proceedings, based upon an asserted right to a deficiency judgment upon the Refunding Mortgage Bonds.

As pointed out in the main brief of the Committee[1] upon its own writ of certiorari (No. 7), this case presents no problem of dealing with such unmortgaged assets.

As of July 31, 1935 (two days before these Section 77 proceedings began), the Debtor had cash on hand amounting to $911,682.42, and receivables aggregating $1,336,664.53.[2]

While it may be true that such cash and current assets are technically free from the lien of the First Mortgage as executed, the Refunding Mortgage Trustee's brief omits to mention the existence of subsequent agreements by the so-called "Refunding Mortgage creditors," which render those assets unavailable for the satisfaction of the Debtor's general creditors.

An indisputable prior right to the cash and current assets of the Debtor was created for the First Mortgage Bondholders by the agreement effecting an extension of the 1934 interest on the First Mortgage Bonds. The interest accrued in the year 1934 amounted to $2,264,505, compared with the total cash and receivables stated above of $2,248,346.95. By agreement dated July 25, 1934, the interest accruing on the First Mortgage Bonds during the year 1934 was extended to January 1, 1937, pursuant to

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[1]Page 10.

[2]R. 1091. The figure for cash on hand is after deducting $38,120.89, representing interest paid by Tidewater Southern on its note pledged under the Refunding Mortgage.

the modified extension agreement[1] subject to the conditions set forth in the Debtor's letter of May 29, 1934,[2] as modified by the Debtor's letter of July 25, 1934.[3] Under the extension agreement RFC, ACJ, RCC (who hold as collateral all the outstanding Refunding Mortgage Bonds) and WP Corp. (the only unsecured creditor of the Debtor) agreed that until such time as the 1934 extended interest on the First Mortgage Bonds should have been paid in full, such extended interest should be entitled to priority of payment over interest and principal of the loans of said junior creditors.[4] That 1934 extended interest has never been paid and under the Commission Plan is included in the unpaid interest for which the First Mortgage Bonds receive new Common Stock.

For the information of this Court, a copy of the subordination agreement executed by ACJ is annexed as Appendix I. The subordination agreements signed by both the other so-called "Refunding Mortgage creditors" and by WP Corp. are in substantially the same form.

The intent and effect of the agreements was and is to require all unmortgaged assets, including cash and current assets, to be applied to the 1934 interest on the First Mortgage Bonds prior to the application thereof to the creditors having claims junior to those of the holders of First Mortgage Bonds. The amount of the extended First Mortgage interest for 1934 exceeds the amount of cash, current assets and other unmortgaged assets, if any, on hand at the

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[1]R. 1092, 2529-39; I. C. C. Ex. 122 (see R. 2536-8), not printed.

[2]I. C. C. Ex. 118 (see R. 2533), not printed.

[3]I. C. C. Ex. 121 (see R. 2537-38), not printed.

[4]I. C. C. Exs. 117, 119, 120 (see R. 2532-35), not printed.

date of the filing of the Debtor's petition instituting these proceedings.

Can the Refunding Mortgage Trustee by any possibility have rights which the pledgees of *all* the Refunding Mortgage Bonds have expressly waived?

2. "Non-carrier Property"

The Refunding Mortgage Trustee also contends that the First Mortgage is not a lien on certain so-called "non-carrier property" to which, if it were unmortgaged assets, the alleged deficiency judgment under the Refunding Mortgage would extend.

This claim of the Refunding Mortgage Trustee refers principally to property at San Francisco, California, acquired by the Debtor at various dates at a cost of $1,586,395.54, similar property at Oakland, California, acquired at various dates at a cost of $355,813.16, and similar property at Sacramento, California, acquired at various dates at a cost of $40,896.91.

Most of the San Francisco property was acquired prior to July 14, 1916, the greater portion of it being the Islais Creek property.[1] The First Mortgage, therefore, is a prior lien thereon as property belonging to the predecessor of the Debtor and specifically covered in Granting Clause First of said First Mortgage. Moreover, the record shows that proceeds of First Mortgage Bonds were expended on account of acquisition of at least a part of the Islais Creek property, or for work thereon. Part of the property was acquired in 1921 and another part in 1925, and expenditures for the acquisition thereof were reimbursed to the Debtor in the amount of $176,734.68.[2]

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[1] R. 2527-28.

[2] I. C. C. Ex. 124 (see R. 2563), not printed.

The Oakland property consists of land acquired by the Debtor from its predecessor with the exception of a certain tract carried on the Debtor's books at $1,306.60, which was a part of a larger tract purchased for right-of-way purposes and financed by the use of deposited cash under the First Mortgage. The Sacramento property consists of land acquired by the Debtor from its predecessor and was a part of a larger tract purchased for station facilities.[1]

As pointed out in the discussion of the Granting Clauses of the First Mortgage (Point I, *supra*), the First Mortgage purports to be, and is, a first lien on all property which belonged to the predecessor of the Debtor of whatever kind or description. Not only is no distinction made in the First Mortgage as to the use to which such property may have been put, but Granting Clause Second expressly subjected to the lien of the First Mortgage, as a supplement to the particular description of railroad property contained in Granting Clause First, "all other * * * lands * * * now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses."

Nowhere, either in the First Mortgage or in the Refunding Mortgage, can the term "non-carrier property" be found. That term had its origin in valuation proceedings made by the Interstate Commerce Commission pursuant to Section 19a of the Interstate Commerce Act long after the First Mortgage was created. The purpose of distinguishing between carrier and non-carrier property in proceedings involving valuation for rate-making purposes is sound. That, however, does not support the validity of such a dis-

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[1]Exhibit H to Stipulation as to Facts Not in Dispute (R. 1017, 1091, 1299), not printed.

tinction for the purpose of determining the lien of a mortgage.

All of the so-called "non-carrier property" of the Debtor was, in fact, formerly classified as "carrier" or "operative" property. For example, this same San Francisco property—the Islais Creek property—was formerly classified as "operative" property, but was transferred to "non-operative property."[1] Clearly a change in accounting classification of the property subject to the lien of the First Mortgage did not destroy the lien of that Mortgage.

The foregoing conclusions are not at all affected by the fact that the 1915 Reorganization Plan of the Debtor's predecessor described the First Mortgage to be created pursuant to that Plan as a first lien on "railroad properties."

Of the approximately $50,000,000 First Mortgage Bonds now outstanding, only $20,000,000 were issued in the 1916 reorganization.[2] To determine the rights of the present First Mortgage Bondholders this Court must look to the First Mortgage as it was actually executed, not to some antecedent and superficial description of it. Indeed, the 1915 Plan did not state that the proposed First Mortgage should not be a lien on other properties which the Debtor might acquire.

3. The Alleged Right to a Deficiency Judgment Under the Refunding Mortgage

None of the Refunding Mortgage Bonds has ever been issued by the Debtor except by way of pledge for the RFC, RCC and ACJ Notes. They therefore do not represent a *debt* of the Debtor.

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[1] See footnote *supra*, p. 34.

[2] R. 120-21. The 1915 Reorganization Plan was consummated in 1916.

It is elemental that the pledge of $2,000 of a debtor's mortgage bonds to secure a $1,000 note of the debtor does not increase the debt beyond $1,000.[1] The only significance of the pledged bonds is that they vest in their pledgees, as security for the primary obligations for which they have been pledged (here the RFC, RCC and ACJ Notes), the right to realize upon the mortgaged property as security for the primary obligations, proportionately to the respective amounts of such pledged bonds.

RFC, RCC and ACJ were, of course, vested by the primary obligations (their respective Notes) with powers of attorney from the Debtor to sell the pledged Refunding Mortgage Bonds at any time prior to the commencement of any legal proceedings against the Debtor designed to crystallize the rights of its creditors *inter se*, such as the appointment of an equity receiver or a bankruptcy trustee. After such appointment, however, a pledgee may not dilute the claims of other creditors of the Debtor by increasing its debt through the sale of such pledged bonds.[2] No such sale has ever been sought by any of the pledgees in the *Western Pacific* case.

Because bonds so pledged are not themselves a debt, but only an indicia of participation in mortgaged security, it is well established that no proof of claim can be made upon pledged bonds; and that they are not entitled as such

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[1] *Merrill* v. *National Bank of Jacksonville*, 173 U. S. 131 (1899); *Mississippi Valley Trust Co.* v. *Railway Steel Spring Co.*, 258 Fed. 346 (C. C. A. 8th, 1919); *Worth* v. *Marshall Field & Co.*, 240 Fed. 395 (C. C. A. 4th, 1917); *Butterfield* v. *Woodman*, 223 Fed. 956 (C. C. A. 1st, 1915); *Hitner* v. *Diamond States Steel Co.*, 176 Fed. 384 (C. C. Del., 1910).

[2] *Mississippi Valley Trust Co.* v. *Railway Steel Spring Co.* 258 Fed. 346 (C. C. A. 8th, 1919).

to a deficiency judgment.[1] The deficiency judgments in the present case (which admittedly exist) are for those parts of the RCC and ACJ Notes which have not been fully provided for by new securities in the reorganization. Those unsecured claims the Commission, as pointed out in the Committee's main brief, found "have no value."[2]

The Refunding Mortgage Trustee is, of course, wholly without standing to assert any rights in respect of those deficiency judgments.

V

ANOTHER "PRACTICAL INTERPRETATION"

While the following facts are concededly not conclusive, they have some persuasive effect as "practical interpretations," to borrow a phrase from the Refunding Mortgage Trustee:

All three plans originally proposed before the Commission by the Debtor, the Committee and ACJ were predicated on the full priority of the First Mortgage over the Refunding Mortgage, except as to the collateral specifically pledged under the latter.

The ACJ Second Plan, the Debtor's First, Second, Third and Fourth Plans and the RCC Plan were all predicated on that priority.

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[1] *Union National Bank* v. *People's Savings & Trust Co.*, 28 F. (2d) 326 (C. C. A. 3rd, 1928); *New York Trust Co.* v. *Palmer*, 101 F. (2d) 1 (C. C. A. 2nd, 1939); see *Jones* v. *Third Nat. Bank of Sedalia*, 13 F. (2d) 86, at 87 (C. C. A. 8th, 1926). See Hatch, *A Form of Depression Finance—Corporations Pledging Their Own Bonds* (1934) 47 Harv. L. Rev. 1093, 1103 *et seq.*

[2] See Committee's main brief, p. 18, and R. 269-70.

No question as to that priority was raised during the period of the negotiation of the Debtor's First Plan or of any of the other original plans.

No specific provision for the relative participation of the First Mortgage Bondholders and the collateral noteholders was made in any proposed plan which did not recognize such priority, until the filing before the District Court of the ACJ objections on December 8, 1939, containing the suggestion by ACJ of a wholly new plan never theretofore discussed.[1]

VI

CONCLUSION

The decision of the District Court approving the tentative determination by the Commission of the various lien questions should be affirmed.

Dated October 2, 1942.

Respectfully submitted,

ROBERT T. SWAINE,
Attorney for Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting the Institutional Bondholders Committee, Respondent.

HERBERT W. CLARK,
BENJAMIN R. SHUTE,
Of Counsel.

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[1] R. 892, 910.

APPENDIX I

I. C. C. EXHIBIT 117[1]

A. C. JAMES CO.
40 Wall Street
New York

July 2, 1934.

The Western Pacific Railroad Company,
37 Wall Street,
New York.

Dear Sirs:

We refer to the letter written to you by the Reconstruction Finance Corporation dated June 23, 1934, and signed by the Chairman of such Corporation.

Subject to your obtaining from the holders of at least 75% of your outstanding First Mortgage Bonds, assents to the agreement of extension, dated as of March 1, 1934, as modified by the additional conditions contained in the printed letter of The Western Pacific Railroad Company dated May 29, 1934 (omitting the condition that the Reconstruction Finance Corporation, The Railroad Credit Corporation, A. C. James Co. and The Western Pacific Railroad Corporation shall in writing unconditionally consent and agree as provided in paragraph 2 contained in said printed letter and substituting therefor that the Reconstruction Finance Corporation, The Railroad Credit Corporation, A. C. James Co. and The Western Pacific Railroad Corporation shall agree as herein set forth) and subject to your obtaining from The Railroad Credit Corporation the Reconstruction Finance Corporation, and The Western Pacific Railroad Corporation an agreement with respect to their

[1]Introduced at R. 2532.

respective loans to your Company similar to the agreement herein contained (with like exception with respect to collateral held by them respectively and in the case of The Railroad Credit Corporation its right to retain sums payable under the Marshalling and Distributing Plan 1931), this corporation agrees, in the circumstances, that it will not, prior to January 1, 1937, or should prior to such date receivers be appointed for the Railroad Company or the filing of a petition by or against it be allowed by the Court under Section 77 of the Federal Bankruptcy Act, as amended, then prior to the appointment of such receivers or the allowance of the filing of such petition, whichever may be earlier, take any action with respect to collecting the interest falling due during the calendar year 1934 on loans of this Corporation to the Railroad Company, and further agrees that, until such time as the 1934 extended interest on the First Mortgage Bonds shall be paid in full, the 1934 extended interest on such assenting First Mortgage Bonds shall be entitled to priority of payment over interest and principal of loans of this Corporation to the Railroad Company (except with respect to assets or the income therefrom on which any mortgage securing bonds comprised in the collateral pledged as security for loans of this Corporation is a lien prior to the lien of said First Mortgage and except the collateral for such loans or the proceeds thereof or any payments which may be received by this Corporation therefrom or be realized by it out of the same) in any proceedings commenced prior to July 1, 1937, whether taken by this Corporation to enforce payment of interest or principal of such loans or otherwise.

Yours very truly,

A. C. JAMES CO.

By E. HAYWARD FERRY
Vice President.

Office - Supreme Court, U. S.
OCT 3 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 61.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,
Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,
Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916.

ORVILLE W. WOOD,
Attorney for Respondents Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

Dated, New York, N. Y., October 3, 1942.

INDEX.

	PAGE
OPINIONS BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
A. The "Lien Controversy"	4
B. Two Significant Provisions of the First Mortgage	5
Granting Clause Third	5
The "Free Funds" Provision	6
SUMMARY OF ARGUMENT	8
ARGUMENT	10
POINT I. THE CONCEPT UNDERLYING THE FIRST MORTGAGE IS THAT OF A MORTGAGE UPON A RAILROAD ENTERPRISE AS AN OPERATING ENTIRETY	10
POINT II. THE FIRST MORTGAGE IS A FIRST LIEN ON THE DEBTOR'S EQUITY IN EQUIPMENT SUBJECT TO THE EQUIPMENT TRUSTS OF 1923, 1924, AND 1929, AND THE BALDWIN LEASE OF 1931	13
A. FACTS	13
B. ARGUMENT	15
(I) The "Exception Clause" in the First Mortgage Does Not Have the Effect of Excepting from the Lien Equipment Acquired under Equipment Trusts, if Such Equipment Was Used or Acquired for Use on the Mortgaged Lines	15
The Opposing Contentions as to the Interpretation of the "Exception Clause"	15
The General Purpose Evidenced by the Granting Clauses of the First Mortgage	17
The Purpose of the "Exception Clause"	19

PAGE

The Function of the Single Limitation in the "Exception Clause" 21

The "Subject, However," Clause 25

(II) The Inclusion in the Refunding Mortgage of Language Not Contained in the First Mortgage Does Not Affect the Interpretation of the First Mortgage 28

(III) The Statements Contained in the Debtor's Listing Applications Are Not Binding upon the Holders of First Mortgage Bonds 29

(IV) The Wabash and Rock Island Cases, Cited by the Refunding Mortgage Trustee, Are Distinguishable 35

(V) The First Mortgage Covers Additions to Equipment Needed for the Efficient Operation of the Mortgaged Enterprise 37

The Covenant to Maintain the Operating Efficiency 37

The Doctrine of the Minneapolis & St. Louis Case 40

The Contentions of the Refunding Mortgage Trustee 44

POINT III. THE NORTHERN CALIFORNIA EXTENSION IS SUBJECT IN ITS ENTIRETY TO THE FIRST MORTGAGE AS A FIRST LIEN THEREON 50

A. FACTS 50

The Construction of the Northern California Extension 50

The Method of Financing 51

The Negotiations with A. C. James Co. 51

The Issue of First Mortgage Bonds 54

The Issue of Debentures 60

The Cancellation of the Debentures 62

PAGE

The Execution and Delivery of the Refunding Mortgage and the Issue of Refunding Mortgage Bonds ---- 63

The Advances by Reconstruction Finance Corporation ---- 64

The Recordation of the First Mortgage and of the Refunding Mortgage ---- 66

B. ARGUMENT ---- 67

(I) The Granting Clauses of the First Mortgage Cover in Its Entirety an Extension Financed in Any Part with First Mortgage Bonds or Deposited Cash; the Lien Thus Created Is Not Limited, Either in Extent or Priority, to the Amount of First Mortgage Bonds or Deposited Cash Used in Such Financing ---- 69

The Granting Clauses of the First Mortgage ---- 70

The Bond and Cash Takedown Provisions ---- 72

The Subordination Covenant ---- 74

(II) The Northern California Extension Cannot Be Divided into Bonded and Unbonded Segments ---- 75

(III) No Supplemental Indenture Was Necessary to Entitle the First Mortgage to Priority over the Refunding Mortgage on the Entire Northern California Extension 78

(IV) The Advances by A. C. James Co. and Reconstruction Finance Corporation Were Not Made Under Such Circumstances as to Create Liens on the Northern California Extension in Favor of Either ---- 81

The Two Requirements: Time and Intent 82

The Authorities ---- 82

PAGE

The Requirement as to Time Was Not Met ---- 91

The Requirement as to Intent Was Not Met ---- 93

POINT IV. THE FIRST MORTGAGE IS A FIRST LIEN ON THE SO-CALLED "NONCARRIER" PROPERTY ---- 95

A. FACTS ---- 95

B. ARGUMENT ---- 97

(I) The Characterization of Property as "Noncarrier" Property in the Debtor's Accounts Does Not Affect the Scope of the Granting Clauses of the First Mortgage ---- 99

(II) The Granting Clauses of the First Mortgage Expressly Cover "Noncarrier" Real Estate Owned by the Debtor at the Date of the Execution and Delivery of the First Mortgage ---- 99

The Granting Clauses of the First Mortgage ---- 99

The Provisions of the 1915 Plan of Reorganization Are Not Relevant ---- 101

CONCLUSION ---- 103

APPENDIX A ---- 105

The Granting Clauses of the First Mortgage ---- 105

APPENDIX B ---- 116

Judge Wilkerson's Opinion in the *Rock Island* Case ---- 116

Table of Authorities Cited.

PAGE

Cases.

Bear Lake Irrigation Co. v. *Garland*, 164 U. S. 1 (1896) 83, 84

California Title Insurance & Trust Co. v. *Pauly*, 111 Cal. 122, 43 Pac. 586 (Cal., 1896) 69, 79, 98

Chicago, Rock Island and Pacific Railway Company, Debtor, In the Matter of The, (D. C., N. D. Ill., E. D., 1939, unreported) 8, 35, 36, 116

Citizens' Savings & Trust Co. v. *Cincinnati & D. Traction Co.*, 106 Ohio St. 577, 140 N. E. 380 (Ohio, 1922) 82

Continental Co. v. *United States*, 259 U. S. 156 (1922) 30, 31

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PAGE

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PAGE

Bankruptcy Act, § 77 (11 U. S. C. A., § 205) 2

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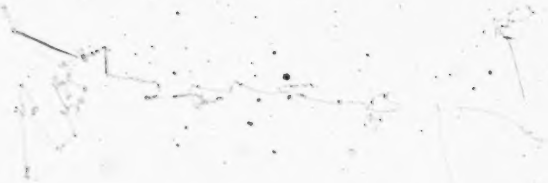

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1942.

No. 61.

IN THE MATTER OF
THE WESTERN PACIFIC RAILROAD COMPANY,
a corporation,

Debtor.

IRVING TRUST COMPANY, as Substituted Trustee under the General and Refunding Mortgage of The Western Pacific Railroad Company,

Petitioner,

against

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO and SAMUEL ARMSTRONG, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916; FREDERICK H. ECKER, JOHN W. STEDMAN and REEVE SCHLEY, constituting the Institutional Bondholders Committee; WESTERN PACIFIC RAILROAD CORPORATION; THE WESTERN PACIFIC RAILROAD COMPANY; A. C. JAMES CO.; THE RAILROAD CREDIT CORPORATION; and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO AND SAMUEL ARMSTRONG, AS TRUSTEES UNDER THE WESTERN PACIFIC RAILROAD COMPANY FIRST MORTGAGE DATED JUNE 26, 1916.

This is a proceeding instituted by the Refunding Mortgage Trustee to review a decree of the United States Circuit

Court of Appeals for the Ninth Circuit entered on November 28, 1941 (R. 2675), as amended on rehearing by order filed February 12, 1942, as amended by order of February 16, 1942 (R. 2681, 2682), which decree reversed an order of the District Court of the United States for the Northern District of California, Southern Division, entered on August 15, 1940 (R. 1569). The order of the District Court approved a plan of reorganization (hereinafter called the "Commission Plan") for the Debtor, The Western Pacific Railroad Company, which had theretofore been approved and certified to the District Court by the Interstate Commerce Commission (R. 1600), in a proceeding for the reorganization of the Debtor under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A., § 205).

OPINIONS BELOW.

The Commission's report and order (R. 194, 284) dated October 10, 1938, approving a plan of reorganization for the Debtor, are reported at 230 I. C. C. 61. The Commission's report and order on further consideration (R. 300, 362) dated June 21, 1939, modifying the plan of reorganization approved in the Commission's report and order dated October 10, 1938, are reported at 233 I. C. C. 409. The Commission's report (R. 884) dated September 19, 1939, on which its order (R. 891) dated September 19, 1939, was entered, denying the Debtor's petition for modification of the Commission Plan, is reported at 236 I. C. C. 1.

The opinion of the District Court (R. 1569) dated August 15, 1940, approving the Commission Plan, is reported at 34 F. Supp. 493.

The opinion of the Circuit Court of Appeals (R. 2663) dated November 28, 1941, is reported at 124 F. (2d) 136. No opinion was rendered on rehearing.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., § 347(a)).

QUESTIONS PRESENTED.

The questions presented are essentially these:

1. Should not this Court, in view of the public interest in bringing about a speedy termination of the reorganization proceedings, decide the issues involved in the so-called "lien controversy", which issues were before the Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination?

2. Were the issues involved in the "lien controversy" correctly determined by the Commission and by the District Court?

With respect to the first question, no controversy exists between the Refunding Mortgage Trustee and the First Mortgage Trustees. In their brief filed in No. 8, the First Mortgage Trustees have taken the position that this Court should decide all of the issues which were before the Circuit Court of Appeals, including the issues involved in the "lien controversy", and should, upon the entire record, reverse the decree of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan.[1]

With respect to the second question, the First Mortgage Trustees believe that the issues involved in the "lien controversy" were correctly determined by the Commission and by the District Court. The argument in this brief will be confined to a discussion of those issues.

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[1] A similar position has been taken by the Institutional Bondholders Committee in its brief filed in No. 7 and by Reconstruction Finance Corporation in its brief filed in No. 33.

STATEMENT OF THE CASE.

A. The "Lien Controversy".

The allocations of new securities under the Commission Plan are premised upon the complete priority of the First Mortgage [1] over the Refunding Mortgage [2] as a lien on substantially all of the Debtor's property, except with respect to certain pledged collateral held by the Refunding Mortgage Trustee (R. 261-267). The correctness of that basic premise is challenged by the Refunding Mortgage Trustee with respect to three classes of property:

(1) The Debtor's equity in certain equipment acquired under three Philadelphia Plan equipment trusts and the so-called Baldwin Lease;

(2) The Northern California Extension; and

(3) Certain so-called "noncarrier" real estate.

A statement of the relevant facts with respect to each of these classes of property will be set forth immediately preceding the portion of the argument to which it relates. This method of presentation, we believe, will facilitate a ready understanding of the questions involved.

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[1] I. C. C. Exhibit No. 5 (R. 1872).

[2] I. C. C. Exhibit No. 6 (R. 1872).

I. C. C. Exhibit Nos. 5 and 6 are among the portions of the record which, by stipulation (R. 2612, 2614), were not printed but which are before this Court pursuant to the stipulation filed July 23, 1942.

The granting clauses of the First Mortgage are printed at R. 1215-1231, as Exhibit D to the Stipulation As To Facts Not In Dispute (R. 1017-1272, 1285)—hereinafter referred to as the "Stipulation" or "Stip." The granting clauses of the Refunding Mortgage are printed at R. 1231-1246, as Exhibit E to the Stipulation. For the convenience of the Court, we have set forth the granting clauses of the First Mortgage in Appendix A of this brief, *infra*, pages 105-115. Page references in this brief to the granting clauses of the First Mortgage are to Appendix A of this brief; page references to other parts of the First Mortgage are to I. C. C. Exhibit No. 5.

Other exhibits which were not printed are referred to in this brief by their exhibit numbers, with citations to the respective pages of the record at which they were offered in evidence.

B. Two Significant Provisions of the First Mortgage.

The answers to the questions involved depend mainly upon the interpretation of the provisions of the First Mortgage.

The provisions chiefly in controversy are the after-acquired property clause in Granting Clause Third [1] and the so-called "free funds" provision.[2] These two provisions fix the boundaries of the lien on after-acquired property. To assist the Court in comparing them, we here set them forth in sequence.

Granting Clause Third.

"*Third.*—Any and all property and facilities of any and every kind and description, including among other things lines of railroad, extensions and branches, telegraph and telephone lines, lines and instrumentalities of water transportation, terminal facilities, equipment, lands, buildings, machinery and tools, stocks, bonds, notes and other obligations and securities and any and all right, title and interest in any of such properties or facilities which may from time to time hereafter be acquired or constructed by or belong to the Company or any successor or purchasing corporation if

(*a*) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) or on account of the purchase, acquisition or construction thereof or work thereon First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; or

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[1] Appendix A, *infra*, pp. 110-111.

[2] Appendix A, *infra*, pp. 113-114.

(*b*) consisting of or, if securities, representing property or facilities constituting an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or

(*c*) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or

(*d*) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or any right, title or interest which the Company or any successor or purchasing corporation may hereafter acquire in or to any of the property of either of said companies or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company, as the term 'subsidiary company' is defined in Section 2 of Article Second hereof."

THE "FREE FUNDS" PROVISION.

"But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests

therein, equipment, stocks, bonds or other securities or other property, rights, franchises, immunities or privileges provided the same shall not be lines of railroad, extensions, or branches or interests therein, equipment, stocks, bonds or other securities, or other property, rights, franchises, immunities or privileges (*a*) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; or (*b*) consisting of, or if securities representing, property or facilities constituting an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or (*c*) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or (*d*) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or of any right, title or interest which the Company or any successor or purchasing corporation may acquire in or to any of the property of either of the companies above named or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company as the term subsidiary company is defined in Section 2 of Article Second hereof; and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

As we interpret these provisions, Granting Clause Third extends the lien to all after-acquired property which falls within any one of the four enumerated categories; the "free funds" provision limits the Debtor's right to acquire property free of the lien to property which does not fall within any one of these same four categories.

SUMMARY OF ARGUMENT.

I. The concept underlying the First Mortgage is that of a mortgage upon a railroad enterprise as an operating entirety.

II. The First Mortgage is a first lien on the Debtor's equity in equipment subject to the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931.

A. The "exception clause" in the First Mortgage does not have the effect of excepting from the lien equipment acquired under equipment trusts, if such equipment was used or acquired for use on the mortgaged lines.

B. The inclusion in the Refunding Mortgage of language not contained in the First Mortgage does not affect the interpretation of the First Mortgage.

C. The statements contained in the Debtor's listing applications are not binding upon the holders of First Mortgage Bonds.

D. The *Wabash* and *Rock Island* cases, cited by the Refunding Mortgage Trustee, are distinguishable.

E. The First Mortgage covers additions to equipment needed for the efficient operation of the mortgaged enterprise.

III. The Northern California Extension is subject in its entirety to the First Mortgage as a first lien thereon.

A. The granting clauses of the First Mortgage cover in its entirety an extension financed in any part

with First Mortgage Bonds or deposited cash; the lien thus created is not limited, either in extent or priority, to the amount of First Mortgage Bonds or deposited cash used in such financing.

B. The Northern California Extension cannot be divided into bonded and unbonded segments.

C. No supplemental indenture was necessary to entitle the First Mortgage to priority over the Refunding Mortgage on the entire Northern California Extension.

D. The advances by A. C. James Co. and Reconstruction Finance Corporation were not made under such circumstances as to create liens on the Northern California Extension in favor of either.

IV. The First Mortgage is a first lien on the so-called "noncarrier" property.

A. The characterization of property as "noncarrier" property in the Debtor's accounts does not affect the scope of the granting clauses of the First Mortgage.

B. The granting clauses of the First Mortgage expressly cover "noncarrier" real estate owned by the Debtor at the date of the execution and delivery of the First Mortgage.

ARGUMENT.

POINT I.

THE CONCEPT UNDERLYING THE FIRST MORTGAGE IS THAT OF A MORTGAGE UPON A RAILROAD ENTERPRISE AS AN OPERATING ENTIRETY.

The Debtor's First Mortgage, like the Debtor itself, is a child of the 1916 reorganization.

The Western Pacific came out of that reorganization with its entire bonded debt wiped out as debt. Every class of security holders was eliminated except one: holders of old first mortgage bonds received stock in the new holding company, together with the right to purchase new First Mortgage Bonds (R. 1112, 1137, 1143, 1150).

Thus the problem which confronted the draftsman of the new First Mortgage was a simple one. The sole problem was to create a single system first mortgage which would provide the new money immediately needed for the reorganization and which would also provide an adequate vehicle for future financing by the Debtor.

To that end, the draftsman created a first mortgage upon the Debtor's railroad enterprise as an operating entirety.

He provided for the issue under that mortgage of $50,000,000 in principal amount of First Mortgage Bonds. Of these, $20,000,000 in principal amount were to be immediately issued to provide new money for the reorganization (Article Second, Section 1[1]), and the remaining $30,000,000 in principal amount were reserved to finance the making of improvements and to finance the acquisition of new lines of railroad and other properties added to the mortgaged enterprise in the course of its future growth (Article Second, Section 2[2]).

First the draftsman placed under the lien all of the property which the Debtor acquired from its predecessor

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[1] I. C. C. Exhibit No. 5, pp. 37-40.

[2] I. C. C. Exhibit No. 5, pp. 40-44.

(the old Western Pacific Railway Company)—except cash items and except certain claims against The Denver and Rio Grande Railroad Company,—together with all other property owned by the Debtor at the date of the execution and delivery of the First Mortgage, including not merely the right of way and station buildings but also tracts of land which were not at the time being used for the transportation of passengers and freight (Granting Clauses First, Second, Fifth, and Sixth[1]).

He then provided that the lien should attach to all after-acquired property the cost of which should be financed in any part with First Mortgage Bonds or deposited cash, and also to all after-acquired property which should be essentially a part of the mortgaged enterprise (Granting Clauses Third, Fifth, and Sixth[2]).

The draftsman did not limit the lien on after-acquired property to property acquired for use on the Debtor's railroad as it existed in 1916. He extended it as well to new lines of railroad to be acquired in the future (Granting Clause Third[3]), and he provided that the lien should attach not only to the franchises with which the Debtor commenced its operations but also to all after-acquired franchises incidental to the maintenance or operation of the mortgaged enterprise, including new franchises acquired in connection with new lines of railroad thereafter becoming subject to the lien (Granting Clause Fifth[4]).

In order not to hamper the Debtor in financing separate ventures, the draftsman specified (in the "free funds" provision[5]) that the lien should not attach to any new property not essentially a part of the mortgaged enterprise, provided the Debtor finance the acquisition of such property entirely outside of the First Mortgage.

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[1] Appendix A, *infra*, pp. 105-109, 111-113.

[2] Appendix A, *infra*, pp. 110-113.

[3] Appendix A, *infra*, pp. 110-111.

[4] Appendix A, *infra*, pp. 111-113.

[5] Appendix A, *infra*, pp. 113-114.

At the end of the "free funds" provision, the draftsman added the so-called "exception clause",[1] which permits the Debtor to create a first lien security in financing purchases of new equipment under equipment trusts and chattel mortgages, provided the financing be done entirely outside of the First Mortgage.

In order to preserve the integrity of the mortgaged enterprise, the draftsman inserted covenants of the Debtor to maintain its railroad system and property, including its equipment, in good condition and to make all necessary replacements, and also all necessary additions, so that the security of the bondholders might not be depleted by a failure to keep up the operating efficiency of the enterprise (Article Fourth, Section 9[2]).

Throughout the pages of the First Mortgage there appears the concept of a mortgage upon a railroad enterprise as an operating entirety. It is the concept that everything which is essentially a part of that enterprise, or to acquire which any First Mortgage money has been used, shall stand as security for the entire mortgage debt. It is not a concept of undivided interests in separate pieces of property standing as security for separate parts of the debt, but a concept of the enterprise as a whole standing as security for the debt as a whole.

The solution of the interpretation problems raised by the "lien controversy" will be simplified, we believe, if this underlying concept be borne in mind.

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[1] Appendix A, *infra*, p. 114.

[2] I. C. C. Exhibit No. 5, pp. 76-77.

POINT II.

THE FIRST MORTGAGE IS A FIRST LIEN ON THE DEBTOR'S EQUITY IN EQUIPMENT SUBJECT TO THE EQUIPMENT TRUSTS OF 1923, 1924, AND 1929, AND THE BALDWIN LEASE OF 1931.

A. FACTS.

At the date of the execution and delivery of the Refunding Mortgage (March 1, 1932) and at the date of the institution of the Section 77 proceedings (August 2, 1935), equipment trust obligations of the Debtor were outstanding under three Philadelphia Plan equipment trusts (hereinafter called, respectively, the "Equipment Trust of 1923", the "Equipment Trust of 1924", and the "Equipment Trust of 1929"), and the Baldwin Lease of 1931. These equipment trust obligations were of serial maturities, and in each case the agreement provided for a cash payment equal to the difference between the cost of the equipment delivered and the principal amount of the equipment trust certificates (R. 1068-1070).

The initial payments and all payments made by the Debtor on the equipment trust obligations were made with funds other than proceeds of First Mortgage Bonds or deposited cash. Since the institution of the Section 77 proceedings, additional payments on the equipment trust obligations have been made by the Trustees of the Debtor and the Equipment Trusts of 1923 and 1924 have been satisfied (R. 1073-1074).

All of the equipment subject to these three equipment trusts and the Baldwin Lease of 1931 was acquired for use on all of the Debtor's lines of railroad, including those specifically described in the granting clauses of the First Mortgage, and was in fact so used (R. 1975).

An analysis of Exhibit G to the Stipulation (R. 1298)[1] shows the following facts:

[1] This exhibit was not printed.

At the date of the execution and delivery of the First Mortgage, the equipment subject to the lien of the First Mortgage consisted of 1,589 units, which had a book value less accrued depreciation as of that date of $3,550,748.93. Subsequent to the execution and delivery of the First Mortgage, the Debtor acquired by the use of First Mortgage Bonds or deposited cash 5,443 additional units of equipment, which had a book value at the date of acquisition of $11,483,640.21. Thus, the equipment on which the First Mortgage became an undisputed first lien (hereinafter called "Original Equipment") aggregated 7,032 units, of an aggregate book value of $15,034,389.14 (hereinafter called "Original Value of Original Equipment").

As of March 1, 1932, 626 units of Original Equipment, having an Original Value of $690,913.11, had been retired. As of that date, the Debtor had acquired by the use of free funds (not under equipment trusts) 52 units of equipment, having a book value at the date of acquisition of $49,027.16, and had acquired under equipment trusts 3,705 units of equipment, having a book value at the date of acquisition of $13,006,454.87,[1] making a total of 3,757 units, having a book value at the date of acquisition of $13,055,482.03.

As of March 1, 1932, the book value of the Original Equipment then remaining in service, less accrued depreciation to that date, was $9,684,906.77, representing a depreciation in the Original Value of Original Equipment of $5,349,482.37.

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[1] This equipment was acquired under the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931, and the book value stated above is the total value of the equipment and not merely the value of the Debtor's equity, as is shown by the figures set forth in paragraph 83 of the Stipulation (R. 1068-1070).

B. ARGUMENT.

(I) The "Exception Clause" in the First Mortgage Does Not Have the Effect of Excepting from the Lien Equipment Acquired under Equipment Trusts, if Such Equipment Was Used or Acquired for Use on the Mortgaged Lines.

THE OPPOSING CONTENTIONS AS TO THE INTERPRETATION OF THE "EXCEPTION CLAUSE".

The controversy as to the equipment centers in a single phrase, "free from the lien hereof", appearing in the "exception clause",[1] which is a part of the "free funds" provision in the First Mortgage.

Isolating this phrase from its context, ignoring other significant language in the "exception clause", and giving to the "exception clause" a meaning wholly inconsistent with the general purpose evidenced by the remainder of the "free funds" provision and by the granting clauses as a whole, the Refunding Mortgage Trustee contends that the "exception clause" has the effect of making the Debtor's equity in this equipment entirely free of the lien of the First Mortgage, because this equipment was acquired under equipment trusts and was not financed under the First Mortgage.[2]

But the phrase "free from the lien hereof" cannot be construed in a vacuum.[3]

The equipment in controversy was acquired for use and was actually used on the mortgaged lines—it is essentially a part of the mortgaged enterprise. That being so, it falls

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[1] Appendix A, *infra* p. 114.

[2] Brief of Refunding Mortgage Trustee, pp. 18-32.

[3] "The meaning of a writing may be distorted where undue force is given to single words or phrases. We read the writing as a whole." *Empire Properties Corp.* v. *Manuf'rs T. Co.*, 288 N. Y. 242, 248, 43 N. E. (2d) 25, 28 (N. Y., 1942).

within the after-acquired property clauses of the First Mortgage.

As we interpret the "exception clause", its purpose and effect are merely to enable the Debtor to vest an unencumbered security title in the equipment lienor, whether the financing be done under an equipment trust or under a chattel mortgage. Our contention is that the lien of the First Mortgage attached to the Debtor's equity in this equipment immediately upon its acquisition and spread as that equity was increased by the subsequent installment payments on the equipment trust obligations.[1]

The interpretation problem presented by the "exception clause" will be more readily visualized if the methods of equipment financing ordinarily used by railroads are kept in mind. The Debtor might finance a purchase of new equipment (1) entirely with treasury cash, or (2) with First Mortgage Bonds or deposited cash, or (3) under a chattel mortgage, or (4) under what are known in common parlance as "equipment trusts". The two usual types of equipment trusts are: (a) a lease or conditional sale agreement, under which the legal title to the equipment is reserved in the lessor or vendor until payment of the final installment of the purchase price, and (b) a Philadelphia Plan equipment trust, under which the legal title to the equipment is conveyed to a trustee, which then issues equipment trust certificates for the unpaid balance of the purchase price (an initial down payment in cash being made by the railroad) and leases the equipment to the railroad under a lease which provides that the installments of rental shall be applied to the retirement of the equipment trust certificates and that the legal title to the equipment shall remain in the trustee until all of the equipment trust certificates are retired. Under both types of equipment trusts,

[1] In *United States Mortgage & Trust Co.* v. *Chicago & A. R. Co.*, 40 F. (2d) 386 (C. C. A., 7th Circ., 1930), the court said, at page 392:

> "The lien of the first lien mortgage did not remain suspended until final payment under the lease or equipment obligation, but attached to the interest of the consolidated company as current payments were made out of its general funds, * * *."

the legal title is reserved in the equipment trust lienor as security for the payment of the unpaid balance of the purchase price, and the railroad acquires an "equity" in the equipment by virtue of the initial down payment, which equity increases in amount as successive installments of the purchase price are paid.

Under the first three methods of financing above mentioned, the legal title to the equipment is vested in the Debtor. Under the fourth method, the legal title (which is merely a security title) is vested in the equipment trust lienor.

The interpretation placed upon the "exception clause" by the Refunding Mortgage Trustee leads to this curious result: In the case of equipment financed entirely with treasury cash, and in the case of equipment financed with First Mortgage Bonds or deposited cash, and also in the case of equipment financed under a chattel mortgage—in other words, in every case in which the legal title to the equipment is vested in the Debtor,—the equipment clearly becomes subject to the lien of the First Mortgage, if it be used or acquired for use on the mortgaged lines. In the first two cases mentioned, the First Mortgage attaches to the equipment as a first lien; in the case of equipment financed under a chattel mortgage, the lien of the First Mortgage is subordinated, by virtue of the "exception clause", to the lien of the chattel mortgage. But, in the single case of equipment financed under an equipment trust, in which the legal title to the equipment is vested, not in the Debtor but in the equipment trust lienor, the "exception clause" (so the Refunding Mortgage Trustee contends) has the effect of making the Debtor's equity entirely free of the lien of the First Mortgage.

The General Purpose Evidenced by the Granting Clauses of the First Mortgage.

No rule of construction is more fundamental than that the "writing will be read as a whole, and every part will be interpreted with reference to the whole; and if possible

it will be so interpreted as to give effect to its general purpose."[1]

The general purpose evidenced by the granting clauses of the First Mortgage is expressed in two parallel and complementary provisions.

The first is a provision in Granting Clause Third,[2] which is to the effect that all after-acquired property, including equipment, and including "any and all right, title and interest" in equipment, shall become subject to the lien, provided that such property falls within any one of four specifically enumerated categories (hereinafter for convenience referred to as the "four categories"), viz.:

> (1) Property on account of which First Mortgage Bonds or deposited cash shall have been taken down;
>
> (2) Property constituting an integral part of the mortgaged property;
>
> (3) Property used or acquired for use in or for the maintenance or operation of or appertaining to any of the mortgaged property; and
>
> (4) Securities of and property acquired from certain subsidiary corporations.

The second is the "free funds" provision,[3] which in effect permits the Debtor, by the use of its credit or free funds, to acquire property, including equipment, free of the lien, provided that such property does not fall within any one of these same "four categories".

The language used in Granting Clause Third to define the extent of the after-acquired property clause is substantially identical with the language used in the "free funds" provision (preceding the "exception clause") to define the limitations upon the Debtor's right to acquire property free of the lien. The language used is not con-

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[1] 3 Williston on Contracts (Williston and Thompson Rev. Ed. 1936), p. 1779.

[2] Appendix A, *infra*, pp. 110-111.

[3] Appendix A, *infra*, pp. 113-114.

tradictory; it is complementary. The after-acquired property clause and the "free funds" provision, when placed side by side, fit together like the two parts of an ancient parchment indenture and indicate clearly a general purpose (1) to subject to the lien all after-acquired property, provided that such property falls within any one of the "four categories", and (2) to permit the Debtor, by the use of its credit or free funds, to acquire any property free of the lien, provided that it does not fall within any one of the "four categories".

The Purpose of the "Exception Clause".

The "exception clause" was obviously inserted to meet the requirements of a particular situation of great practical importance—the necessity of permitting the Debtor to finance purchases of equipment through loans secured by liens upon the equipment purchased. To that end, it was essential to empower the Debtor to make effective pledges of the equipment—whether under some form of equipment trust or under some form of chattel mortgage—as security for the advances obtained. There is no reason to believe that the draftsman of the First Mortgage sought to accomplish anything more. To accomplish that result, consistently with the general purpose above stated, it was necessary only to create an exception to the first lien character of the coverage of the First Mortgage, so as to enable the Debtor to vest an unencumbered security title in the equipment lienor. It was not necessary also to prevent the lien of the First Mortgage from attaching to the Debtor's equity in the equipment, and such a result would be inconsistent with the general purpose above stated.

If the equipment in controversy had been acquired by the Debtor entirely by the use of free cash in its treasury, it would unquestionably be subject to the lien of the First Mortgage, because it was acquired for use and was actually used on the mortgaged lines and therefore falls within the third of the "four categories". What reason can there be for making a distinction based on the fact that this equip-

ment was acquired under equipment trusts instead of with treasury cash? It is fair to assume that the draftsman of the First Mortgage was seeking to accomplish an intelligent purpose. But to impute to the draftsman an intent that the lien of the First Mortgage should attach or should not attach to equipment, according to the chance circumstance of whether it is acquired with treasury cash or under an equipment trust, is to impute to the draftsman a whimsical intent which is not consistent with any intelligent purpose.

We submit that the "exception clause" should be given a sensible meaning consistent with the general purpose above stated and that the after-acquired property clause and the "free funds" provision, when read as a whole, have the effect of subjecting the Debtor's equity in this equipment to the lien of the First Mortgage.

Not only does the Refunding Mortgage Trustee lift the "exception clause" out of its context as a part of the "free funds" provision; it does not even construe the "exception clause" itself as a whole.

The "exception clause" deals with two alternative methods of equipment financing, viz., (a) financing under some form of equipment trust, with the legal title vested in the equipment lienor, and (b) financing under a chattel mortgage, with the legal title vested in the Debtor subject to the lien securing the equipment obligations.

We believe the language used in dealing with these two alternative methods of financing shows that the purpose of the "exception clause" is not to free the Debtor's equity from the lien of the First Mortgage but merely to enable the Debtor to vest an unencumbered security title in the equipment lienor. In dealing with financing under an equipment trust, where the legal title is in the equipment lienor, the draftsman used the words "free from the lien hereof". In dealing with financing under a chattel mortgage, where the legal title is in the Debtor, the draftsman used the words "superior to the lien of this indenture". This differentiation in the language used shows that the draftsman was thinking, not of the Debtor's equity

but of the security title. In each case, he used appropriate words to disencumber the security title.

The context clearly shows that, in the case of chattel mortgage financing, the draftsman contemplated that the First Mortgage would be a lien on the Debtor's equity in the equipment. Why should he make a whimsical distinction between equipment financed under a chattel mortgage and equipment financed under an equipment trust? The sensible interpretation, we submit, is that the Debtor's equity is subject to the lien of the First Mortgage in both cases and that the "exception clause" merely disencumbers the security title, thereby enabling the Debtor to create a first lien security for the equipment obligations.

The Function of the Single Limitation in the "Exception Clause".

The "exception clause" places a single limitation upon the right of the Debtor to finance purchases of equipment with first lien equipment obligations, that limitation being expressed in the words "unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same".[1]

Relying upon a superficial resemblance of language, the Refunding Mortgage Trustee erroneously assumes that the single limitation in the "exception clause" is identical with the first of the four limitations upon the right of the Debtor to acquire property free of the lien which are specified in the preceding part of the "free funds" provision,[2] and it proceeds to argue that there "would have been no point in repeating" that first limitation in the "exception clause", if it had been intended that all four of the limitations specified in the preceding part of the "free funds"

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[1] Appendix A, *infra*, p. 114.

[2] The "free funds provision" permits the Debtor to acquire property free of the lien, provided that such property does not fall within any one of the "four categories". The "four limitations" referred to in the brief of the Refunding Mortgage Trustee (p. 22) are those expressed in the enumeration of the "four categories".

provision should apply to property acquired under the "exception clause".[1]

The fallacy of this argument lies in its premise. As an analysis will show, the single limitation in the "exception clause" is not identical with the first of the four limitations expressed in the "four categories"; their functions are distinct and independent. The function of the four limitations expressed in the "four categories" is to limit the right of the Debtor to acquire property free of the lien; the function of the single limitation in the "exception clause" is to limit the right of the Debtor to finance purchases of new equipment with first lien equipment obligations.

Nor does the single limitation in the "exception clause" have the effect of preventing the lien of the First Mortgage from attaching to equipment acquired under the "exception clause" and not financed with First Mortgage Bonds or deposited cash. This becomes instantly apparent when the "exception clause" is read as a whole.

The "exception clause", as we have seen, deals with two alternative methods of equipment financing, viz., (a) equipment trust financing, and (b) chattel mortgage financing. The single limitation in the "exception clause" applies equally to both, and it is logical to assume that its effect is the same in both cases.

The words "superior to the lien of this indenture"[2] show that equipment financed under a chattel mortgage may come under the lien, even though no First Mortgage Bonds or deposited cash be used in the financing. The single limitation in the "exception clause" does not have the effect, then, of preventing the lien of the First Mortgage from attaching.

But what is the test of whether, in a particular case, the lien attaches or does not attach to equipment financed under a chattel mortgage? Obviously, that test must be sought outside of the "exception clause". The "exception clause" is not a granting clause. Equipment comes

[1] Brief of Refunding Mortgage Trustee, p. 22.

[2] Appendix A, *infra*, p. 114.

under the lien, not by virtue of the "exception clause" but by virtue of the after-acquired property clauses, which by their terms extend the lien to all property falling within any one of the "four categories". If, as the Refunding Mortgage Trustee contends, the test of the "four categories" does not apply, we are left without any test for determining whether, in a particular case, the lien attaches or does not attach to equipment financed under a chattel mortgage.

Accepting the argument of the Refunding Mortgage Trustee leads to this bizarre result: If the test of the "four categories" does not apply, equipment financed under a chattel mortgage must come under the lien, not by virtue of the after-acquired property clauses but by virtue of the "exception clause" itself, operating as an independent granting clause. Since nothing in the "exception clause" limits the extent of the lien in such a case, it must follow that the lien attaches to all equipment financed under a chattel mortgage, even to equipment used exclusively on unmortgaged lines.

This but shows the morass of logical difficulties into which we are led by the attempt of the Refunding Mortgage Trustee to lift the phrase "free from the lien hereof" out of its context and to construe it in a vacuum without regard to the general purpose evidenced by the granting clauses.

When the "exception clause" and the preceding part of the "free funds" provision are read together as one harmonious whole, the function of the single limitation in the "exception clause" becomes perfectly clear. It prohibits the Debtor from financing purchases of new equipment with first lien equipment obligations, unless the financing be done entirely outside of the First Mortgage.

Whether the lien of the First Mortgage attaches or does not attach to the Debtor's equity in the equipment is determined, not by the "exception clause" but by the test of the "four categories". Under that test, the lien attaches to all equipment used or acquired for use on the mortgaged lines, whether the cost be financed entirely with

treasury cash, or be financed with First Mortgage Bonds or deposited cash or be financed under a chattel mortgage, or be financed under an equipment trust.

This interpretation gives due effect both to the single limitation specified in the "exception clause" and to the four limitations specified in the preceding part of the "free-funds" provision, and it gives a sensible meaning to the "exception clause" which is consistent with the general purpose evidenced by the granting clauses.

The Refunding Mortgage Trustee argues that our interpretation of the "exception clause" would limit the operation of the "exception clause" to "equipment bought for use exclusively on after-acquired branches or extensions not financed with First Mortgage funds and which was never used on the main line" and argues that such a limitation "would be unreasonable, and also contrary to sound railroading practice, for efficient use of equipment requires that it be available for use on any portion of the railroad's property".[1]

A complete answer to this argument is found in Granting Clause Fifth,[2] which in effect provides that the lien shall attach to after-acquired equipment (among the other property) which is "* * * used or held for use as, or as a part or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches, * * * or other properties now or at any time hereafter subject to the lien of this indenture—*whether the same exclusively appertain to or be used as parts of or in or for the maintenance or operation of lines of railway or other properties subject to the lien hereof or appertain to or be so used as parts of or in or for the maintenance or operation of such lines of railroad or other properties in common with lines of railroad or property not subject to the lien hereof*".[3]

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[1] Brief of Refunding Mortgage Trustee, pp. 21-22.

[2] Appendix A, *infra*, pp. 111-113.

[3] Italics in this brief are ours, unless otherwise designated, or unless otherwise clearly indicated by the context.

This language evidences a clear intent that the First Mortgage shall become a lien on all after-acquired equipment which is essentially a part of the mortgaged enterprise, even though the Debtor may also use such equipment in connection with wholly separate unmortgaged ventures.

THE "SUBJECT, HOWEVER," CLAUSE.

Although, as we believe, one need not look beyond the provisions already discussed for convincing proof of the correctness of our interpretation of the "exception clause", that interpretation finds added support in the "subject, however," clause,[1] which immediately follows the habendum clause in the First Mortgage. This provision was cited by the Commission in its report dated October 10, 1938 (R. 266). It reads:

> "SUBJECT, HOWEVER, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, *and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby,* and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture."

As the Commission aptly said, "If all equipment acquired under equipment trusts was to be entirely free of the lien of the first mortgage, it is not apparent why the words 'equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby' were made part of the last quoted provision" (R. 266).

The Refunding Mortgage Trustee contends that these words refer to a situation in which the cost of new equipment is financed partly with First Mortgage Bonds or deposited cash and partly under an equipment trust. In such a situation, the Refunding Mortgage Trustee con-

[1] Appendix A, *infra*, p. 115.

tends, the First Mortgage will attach to the Debtor's equity as a lien subordinate to the lien created by the equipment trust.[1]

For a railroad to purchase equipment under an equipment trust and to finance the acquisition of the equity with first mortgage bonds authenticated and delivered against the acquisition of such equity would be so unusual as to be a practically unheard of situation. It is difficult to believe that the draftsman of the First Mortgage inserted the phrase above quoted merely to provide for such a situation. It is logical to suppose that he had in mind situations involving the ordinary methods of equipment trust financing.

In support of its contention, the Refunding Mortgage Trustee refers to the bond and cash takedown provisions in Section 2 of Article Second of the First Mortgage[2] and particularly to the definition of the words "lien" and "charge" in subsection G, on page 60, as indicating that the First Mortgage contemplates that the cost of new equipment may be so financed.

We believe the provisions of the First Mortgage do not permit the cost of new equipment which is being financed in part under an equipment trust to be made the basis for taking down First Mortgage Bonds or deposited cash.

The definition of the words "lien" and "charge", in subsection G, on page 60, is as follows:

> "The words 'lien' and 'charge,' as used in this Section 2, shall be deemed to include, among other things, *deferred instalments of the purchase price of property in every case where title thereto has not then vested in the purchaser* or, having so vested, is subject to a vendor's lien or any right of the seller to retake or enforce a charge upon such property upon default in the payment of such deferred instalments of the purchase price and also *the deferred payments to be made or rentals to be paid under any conditional sale agreement or lease or trust agreement covering equipment.*"

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[1] Brief of Refunding Mortgage Trustee, pp. 23-25.

[2] I. C. C. Exhibit No. 5, pp. 40-60.

The purpose of requiring the Debtor to certify "liens" and "charges" in an application to take down bonds or deposited cash is twofold: (1) to disclose to the First Mortgage Trustees the existence of any encumbrances which might affect the right of the Debtor to bond the property, so as to enable them to determine whether the property can be bonded at all, and (2), if the property is bondable, to show the amount of indebtedness secured by such encumbrances, so that bonds or deposited cash may be reserved against them pursuant to subsection E, on pages 57-58.

The mere fact that a certain kind of encumbrance is included in the definition of the words "lien" or "charge" does not mean, however, that property subject to such an encumbrance may be bonded. The bond and cash takedown provisions specify various conditions precedent to the bonding of property, which must in each case be complied with. Among these conditions precedent is the requirement, in clause (a) of paragraph Sixth, on page 54, that the First Mortgage Trustees shall be furnished with evidence of the execution and delivery to the Debtor of "all deeds, conveyances or other instruments necessary to vest the title to such property" in the Debtor.

The definition of the words "lien" and "charge", on page 60, includes at least one example of an encumbrance the existence of which would prevent the bonding of property, because the requirement that title be vested in the Debtor could not be met. The definition includes "deferred instalments of the purchase price of property in every case where title thereto has not then vested in the purchaser."

Obviously, the term "title", as used in the above-quoted language of the definition, has the same meaning as in clause (a) of paragraph Sixth. Although the term is not defined, the context indicates that it means "legal title". If this be the correct meaning, then equipment acquired under an equipment trust or conditional sale agreement could not be bonded, because the requirement in clause (a) of paragraph Sixth that title be vested in the Debtor could not be met.

If we accept the Refunding Mortgage Trustee's explanation of the "subject, however," clause, we are obliged to draw another illogical distinction between equipment financed under an equipment trust and equipment financed under a chattel mortgage.

In the case of equipment financed under a chattel mortgage, the "exception clause" makes perfectly clear that First Mortgage Bonds or deposited cash may not be used unless the lien of the chattel mortgage be subordinate to the lien of the First Mortgage. Otherwise, the single limitation specified in the "exception clause" becomes meaningless, for the language is,

> "and the Company *may, unless* First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, * * * purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment *superior to the lien of this indenture.*"[1]

Yet, in the case of equipment financed under an equipment trust, the Refunding Mortgage Trustee contends that if First Mortgage Bonds or deposited cash be used in the financing, the lien of the First Mortgage will be subordinate to the lien created by the equipment trust.

To require that the bondholders be given a first lien on the equipment in the one case, but not in the other, would be no less than capricious.

(II) The Inclusion in the Refunding Mortgage of Language Not Contained in the First Mortgage Does Not Affect the Interpretation of the First Mortgage.

The "exception clause" appearing in the Refunding Mortgage[2] contains a proviso to the effect that, when and as the Debtor acquires an equity in equipment acquired under

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[1] Appendix A, *infra*, p. 114.

[2] I. C. C. Exhibit No. 6, pp. 22-23.

equipment trusts or chattel mortgages, such equity shall become subject to the lien of the Refunding Mortgage. The Refunding Mortgage Trustee contends that the absence from the First Mortgage of a similar proviso indicates an intent that the Debtor's equity in equipment acquired under equipment trusts shall be free of the lien of the First Mortgage.[1]

We submit that the interpretation of the provisions of the First Mortgage must be governed exclusively by the terms of that instrument, without reference to the terms of the Refunding Mortgage. We believe that, under the proper interpretation of the granting clauses of the First Mortgage, the Debtor's equity in the equipment subject to the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931 is subject to the lien of the First Mortgage. We do not perceive how this result can be deemed to be affected by the chance circumstance that the draftsman of a mortgage executed nearly sixteen years after the execution of the First Mortgage considered it appropriate to insert in that instrument additional language not appearing in the First Mortgage. As is well known, during the period since 1916, there has been an increasing tendency on the part of meticulous draftsmen to insert in corporate mortgages language intended to dispose of every conceivable question which might be raised as to their meaning, even though under a reasonable interpretation the meaning would otherwise be clear.

(III) The Statements Contained in the Debtor's Listing Applications Are Not Binding upon the Holders of First Mortgage Bonds.

The Refunding Mortgage Trustee contends that certain language appearing in certain of the Debtor's listing applications, in connection with issues of First Mortgage Bonds, indicates a practical construction of the First Mortgage as not covering the Debtor's equity in the equipment

[1] Brief of Refunding Mortgage Trustee, pp. 19, 22, 25.

subject to the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931.[1]

The language of the listing applications, however, at most indicates the construction placed upon the First Mortgage by the Debtor, which is the party beneficially affected by such construction. There is nothing in the record to indicate that either the First Mortgage Trustees or the holders of First Mortgage Bonds—the parties adversely affected—acquiesced in such construction. It is difficult to understand how the meaning of a contract can be deemed to be governed by a purely unilateral construction placed upon it by the party beneficially affected, without such construction being acquiesced in by the parties adversely affected.

> "Contemporary construction of a contract by acts of the parties is entitled to very great weight, but it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are now sought to be applied." *Kane* v. *Schuylkill Fire Ins. Co.*, 199 Pa. 205, 207, 48 Atl. 989 (Pa., 1901); cited with approval in *Sternbergh* v. *Brock*, 225 Pa. 279, 74 Atl. 166, 169 (Pa., 1909).

To give to the language of the listing applications the effect claimed by the Refunding Mortgage Trustee would amount to adopting the fantastic proposition that the lien of the holders of outstanding bonds can be changed or made to vanish by the mortgagor company inserting a statement in a listing application which the bondholders may never have seen or heard of.

Nor do the cases cited by the Refunding Mortgage Trustee[2] support such a proposition.

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[1] Brief of Refunding Mortgage Trustee, pp. 17, 26-27.

[2] *Continental Co.* v. *United States*, 259 U. S. 156 (1922); *In re New York, N. H. & H. R. Co.*, 27 F. Supp. 392 (D. C., D. Conn., 1938), aff'd on op. below, 104 F. (2d) 1018 (C. C. A., 2nd Circ., 1939); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624; 265 N. Y. Supp. 256 (N. Y., 1933); *Continental Ins. Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, 283 Fed. 276 (D. C., D. Minn., 1922).

Continental Co. v. *United States* involved a controversy between the preferred and common stockholders of the Reading Company as to their respective rights in the distribution of capital assets on liquidation. This Court based its conclusion on the construction of the words of the organization agreement of 1896 and referred to the language of the listing application of 1904 merely as confirming that conclusion.

The Refunding Mortgage Trustee interprets this case as holding that the corporation which filed the listing application was "the representative of the security holders".[1] This interpretation is apparently based upon the language of the first part of the sentence appearing at the bottom of page 180 and the top of page 181 of 259 U. S., only the last part of which is quoted in the brief of the Refunding Mortgage Trustee. We submit that the language does not justify such an interpretation. We quote the full text of the sentence:

> "Coming as this must have come from the *representatives of both* the preferred and common stockholders, it is significant evidence of *what they then thought* of their respective rights and has the additional weight of a representation to future purchasers of the two classes of stock as to the kind of interests they were buying in the company."

The use of the plural "representatives" and the reference to "both" groups of stockholders indicate that the Court was referring, not to the corporation but to individuals having authority to speak for both groups, and the words "what they then thought" indicate that the Court had in mind persons consciously formulating an opinion as to their rights with knowledge of the facts.

If it be argued that the directors of a corporation are the "representatives" of the stockholders, who elected them, it does not follow that either the directors or the corporation are the "representatives" of bondholders, with authority to compromise or destroy their security by

[1] Brief of Refunding Mortgage Trustee, pp. 26-27.

statements made without the knowledge or consent of the bondholders. Even a mortgage trustee is not the "representative" of its bondholders to that extent.

In *Guaranty Trust Co. of New York, et al.* v. *Minneapolis & St. L. R. Co., et al.*, 36 F. (2d) 747 (C. C. A., 8th Circ., 1929), cert. denied, 281 U. S. 756 (1930), the trustee under the Minneapolis & St. Louis First and Refunding Mortgage joined with a successor to the mortgagor company and the trustee under the successor company's mortgage in executing a so-called "closure agreement", the effect of which, if valid, would have been to terminate the operation of the after-acquired property clauses of the Minneapolis & St. Louis First and Refunding Mortgage. The Minneapolis & St. Louis First and Refunding Mortgage bondholders were not parties to the "closure agreement", but it was argued that the mortgage trustee was the "duly accredited representative of the bondholders", and that the bondholders were therefore bound. The Circuit Court of Appeals concurred in the view of the District Court that the mortgage trustee was without such authority (p. 753).

The District Court nevertheless held the "closure agreement" to be binding on the bondholders "upon the ground that there was no sufficient proof in the record that the agreement was entered into without their knowledge; that there was no showing as to the time when the bondholders first learned of the agreement, even if they did not know of it at the time of its execution; that there was no showing whether these bondholders had held their holdings in 1912; and, finally that the recording of this agreement in the various counties in Minnesota, and with the secretary of state of South Dakota, besides other acts of publicity, showed laches on their behalf in asserting the alleged violation of their rights" (p. 754). The Circuit Court of Appeals, in holding that the "closure agreement" was not binding on the bondholders, said (p. 754):

> "The bondholders, in their pleading denied knowledge of the 1912 agreement, but the decision of the lower court, in effect, imputed knowledge to them, apparently on the ground that a reasonably prudent man

should have found out what was shown by the public records, or what was a matter of some notoriety. We are of the view that such an imputation is not warranted. The agreement was made without consulting the bondholders, and without their knowledge; and, until there was a default in the payment of the interest coupons, there was nothing to arouse in any bondholder the least suspicion that the mortgage had been modified by a subsequent agreement."

The *New Haven* case involved a controversy between the trustee under the Air Line Mortgage and the trustee under the New Haven First and Refunding Mortgage as to which mortgage constituted a first lien on certain parcels of land originally acquired by the Air Line Company or its predecessor. The Air Line Mortgage, which purported to cover all of the property of the Air Line Company, was executed in 1905 at the request of the New Haven, at a time when the New Haven was operating the Air Line property as lessee, and the mortgage recited that the Air Line Company had been legally requested to execute a mortgage of all of its property. In 1907, the New Haven acquired all of the Air Line property through a merger. The New Haven First and Refunding Mortgage was not executed until 1920.

The court, after finding in the Air Line Mortgage a plainly expressed intent to cover the parcels of land in question, then went on to state (p. 395) that an examination of the circumstances surrounding the execution of the Air Line Mortgage led to no different conclusion. In that connection, the court referred to a listing application filed by the New Haven in 1908—twelve years before the execution of the New Haven First and Refunding Mortgage—in which the New Haven stated that the Air Line bonds were secured by a mortgage upon all of the property of the Air Line Company. The court overruled an objection of the trustee under the New Haven First and Refunding Mortgage to the introduction of the listing application in evidence.

The listing application, which was filed years before the New Haven First and Refunding Mortgage came into exist-

ence, constituted an admission against interest by the New Haven, the party adversely affected by the interpretation placed by the court upon the language of the Air Line Mortgage. There is nothing in the *New Haven* case to show that a listing application not acquiesced in by bondholders may be used to support an interpretation of the mortgage adverse to the bondholders. The same is true of the *Cunningham* case.

In the *Cunningham* case, a bondholder sued to enforce payment of his bonds after maturity, and the question was whether the unconditional promise to pay at maturity, contained on the face of the bonds, could be contradicted by a reference in the bonds to the indenture, which indenture contained provisions restricting the right of bondholders to sue. The court held that it could not. In the opinion, the court mentioned the fact that the listing application filed by the defendant referred to no provision in the indenture, or otherwise, which would preclude any bondholder from enforcing collection of his bonds at maturity (p. 627 of 238 App. Div.). To the extent that the listing application was given any weight, it constituted an admission against interest by the party adversely affected.

In *Continental Ins. Co.* v. *Minneapolis, St. P. & S. S. M. Ry. Co.*, the plaintiffs, preferred stockholders of the defendant railway company, sought to enjoin the payment of a dividend to holders of common stock, on the ground that the payment would violate their preferential rights as specified in the preferred stock certificates. The court held that the language of the preferred stock certificates was inconsistent with the provisions of the articles of consolidation and that the latter must prevail. The court held that the rights of stockholders established by the articles of consolidation "could not be changed, either by inadvertent or intentional action, by the board of directors" (p. 284).

The court further held that there was no estoppel in favor of the plaintiffs against the defendant and added that there had been a practical construction of the contract with reference to the preferred stock (p. 284). The facts which the court recited as establishing a practical construction showed that the plaintiffs, with knowledge,

acquiesced in a course of conduct by the defendant railway company which negatived the interpretation of the contract for which the plaintiffs were contending.

In the preliminary statement of facts in the first part of the opinion, the court quoted language appearing in two applications made to the New York Stock Exchange for the listing of preferred stock (p. 278), but the court made no mention of the listing applications in its recital of the facts which it regarded as establishing a practical construction (p. 284). Curiously enough, the language of the listing applications supported the interpretation contended for by the plaintiffs rather than the interpretation adopted by the court.

Prior to the filing of the first of the listing applications relied upon by the Refunding Mortgage Trustee, over $27,000,000 in aggregate principal amount of First Mortgage Bonds had been issued (R. 1045-1046). It is absurd to say that the holders of those bonds were bound, at their peril, to ascertain from day to day whether the Debtor was about to file with some stock exchange a listing application containing statements which compromised or destroyed their security and to take steps to prevent such filing.

(IV) The Wabash and Rock Island Cases, Cited by the Refunding Mortgage Trustee, Are Distinguishable.

As authority for its interpretation of the "exception clause", the Refunding Mortgage Trustee places reliance upon an unreported opinion of Judge SANBORN in *The Equitable Trust Company of New York, Trustee* v. *The Wabash Railroad Company, et al.* (R. 1721-1734) and upon an unreported opinion of Judge WILKERSON filed on October 31, 1939, in the Rock Island reorganization proceeding.[1]

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[1] Brief of Refunding Mortgage Trustee, pp. 27-32.

For the convenience of the Court, a copy of Judge WILKERSON's opinion, as it appears at pages 2807-2838 of the Printed Record in the Rock Island reorganization proceeding, is set forth in Appendix B of this brief

A comparison of the granting clauses of the Wabash mortgage and of the two Rock Island mortgages with the granting clauses of the First Mortgage will show that the provisions of the Wabash and Rock Island mortgages differed so radically from the provisions of the First Mortgage that these cases throw little light upon the interpretation of the "exception clause".

Neither the Wabash mortgage *nor the* Rock Island mortgages contained any provision comparable to the "exception clause" in the First Mortgage. The so-called "reservation paragraph" in the Wabash mortgage, which was the provision which Judge SANBORN was construing, was in reality a "free funds" provision. The same is true of the so-called "proviso" in the Rock Island "general gold bond mortgage" and of the so-called "free property clause" in the Rock Island "first and refunding mortgage".

In the *Wabash* case, Judge SANBORN relied upon specific repugnant language in the "reservation paragraph" (or "free funds" provision), coming at the end of the granting clauses, to contradict and cut down the sweeping general language of the after-acquired property clauses.

In the *Rock Island* case, Judge WILKERSON was faced with the problem of reconciling seemingly contradictory language in the granting clauses (including the "free funds" provision) of each of the two Rock Island mortgages. In each case, he considered the effect of particular language in the after-acquired property clauses and in the "free funds" provision as indicating a general purpose and sought to give a meaning to both the after-acquired property clauses and the "free funds" provision which would be consistent with that general purpose.

As we have pointed out, the language of the after-acquired property clauses and the language of the "free-funds" provision in the First Mortgage are not contradictory but complementary and, when read together, clearly indicate an intent to subject to the lien of the First Mortgage the Debtor's equity in the equipment subject to the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931.

(V) The First Mortgage Covers Additions to Equipment Needed for the Efficient Operation of the Mortgaged Enterprise.

THE COVENANT TO MAINTAIN THE OPERATING EFFICIENCY.

In addition to the grant, in Granting Clause Third, of after-acquired equipment "used or acquired for use in or for the maintenance or operation" of the mortgaged enterprise,[1] and in addition to the grant, in Granting Clause Fifth, of after-acquired equipment "used or held for use * * * to facilitate or safeguard the maintenance or operation" of the mortgaged enterprise,[2] the First Mortgage contains, in Granting Clause Fifth, the following grant of after-acquired equipment (among other property):

> "any and all *replacements*, renewals, improvements and betterments of *and additions* to any such lines of railroad or any property or rights of whatsoever description now or at any time hereafter subject to the lien of this indenture, whensoever and by whomsoever such replacements, renewals, improvements, betterments or additions may be made."[3]

The last quoted after-acquired property clause is supplemented by a covenant of the Debtor, in the first paragraph of Section 9 of Article Fourth,[4] which reads as follows:

> "Section 9.—The Company will diligently preserve all of the rights and franchises to it granted and upon it conferred and will at all times maintain, preserve and keep its railroad system and property in

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[1] Appendix A, *infra*, p. 110.
[2] Appendix A, *infra*, p. 112.
[3] Appendix A, *infra*, p. 113.
[4] I. C. C. Exhibit No. 5, p. 76.
The second paragraph of Section 9 contains a special maintenance and replacement covenant which applies only to equipment upon which the First Mortgage is a first lien. This covenant is quoted and discussed at pages 44-46 of this brief.

good repair, working order and condition and *will from time to time make all needful and proper* repairs, renewals and *replacements and* alterations, *additions*, betterments and improvements; and will cause each subsidiary company to preserve its rights, franchises and property in like manner and to like extent."

This covenant, which requires the Debtor not only to make all needful and proper repairs, renewals, and replacements but also to make all needful and proper "additions", is in effect a covenant of the Debtor to maintain under the First Mortgage a railroad fully equipped for efficient operation and, to that end, to make such "additions" to its equipment and other property as may be necessary to keep up the operating efficiency of the mortgaged enterprise. Coupled with the corresponding language in Granting Clause Fifth, this covenant defines the scope of the grant of after-acquired property as including after-acquired equipment coming within the description of such "additions", and it has the effect of causing the lien to attach to all after-acquired equipment which is needed for the efficient operation of the mortgaged enterprise.

The governing principle was stated by then Chief Judge Cardozo of the New York Court of Appeals in *Guaranty Trust Co.* v. *N. Y. & Q. C. Ry. Co.*, 253 N. Y. 190, 170 N. E. 887 (N. Y., 1930), in the following language (p. 199 of 253 N. Y.):

> "A mortgage of property to be acquired in the future is not a present lien at law (*Rochester Distilling Co.* v. *Rasey*, 142 N. Y. 570). It is, however, equivalent to a covenant to give a lien, and as such, when the property comes into existence, may be specifically enforced in equity (*Kribbs* v. *Alford*, 120 N. Y. 519): *In the absence of intervening equities forbidding such a use, the property, when acquired, is deemed to feed the mortgage, as if in existence at the beginning* (*Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Zartman* v. *First Nat. Bank*, 189 N. Y. 267). There is need to distinguish, however, between the enforce-

ment of the covenant in respect of property thereafter acquired by the mortgagor itself, and property thereafter acquired by a successor or a purchaser. *Property thereafter acquired by the mortgagor itself will be subject to the mortgage, if within the description of the covenant*, however alien it may be in quality or function to the property presently subjected to the lien (*People's Trust Co.* v. *Schenck*, 195 N. Y. 398; *Ithaca Trust Co.* v. *Ithaca Traction Corp.*, 248 N. Y. 322). It is otherwise in respect of purchasers, and even at times successors. To spread the lien of the mortgage to property acquired by these, there must be an independent ground of duty. This may have its origin in a statute or in a covenant of assumption or in the principles of estoppel or accession, or in some other kindred equity (*Trust Co.* v. *City of Rhinelander*, 182 Fed. Rep. 64, 69; *Metropolitan Trust Co.* v. *Chicago, etc., R. R. Co.*, 253 Fed. Rep. 868; certiorari denied, 248 U. S. 586)."

There can be no question but that the equipment acquired under the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931 was needed for the efficient operation of the mortgaged enterprise. The fact that this equipment was acquired for use and was actually used on the mortgaged lines, and the fact that the Debtor's management deemed the acquisition of this equipment to be so essential as to justify a resort to borrowing, sufficiently evidence the need. This equipment therefore is "within the description of the covenant".

At the time this equipment was acquired, there were no "intervening equities" to prevent the lien of the First Mortgage from attaching. The Refunding Mortgage had not come into existence, and, in any case, the holders of Refunding Mortgage Bonds could not establish superior equities with respect to this equipment. In view of the subordination provision in the Refunding Mortgage,[1] the holders of Refunding Mortgage Bonds could have no standing in equity to claim a prior lien on property coming

[1] I. C. C. Exhibit No. 6, p. 23.

"within the description of the covenant" in the First Mortgage and which the Debtor was under an equitable duty to subject to the lien of the First Mortgage.

See *Westinghouse Electric & Mfg. Co.* v. *Brooklyn R. T. Co.*, 276 Fed. 152 (D. C., S. D. N. Y., 1921).

As will be observed, the covenant in the first paragraph of Section 9 of Article Fourth is more than a mere covenant to replace specific units of equipment as they are retired from service: it is a covenant to make all needful and proper "additions". Moreover, the "description of the covenant" is not confined to equipment on which the First Mortgage is a first lien: it is broad enough to include equipment acquired under equipment trusts. Nor is there anything in the language of the covenant, or in the corresponding language in Granting Clause Fifth, to suggest that a marking of the equipment is a condition precedent to the attaching of the lien.

Regardless of the interpretation placed upon the "exception clause", we submit that the First Mortgage is a first lien on the Debtor's equity in all of the equipment in controversy, because this equipment constitutes "additions" needed for the efficient operation of the mortgaged enterprise.

The Doctrine of the Minneapolis & St. Louis Case.

As applied to equipment, the covenant in the first paragraph of Section 9 of Article Fourth is a threefold covenant: it is a covenant (1) to maintain in good condition, (2) to make replacements, and (3) to make "additions".

In *Guaranty Trust Co. of New York, et al.* v. *Minneapolis & St. L. R. Co., et al.*, 36 F. (2d) 747 (C. C. A., 8th Circ., 1929), cert. denied, 281 U. S. 756 (1930), the Circuit Court of Appeals for the Eighth Circuit considered the effect of maintenance and replacement provisions of a railroad mortgage as causing the lien of the mortgage to attach to equipment which would otherwise be free of the lien.

In that case, the Iowa Central First Mortgage contained maintenance and replacement provisions in the following language (p. 756):

> "The trustee shall also have power to allow the mortgagor, its successors or assigns from time to time to dispose, according to its or their discretion, of such portion of the equipment, machinery and implements at any time held or acquired for the use of the said railways as may have become unfit for such use, replacing the same by new, which shall at once be subject to the lien of these presents without any further conveyance or mortgage. * * *" (eighth paragraph).
>
> "The mortgagor shall and will until the bonds secured by this indenture are fully paid, make all necessary repairs and replacements to keep up the property, rolling stock and equipment hereby conveyed and transferred, * * *." (fourteenth paragraph).

As will be observed, the fourteenth paragraph of the Iowa Central First Mortgage contained a maintenance and replacement covenant substantially similar to the maintenance and replacement covenant in the first paragraph of Section 9 of Article Fourth of the First Mortgage, but it contained no covenant comparable to the covenant to make "additions" which appears in the first paragraph of Section 9 of Article Fourth of the First Mortgage.

After holding that the granting clauses of the Iowa Central First Mortgage did not cover after-acquired equipment, the court said (p. 757):

> "The mortgage does, however, contain replacement clauses, and under these it was the duty of the mortgagor and its successors to maintain and replace the mortgaged equipment. Under this covenant the mortgagor, and its successors, were required to keep under the lien of this mortgage *the same value amount of equipment as it existed at the time of the execution of the mortgage.* In other words, the lien of this mortgage attached to all equipment owned by the Iowa Central at the time of its execution, and so much of the equipment thereafter acquired, either by itself or its

successors, *as was necessary to keep intact in value the equipment as it existed at the date of the execution of the mortgage.* * * *"*

In other words, the court construed the limited maintenance and replacement provisions of the Iowa Central First Mortgage as requiring the mortgagor company to maintain under the mortgage equipment of a value equal to the original value of all mortgaged equipment. The principle applied was the maintenance of the original value of the mortgaged equipment and not the replacement of specific units of equipment which had been worn out or destroyed.

The doctrine of the *Minneapolis & St. Louis* case was applied by Judge WILKERSON in his recent opinion in the Rock Island reorganization proceedings, which is set forth in Appendix B of this brief, although Judge WILKERSON did not cite the *Minneapolis & St. Louis* case. That Judge WILKERSON applied the same principle, namely, the maintenance of the original value of the mortgaged equipment, is apparent from the formula which he prescribed, which is set forth at pages 142-144 of Appendix B.

Applying the doctrine of the *Minneapolis & St. Louis* case to the facts of the present case, and giving effect only to that portion of the covenant in the first paragraph of Section 9 of Article Fourth which requires the Debtor to maintain in good condition and to make replacements, would lead to the conclusion that, prior to the execution and delivery of the Refunding Mortgage on March 1, 1932, the lien of the First Mortgage had already attached to the Debtor's equity in substantially all of the equipment in controversy.

The Original Value of Original Equipment was $15,034,389.14.[1]

On March 1, 1932, the depreciated book value of the Original Equipment then remaining in service was $9,684,906.77. At the date of the execution and delivery of the Refunding Mortgage, therefore, the Debtor was required, under the doctrine of the *Minneapolis & St. Louis*

[1] See page 14, *supra*.

case, to place under the lien of the First Mortgage equipment having a value of $5,349,482.37.

The only equipment which the Debtor on that date had available for that purpose consisted of 52 units of equipment acquired by the use of free funds (not under equipment trusts), having a book value at the date of acquisition of $49,027.16, and its equity in 3,705 units of equipment acquired under the Equipment Trusts of 1923, 1924, and 1929, and the Baldwin Lease of 1931, having a total book value at the date of acquisition of $13,006,454.87, making a total of 3,757 units, having a book value at the date of acquisition of $13,055,482.03.[1] Inasmuch as $5,297,329.36 in principal amount of equipment obligations were then outstanding under the three equipment trusts and the Baldwin Lease,[2] the Debtor's equity in this equipment, after taking into account accrued depreciation, could not have greatly exceeded the amount required to maintain under the First Mortgage equipment equal in value to the Original Value of Original Equipment.

As we have pointed out, the covenant in the first paragraph of Section 9 of Article Fourth of the First Mortgage goes beyond the limited maintenance and replacement covenant which the court was considering in the *Minneapolis & St. Louis* case. It is also a covenant to make all needful and proper "additions", and it has the effect of causing the lien of the First Mortgage to attach to all after acquired equipment which is needed for the efficient operation of the mortgaged enterprise. Giving effect to the covenant in its entirety, the conclusion seems clear that the Debtor's equity in all of the equipment in controversy is subject to the First Mortgage as a first lien.

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[1] Although the depreciated book values of this equipment on March 1, 1932, are not shown by the record, they were obviously much less than the amounts above stated.

[2] This figure represents the aggregate principal amount of equipment trust obligations which were unmatured on March 1, 1932, as shown by paragraph 83 of the Stipulation (R. 1068-1070) and by I. C. C. Exhibit No. 110 (R. 2517).

The Contentions of the Refunding Mortgage Trustee.

The brief of the Refunding Mortgage Trustee ignores the covenant in the first paragraph of Section 9 of Article Fourth and the provision in Granting Clause Fifth of the First Mortgage; the argument in the brief (pp. 32-40) is directed exclusively to the provisions of the second paragraph of Section 9 of Article Fourth[1] and to the provisions of the first paragraph of Section 5 of Article Seventh.[2]

The second paragraph of Section 9 of Article Fourth reads as follows:

> "All equipment upon which this indenture is or shall be a first lien shall be marked so as to identify the same as equipment subject to this indenture as a first lien thereon, and the Company will at all times keep such equipment in good order and condition, reasonable wear and tear excepted, and marked distinctively as aforesaid, and will replace such of said equipment as shall be worn out or destroyed with other equipment of at least equal value on which this indenture shall constitute a first lien.
>
> "The Company will, at such times as the Trustees may request, furnish to them a complete list of all equipment upon which this indenture is or shall be a first lien; but the fact that any such equipment shall not be marked or included in such list shall not create any presumption that the same is not subject to this indenture as a first lien thereon."

The first paragraph of Section 5 of Article Seventh reads as follows:

> "Section 5.—The Company shall have full power from time to time in its discretion to dispose of free from the lien hereof any of the rails, equipment, machinery, tools and implements at any time subject hereto that may have become unsuitable or unneces-

[1] I. C. C. Exhibit No. 5, pp. 76-77.
[2] I. C. C. Exhibit No. 5, p. 111.

sary for use, first or simultaneously replacing the same by new rails, equipment, machinery, tools and implements of substantially equal value to the Company, which shall become subject to the lien of this indenture in like degree; and any subsidiary company may dispose of similar property, replacing it with property of substantially equal value."

The covenants in the second paragraph of Section 9 of Article Fourth are special covenants which apply only to equipment upon which the First Mortgage is a first lien. They in no way limit the covenant in the first paragraph of the section, which requires the Debtor to make such "additions" to its equipment and other property as may be necessary to keep up the operating efficiency of the mortgaged enterprise.

The first paragraph of Section 5 of Article Seventh merely confers upon the Debtor the power to dispose of equipment and other property which has become unsuitable and unnecessary for use. It in no way affects the scope of the covenant in the first paragraph of Section 9 of Article Fourth.

The Refunding Mortgage Trustee contends (1) that the maintenance and replacement provisions above quoted apply only to equipment "worn out or destroyed" or "disposed of", (2) that these maintenance and replacement provisions cannot be complied with except by the use of equipment on which the First Mortgage will be a first lien, and (3) that the lien of the First Mortgage cannot attach to equipment by virtue of these maintenance and replacement provisions until such equipment has been marked or otherwise specifically allocated as replacements.

The first two contentions may be disposed of briefly. They have no bearing upon the question whether the equipment in controversy was brought under the lien by virtue of the covenant in the first paragraph of Section 9 of Article Fourth. As we have pointed out, that covenant is more than a mere covenant to replace specific units of equipment as they are retired from service: it is a covenant to make all needful and proper "additions". The

scope of that covenant is not limited to equipment upon which the First Mortgage is a first lien.

The third contention of the Refunding Mortgage Trustee requires more detailed comment.

The grant of after acquired equipment contained in Granting Clause Fifth, as supplemented by the covenant in the first paragraph of Section 9 of Article Fourth, includes in its scope all after acquired equipment falling within the description of "needful and proper additions". There is nothing in the language of either of these provisions to suggest that a marking, or any other form of specific allocation, of the equipment is a condition precedent to the attaching of the lien.

Nor is there anything in the language of the second paragraph of Section 9 of Article Fourth which imposes such a condition precedent.

The covenant as to marking, contained in that paragraph is not, as stated on page 33 of the brief of the Refunding Mortgage Trustee, a covenant to mark "all equipment subject to the Mortgage". It is a covenant to mark "All equipment upon which this indenture is or shall be a first lien".[1]

The language of the covenant, which applies to all equipment upon which the First Mortgage is a first lien, and not merely to equipment acquired as replacements, makes clear that the covenant relates to equipment already subject to the lien and that it does not impose a condition precedent to the attaching of the lien. This is shown by the provision (in the last sentence of the paragraph) that the failure to mark shall not create any presumption that the equipment is not subject to the lien.

Nor was a marking or other specific allocation of the equipment in controversy necessary to identify it as equipment falling "within the description of the covenant" in the first paragraph of Section 9 of Article Fourth. We are not dealing here with a divisional mortgage but with

[1] Inasmuch as all of the equipment in controversy was acquired under equipment trusts, it was not, by the terms of this covenant, required to be marked.

a system mortgage, which covers all of the lines of railroad owned by the Debtor. The equipment in controversy was acquired for use and was actually used on the mortgaged lines; its dedication to that use identifies it as coming "within the description of the covenant".

The three cases cited at pages 37-40 of the brief of the Refunding Mortgage Trustee[1] are not in point.

The *Wabash Western* case involved a divisional mortgage, which by its terms was to cover only "the rolling stock belonging" to the Omaha Division (p. 891). The requirement as to marking was for the express purpose of designating the equipment "belonging" to the Omaha Division and "distinguishing it from the rolling stock appurtenant to the main line and other branches of the road" (p. 891). In other words, under the peculiar provisions of the Omaha Division mortgage, equipment did not come within the description of the granting clauses unless it had been designated by a marking as being equipment "belonging" to the Omaha Division. The mortgagor company having failed to perform its covenant to designate, the foreclosure purchasers of the Omaha Division property sought to make good the deficiency out of the general equipment owned by a successor company, to which the liens of the successor company's mortgages had already attached. The court held merely that the lien of the successor company's mortgages could not be displaced. The opinion does not indicate whether the successor company had assumed the covenants of the mortgagor company under the mortgage.

The *Metropolitan Trust Company* case and the *New York and Queens County Railway* case each involved the question of the extent to which the covenants of the original mortgagor company became binding upon a successor

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[1] *United States Trust Co.* v. *Wabash W. Ry. Co.*, 38 Fed. 891 (Circ. Ct., S. D. Iowa, W. D., 1889), appeal dismissed, 140 U. S. 703 (1891); *Metropolitan Trust Co.* v. *Chicago & E. I. R. Co., et al.*, 253 Fed. 868 (C. C. A., 7th Circ., 1918); *Guaranty Trust Co.* v. *N. Y. & Q. C. Ry. Co.*, 253 N. Y. 190, 170 N. E. 887 (N. Y., 1930).

company after a consolidation or merger, whereas in the present case the equipment in controversy was acquired by the original mortgagor company (the Debtor).

In the *Metropolitan Trust Company* case, the court, after holding that the after-acquired property clauses of the Metropolitan mortgage did not survive the consolidation of the mortgagor company, held that the successor company was under no contractual obligation to maintain and replace the mortgaged equipment. The court expressly found (p. 879) that the usual covenant for maintenance and replacement of equipment was not to be found in the Metropolitan mortgage. It then went on to state (p. 879) by way of dictum that, "if it were there, or if the provisions present were properly to be construed as such a covenant, no lien would attach merely because of the mortgagor's breach of the covenant through its failure to maintain and replace the Coal Company equipment of 1894". This dictum goes no further than to state the obviously correct principle that the covenant could not be enforced in respect of equipment acquired by a successor company which had not assumed the obligations of the mortgagor company.

In the *New York and Queens County Railway* case, the question was whether the lien of the Steinway mortgage attached to property acquired subsequent to a merger by a successor company which had not assumed the obligations of the mortgagor company.

The controlling principle of the case is stated in that part of the opinion which is quoted on pages 38-39 of this brief.

After holding that the successor company was under no statutory or contractual duty to subject the property to the lien of the Steinway mortgage and that the lien of the Steinway mortgage did not spread by reason of estoppel or accession, the court then considered whether the extension of the lien of the Steinway mortgage to the new power house and car barn could be justified on the theory that the successor company was under an equitable duty to provide a substituted security when it abandoned or disman-

tled the old Steinway power house and car barn. The court held that, inasmuch as the old Steinway power house and car barn were not abandoned or dismantled until after the new power house and car barn had been acquired and had become subject to the lien of the successor company's mortgage, no equity arose in favor of the Steinway bondholders which could displace the existing lien of the successor company's mortgage.

In the present case, the equipment in controversy was acquired, not by a successor company, but by the original mortgagor company (the Debtor), which was bound by its covenant to make all "additions" to its equipment which were "needful and proper" to keep up the operating efficiency of the mortgaged enterprise. The holders of Refunding Mortgage Bonds can establish no superior equity with respect to equipment coming "within the description of the covenant" in the First Mortgage.

As we interpret the provisions of the First Mortgage, they clearly evidence a purpose that the security under the mortgage shall at all times consist of a railroad fully equipped for efficient operation. The interpretation placed upon these provisions by the Refunding Mortgage Trustee would permit that purpose to be defeated: the Debtor could, over a period of years, allow the mortgaged enterprise to become denuded of equipment, thus leaving the bondholders with an empty shell.

By purchasing all of its new equipment under equipment trusts, the Debtor could, under the Refunding Mortgage Trustee's interpretation of the "exception clause", entirely escape the operation of the after-acquired property clauses, even as to equipment acquired for use and used exclusively on the mortgaged lines.

Under the Refunding Mortgage Trustee's interpretation of the equipment covenants, as the mortgaged equipment became obsolete and new equipment was needed to maintain the operating efficiency of the mortgaged enterprise, the Debtor would be under no duty to acquire new equipment, except to replace specific units as they became ready for the scrap heap. And even as to equipment ac-

quired as replacements, the lien of the First Mortgage would not attach if the Debtor neglected to make a specific allocation, by marking or otherwise.

Thus, upon a foreclosure, the bondholders might find themselves with a lien upon a gutted property—a line of railroad without equipment.

Surely, the draftsman of the First Mortgage did not intend to create so illusory a thing as a vanishing security.

POINT III.

THE NORTHERN CALIFORNIA EXTENSION IS SUBJECT IN ITS ENTIRETY TO THE FIRST MORTGAGE AS A FIRST LIEN THEREON.

A. FACTS.

The Construction of the Northern California Extension.

The Northern California Extension connects with the main line of the Debtor at Keddie, Plumas County, California, and extends to a connection with the Great Northern Railway at Bieber, Lassen County, California, a distance of approximately 112 miles (R. 1076).

Construction of the Northern California Extension was commenced on August 16, 1930, and by December 31, 1930, there had been completed 32% of the grading, 16% of the tunneling, practically all of the clearing, and a large percentage of the culvert installation; construction of concrete bridge foundations was largely under way. Connection with the Great Northern Railway at Bieber was made on November 10, 1931, and freight service was then inaugurated under the jurisdiction of the construction department. Owing to the approach of the winter season, complete ballasting of the line, as well as the completion of certain other facilities, was deferred until 1932. Ballasting was practically completed in 1932, and on June 1, 1932, the line was placed in full commercial operation for freight service (R. 1077).

The Method of Financing.

The total cost of construction of the Northern California Extension was in excess of $10,000,000 (the cost to May 31, 1932, was $10,183,641.90). The cost of construction was financed (1) by the sale at 97½ to The Western Pacific Railroad Corporation of $5,000,000 principal amount of First Mortgage Bonds, (2) by the sale at par to the A. C. James Co. of $5,000,000 principal amount of Debentures issued under the Indenture dated July 1, 1930 (I. C. C. Exhibit No. 50, R. 2327, 2335), and (3) by loans obtained by the Debtor from Reconstruction Finance Corporation aggregating $559,408 (R. 1078).

The first step in the actual financing was the sale of $1,000,000 principal amount of said First Mortgage Bonds, the deposit on February 11, 1931, of the cash proceeds thereof with the First Mortgage Trustees and the simultaneous withdrawal of the cash proceeds to reimburse the Debtor for expenditures made by it out of its own funds for the construction of the Northern California Extension between February 1, 1929, and November 30, 1930. By February 11, 1931, before any of the Debentures had been issued and before any of the loans had been obtained from Reconstruction Finance Corporation, the Northern California Extension had come into existence as a continuous right of way with substantial improvements, owned by the Debtor, and used as a basis for the withdrawal of deposited cash under the First Mortgage (R. 1077, 1079-1082, 1084-1085, 1088-1089).

The Negotiations with A. C. James Co.

Under date of May 14, 1929, while the original application of the Debtor to the Interstate Commerce Commission for a certificate of public convenience and necessity for the construction of the Northern California Extension was still pending before the Commission, the A. C. James Co. made to the Debtor a written offer (I. C. C. Exhibit No. 45; R. 1078-1079, 2308, 2316), in which it stated:

"In the event your application for a certificate of public convenience and necessity is granted by the Interstate Commerce Commission, this company is prepared to advance to you, from time to time as requested by you, all moneys required for the construction of the proposed Northern Extension. Such advances are to be evidenced by your bonds or notes, bearing interest at 5 per cent. per annum, payable semi-annually; principal payable January 1, 1950; said bonds or notes to be redeemable in whole or part, at par, at your option upon any interest date, on thirty days' notice; said bonds or notes are to be secured by a trust indenture creating a first lien upon the proposed Northern Extension as security for said bonds or notes and expressly providing that you will not place any additional mortgage indebtedness upon any other real property owned by you, over and above the bonds authorized under your present existing first mortgage of June 26, 1916, without providing, from the proceeds of such additional financing, for the redemption of these bonds."

This financing was not carried out on the basis outlined in I. C. C. Exhibit No. 45 (R. 2308, 2315), but, under date of June 19, 1929, the A. C. James Co. made a new offer (I. C. C. Exhibit No. 46; R. 1079, 2319), in which it stated:

"In the event a certificate of public convenience and necessity is granted by the Interstate Commerce Commission, this company is prepared to advance to you, from time to time, as requested by you, fifty per cent. (50%) of all moneys required for the construction of the proposed Northern Extension, our advances to be limited in the aggregate to the sum of Five Million Dollars ($5,000,000).

"We understand that you propose to provide the remaining funds required for the extension by application of current funds and/or sale of First Mortgage Bonds, under your existing mortgage of June 26, 1916. The advances to be made you by this company are to be evidenced from time to time as made to you, by your debenture bonds or notes, bearing interest at 5 per

cent. per annum, payable semi-annually; principal payable January 1, 1950; said bonds or notes to be redeemable in whole or in part, at par at your option upon any interest date, on thirty days' notice; said bonds or notes are to be issued under an indenture which will contain, in addition to the conventional provisions of such agreements, an express provision that you will not place any mortgage indebtedness or other lien upon any property owned by you, other than the bonds authorized under your existing first mortgage of June 26, 1916, without providing, from the proceeds of such additional financing, for the redemption of the debenture bonds or notes issued to us under the terms of this offer. This shall not be construed, however, as limiting your company in the issue of equipment trust certificates or other purchase money obligations.

"In view of the fact that Mr. A. C. James, a director of your company, is substantially interested in this company, we are advised that this offer on our part necessarily takes the form of an offer to bid at par for the securities mentioned above upon a public sale, and that your company is under the necessity of complying with the requirements of public sale provided by the Clayton Act as to such securities and cannot commit itself to dispose of the securities to this company on the basis indicated above. It is intended, however, that this letter shall be a firm commitment to you that this company will bid for such securities on the terms indicated, at any such public sale.

* * * * *

"We understand that you propose, in reliance upon this offer, to make definite commitments in connection with the construction of the proposed Northern Extension. It is further understood that this offer is *in lieu of and in substitution for our offer* of May 14, 1929, *which contemplated the issue to us of bonds or notes secured by a first lien* on the Northern Extension as then proposed and described in the original application for a certificate of public convenience and necessity filed February 8, 1929."

This offer was accepted by the Executive Committee of the Debtor at a meeting held June 19, 1929, Mr. A. C. James being present but not voting (Exhibit VII to I. C. C. Exhibit No. 80; R. 1079, 2444). The minutes of this meeting show that the original offer (I. C. C. Exhibit No. 45, R. 2308, 2316) was based upon the understanding that the proposed new line could be constructed for approximately $5,000,000.

THE ISSUE OF FIRST MORTGAGE BONDS.

The $5,000,000 principal amount of First Mortgage Bonds issued to finance in part the construction of the Northern California Extension were offered from time to time at public sale to the highest bidder in blocks of $1,000,000 principal amount or less, all of them being purchased by The Western Pacific Railroad Corporation at 97½ and accrued interest. The notice, dated January 8, 1931 (I. C. C. Exhibit No. 93, sheet 1, R. 2459), calling for bids on the first block of $1,000,000 principal amount, referred to the specifications, form of proposals and form of contract on file with the Debtor. The specifications contained the following statement (I. C. C. Exhibit No. 93, sheet 2, R. 2459):

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. Upon the completion of the construction and/or acquisition of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed."

The bid of The Western Pacific Railroad Corporation (I. C. C. Exhibit No. 93, sheet 6, R. 2459) stated that it was made

> "In accordance with and subject to all the terms of the notice dated January 8, 1931, published by

> your Company in newspapers of New York and San Francisco, and in accordance with the specifications referred to in said notice, which notice and specifications have been examined by the undersigned, * * *."

The notices, specifications and bids in connection with the sale of the remainder of the bonds were substantially identical with those contained in I. C. C. Exhibit No. 93. (R. 1079-1080, 2459.)

Mr. A. C. James was then a director of The Western Pacific Railroad Corporation (R. 1080).

The bonds were authenticated and delivered by the First Mortgage Trustees pursuant to paragraph B of Section 2 of Article Second of the First Mortgage,[1] which provides for the authentication and delivery of bonds against the deposit with the Trustees of the cash proceeds of their sale. The dates of authentication and delivery, the principal amounts of bonds authenticated and delivered, the amounts of cash proceeds deposited, and the numbers of the I. C. C. exhibits containing the application papers furnished to the First Mortgage Trustees are as follows (R. 1080, 2358-2359, 2378-2380):

Date	Principal Amount of Bonds	Amount of Cash Proceeds	I. C. C. Exhibit No.
Feb. 11, 1931	$1,000,000	$975,000	61
June 25, 1931	1,000,000	975,000	63
July 23, 1931	900,000	877,500	65
Nov. 25, 1931	750,000	731,250	68
Jan. 8, 1932	350,000	341,250	70
Jan. 29, 1932	1,000,000	975,000	72

The deposited cash was withdrawn by the Debtor on requisitions filed with the First Mortgage Trustees, pursuant to Section 2 of Article Second of the First Mortgage, to reimburse the Debtor for expenditures made in the construction of the Northern California Extension, the expenditures certified being equal to the principal amount

[1] I. C. C. Exhibit No. 5, p. 44.

of the bonds represented by the deposited cash, as required by the provisions of the First Mortgage (p. 45) (R. 1080-1081, 1872).

The application papers contained in the requisitions included in each case resolutions of the Executive Committee of the Debtor, pursuant to subparagraph First of Section 2 of the First Mortgage (pp. 45-46), a certificate signed by officers of the Debtor, pursuant to subparagraphs Second (pp. 46-48), Sixth (pp. 54-55), Seventh (pp. 55-56) and Eighth (pp. 56-57) of Section 2 of Article Second, certifying, *inter alia*, the amounts and dates of the expenditures made, and an opinion of the Debtor's General Counsel, pursuant to clause (c) of subparagraph Sixth (p. 55) and clause (c) of subparagraph Seventh (p. 56) of Section 2 of Article Second (I. C. C. Exhibits Nos. 62, 64, 66, 67, 69, 71, and 73, R. 2368, 2378-2380).

The resolutions in each case recited that expenditures of a specified amount had been made between specified dates "for the construction and/or acquisition of a new line of railroad by this Company known as its 'Northern California Extension' to connect with the existing main line of the Company in the vicinity of Keddie, Plumas County, California, and extending to a point at or near Bieber, Lassen County, California; and including a line of railroad to be acquired and/or constructed by this Company jointly with Great Northern Railway Company to connect with said line of railroad first above mentioned via trackage rights, and extending from a point at or near Lookout, Modoc County, California, to a point at or near Hambone, Siskiyou County, California", and also contained the language "all portions of said extension which have been constructed and/or acquired being subject to the lien of said First Mortgage and now in the possession of this Company" (I. C. C. Exhibit No. 62, sheet 10, which is typical of all of the subsequent requisitions, R. 2368).

The officers' certificate in each case stated that expenditures of a specified amount had been made between specified dates "for the construction of a new line of railroad, known as this Company's 'Northern California Extension'", describing the line as in the resolutions of the

Executive Committee (I. C. C. Exhibit No. 62, sheet 11, R. 2368), and also stated:

> "3. That so far as known or believed by us the property so constructed or acquired as aforesaid, is not subject to any lien or charge, except (a) necessarily undetermined liens or charges ordinarily incident to construction and (b) the lien of said First Mortgage. That there have been executed and delivered to the Company all deeds, conveyances, or other instruments necessary to vest the title to the property constructed or acquired as aforesaid in the Company, subject only to the liens or charges aforesaid." (I. C. C. Exhibit No. 62, sheet 13, R. 2368.)

The opinion of counsel in each case stated that title to all those portions of the Debtor's new line of railroad known as its "Northern California Extension" and to all of the property mentioned in the officers' certificate "has vested in The Western Pacific Railroad Company, subject only to liens or charges certified in said certificate and to liens or charges of the character not required to be certified under the terms of paragraph 'Second' of subsection D of Section 2 of Article Second of The Western Pacific Railroad Company's First Mortgage dated June 26, 1916, and all deeds, conveyances or other instruments necessary to vest the title to said property in said Company have been executed and delivered to it, and all said portions of said extension and said property are subject to the lien of this Company's First Mortgage, and no supplemental indenture or instruments of further assurance are necessary to subject said property, or any part thereof, to the lien of said First Mortgage, subject only to the liens and charges aforesaid" (I. C. C. Exhibit No. 62, sheets 8-9, R. 2368).

The resolutions authorizing the withdrawal of the deposited cash were adopted by the Executive Committee of the Debtor at its meetings held on February 11, June 25, July 23, October 15, November 17, and December 21, 1931, and January 29, 1932 (I. C. C. Exhibit No. 86, R. 2455). Mr. A. C. James was present at each of those meetings (R. 1081).

The dates and amounts of the withdrawals of deposited cash, the numbers of the requisitions and their I. C. C. exhibit numbers are as follows (R. 1081, 2368, 2378-2380):

Requisition No.	Date	Amount	I. C. C. Exhibit No.
244	Feb. 11, 1931	$975,000.00	62
246	June 25, 1931	975,000.00	64
247	July 23, 1931	812,571.03	66
248	Oct. 24, 1931	64,928.97	67
250	Nov. 25, 1931	731,250.00	69
251	Jan. 8, 1932	341,250.00	71
252	Jan. 29, 1932	975,000.00	73

The amounts and dates of the expenditures and the itemization of the expenditures, as set forth in the officers' certificates contained in these requisitions, are as follows (R. 1081-1083):

Req. No. 244 Amount $999,998.98	Date February 1, 1929, to November 30, 1930
Engineering	$ 244,777.82
Land for Transportation Purposes	121,377.67
Grading	589,393.37
Tunnels and Subways	44,450.12
Total Expenditure	$ 999,998.98

Req. No. 246 Amount $1,000,000.00	Date January 1, 1931, to April 30, 1931
Engineering	$ 25,001.21
Land for Transportation Purposes	16,965.14
Grading	358,532.33
Tunnels and Subways	298,589.02
Bridges, Trestles and Culverts	286,163.05
Ties	2,014.38
Rails	3,021.57
Track Laying and Surfacing	130.00
Right of Way Fences	3,198.56
Crossings and Signs	3,040.97
Station and Office Buildings	990.26
Water Stations	717.55
Other Expenditures—Road	1,635.96
Total Expenditure	$1,000,000.00

Req. No. 247 Amount $833,406.18	Date May 1, 1931, to June 30, 1931
Engineering	$ 27,108.10
Land for Transportation Purposes	58,732.92
Grading	346,349.05
Tunnels and Subways	67,990.50
Bridges, Trestles and Culverts	157,575.37
Ties	31,861.33
Rails	58,146.84
Other Track Material	21,748.24
Ballast	349.54
Track Laying and Surfacing	22,993.58
Right of Way Fences	335.64
Crossings and Signs	3,213.59
Station and Office Buildings	216.72
Water Stations	7,532.40
Telegraph and Telephone Lines	14,461.63
Other Expenditures—Road	14,790.73
Total Expenditure	$ 833,406.18

Req. No. 248 Amount $66,593.82	Date August 1, 1931, to August 31, 1931
Bridges, Trestles and Culverts	$ 66,593.82

Req. No. 250 Amount $750,000.00	Date August 1, 1931, to September 30, 1931
Engineering	$ 16,801.95
Grading	29,350.73
Tunnels and Subways	49,636.90
Bridges, Trestles and Culverts	140,588.13
Ties	103,826.07
Other Track Material	73,112.72
Ballast	191,428.53
Track Laying and Surfacing	139,660.60
Water Stations	5,594.37
Total Expenditure	$ 750,000.00

Req. No. 251 Amount $350,000.00	Date September 1, 1931, to October 31, 1931
Engineering	$ 31,703.24
Tunnels and Subways	100,386.60
Bridges, Trestles and Culverts	217,910.16
Total Expenditure	$ 350,000.00

Req. No. 252 Amount $1,000,000.00	Date June 1, 1931, to November 30, 1931
Grading	$1,000,000.00

The Issue of Debentures.

The $5,000,000 principal amount of Debentures issued to finance in part the Northern California Extension were offered at public sale to the highest bidder in a single block, all of them being purchased by the A. C. James Co. at par and accrued interest (I. C. C. Exhibits Nos. 48 and 49; R. 1084-1085, 2326-2327). The notice, dated January 8, 1931 (I. C. C. Exhibit No. 48, sheet 14, R. 2326), calling for bids, referred to the specifications, form of proposals and form of contract on file with the Debtor. The specifications contained the following statement (I. C. C. Exhibit No. 48, sheet 5, R. 2326):

> "The main line of railroad of the Company extends from San Francisco, California, to Salt Lake City, Utah, with branches, and aggregates 1050.5 miles, more or less of first track. Upon the completion of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed.
>
> "The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than $50,000,000. thereof may be outstanding at any one time, is a first lien on said main line of railroad."

The bid of the A. C. James Co. (I. C. C. Exhibit 49, R. 2327) stated that it was made "In accordance with and subject to all the terms of the notice dated January 8, 1931, published by your Company in newspapers of New York and San Francisco, and in accordance with the specifications referred to in said notice, which notice and specifications have been examined by the undersigned, * * *".

Mr. A. C. James was then the President and a Director of the A. C. James Co. (R. 184).

The Debentures were authenticated and delivered pursuant to Article II of the Indenture dated July 1, 1930 (R. 1084).

Section 1 of Article II provides (I. C. C. Exhibit No. 50, pp. 16-17, R. 2327, 2335) for the authentication and delivery of Debentures "for the purpose of constructing, purchasing, and/or otherwise acquiring the proposed so-called Northern California Extension" (which is described by its termini), "*provided, however,* that not to exceed 50% of the cost of any such construction, purchase or acquisition, may be met by the issue of the Debentures hereunder and the other 50% of such cost shall be paid by the Company by the sale of First Mortgage bonds of the Company issued under the Company's First Mortgage dated June 26, 1916, and/or funds derived from other sources; * * *".

Section 2 (pp. 17-19) specifies the application papers to be furnished to the Trustee, including, *inter alia,* (1) a written order of the Debtor, (2) a certificate signed by officers of the Debtor stating, *inter alia,* that liabilities to an amount specified have been incurred, or within 60 days next succeeding the date of the certificate will be incurred, and/or that expenditures to an amount specified have been made, for the purposes set forth in Section 1, and that the total amount of liabilities and/or expenditures so certified is equal to at least twice the aggregate principal amount of the Debentures then applied for, and (3) an opinion of counsel to the effect that the issue of the Debentures has been duly authorized by any governmental bodies having jurisdiction.

Under the terms of the Indenture (I. C. C. Exhibit No. 50, R. 2327, 2335), the Debentures were entirely unsecured.

The dates on which the Debentures were authenticated and delivered and the respective principal amounts thereof are as follows (R. 1084-1085):

Date	Amount
Feb. 27, 1931	$1,000,000
March 26, 1931	600,000
May 25, 1931	530,000
June 20, 1931	995,000
Aug. 25, 1931	309,000
Oct. 20, 1931	600,000
Nov. 25, 1931	120,000
Jan. 28, 1932	350,000
March 28, 1932	347,000
May 31, 1932	149,000

The officers' certificate contained in the requisition for the first $1,000,000 principal amount of Debentures shows that, by February 1, 1931, a total of $1,682,298.18 had been expended by the Debtor on the Northern California Extension (I. C. C. Exhibit No. 95, sheet 10, R. 2464).

THE CANCELLATION OF THE DEBENTURES.

On March 1, 1932, contemporaneously with the execution and delivery of the Refunding Mortgage and the authentication and delivery of the initial issue of $14,380,000 principal amount of Refunding Mortgage Bonds, the A. C. James Co. surrendered to the Trustee under the Indenture dated July 1, 1930 (I. C. C. Exhibit No. 50, R. 2327, 2335) for cancellation $4,504,000 principal amount of Debentures, being all of the Debentures then outstanding. These Debentures were surrendered for cancellation by the A. C. James Co. in exchange for a note of the Debtor in the principal amount of $4,504,000 secured by the pledge of $5,630,000 principal amount of Refunding Mortgage Bonds (R. 1085).

The $347,000 principal amount of Debentures authenticated and delivered on March 28, 1932, were simultaneously surrendered to the Trustee under the Indenture dated July 1, 1930 (I. C. C. Exhibit No. 50, R. 2327, 2335) for cancellation, in exchange for the delivery to the A. C. James Co. of a note of the Debtor in like principal amount secured by the pledge of $433,500 principal amount of Refunding Mortgage Bonds. A similar procedure was fol-

lowed in the case of the $149,000 principal amount of Debentures authenticated and delivered on May 31, 1932, the principal amount of Refunding Mortgage Bonds then pledged being $186,000 (R. 1085-1086).

THE EXECUTION AND DELIVERY OF THE REFUNDING MORTGAGE AND THE ISSUE OF REFUNDING MORTGAGE BONDS.

The aggregate principal amount of bonds authenticated and delivered under the Refunding Mortgage is $18,999,500. The dates on which these bonds were authenticated and delivered to the Debtor and the respective principal amounts thereof are as follows:

Date	Amount
March 1, 1932	$14,380,000
March 28, 1932	433,500
May 31, 1932	186,000
Feb. 27, 1933	4,000,000

All of the bonds were bonds of Series A, except the $4,000,000 principal amount authenticated and delivered on February 27, 1933, which were of Series B (R. 1086).

All of the bonds were pledged with the A. C. James Co., Reconstruction Finance Corporation, and The Railroad Credit Corporation (R. 1086-1087).

The Series A bonds were authenticated and delivered to the Debtor pursuant to Section 1 of Article Two of the Refunding Mortgage,[1] which provides for an initial issue of $15,000,000 principal amount of bonds upon the furnishing by the Debtor to the Refunding Mortgage Trustee of a certified copy of resolutions of the Board of Directors of the Debtor requesting the authentication and delivery of the bonds, together with an opinion of counsel with respect to the due authorization of the issue of the bonds by any governmental bodies having jurisdiction (R. 1087).

The Series B bonds were authenticated and delivered to the Debtor pursuant to Sections 1 and 2 of Article Two of the Refunding Mortgage.[2] Under Section 2, $5,000,000

[1] I. C. C. Exhibit No. 6, pp. 36-37.
[2] I. C. C. Exhibit No. 6, pp. 36-44.

principal amount of Refunding Mortgage Bonds were required to be reserved for the purpose of refunding the $5,000,000 principal amount of Debentures issued under the Indenture dated July 1, 1930 (pp. 37-38), but it was provided (p. 43) that bonds reserved under Section 2 for the purpose of refunding Debentures could be released from reservation by a resolution of the Board of Directors of the Debtor declaring them to be no longer needed for that purpose, in which event such reserved bonds might be authenticated and delivered in accordance with the provisions of either Section 1 or Section 3[1] of Article Two. The Board of Directors of the Debtor, at a meeting held on July 14, 1932, adopted resolutions declaring that the $5,000,000 principal amount of Refunding Mortgage Bonds reserved under Section 2 for the purpose of refunding the $5,000,000 principal amount of Debentures need no longer be held or reserved for that purpose (Exhibit H to I. C. C. Exhibit No. 90, R. 2457), and the Series B bonds were accordingly authenticated and delivered in accordance with the provisions of Section 1 of Article Two (R. 1087-1088).

None of the Refunding Mortgage Bonds were authenticated and delivered upon the basis of the construction or acquisition of any property, as permitted by Section 3.

The Advances by Reconstruction Finance Corporation.

The construction of the Northern California Extension was financed in part with funds advanced by Reconstruction Finance Corporation on the following dates and in the following amounts:

Date	Amount
March 1, 1932	$259,000
June 29, 1932	268,061
Aug. 1, 1932	32,347

[1] Section 3 provides for the authentication and delivery of bonds upon the basis of the construction or acquisition of additional property (I. C. C. Exhibit No. 6, pp. 44-48).

These advances formed part of loans of larger amounts made by Reconstruction Finance Corporation to the Debtor, which were secured by the pledge of Refunding Mortgage Bonds and other collateral (R. 1088-1089).

In its application to Reconstruction Finance Corporation dated February 5, 1932, for the loan which included the first advance of $259,000 on account of the Northern California Extension (I. C. C. Exhibit No. 82; R. 1089, 2449, 2451), the Debtor stated (I. C. C. Exhibit No. 82, sheet 6, and Schedule P, R. 2449, 2451) that $259,000 was required on or before March 1, 1932 "to pay contractors for work in constructing the branch line (now nearly completed)", the reference being to the Northern California Extension. It further stated (I. C. C. Exhibit No. 82, sheet 7, R. 2449, 2451) that the Refunding Mortgage "will be a lien on all of the properties, and assets of the Applicant [*i. e.*, the Debtor] subject only to equipment trust obligations and the lien of the Applicant's First Mortgage". The property of the Debtor was described as consisting of 925.706 miles of main line running from Salt Lake City, Utah, to San Francisco, California, with various branches, including the Northern California Extension, "making a total of main line and branch line mileage of approximately 1163 miles, together with adequate side tracks and industrial spur tracks".

In its application to Reconstruction Finance Corporation dated May 23, 1932, for the loans which included the remainder of the advances made for the construction of the Northern California Extension (I. C. C. Exhibit No. 87; R. 1089, 2456), the Debtor stated that $253,311 was required on or before June 20, 1932, for work in constructing the line, "$164,133 being either past due or payable in June to contractors for work in constructing such line, and the balance to provide funds to pay for work under way in the Fall of 1931 which was temporarily discontinued by reason of winter conditions and which must now be carried out" (I. C. C. Exhibit 87, p. 3, R. 2456). It further stated that $14,750 was required on or before July 1, 1932 (I. C. C. Exhibit No. 87, p. 4, R. 2456), and $32,347

on or before August 1, 1932 (I. C. C. Exhibit No. 87, p. 5, R. 2456) to pay for work of similar character. The details of the work for which these advances were sought are set forth in Schedule P annexed to I. C. C. Exhibit No. 87 (R. 2456). An examination of Schedule P shows that the greater part of the expenses was for labor.

This application (I. C. C. Exhibit No. 87, R. 2456) contains the following statement (p. 15):

> "The General and Refunding Mortgage is a first lien on certain securities having a book value of $2,374,655, and a second lien on all of the remaining property of the Railroad Company, subject only to $49,290,100 First Mortgage Bonds now outstanding and $4,550,000 of Equipment Trust Certificates."

The report of the Commission which formed the basis of the certificate of approval, issued February 29, 1932 (I. C. C. Exhibit No. 52; R. 1089, 2340), states that the Refunding Mortgage Bonds to be pledged as collateral for the loan "are to be issued under a proposed new general and refunding mortgage and will be a second lien upon all the carrier's property, including personal property" (I. C. C. Exhibit No. 52, p. 3, R. 2340).

The Recordation of the First Mortgage and of the Refunding Mortgage.

The Northern California Extension is situate entirely within the counties of Plumas and Lassen, California (R. 1076).

The First Mortgage was recorded in both of these counties on July 17, 1916 (R. 1066-1067). The Refunding Mortgage was recorded in Plumas County on March 12, 1932, and in Lassen County on March 14, 1932 (R. 1067).

B. ARGUMENT.

The contentions advanced by the Refunding Mortgage Trustee with respect to the Northern California Extension we understand to be as follows:

(a) The granting clauses of the First Mortgage permit the Debtor, by the use of its credit or free funds, to construct extensions free of the lien of the First Mortgage; therefore, the First Mortgage is a lien on the Northern California Extension as an entirety only to the extent that it was financed by the use of First Mortgage Bonds or deposited cash, and, to the extent that it was not so financed, the lien of the Refunding Mortgage ranks prior to or *pari passu* with the lien of the First Mortgage, because the granting clauses of the Refunding Mortgage specifically describe the Northern California Extension, and because the Refunding Mortgage provides that the property conveyed thereunder is subject to the lien of the First Mortgage only in so far (in extent, degree of priority, or otherwise) as in law it may attach;[1]

(b) Since only a part of the cost of the land acquired for the Northern California Extension was financed by the use of First Mortgage Bonds or deposited cash, the First Mortgage is a lien only on such portions of the Northern California Extension as were financed by the use of First Mortgage Bonds or deposited cash; the Refunding Mortgage is a first lien on any portions of the Northern California Extension not so financed;[2]

(c) In the absence of a recorded supplemental indenture specifically describing the Northern California Extension, the notice imparted by the recording of the First Mortgage was insufficient to entitle the

[1] Brief of Refunding Mortgage Trustee, pp. 7, 41, 44-51.

[2] Brief of Refunding Mortgage Trustee, pp. 40, 43, 46-47.

First Mortgage to priority over the Refunding Mortgage on the entire Northern California Extension;[1]

(d) Those holders of Refunding Mortgage Bonds who participated in the financing of the Northern California Extension (the A. C. James Co. and Reconstruction Finance Corporation)[2] made their advances under such circumstances as to create in their favor liens on the Northern California Extension ranking *pari passu* with the lien of the First Mortgage.[3]

The first two contentions present alternative theories as to the relative priorities of the First Mortgage and the Refunding Mortgage. The theory of the first contention (which we may call the "undivided interest theory") is that the First Mortgage is in effect a lien on an undivided interest in the entire Northern California Extension. The theory of the second contention (which we may call the "separate segment theory") is that the Northern California Extension is divisible into bonded and unbonded segments, the bonded segments being subject to the lien of the First Mortgage and the unbonded segments being subject only to the lien of the Refunding Mortgage.

The third contention is apparently merely a subsidiary contention advanced in support of both the "undivided interest theory" and the "separate segment theory", but it can more conveniently be discussed as a separate proposition.

The theory of the fourth contention apparently is that the advances made by the A. C. James Co. and Reconstruction Finance Corporation are secured by equitable liens, analogous to purchase-money liens, entirely apart from the lien created by the Refunding Mortgage.

These four contentions will be discussed in order.

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[1] Brief of Refunding Mortgage Trustee, pp. 41, 43-44, 45.

[2] The Railroad Credit Corporation did not participate in the financing.

[3] Brief of Refunding Mortgage Trustee, pp. 41, 48-51.

(I). The Granting Clauses of the First Mortgage Cover in Its Entirety an Extension Financed in Any Part with First Mortgage Bonds or Deposited Cash; the Lien Thus Created Is Not Limited, Either in Extent or Priority, to the Amount of First Mortgage Bonds or Deposited Cash Used in Such Financing.

There can be no question but that, as regards California property, a mortgage of after-acquired property, duly recorded, is effective against creditors and subsequent encumbrancers.

Section 2883 of the Civil Code of California[1] provides as follows:

> "§ 2883. *Lien on future interest.* An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest."

Section 2930 of the Civil Code of California[2] provides as follows:

> "§ 2930. [*Subsequently acquired title inures to mortgagee.*] Title acquired by the mortgagor subsequent to the execution of the mortgage, inures to the mortgagee as security for the debt in like manner as if acquired before the execution."

See:

California Title Insurance & Trust Co. v. *Pauly*, 111 Cal. 122, 43 Pac. 586 (Cal., 1896);

Mason v. *Citizens' Nat. Trust & Savings Bank of Los Angeles*, 71 F. (2d) 246 (C. C. A., 9th Circ., 1934).

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[1] Cal. Civ. Code (Deering, 1941) § 2883.

[2] Cal. Civ. Code (Deering, 1941) § 2930.

The question here is solely one of interpretation of the after-acquired property clauses of the First Mortgage.

THE GRANTING CLAUSES OF THE FIRST MORTGAGE.

Granting Clause Third[1] of the First Mortgage covers, *inter alia*:

> "Any and all * * * extensions * * * which may from time to time hereafter be acquired or constructed by or belong to the Company * * * if
>
> "(a) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) *or on account of the purchase, acquisition or construction thereof or work thereon* First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; * * *."

It is significant that the qualifying proviso in subparagraph (a) is stated in the alternative: an after-acquired extension falls within the scope of the after-acquired property clause, if either (1) the extension be "acquired or constructed" by the use of First Mortgage Bonds or deposited cash, or (2) First Mortgage Bonds or deposited cash be taken down "on account of the purchase, acquisition or construction thereof or work thereon."

The difference between the two alternatives is apparent from the words used. The first alternative must contemplate a financing entirely by the use of First Mortgage Bonds or deposited cash; the second alternative, with the words "on account of", and the words "or work thereon", must contemplate a financing in part by such means. In either case, the extension falls within the scope of the after-acquired property clause, and there is no language

[1] Appendix A, *infra*, pp. 110-111.

which suggests an intent that the lien of the First Mortgage should attach to an extension financed in part by the use of First Mortgage Bonds or deposited cash to a lesser extent than would be the case if the extension were financed entirely by such means.

The "undivided interest theory" is based primarily upon the "free funds" provision,[1] which reads in part as follows:

> "But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests therein, * * * *provided the same shall not be* lines of railroad, extensions, or branches or interests therein, * * * (a) *on account of the purchase, acquisition or construction whereof or work whereon* First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; * * *."

But the right reserved, viz., to acquire property free of the lien, is strictly limited by the language of the proviso, which is to the effect that such property shall not be property "on account of the purchase, acquisition or construction whereof or work whereon" First Mortgage Bonds or deposited cash shall be taken down. The language of the proviso in the "free funds" provision is substantially identical with the language in the after-acquired property clause—the "free funds" provision and the after-acquired property clause are parallel and complementary. The right to acquire an extension free of the lien stops at the

[1] Appendix A, *infra*, pp. 113-114.

point where the after-acquired property clause begins, namely, the point at which First Mortgage Bonds or deposited cash are used to finance in any part the purchase, acquisition or construction of such extension or any work thereon.

Construing the "free funds" provision in the light of the after-acquired property clause in Granting Clause Third, it is apparent that an after-acquired extension becomes subject in its entirety to the lien of the First Mortgage if financed either in whole or in part with First Mortgage Bonds or deposited cash and that the lien thus created is not limited, either in extent or in priority, to the amount of First Mortgage Bonds or deposited cash used in such financing.

The Bond and Cash Takedown Provisions.

That this is the correct interpretation is further indicated by the provisions of Section 2 of Article Second,[1] which specify the conditions upon which bonds and deposited cash may be taken down in respect of the acquisition of property. These provisions permit the bonding of property, although only a portion of its entire cost be used as the basis for the takedown of bonds or deposited cash;[2] but these provisions require that the entire interest acquired by the Debtor in the property bonded shall be subjected to the lien of the First Mortgage, and do not permit any part of the interest acquired by the Debtor to be kept out of the lien of the First Mortgage and pledged to some other party.[3] Furthermore, they con-

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[1] J. C. C. Exhibit No. 5, pp. 40-60.

[2] Although this is apparent from a reading of the bond and cash takedown provisions as a whole, the provisions of clause (f) on page 43 will serve as a specific illustration. Clause (f) permits bonds or deposited cash to be taken down to reimburse the Debtor "*in whole or in part* for money expended by it after June 30, 1916, for any one or more of the purposes enumerated in clauses (a), (b), (c), (d) and (e) of this subsection A".

[3] Paragraph Sixth, on pages 54-55, requires the delivery to the First Mortgage Trustees, in case bonds or deposited cash are taken down "with respect to the construction or acquisition of *any prop-*

template that the First Mortgage shall be in effect a first lien on the property bonded; the only outstanding prior encumbrances permitted are certain excepted encumbrances,[1] such as charges ordinarily incident to construction, which are treated as *de minimis*, and liens existing at the time of acquisition, which are required to be certified at the time of the bonding and which are required to be taken care of by reserving bonds or deposited cash. The curious encumbrance contended for by the Refunding Mortgage Trustee is not one of the excepted encumbrances or certified liens.

Since the First Mortgage requires that the Debtor's entire interest in all property bonded shall be subject to the lien, the words "on account of the purchase, acquisition or construction thereof or work thereon" in Granting Clause Third,[2] and the words "on account of the purchase, acquisition or construction whereof or work whereon" in the "free funds" provision,[3] would seem to be meaningless and to serve no useful purpose, unless these provisions be construed as causing the lien of the First Mortgage to attach to the Debtor's entire interest in after-acquired extensions, if the purchase, acquisition

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erty", of (a) evidence of the execution and delivery to the Debtor of "all deeds, conveyances or other instruments necessary to vest the title to *such property*" in the Debtor, subject only to excepted encumbrances and certified liens, (b) "all supplemental indentures or instruments of further assurance necessary to subject *any such property acquired*" by the Debtor to the lien of the First Mortgage, subject only to excepted encumbrances and certified liens, and (c) an opinion of counsel to the effect that the instruments delivered as called for by clauses (a) and (b) are sufficient for the purposes above specified or that no such instrument is necessary for either or both of said purposes.

[1] The excepted encumbrances include (p. 50): (1) necessarily undetermined liens or charges ordinarily incident to construction or operation and current indebtedness arising from operation for a period not exceeding six months, (2) the lien of the First Mortgage, (3) liens subordinate to the lien of the First Mortgage, (4) liens pledged under the First Mortgage, and (5) liens previously certified against which bonds or deposited cash have already been reserved.

[2] Appendix A, *infra*, p. 110.

[3] Appendix A, *infra*, p. 114.

or construction thereof, or any work thereon, be financed in any part with First Mortgage Bonds or deposited cash.

THE SUBORDINATION COVENANT.

Further evidence of the correctness of this interpretation is found in the covenant contained in Section 13 of Article Fourth of the First Mortgage,[1] which reads as follows:

> "In case the Company shall hereafter mortgage any of the property which is, or by the terms hereof purports to be or which is intended to become, subject hereto, such mortgage shall be, and shall be expressed to be, subject to the prior lien of this indenture for the security of all First Mortgage Bonds then or thereafter to be outstanding hereunder."

In the face of this covenant, it is impossible to construe the after-acquired property clauses of the First Mortgage as creating a lien ranking merely *pari passu* with the lien of a subsequently executed mortgage on property financed only in part with First Mortgage Bonds or deposited cash. If the lien of the First Mortgage attaches at all to the property, it clearly attaches as a first lien upon the Debtor's entire interest in the property and is prior in every respect to the lien of the subsequently executed mortgage.

Such a result is not inequitable, as contended by the Refunding Mortgage Trustee.[2] The terms of the mortgage contract are perfectly clear. They impose a condition upon the right of the Debtor to take down bonds or deposited cash. The Debtor is not obliged to finance any part of the cost of new property with First Mortgage Bonds or deposited cash, but, if it chooses to do so, the First Mortgage requires that its entire interest in the property bonded be subjected to the lien. If the Debtor wishes to acquire

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[1] I. C. C. Exhibit No. 5, p. 79.

[2] Brief of Refunding Mortgage Trustee, pp. 48-49.

property free of the lien, it must finance it entirely outside of the First Mortgage.

As we have pointed out, the bond and cash takedown provisions of the First Mortgage evidence a purpose that the First Mortgage shall be in effect a first lien on all property bonded. The draftsman sought to accomplish that purpose by carefully providing that liens existing at the time of acquisition should be certified at the time of the bonding and that First Mortgage Bonds or deposited cash should be reserved against them. That purpose would be defeated if the Debtor were permitted at a later date to create all sorts of *pari passu* liens without reserving First Mortgage Bonds or deposited cash to take care of them.

The concept underlying the First Mortgage is not a concept of undivided interests in separate pieces of property standing as security for separate parts of the debt, but a concept of the mortgaged enterprise as a whole standing as security for the debt as a whole.

(II) The Northern California Extension Cannot Be Divided into Bonded and Unbonded Segments.

The "separate segment theory" is based principally upon the fact that the cash requisitions under the First Mortgage in connection with the Northern California Extension include only $197,075.73 of expenditures for "land for transportation purposes",[1] whereas the total amount spent from all sources for "land for transportation pur-

[1] There is nothing in the record to indicate that these expenditures can be allocated to any particular portion of the land acquired. It is logical to assume that the expenditures certified represent merely a proportionate amount of the aggregate cost of all of the land acquired. This is consistent with the scheme of financing outlined in Sections 1 and 2 of Article II (pp. 16-19) of the Indenture dated July 1, 1930 (I. C. C. Exhibit No. 50, R. 2327, 2335), which contemplated that Debentures and First Mortgage Bonds would be used in approximately equal proportions to meet the cost of the Northern California Extension as the work went forward.

poses" in connection with the Northern California Extension was $504,590.66 (R. 1084). The argument is made, therefore, that the lien of the First Mortgage attached only to the land acquired with the proceeds of the First Mortgage Bonds.

This argument overlooks the fact that the cash requisitions under the First Mortgage included expenditures for other purposes in connection with the construction of the Northern California Extension and that there is nothing in the record to indicate that these expenditures were made only upon land acquired with the proceeds of the First Mortgage Bonds. On the contrary, the evidence strongly indicates that the proceeds of the First Mortgage Bonds were applied indiscriminately over the entire line.

The officers' certificates included in the cash requisitions under the First Mortgage, in certifying that expenditures have been made, refer to the extension in its entirety (I. C. C. Exhibit No. 62, sheet 11, which is typical of all of the subsequent requisitions, R. 2368), and the itemizations of the expenditures made indicate that they were not confined to any particular sections of the line.

The first requisition, under which the proceeds of $1,000,000 principal amount of bonds were withdrawn on February 11, 1931, was based upon expenditures between February 1, 1929, and November 30, 1930, including items of engineering, land, grading, tunnels and subways (R. 1082). By December 31, 1930, a substantial part of the grading, tunneling and culvert installation, and practically all of the clearing, had been completed (R. 1077), so that it is a fair inference that the right of way for the entire line had by then been acquired and that the expenditures certified in the various cash requisitions under the First Mortgage were made over the entire line and not merely upon segments or sections of an incomplete right of way.

The large amounts of expenditures certified in the various cash requisitions for such purposes as engineering ($345,392.32), grading ($2,323,625.48), tunnels and subways ($561,053.14), and bridges, trestles and culverts

($868,830.53)[1] are a strong indication that the expenditures certified were not confined to land acquired with the proceeds of the First Mortgage Bonds, All of the expenditures certified in the cash requisitions were made prior to November 30, 1931,[2] and the last withdrawal of deposited cash under the First Mortgage was made on January 29, 1932, prior to the execution and delivery of the Refunding Mortgage, so that none of the expenditures certified could have been made on land to which the lien of the Refunding Mortgage had already attached (R. 1067, 1081-1083).

The bond and cash takedown provisions of the First Mortgage (clauses (a) and (f) of subsection A of Section 2 of Article Second[3]) permit the bonding of an extension only when it is "connecting with" a line of railroad owned by the Debtor and subject to the lien of the First Mortgage. Accordingly, the First Mortgage would not have permitted the Debtor to bond disconnected segments of the Northern California Extension. The fact that, in the cash requisitions, the Northern California Extension was described by its termini as a new line of railroad "to connect with the existing main line" of the Debtor indicates an inten-

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[1] The aggregate amounts of the expenditures for the various purposes specified in the cash requisitions are as follows (R. 1081-1083):

Land for Transportation Purposes	$. 197,075.73
Engineering	345,392.32
Grading	2,323,625.48
Tunnels and Subways	561,053.14
Bridges, Trestles and Culverts	868,830.53
Ties	137,701.78
Rails	61,168.41
Other Track Material	94,860.96
Ballast	191,778.07
Track Laying and Surfacing	162,784.18
Right-of-Way Fences	3,534.20
Crossings and Signs	6,254.56
Station and Office Buildings	1,206.98
Water Stations	13,844.32
Telegraph and Telephone Lines	14,461.63
Other Expenditures—Road	16,426.69

[2] Connection with the Great Northern Railway at Bieber was made on November 10, 1931, and freight service was then inaugurated under the jurisdiction of the construction department (R. 1077).

[3] I. C. C. Exhibit No. 5, pp. 41, 43.

tion to bond the extension as an entirety and not merely disconnected segments of the extension.

Even if it could be demonstrated that all of the expenditures certified were made on particular segments of the line and that there were other segments upon which no proceeds of the First Mortgage Bonds were expended, that fact would not prevent the lien of the First Mortgage from attaching to the entire Northern California Extension.

Granting Clause Third[1] of the First Mortgage covers, *inter alia*,

> "Any and all property and facilities * * * which may from time to time hereafter be acquired or constructed by or belong to the Company * * * if
>
> * * * * * *
>
> "(b) consisting of * * * property or facilities constituting *an integral part or parts* of * * * extensions * * * subject to the lien of this indenture *or some other integral portion whereof is or integral portions whereof are subject to the lien hereof* * * *."

Assuming that the Northern California Extension is divisible into bonded and unbonded segments, it is clear that each segment is an "integral part" of the extension. Inasmuch as the bonded segments are admittedly subject to the lien of the First Mortgage, the conclusion is inescapable that the unbonded segments are likewise subject to the lien of the First Mortgage, because they constitute integral parts of an extension of which other integral portions are subject to the lien of the First Mortgage.

(III) No Supplemental Indenture Was Necessary to Entitle the First Mortgage to Priority over the Refunding Mortgage on the Entire Northern California Extension.

The third contention of the Refunding Mortgage Trustee is that, in the absence of a recorded supplemental in-

[1] Appendix A, *infra*, pp. 110-111.

denture specifically describing the Northern California Extension, the notice imparted by the recording of the First Mortgage was insufficient to entitle the First Mortgage to priority over the Refunding Mortgage on the entire Northern California Extension.

This contention apparently is founded upon the argument that the descriptive language in the after-acquired property clauses of the First Mortgage is not sufficiently definite.

Under the test laid down by the California statutes and by the authorities, a description in a deed or mortgage is sufficiently definite if the property can be identified by extrinsic evidence.

Section 3538 of the Civil Code of California[1] provides as follows:

> "§ 3538. That is certain which can be made certain."

See:

California Title Insurance & Trust Co. v. *Pauly*, 111 Cal. 122, 43 Pac. 586 (Cal., 1896);

Higgins v. *Higgins*, 121 Cal. 487, 53 Pac. 1081 (Cal., 1898);

Hancock v. *Watson*, 18 Cal. 137, 140 (1861).

In the *Pauly* case, the court held that a mortgage of a street railway line, the granting clauses of which contained the language "and its real, personal, and mixed property, franchises, rights of way, privileges, interests, and appurtenances, of every kind and nature, that it now owns, or that it may hereafter acquire, for use, or adapted to use, on or about its said lines of railway" covered an after-acquired piece of land which, by parol evidence, was shown to have been acquired for use, and to be adapted to use, on or about the mortgaged lines. Counsel for the appellant objected to the admission of parol evidence to show that the property was of the character described in the granting clauses.

[1] Cal. Civ. Code (Deering, 1941) § 3538.

In holding that the evidence was admissible, the court said (p. 588 of 43 Pac.):

> "The purpose for which such evidence was introduced, and which it served, was to prove that the pavilion grounds were acquired by the railway company for use, and adapted to use, 'on or about its said lines of railway;' and thus to identify them as being after-acquired real estate described in the mortgage, or, as may be otherwise expressed, to apply to those grounds the description contained in the mortgage, though the description of itself is unambiguous and sufficiently certain. That parol evidence is competent for this purpose does not admit of a doubt. Greenl. Ev. § 287; Hancock *v.* Watson, 18 Cal. 137; Began *v.* O'Reilly, 32 Cal. 11; Marriner *v.* Dennison, 78 Cal. 202, 20 Pac. 386; Towle *v.* Coal Co., 99 Cal. 397, 33 Pac. 1126."

Section 19 of the Civil Code of California[1] provides as follows:

> "§ 19. *Constructive notice, when deemed.* Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The law is well settled that a description in a mortgage sufficient to put a subsequent purchaser or encumbrancer upon inquiry as to the property intended to be conveyed is constructive notice of the effect of the recorded instrument.

8 Thompson, Real Property (Perm. Ed. 1939), § 4338;

Vercruysse v. *Williams*, 112 Fed. 206 (C. C. A., 8th Circ., 1901).

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[1] Cal. Civ. Code (Deering, 1941) § 19.

The First Mortgage was recorded in the counties in which the Northern California Extension is situate in 1916 (R. 1066-1067). The Refunding Mortgage, by the provisions appearing on page 23 of I. C. C. Exhibit No. 6, is made expressly subject to the lien of the First Mortgage. Aside from the notice thus imparted, we do not believe it can be seriously contended, on the facts disclosed in the record in this proceeding, that the holders of Refunding Mortgage Bonds did not have at least constructive, if not actual, notice as to the lien of the First Mortgage on the Northern California Extension.

(IV) The Advances by A. C. James Co. and Reconstruction Finance Corporation Were Not Made Under Such Circumstances as to Create Liens on the Northern California Extension in Favor of Either.

The doctrine under which parties making advances for the acquisition or construction of property may, under certain circumstances, become entitled to liens on the property prior to the lien of an existing mortgage containing an after-acquired property clause is well known to equity. But the authorities which establish the doctrine also prescribe certain essential requirements which must be met. In the case of the advances made by the A. C. James Co. and Reconstruction Finance Corporation, as will be shown, these requirements were not met.

In an effort to escape the inexorable conclusion to which these authorities lead, the Refunding Mortgage Trustee insists that it is claiming, not prior liens but merely *pari passu* liens.[1] But we know of no other doctrine, legal or equitable, under which parties making such advances can obtain either priority over or parity with the lien of an existing mortgage with an after-acquired property clause:

[1] Brief of Refunding Mortgage Trustee, pp. 49-51.

The case of *Citizens' Savings & Trust Co.* v. *Cincinnati & D. Traction Co.*, 106 Ohio St. 577, 140 N. E. 380 (Ohio, 1922), cited by the Refunding Mortgage Trustee, is so clearly not in point that it scarcely merits discussion.

In that case, each of the three divisional mortgages covered a power plant. When the consolidated company discontinued these separate power plants, it took away part of the security of each of the divisional mortgages, which it then became under an equitable duty to restore. This it did in effect by building a central power plant. But, since the court could not divide the central power plant into three parts and give one part to each of the three divisional mortgages, it did the only thing which a court of equity could do under the circumstances—it gave to each a *pari passu* lien on an undivided interest in the whole. There is no analogy between the situation in that case and the situation of a creditor seeking to displace the lien of an existing mortgage.

The Two Requirements: Time and Intent.

The doctrine under which parties making advances for the acquisition or construction of property become entitled to liens on the property prior to the lien of an existing mortgage containing an after-acquired property clause is subject to two important requirements:

(1) The advances must have been made before or in substance at the very time of the coming of the property into the possession or ownership of the mortgagor, and

(2) An express agreement or intent to create a prior lien securing the advances must have been clearly evidenced.

The Authorities.

In *Harris* v. *Youngstown Bridge Co.*, 90 Fed. 322 (C. C. A., 6th Circ., 1898), the court, consisting of Circuit Judges Taft and Lurton and District Judge Clark, in

an opinion rendered by Judge TAFT, discussed and applied the doctrine.

In 1881, the Kentucky & Indiana Bridge Company made the "first mortgage" to secure $1,000,000 in principal amount of bonds; the "first mortgage" in terms covered the bridge and its approaches and all after-acquired property.

In 1886, after the "bridge and its main line" were completed, the Bridge Company, to secure a new tenant, agreed to connect the bridge with additional railroads and terminals and to replace the wooden approach by a steel structure. For the purpose, the Bridge Company made the "terminal trust deed" to Theodore Harris as trustee securing an issue of $400,000 in principal amount of bonds issued to the "contract company"; the "contract company" with its own funds purchased additional land and constructed tracks connecting the bridge with the additional railroads and terminals; the "contract company" acquired title to the land, either in its name or in the name of a trustee, and, after the partial completion of the tracks, conveyed the property to the Bridge Company.

The "terminal trust deed" bonds were held entitled to priority over the "first mortgage" bonds in respect of the additional land and tracks paid for by the "confract company".

The court, after mentioning vendor's liens, liens of purchase-money mortgages, rights of conditional vendors, and liens of unrecorded mortgages as examples of claims entitled to priority over the lien of a mortgage containing an after-acquired property clause, stated in general terms the rule that (p. 329), "where the legal or equitable title of the mortgagor ripens and is acquired only through the outlay or expenditure of another, under such circumstances that, as between the other and the mortgagor, the former has a lien in equity upon the interest of the latter, the prior mortgage with an after-acquired property clause attaches only to the interest of the mortgagor subject to the same lien".

For the general statement of the rule, the court cited *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1 (1896),

in which case this Court referred to the doctrine in the following terms (pp. 15-16):

> "On the contrary, the latter claim to bring their case within the rule recognized in this court, that even under the after-acquired property clause in a mortgage, if property be burdened with an incumbrance or lien at the very time of coming into the possession or ownership of the mortgagor, such incumbrance remains prior and superior to the lien of the mortgage, although it was actually subsequent thereto in point of time. * * *"

The Circuit Court of Appeals, after stating the general rule and citing the *Garland* case, then applied the general rule to the claim of the "contract company" (p. 329):

> "* * * Where, therefore, at the instance of the mortgagor, a third person pays the purchase money for additions, and takes title to them himself, or directs their conveyance directly to the mortgagor, with an express agreement that he shall have a lien for the purchase money, such lien is prior to that of the mortgagor, because it is only through his expenditure that the purchase is effected and the addition acquired. * * * So long as the lien asserted is for money used in good faith to acquire the very thing upon which the lien is claimed, we do not see how the first mortgagee is defrauded."

The court stated its conclusion that the "terminal trust deed" bonds were entitled to a prior lien as follows (p. 330):

> "* * * We are therefore of opinion that in the case before us all the rights of way which were purchased and paid for by the contract company, together with all the improvements placed thereon by that company, whether the rights of way were first put in the name of Harris, trustee, as the contract required they should be, before transfer to the bridge company, or were conveyed directly to the bridge company, without the interposition of Trabue or Harris, trustee, are subject to a lien in favor of Harris, trustee, for the bondholders, prior to that of the first mortgage. This

will include the two lots acquired by condemnation, for which the contract company paid the full purchase-price. The payment of the price was a condition precedent to the passing of any title at all, and the contract company, and Harris, trustee, for the bondholders, in thus effecting the purchase, are entitled to rely on the rights secured to them by their contract with the bridge company."

The court, however, took a distinction as to the rights of way not paid for by the "contract company" but apparently constituting essential parts of the addition acquired through the "terminal trust deed" transaction (pp. 331-332):

"What has been said applies only to the private property bought by the contract company with its money. With respect to the rights of way obtained by ordinances from the city of Louisville and the village of Parkland, the case is different. The contract company paid nothing for these rights of way, and contributed nothing to their acquisition. Therefore they came into the possession and enjoyment of the bridge company burdened with no lien except such as might arise from the improvement of that which was already the property of the bridge company. * * *

It follows that the lien given by the after-acquired property clause of the first mortgage attached to the rights of way in the streets immediately upon the passage of the ordinances, and that improvements upon the rights of way only increased the security by becoming part of the realty. The lien asserted by Harris, trustee, on this part of the terminals, did not arise in the act of acquisition, but only in the improvement after acquisition. * * *

"It remains to consider those cases in which the land for rights of way was given for a nominal consideration to the bridge company. It is impossible to distinguish them from the rights of way granted by ordinance; The title to the land passed to the bridge company, and the improvements constructed thereon became a part of the realty of that company, to which

the lien of the first mortgage attached the moment the title to the land passed to the company. The lien of Harris, trustee, upon such lands, must therefore be postponed to that of the first mortgage.

"The result is that the lien of the terminal trust bondholders upon the new terminals is, as to that part situate upon real estate or rights of way for which the contract company paid, prior in right to the lien of the first mortgage, to the extent of the sums expended in buying the lands or easements, and in erecting the necessary structures thereon, but that as to the remainder of the new terminals their lien is junior to that of the first mortgage."

A separate claim was made by the Columbia Finance & Trust Company and sustained by the court.

Some land was bought and a new steel approach substituted for the old wooden approach with funds borrowed from the Trust Company, under a contract (which expressly provided for a lien to secure the Trust Company [p. 334])[1] pursuant to which the Trust Company pur-

[1] The Transcript of the Record on Appeal in that case (pp. 97, 98 and 99) shows the contract contained the following provisions in addition to those quoted in the opinion at page 334:

"Whereas * * * the Trust Company is willing to advance the money for the purchase of said lots of land, and the Bridge Company expects to obtain other persons, as friends of the company, to advance to or for it the means necessary to pay for the labor or material * * * but said persons will not be willing to advance said money unless secured therein in manner and form as herein set forth; and

* * * * *

"III

"All of the ground so to be conveyed to the Trust Company, together with the entire railroad to be constructed thereon, and all the material embraced therein, shall be held by it in trust as follows:

"First. To secure to the said Trust Company the payment by the Bridge Company of all sums of money which it may have advanced for the purchase of said tracts of ground above mentioned, * * *. And for any unpaid residue the said Trust Company shall have the right by legal proceedings to cause a sale of the entire ground occupied by said railroad and said railroad itself."

chased with its own funds the rights of way and took title in its own name and thereafter conveyed title to the Bridge Company. The court held that the Trust Company was entitled to a first lien on the property so purchased to secure the amount of the advances and the consequential damages and compensation provided for pursuant to the contract.

An additional claim was made by indorsers of notes of the Bridge Company sold to obtain funds for the construction of the new steel approach. The claim was for a prior lien to secure the amounts which the indorsers had been required to pay to discharge their liabilities as indorsers. The claim was rejected.

The court pointed out (p. 334) that the funds obtained appeared to have been turned in to the general account of the Bridge Company and that the testimony merely showed an amount equal to the funds so obtained was at some time expended on the construction of the new steel approach. The court said (p. 334):

> "* * * The after-acquired property clause in a mortgage does not displace any equitable lien which really grows out of the act of acquisition, by purchase or otherwise, so that the mortgagor may be properly said to acquire the property with the lien on it, or less the lien. It is not infrequently a nice question to decide whether the lien really inheres in the act of acquisition, or whether it is given the false appearance of doing so at the instance of the purchaser, for the purpose of evading an after-acquired property clause in a prior mortgage, and is really nothing more than a lien taking effect after the act of acquisition, and not as part of it, and is thus subordinate to the mortgage. * * * The creditors sought to be secured were the creditors of the bridge company. They loaned their credit to the bridge company to enable it to borrow money to build its own bridge. The bridge company secured to them a lien on its equitable interest in the land bought for it by the Columbia Trust Company, after it should have paid the purchase price to the trust company. To that equitable interest the lien

of the first mortgage attaches the moment the purchase money is paid. As the learned judge of the circuit well said, 'The interest which was thus made subject to these advances was the interest of the bridge company, and not the title or interest of the trust company.' The lien of Gaulbert and others upon the new approach is therefore subordinate to the lien of the first mortgage."

The court rejected the claim of the indorsers even though an agreement, which was put in evidence and quoted in part in the opinion (p. 334), expressly provided for a lien to secure "moneys raised upon notes or other obligations upon which individuals may have become bound for the bridge company, as indorsers, guarantors, accommodation makers, or otherwise".

The doctrine discussed and applied in the *Harris* case was also discussed and applied, with particular stress upon the necessity of an express agreement or intent to create a prior lien securing the advances, in *Shooters Island S. Co.* v. *Standard Shipbuilding Corp.*, 293 Fed. 706 (C. C. A., 3rd Circ., 1923).

In 1915, the Standard Shipbuilding Corporation made a mortgage in the amount of $863,000 to secure the purchase price of premises constituting a shipbuilding plant; the mortgage in terms covered the premises "'And all additions and extensions to said real property, including any and all rights to lands under water adjoining said premises' * * *". In 1917, a supplemental mortgage was given, pursuant to the covenant of further assurance in the mortgage, covering a leasehold interest (in land under water) acquired by the Shipbuilding Corporation after the execution of the mortgage; the lease contained an option to purchase the fee.

Subsequent to the execution of the supplemental mortgage, the United States Shipping Board Emergency Fleet Corporation, following the requisitioning of all ships under construction in the Shipbuilding Corporation's plant, made various advances to the Shipbuilding Corporation, includ-

ing an advance of more than $5,000,000 for additions and improvements to the plant. The court pointed out (p. 709) that this advance was made without demanding security and, so far as the record in the case showed, without a move to question or disturb the lien of the mortgage upon the after-acquired properties.

The advance of more than $5,000,000 was used, among other things, for the purchase (pursuant to the option) of the fee to the land a leasehold interest in which was covered by the supplemental mortgage.

In 1920, the Shipbuilding Corporation and the Emergency Fleet Corporation made a contract adjusting their accounts, which found the sum of $1,337,000 to be due to the Emergency Fleet Corporation. The Shipbuilding Corporation delivered bonds for this amount secured by a mortgage on the plant; the mortgage was executed pursuant to an agreement which provided that the mortgage should be subject to the existing mortgage for $863,000. The court pointed out (p. 710) there could be no doubt that, at the time of the execution of the mortgage to the Emergency Fleet Corporation, it had no other thought than that it was obtaining a mortgage whose lien was subject to the prior lien of the $863,000 mortgage.

In 1922, in connection with suits to foreclose the two mortgages, the Emergency Fleet Corporation claimed, for the first time, a prior lien on the fee to the land purchased with the money advanced by the Emergency Fleet Corporation (and the improvements made to said land with money so advanced).

In rejecting the claim to priority, the court said (pp. 713-714):

> "The claimed equitable lien, therefore, rests on the single fact that money which the Fleet Corporation loaned or advanced to the Shipbuilding Corporation under shipping contracts was used in the purchase and improvement of the land. That the Fleet Corporation intended it to be so used is evidenced by the warrant issued for the money and its expenditure, * * *. Unless we are to hold that such expenditures, singly

and alone, create in each instance, wherever applied and expended, an equitable lien in favor of the party advancing the money, thereby divesting rights held under an existing mortgage, we are constrained to hold that the purchase of lands from the State of New Jersey and the building of ways thereon with moneys which the Fleet Corporation either loaned or advanced to the Shipbuilding Corporation do not, without more, give it an equitable lien on the properties so purchased and improved. We freely admit that under different circumstances an equitable lien could have been created which would have displaced the lien of the prior mortgage under its after-acquired property clause. But under the circumstances as they were, we are unable to find, either on authority or principle, that the rights of one silently and unconditionally loaning money for the purchase and improvement of property are superior to the rights of a party who holds the lien of a prior mortgage against the property.

. . . . .

"[5] We come to this conclusion not on the theory of estoppel of or waiver by the Fleet Corporation in adjusting its differences with the Shipbuilding Corporation in 1922 and accepting a second mortgage in settlement, as urged by the Shooters Island Company, although there is substance in this contention, Griffin *v.* Smith, 143 Fed. 865, 75 C. C. A. 73, but on the ground that where the evidence shows nothing, expressly or impliedly, was demanded or promised by either party, an equitable lien is not raised by the mere loaning and application of money for purchases and improvements that were understood and intended.

"[6] Passing from its alternative claims to legal and equitable liens, the Fleet Corporation next maintains that, having supplied the purchase money for the after-acquired property, its mortgage is a purchase money mortgage on the principle that an instrument may be a purchase money mortgage although given to a third person to secure money advanced by him. There is ample authority for this proposition. But even in such a situation the mortgage must be given for the purpose and with the intention of

securing the purchase money and, without regard to the date, it must be a part of one continuous transaction. New Jersey Building Loan & Investment Co. *v.* Bachelor, 54 N. J. Eq. 600, 35 Atl. 745; Stewart *v.* Smith, 36 Minn. 82, 30 N. W. 430, 1 Am. St. Rep. 651. Here the mortgage was given the Fleet Corporation five years after the money was advanced and there is nothing to show an agreement that, at the time of the advance, repayment was to be secured by the mortgage. It is, of course, not necessary that a deed and mortgage should be executed at the same hour, or even on the same day, provided, as the authorities say,

> 'the execution of the two instruments constitute part of one continuous transaction and were so intended. But where the mortgage is not executed until a considerable time after the deed, they cannot be construed as simultaneous and the mortgage will be postponed to intervening valid liens.' 1 Jones on Mortgages, § 469; Bridges *v.* Cooper, 98 Tenn. 381, 39 S. W. 720."

THE REQUIREMENT AS TO TIME WAS NOT MET.

As we have pointed out, the Debtor commenced making expenditures in connection with the Northern California Extension as early as February 1, 1929 (R. 1082). Actual construction work was commenced on August 16, 1930, and, by the end of 1930, practically all of the clearing and a substantial part of the construction work for the entire line had been completed (R. 1077), so that presumably the entire right of way had been acquired. By February 1, 1931, a total of $1,682,298.18 had been expended by the Debtor (I. C. C. Exhibit No. 95, sheet 10, R. 2464), before a single dollar had been advanced by either the A. C. James Co. or Reconstruction Finance Corporation.

On February 11, 1931, the first $1,000,000 principal amount of First Mortgage Bonds was authenticated and delivered and their cash proceeds withdrawn to reimburse the Debtor for the expenditures made up to November 30, 1930 (R. 1080-1082), and the lien of the First Mortgage

attached, by virtue of the after-acquired property clauses, to the line as it then existed.

The bid of the A. C. James Co. for the $5,000,000 principal amount of Debentures (I. C. C. Exhibit No. 49, R. 2327) was dated January 22, 1931, but the first $1,000,000 principal amount of Debentures was not authenticated and delivered until February 27, 1931 (R. 1084-1085).

Thus, the Northern California Extension had come into existence as a continuous right of way, with substantial improvements, owned by the Debtor, before a single dollar was advanced by the A. C. James Co.

Consequently, to use the language of Judge TAFT quoted at page 85 of this brief, the property "came into the possession and enjoyment of the * * * company burdened with no lien except such as might arise from the improvement of that which was already the property of the * * * company", and that property and the improvement were subject to the lien of the First Mortgage as a first lien. The liens claimed "did not arise in the act of acquisition, but only in the improvement after acquisition."

As indicated by the officers' certificates included in the cash requisitions under the First Mortgage, the expenditures made subsequent to February 27, 1931, were made chiefly for improvements to the real property constituting the right of way (R. 1081-1083), so that, even to the extent financed by the subsequent advances made by the A. C. James Co., the "improvements upon the rights of way only increased the security by becoming part of the realty" covered by the First Mortgage as a first lien,—to use the language of Judge TAFT quoted on page 85 of this brief.

The same is true of the advances made by the Reconstruction Finance Corporation, which were made between March 1 and August 1, 1932 (R. 1088), by which time the Northern California Extension was nearly completed and had already been placed in operation for freight service under the jurisdiction of the construction department (R. 1077). As shown by the applications submitted by the

Debtor to Reconstruction Finance Corporation, the advances were made entirely for the purpose of financing improvements to the already existing line (I. C. C. Exhibit No. 82, sheet 6 and Schedule P, R. 2449, 2451; I. C. C. Exhibit No. 87, pp. 3-5 and Schedule P, R. 2456).

Thus an examination of the record discloses a complete failure to meet the requirement that advances must be made before or in substance at the very time of the coming of the property into the possession or ownership of the mortgagor in order to cause such advances to be entitled to a lien on the property prior to the lien of a mortgage containing an after-acquired property clause.

THE REQUIREMENT AS TO INTENT WAS NOT MET.

Furthermore, an examination of the record discloses a complete failure to meet the requirement that an express agreement or intent to create a prior lien securing the advances must have been clearly evidenced.

The record contains no indication that either the A. C. James Co. or Reconstruction Finance Corporation had any intention that their advances when made would be secured by a prior lien on the Northern California Extension; the record indicates the opposite, namely, an intention or understanding that the Northern California Extension would be subject to the lien of the First Mortgage as a first lien.

The original offer of the A. C. James Co., dated May 14, 1929, stipulated that the advances should be secured by a first lien upon the Northern California Extension (I. C. C. Exhibit No. 45, R. 2308, 2316), but this offer was withdrawn and a new offer substituted, under date of June 19, 1929, which stipulated that the loan should be evidenced by unsecured debentures (I. C. C. Exhibit No. 46, R. 2319).

The specifications on the basis of which the A. C. James Co. purchased the Debentures issued under the Indenture dated July 1, 1930, stated in effect that the First Mortgage would constitute a first lien on the Northern California Extension (I. C. C. Exhibit No. 48, sheet 5, R. 2326). A

similar statement appeared in the specifications upon the basis of which The Western Pacific Railroad Corporation (of which Mr. A. C. James was a director) purchased the $5,000,000 principal amount of First Mortgage Bonds which were issued to finance in part the construction of the new extension (I. C. C. Exhibit No. 93, sheet 2, R. 2459; R. 1079-1080).

The resolutions adopted by the Executive Committee of the Debtor (Mr. James being a member of the Executive Committee and being present at the meetings at which those resolutions were adopted), and the opinions of counsel which the Debtor furnished to the First Mortgage Trustees in applying for the withdrawal of the cash proceeds of the First Mortgage Bonds showed that the Debtor regarded the entire Northern California Extension as being subject to the lien of the First Mortgage (I. C. C. Exhibit No. 86, R. 2455; I. C. C. Exhibit No. 62, sheets 8-9, R. 2368). In view of the close relationship of Mr. James to the Debtor, these formal expressions of the position of the Debtor indicate to an important extent the intention or understanding of Mr. James.

That intention or understanding is further indicated by the following statement appearing at page 6 of the petition of the A. C. James Co. for leave to intervene in the proceeding before the Commission (R. 2194, 2196):[1]

> "During the depression, the Northern California Extension, now recognized in any estimate of the future earning power of the road to be a factor of great importance, was built under the lien of the First Mortgage. Approximately $7,000,000 was advanced for the purpose by your petitioner, upon evidences of debt which were junior to the First Mortgage. The security held for the benefit of the First Mortgage bondholders was thus improved during the depression years."

The record shows that the intention or understanding of Reconstruction Finance Corporation also was that the

[1] This petition was not printed.

First Mortgage would constitute a first lien on the Northern California Extension. The applications made by the Debtor to Reconstruction Finance Corporation for loans to be secured by the pledge of Refunding Mortgage Bonds in effect stated that the lien securing the Refunding Mortgage Bonds would be junior to the lien of the First Mortgage on all of the properties of the Debtor except certain securities (I. C. C. Exhibit No. 82, sheet 7, R. 2449, 2451; I. C. C. Exhibit No. 87, p. 15, R. 2456).

POINT IV.

THE FIRST MORTGAGE IS A FIRST LIEN ON THE SO-CALLED "NONCARRIER" PROPERTY.

A. FACTS.

The Debtor's Account No. 705, entitled "Miscellaneous Physical Property", at December 31, 1935, contained certain items described as being property for "noncarrier" purposes (R. 1090-1091, and Exhibit H to the Stipulation,[1] p. 1, R. 1299). We understand that the claims with respect to "noncarrier" property asserted by the Refunding Mortgage Trustee are limited to the six items appearing in Lines 41, 66, 86, 105, 123, and 151.[2]

The only one of these items specifically mentioned in the brief of the Refunding Mortgage Trustee is the item appearing in Line 123. This item consists of numerous parcels of land in the Islais Creek District of San Francisco, which are shown in detail on the maps and schedules annexed to Exhibit H to the Stipulation. An analysis of these maps and schedules shows that by far the greater part of this property was acquired by the Debtor from its predecessor, Western Pacific Railway Company. All of the property acquired by the Debtor subsequent to the

[1] This exhibit was not printed.

[2] Stip., Exhibit H, p. 1, and Brief of Refunding Mortgage Trustee, p. 51.

execution and delivery of the First Mortgage was either acquired by the use of deposited cash under the First Mortgage or was acquired in exchange for property of the Debtor which was released from the lien of the First Mortgage, with the exception of two parcels of an aggregate book cost of approximately $7,000, which were acquired in 1932.[1] These two parcels, which are shown on Map "B", and on sheet 1 of Schedule B annexed to Exhibit H, as I. C. C. Parcels Nos. 253-A and 261-A, are situate in the area west of Illinois Street. They were acquired for industrial sites and trackage necessary to serve future industries (R. 1299-1300) and were originally carried on the books of the Debtor as "carrier" property (Stip., Exhibit H, p. 4).

The remaining items consist of (1) land in Oakland and Sacramento, California, all of which was either acquired by the Debtor from its predecessor, Western Pacific Railway Company, or was acquired by the use of deposited cash under the First Mortgage, and (2) land of negligible value acquired subsequent to the execution and delivery of the First Mortgage for use as gravel pits, none of which was acquired by the use of First Mortgage Bonds or deposited cash (Stip., Exhibit H, pp. 2-3).

The items appearing in Lines 86, 105 and 123 were originally carried on the Debtor's books in Account No. 701, entitled "Investment in Road and Equipment", and were subsequently transferred to Account No. 705, entitled "Miscellaneous Physical Property" (Stip., Exhibit H, p. 1).

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[1] Exhibit H to the Stipulation (pp. 5-6) clearly shows that some of the Islais Creek property was acquired subsequent to the execution and delivery of the First Mortgage and was acquired by the use of deposited cash under the First Mortgage. We understand the statement on page 52 of the brief of the Refunding Mortgage Trustee, that "The properties in dispute * * * were not acquired from proceeds of First Mortgage Bonds", to mean that the claims of the Refunding Mortgage Trustee are limited to that portion of the property which was not acquired by the use of deposited cash under the First Mortgage.

B. ARGUMENT.

All of the above described items of so-called "noncarrier" property fall within one or the other of two general classes, namely, (1) property acquired by the Debtor from its predecessor, Western Pacific Railway Company, and owned by the Debtor at the date of the execution and delivery of the First Mortgage, and (2) property acquired by the Debtor subsequent to the execution and delivery of the First Mortgage.

The brief of the Refunding Mortgage Trustee does not make clear whether the Refunding Mortgage Trustee is asserting its claims with respect to both classes of property or only with respect to property in the first class. Although the statement of facts in the brief (pp. 51-52) contains language indicating that the Refunding Mortgage Trustee may be asserting its claims with respect to property in both classes, the argument in the brief (pp. 53-55) deals only with "noncarrier" real estate acquired by the Debtor from its predecessor, Western Pacific Railway Company, and owned by the Debtor at the date of the execution and delivery of the First Mortgage. We shall therefore direct the argument in this brief primarily to property belonging in that class.

We do not believe that any valid contention can be made that the "noncarrier" property acquired by the Debtor subsequent to the execution and delivery of the First Mortgage is not subject to the First Mortgage as a first lien.

That portion of the after-acquired "noncarrier" property which was acquired by the use of deposited cash is subject to the lien of the First Mortgage by reason of the provisions of Granting Clause Third.[1]

That portion of the after-acquired "noncarrier" property which was acquired in exchange for property released from the lien of the First Mortgage is subject to the lien of the First Mortgage by reason of the provisions appearing in the last sentence of Section 8 of Article Seventh.[2]

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[1] Appendix A, *infra*, pp. 110-111.

[2] I. C. C. Exhibit No. 5, p. 115.

The two after-acquired parcels in the Islais Creek District of San Francisco which were acquired for industrial sites and trackage necessary to serve future industries are subject to the lien of the First Mortgage for the reason that they are property "acquired for use in or for the maintenance or operation" of the mortgaged lines (Granting Clause Third[1]) and are property "held for use * * * to facilitate * * * the maintenance or operation" of the mortgaged lines (Granting Clause Fifth[2]). The acquisition of land to be held for future sale to industries for the construction of plants and warehouses is an important and useful means of increasing the traffic and revenues of a railroad. An analogous situation was considered by the Supreme Court of California in *California Title Insurance & Trust Co.* v. *Pauly*, 111 Cal. 122, 43 Pac. 586 (Cal., 1896); see also *People's Trust Co.* v. *Schenck*, 195 N. Y. 398, 88 N. E. 647 (N. Y., 1909).

The three gravel pit properties are subject to the lien of the First Mortgage for a similar reason. A gravel pit is used by a railroad chiefly for the purpose of supplying material for ballast and other purposes in connection with the maintenance of the right of way.

The Refunding Mortgage Trustee contends, we understand, that the "noncarrier" real estate with respect to which it is asserting its claims is free of the lien of the First Mortgage and constitutes free assets against which the pledged holders of Refunding Mortgage Bonds are entitled to assert deficiency claims.[3]

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[1] Appendix A, *infra*, p. 110.

[2] Appendix A, *infra*, p. 112.

[3] Brief of Refunding Mortgage Trustee, pp. 53-55.

As pointed out in the answering brief of the Institutional Bondholders Committee (pp. 36-37), no deficiency claims can be asserted on the pledged Refunding Mortgage Bonds as such.

The cash and other current assets on hand at the date of the institution of the Section 77 proceedings, which the brief of the Refunding Mortgage Trustee (p. 8) mentions as being unmortgaged, are no longer available as a fund out of which the claims of creditors may be satisfied. Pursuant to orders of the District Court $10,000,000 in principal amount of prior lien trustees' certificates

(I) The Characterization of Property as "Noncarrier" Property in the Debtor's Accounts Does Not Affect the Scope of the Granting Clauses of the First Mortgage.

The fact that the Debtor, in accordance with the accounting regulations prescribed by the Interstate Commerce Commission, characterized certain property in its accounts as being for "noncarrier" purposes does not affect the scope of the granting clauses of the First Mortgage. The phrase would seem to have no other significance than as indicating that the property was not at the time actually being used for transportation purposes.

The granting clauses of the First Mortgage are not limited to property actually used for transportation purposes.

(II) The Granting Clauses of the First Mortgage Expressly Cover "Noncarrier" Real Estate Owned by the Debtor at the Date of the Execution and Delivery of the First Mortgage.

THE GRANTING CLAUSES OF THE FIRST MORTGAGE.

Granting Clause First of the First Mortgage[1] covers:

"All and singular the following described lines of railroad, terminals, lands, equipment, shares of stock

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have been issued to finance necessary maintenance expenditures in connection with the Debtor's three-year rehabilitation program (R. 1092-1093). Inasmuch as the District Court had no power to authorize the issuance of these trustees' certificates, except upon a showing that there were no funds available to finance the expenditures, it must follow that all of these current assets have been used up in the operation of the Debtor's railroad, to enable it to discharge its primary duty to the public to provide safe and efficient operation of transportation facilities required by the public interest. See: *Union Trust Co.* v. *Illinois Midland Co.*, 117 U. S. 434, 455-456 (1886); *International Trust Co.* v. *Decker Bros., et al.*, 152 Fed. 78 (C. C. A., 9th Circ., 1907); *Meyer* v. *Johnston*, 53 Ala. 237, 346-350 (1875).

[1] Appendix A, *infra*, pp. 105-109.

and other real and personal property and interests and rights in property owned by the Company or to which it may be entitled, formerly the property of or belonging to Western Pacific Railway Company, a corporation of the State of California, or its receivers:"

This language is followed by specific descriptions contained in six subdivisions.

Subdivision III reads as follows:

"All terminals and *all lands and interests in lands, easements therein and improvements thereon*, including, among other things, yards, station and depot grounds, sheds, station houses, freight houses, warehouses, elevators, stockyards, carhouses, engine houses, oil tanks, water tanks, water supply, shops, hotels, boarding houses, hospitals, docks, wharves, piers, slips, telephone and telegraph lines and other structures and erections and the appurtenances of all and every of the foregoing, *whether or not for use in connection with said or any lines of railroad.*"

Subdivision VII reads as follows:

"All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause *First* of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled."

Granting Clause Second[1] covers:

"All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or

[1] Appendix A, *infra*, p. 109.

> equitable) now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses."

It is difficult to see how the draftsman of the First Mortgage could express more clearly an intent that all property (with certain specified exceptions not relevant to this discussion) owned by the Debtor at the date of the execution and delivery of the First Mortgage, including property acquired by it from its predecessor, Western Pacific Railway Company, should be subject to the lien of the First Mortgage. The words "whether or not for use in connection with said or any lines of railroad", appearing in subdivision III of Clause First, clearly show that the property mortgaged included "noncarrier" property as well as "carrier" property.

The Provisions of the 1915 Plan of Reorganization Are Not Relevant.

The Refunding Mortgage Trustee contends that "noncarrier" real estate owned by the Debtor at the date of the execution and delivery of the First Mortgage is not subject to the lien, because of the provision appearing in Article VII of the plan of reorganization of the Debtor's predecessor, Western Pacific Railway Company, dated December 15, 1915, which describes the new First Mortgage Bonds to be issued by the Debtor pursuant to the plan in the following language (R. 1141):

> "To be secured by first mortgage upon all of the existing railway properties of the Old Company and all property hereafter acquired by the Operating Company integrally connected therewith and all property acquired by means of the use of proceeds of the New Bonds or against which New Bonds shall be issued."

The Refunding Mortgage Trustee contends that the plan "constituted a contract between the stockholders of the Debtor (who were bondholders of the predecessor company) and the new First Mortgage bondholders" and that

to interpret the First Mortgage as covering the "noncarrier" real estate in question "would violate the terms under which the old bondholders agreed to take stock in the new company (the Debtor herein) in exchange for their claims."[1]

We question whether the words "existing railway properties" were used in the plan in a narrow sense as excluding from their meaning physical properties used or acquired for use in the business of the railroad but not used in the actual transportation of passengers and commodities. The provisions of the plan indicate rather that the draftsman used these words to describe the properties of the predecessor company which were to be transferred to the new operating company (the Debtor), as distinguished from the claims against The Denver and Rio Grande Railroad Company which were to be transferred to the new holding company (R. 1135-1136).

The language of Granting Clause First of the First Mortgage,[2] amounts to an interpretation of these words in the plan as having that meaning.[3]

But, even if the words "existing railway properties" be held to exclude from their meaning "noncarrier" real estate, the provisions of the plan are not relevant to the question of the scope of the granting clauses of the First Mortgage. The language used in the above quoted provisions of the granting clauses is clear and free from ambiguity. It plainly includes all "noncarrier" real estate owned by the Debtor at the date of the execution and de-

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[1] Brief of Refunding Mortgage Trustee, p. 53.

Although the distinction seems immaterial, we wish to point out for the sake of accuracy that the bondholders of the predecessor company did not become direct stockholders of the Debtor. Under the plan, all of the stock of the Debtor was placed in the new holding company (R. 1135-1136), and the bondholders of the predecessor company were given stock of the holding company (R. 1143-1144).

[2] Appendix A, *infra*, pp. 105-109.

[3] The agreement of reorganization (R. 1165-1210) provided (R. 1178):

> "The Reorganization Committee may construe the Plan and Agreement and its construction thereof or action thereunder in good faith shall be final and conclusive."

livery of the First Mortgage, including "noncarrier" real estate acquired by the Debtor from its predecessor, Western Pacific Railway Company.

The provisions of the plan are inadmissible to contradict the clear and unambiguous provisions of the granting clauses of the First Mortgage.

CONCLUSION.

We respectfully submit:

1. That this Court, in view of the public interest in bringing about a speedy termination of the reorganization proceedings, should decide the issues involved in the "lien controversy".

2. That this Court should decide that the issues involved in the "lien controversy" were correctly determined by the Commission and by the District Court.

3. That, for the reasons set forth in this brief and in the brief of the First Mortgage Trustees filed in No. 8, this Court should reverse the decision of the Circuit Court of Appeals and affirm the order of the District Court approving the Commission Plan.

Dated, New York, N. Y., October 3, 1942.

Respectfully submitted,

ORVILLE W. WOOD,
Attorney for Respondents Crocker First National Bank of San Francisco and Samuel Armstrong, as Trustees under The Western Pacific Railroad Company First Mortgage dated June 26, 1916.

ARTHUR A. GAMMELL,
Of Counsel.

Appendix A.

The Granting Clauses of the First Mortgage.

"NOW, THEREFORE, THIS INDENTURE WITNESSETH, that, in order to secure the payment of all of said bonds (which are hereinafter called 'First Mortgage Bonds') at any time issued and outstanding under this indenture according to their tenor, purport and effect, as well the interest as the principal thereof, and to secure the performance and observance of all of the covenants and conditions therein and herein contained and to declare the terms and conditions upon which the First Mortgage Bonds are to be executed, authenticated, delivered and received, the Company, in consideration of the premises and of the acceptance or purchase of said bonds by the holders thereof and of the sum of One hundred Dollars, lawful money of the United States of America, to it duly paid by the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, confirmed, mortgaged, pledged, assigned, transferred and set over, and by these presents doth grant, bargain, sell, alien, remise, release, convey, confirm, assign, mortgage, pledge, transfer and set over unto the Trustees, their successors in the trust and their assigns forever, all of the following described railways, franchises and other properties (which collectively are hereinafter called the 'trust estate'), to wit:

"*First.*—All and singular the following described lines of railroad, terminals, lands, equipment, shares of stock and other real and personal property and interests and rights in property owned by the Company or to which it may be entitled, formerly the property of or belonging to Western Pacific Railway Company, a corporation of the State of California, or its receivers:

"I.—A main line of railroad commencing in the City and County of San Francisco, running thence in and through said City and County to certain slips, piers and landing places upon San Francisco Bay in said City and County; thence by ferry and barge to the City of

Oakland, in the County of Alameda; thence in and through said City of Oakland; thence in a southeasterly, easterly, northeasterly and northerly direction through the Counties of Alameda and San Joaquin, passing in and through the City of Stockton in said County of San Joaquin; thence in a general northerly direction through the County of Sacramento, passing in and through the City of Sacramento in said county; thence in a general northerly direction through the Counties of Sutter and Yuba, passing in and through the City of Marysville in said County of Yuba; thence in a general northerly direction through the County of Butte, passing through the City of Oroville in said County; thence in a general northeasterly, easterly and southeasterly direction through the County of Plumas; thence in a general northerly and easterly direction through the County of Lassen to a point on the boundary line between the States of California and Nevada; thence in a general easterly and northeasterly direction through the Counties of Washoe, Humboldt, Lander, Eureka and Elko, in the State of Nevada, to a point on the boundary line between the States of Nevada and Utah; thence in a general easterly direction through the Counties of Tooele and Salt Lake, in the State of Utah, to and into Salt Lake City, in said State of Utah—said line of railroad being about 927.3 miles in length.

"II.—A branch line of railroad, having its initial point and connection with said main line at or near Carbona in San Joaquin County, California, and extending thence in a southwesterly and westerly direction to a point near Tesla, Alameda County, California—being about 13 miles in length.

"III.—All terminals and all lands and interests in lands, easements therein and improvements thereon, including, among other things, yards, station and depot grounds, sheds, station houses, freight houses, warehouses, elevators, stock-yards, carhouses, engine houses, oil tanks, water tanks, water supply, shops, hotels,

boarding houses, hospitals, docks, wharves, piers, slips, telephone and telegraph lines and other structures and erections and the appurtenances of all and every of the foregoing, whether or not for use in connection with said or any lines of railroad.

"IV.—All locomotives, motor cars, express cars, dining cars, freight cars, passenger cars; combination cars, work cars and other rolling stock; all ferries, tugs, barges, transfers, lighters, harbor craft and other floating equipment; all machinery, tools and appliances, all electrical generating and transmission and other electrical apparatus and all other equipment, apparatus, appliances and facilities.

"V.—The following shares of stock in other corporations, which are hereby assigned to and simultaneously with the execution hereof are deposited with the Trustees:

995 shares of the par value of $100 each of the capital stock of The Salt Lake City Union Depot and Railroad Company, a Utah corporation, all of the other shares of stock wherein (except 9 shares held by directors)—to wit, 996 shares—are owned or controlled by The Denver and Rio Grande Railroad Company, a consolidated corporation existing under the laws of Colorado and Utah.

4000 shares of the par value of $100 each of the capital stock of Standard Realty and Development Company, a California corporation, being all of the capital stock thereof except 5 shares held by directors.

"VI.—The estates, interests and rights of the Company under any and all leases, leaseholds, rights under leases or contracts, trackage agreements, traffic agreements and operating agreements, and particularly the interests and rights of the Company heretofore possessed by Western Pacific Railway Company (but not including any of the claims or rights against, or with

respect to the property of, The Denver and Rio Grande Railroad Company or any predecessor or successor corporation of, or which originally arose in favor of, holders of the First Mortgage Five Per Cent. Thirty-year Gold Bonds of said Western Pacific Railway Company or of coupons belonging thereto nor any of the proceeds or avails of any such claims or rights whether or not such proceeds or avails shall have been collected or obtained otherwise, in whole or in part, by the use of First Mortgage Bonds or the proceeds thereof unless the same or any part thereof shall hereafter be subjected to the lien hereof by an instrument executed expressly for such purpose) under (1) an agreement, bearing date June 23, 1905, between The Denver and Rio Grande Railroad Company, The Rio Grande Western Railway Company, Western Pacific Railway Company and Bowling Green Trust Company (The Equitable Trust Company of New York being successor thereto), as trustee under the First Mortgage of Western Pacific Railway Company, and (2) an agreement bearing date said last-mentioned day between Missouri Pacific Railway Company and The Denver and Rio Grande Railroad Company; provided, however, that any now existing interest or right of the Company under any lease, agreement or other instrument or contract, which by the terms of a decree of foreclosure and sale entered in a cause pending in the United States District Court for the Northern District of California, wherein The Equitable Trust Company of New York was plaintiff and Western Pacific Railway Company and others were defendants, the Company is entitled to renounce or disaffirm and which pursuant to the provisions of said decree it shall so renounce or disaffirm, shall not be deemed to have been assigned, mortgaged, pledged or otherwise encumbered by this indenture.

"VII.—All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the fore-

going subdivisions of this clause *First* of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled.

"The lines of railroad, terminals, lands, structures, equipment, shares of stock and other property, interests and rights hereinabove in this clause *First* of these granting clauses described, were formerly the properties, interests and rights of Western Pacific Railway Company or its receivers and were conveyed and assigned to the Company by deed dated July 1, 1916, wherein Francis Krull as Special Master appointed in and by said above mentioned decree of foreclosure and sale is named as party of the first part, said Western Pacific Railway Company as party of the second part, F. G. Drum and Warren Olney, Junior, as receivers of said Western Pacific Railway Company, as parties of the third part, The Equitable Trust Company of New York, as trustee under the First Mortgage of said Western Pacific Railway Company executed to the Bowling Green Trust Company, trustee, as of date September 1, 1903, as party of the fourth part, Central Trust Company of New York, as trustee under the Second Mortgage of Western Pacific Railway Company executed to said Central Trust Company of New York, trustee, and dated July 1, 1908, as party of the fifth part, Franklin V. Spooner, Robert R. Pardow and John C. Rued, as parties of the sixth part, and the Company as party of the seventh part; which deed was executed and delivered to the Company before the execution of this indenture.

"*Second.*—All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or equitable) now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses.

"*Third.*—Any and all property and facilities of any and every kind and description, including among other things lines of railroad, extensions and branches, telegraph and telephone lines, lines and instrumentalities of water transportation, terminal facilities, equipment, lands, buildings, machinery and tools, stocks, bonds, notes and other obligations and securities and any and all right, title and interest in any of such properties or facilities which may from time to time hereafter be acquired or constructed by or belong to the Company or any successor or purchasing corporation if

(*a*) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) or on account of the purchase, acquisition or construction thereof or work thereon First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; or

(*b*) consisting of or, if securities, representing property or facilities constituting an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or

(*c*) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or

(*d*) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or any right,

title or interest which the Company or any successor or purchasing corporation may hereafter acquire in or to any of the property of either of said companies or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company, as the term 'subsidiary company' is defined in Section 2 of Article Second hereof.

"*Fourth.*—Any and all lines of railroad and other property of whatsoever kind or description, which may include, among other things, stocks, bonds, notes and other obligations and securities and also claims, demands and choses in action of whatsoever kind, from time to time hereafter by delivery or by writing of any kind, for any of the purposes hereof, conveyed, assigned, transferred, mortgaged or pledged by the Company or by any successor or purchasing corporation or by any person or corporation on behalf of any of them or with the written consent of any of them to the Trustees, who are hereby authorized to receive any such property at any and all times as and for additional security hereunder and also when and as hereinafter provided as substituted security hereunder and, except as hereinafter otherwise expressly provided and except with respect to anything which by or under any other of the provisions of this indenture is mortgaged or pledged or agreed to be mortgaged or pledged or to be subjected to the lien hereof as security hereunder, any such conveyance, assignment, transfer, mortgage or pledge may be made subject to any conditions, reservations, limitations and provisions which shall be set forth in an instrument in writing then to be executed by the Company or the person or corporation making such conveyance, assignment, transfer, mortgage or pledge respecting the use, management and disposition of the property constituting such additional security and the proceeds thereof.

"*Fifth.*—All rights of way and other easements; all tunnels, roadbeds, main tracks, double tracks and other additional tracks, spurs, side tracks, turn-outs, switches, turn-

tables; all superstructures, bridges, viaducts, stringers, ties, rails, frogs and bolts; all fences, telegraph and telephone lines, poles, wires, block signals and instruments; all terminal facilities; all wharves, docks, slips, piers, floats, loading and unloading apparatus and landings; all steamships, tugs, ferries, barges, lighters and other floating equipment; all passenger stations, freight houses, warehouses, elevators, power houses, coal houses, oil tanks, car-houses, engine houses, machine shops and other shops and structures; all water stations, water tanks and water supplies; all locomotives, tenders, motor cars, express cars, postal cars, dining cars, baggage cars, passenger cars, combination cars, work cars, freight cars and other rolling stock and equipment; all machinery, apparatus, tools, implements, appliances, furniture, material and supplies; all land used or designed for way-grounds, terminals, yards, stations, depots, warehouses or other structures or facilities; all other property of every description and all rights and interests in or with respect to the use of property; provided that the foregoing or any thereof, whether now owned by the Company or at any time hereafter acquired by it or any grantee, successor or purchasing corporation, shall be appurtenant to or used or held for use as, or as a part or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches, telegraph or telephone lines, lines of water transportation, terminal facilities or other properties now or at any time hereafter subject to the lien of this indenture—whether the same exclusively appertain to or be used as parts of or in or for the maintenance or operation of lines of railway or other properties subject to the lien hereof or appertain to or be so used as parts of or in or for the maintenance or operation of such lines of railroad or other properties in common with lines of railroad or property not subject to the lien hereof; also all corporate and other rights, franchises, privileges and immunities now appertaining or hereafter to appertain to or used or held for use in or for the maintenance or operation of any such lines of railroad or other property now or at any time hereafter subject to the lien of this indenture, whether

the Company now owns or it or any successor or purchasing corporation hereafter shall acquire any such rights, franchises, privileges or immunities; also any and all replacements, renewals, improvements and betterments of and additions to any such lines of railroad or any property or rights of whatsoever description now or at any time hereafter subject to the lien of this indenture, whensoever and by whomsoever such replacements, renewals, improvements, betterments or additions may be made.

"*Sixth.*—All and singular the estates, rights, titles, interests, possession, claims and demands, whatsoever, as well at law as in equity, of the Company and of any successor or purchasing corporation of, in or to any of the lines of railroad, extensions, branches, telegraph and telephone lines, lines of water transportation, terminal facilities, equipment, lands and other properties, hereditaments, appurtenances, rights, franchises, privileges and immunities hereby conveyed, assigned, mortgaged or pledged or intended to be conveyed, assigned, mortgaged or pledged or now or at any time hereafter subject to the lien of this indenture and every part and parcel thereof, and all and singular the rents, issues, tolls, profits and other income of all and every part of the property of whatsoever kind or description hereby conveyed, assigned, mortgaged or pledged or intended to be conveyed, assigned, mortgaged or pledged or now or at any time hereafter subject to the lien of this indenture.

"But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests therein, equipment, stocks, bonds or other securities or other prop-

erty, rights, franchises, immunities or privileges provided the same shall not be lines of railroad, extensions, or branches or interests therein, equipment, stocks, bonds or other securities, or other property, rights, franchises, immunities or privileges (*a*) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; or (*b*) consisting of, or if securities representing, property or facilities constituting an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or (*c*) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or (*d*) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or of any right, title or interest which the Company or any successor or purchasing corporation may acquire in or to any of the property of either of the companies above named or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company as the term subsidiary company is defined in Section 2 of Article Second hereof; and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture.

"To Have and to Hold the premises, railways, properties, securities, rights, franchises, estates and appurtenances hereby conveyed or assigned or intended to be conveyed or assigned unto the Trustees, their successors in the trust and assigns forever.

"Subject, However, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, and as to any property hereafter acquired by the Company or by any successor or purchasing corporation and becoming subject to the lien of this indenture, to any liens thereon existing at the time of such acquisition and not expressly prohibited by the terms of this indenture.

"But in Trust Nevertheless for the equal and proportionate benefit and security of all present and future holders of the First Mortgage Bonds and coupons and for the enforcement of the payment of said bonds and coupons when payable and the performance and observance of and compliance with the covenants and conditions of this indenture, without preference, priority or distinction as to lien or otherwise of one bond over any other bond by reason of priority in the issue, sale or negotiation thereof, or the purpose of its issue, so that each and every bond hereby secured shall have the same right, lien and privilege under and by virtue of this indenture and, subject to the terms hereof, be equally and proportionately secured hereby, as if all of the First Mortgage Bonds had been made, executed, authenticated, delivered and negotiated simultaneously with the execution and delivery of this indenture, it being intended that the lien and security of this indenture shall take effect from the date of the execution and delivery hereof without regard to the time of the actual issue, sale or negotiation of said bonds as though upon said date all of said bonds were actually authenticated, issued, sold and delivered and were in the hands of holders in due course."

Appendix B.

OPINION OF COURT ON EXCEPTIONS TO MASTER'S REPORT ON EQUIPMENT LIEN CONTROVERSY.

(FILED OCTOBER 31, 1939.)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF ILLINOIS,

EASTERN DIVISION.

IN THE MATTER of THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, *Debtor.*	No. 53209.

ON EXCEPTIONS TO THE MASTER'S REPORT ON EQUIPMENT LIEN CONTROVERSY.

WILKERSON, *District Judge:*

The reorganization petition herein was filed on June 7, 1933. The Supreme Court of the United States, affirming the injunctional orders of this court against suits by creditors, on April 1, 1935, said:

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and of the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude, should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined." (*Con-*

tinental Bank v. *Rock Island Railway*, 294 U. S. 648, 685.)

On August 6, 1935, the court entered an order requiring the debtor to show cause why it should not be required to file a reorganization plan by November 1, 1935. The debtor, on September 16, 1935, invoked the Act of Congress of August 27, 1935, amending paragraph 77(d) of the Bankruptcy Act and requested additional time for filing the plan. The court discharged the rule to show cause and granted extensions for filing the plan from time to time until July 15, 1936. On that date a plan was filed by the debtor with the Interstate Commerce Commission. The hearings on the plan have proceeded before the commission and on September 22, 1939, the examiner appointed by the commission filed a report to the commission which contains recommendations for a plan. The hearing on the report is to be had before the commission on December 7, 1939.

On May 24, 1937, while the hearing on the plan was proceeding before the commission, the mortgage trustees and protective committees representing the general gold bond mortgage and the first and refunding mortgage of the debtor filed their petition for an order "declaring the rights and other legal relations of the parties" with reference to certain equipment mentioned in the petition. Answers were filed by the railway company, by protective committees representing Choctaw, Oklahoma and Gulf mortgage bonds, Rock Island, Arkansas and Louisiana mortgage bonds, and St. Paul and Kansas City Short Line mortgage bonds, by trustees under most of the mortgages, and by the Reconstruction Finance Corporation.

The propriety of a hearing by the court before the commission had concluded its hearings on the plan and had reported to the court was not questioned by any of the parties. The petitions did not refer to any provisions of the act relating to the reorganization of railroads which authorized or required the court to hold such a hearing

before the commission had passed upon the questions relating to the reorganization plan.

On July 27, 1937, an order was entered referring the petition to a special master for hearing and report upon facts and law. The report of the special master was filed on April 4, 1939. Exceptions to the report were duly filed and were heard by the court on July 24, 1939.

In the order of reference the equipment involved is called "disputed equipment", which the order defines as equipment owned by the principal debtor at the time of the filing of the original petition of the principal debtor herein and not since retired, and which has been used indiscriminately over the lines operated by the trustees of the principal debtor, except:

> (a) equipment specifically pledged or allocated by the principal debtor on its present records under any of the principal debtor's own mortgages;
>
> (b) equipment acquired by the principal debtor from the Burlington, Cedar Rapids and Northern Railway Company; and
>
> (c) equipment acquired through the use of any of the mortgage bonds of the principal debtor or of any of its subsidiary companies or the proceeds of any such bonds;

and shall not include any equipment allocated by the principal debtor on its present records to any of its subsidiary companies, or any equipment used exclusively on any mortgaged or leased line, but shall include the right, title and interest of the principal debtor and/or trustees of the principal debtor in and to the equipment subject to the principal debtor's equipment trust agreements.

The questions at issue relate to the proper construction of mortgage provisions and provisions in leases in so far as they may relate to a lien upon or property interest in any portion of the "disputed equipment", and the proper method or measure of determining the extent of any lien upon or property interest in the "disputed equipment" which the mortgage trustee or the lessor under

a lease, as the case may be, may have under any such instruments.

The lease provisions that are pertinent relate to replacement of equipment worn out or no longer fit for service, and equipment added to the leased property and referred to in the lease as additions and betterments. The mortgage provisions that are pertinent relate to replacement of equipment worn out or no longer fit for service and which was subject to the mortgage lien, and to so-called "after acquired" equipment.

The questions involved are difficult and complicated and the answers to them in some instances are not free from doubt. The master has made a report in which he has analyzed the provisions in question and has stated fully and ably his reasons for the construction which he places upon them. The court is asked to rule upon the exceptions to the master's report and to enter an order declaring the rights of the respective parties with reference to the equipment in question.

Before considering the questions presented by the pleadings and the report we should look into the nature of this proceeding and inquire into the scope of the order which the court properly may make concerning matters which are involved in the reorganization plan while the hearings on the plan are being held by the commission and before the commission has made its report on the plan to the court.

The duty and authority of the commission and the court in reorganization proceedings must be found in the statute. The proceeding is not a bankruptcy although an amendment to the Bankruptcy Act creates and regulates the remedy. (*Louden* v. *Northwestern National Bank*, 298 U. S. 160, 163, 164.)

The court is charged with the responsibility for the operation of the business and the conservation of the assets while the reorganization proceeding is pending. The court is charged with the duty of requiring the debtor and trustees to file schedules and submit information necessary to disclose the conduct of the debtor's affairs and the fair-

ness of any proposed plan, and of directing the preparation of lists of bondholders, stockholders and creditors. The court is required to fix a time within which claims may be filed, and for the purposes of the plan and its acceptance to make a classification of creditors and stockholders according to the nature of their respective claims and interests. Section 77(c)(7) provides that while the trustee under any mortgage, deed of trust or indenture may file a claim in behalf of all securityholders thereunder, such trustee may not be the representative of such holders for the purpose of accepting or rejecting any plan of reorganization.

The initial proceedings with reference to the reorganization plan are placed exclusively within the control of the commission. At the hearings before the commission all interested parties are entitled to be heard. Section 77(d) expressly provides that "no plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the commission and certified to the court".

When the plan is certified all parties in interest are entitled to be heard by the court upon the question of its fairness, and, as has been pointed out above, trustees may not represent the owners of securities issued under their respective trust deeds at that hearing.

It is not necessary to decide whether or not a determination by the court of the conflicting claims to the equipment in question could be made binding upon those who have joined in submitting their claims to the court at this time. There are so many parties in interest entitled to be heard on the fairness of the plan who have not joined in this application and who would not be bound by the court's decision that whatever the court might now decree would have to be re-examined in the light of the plan when certified, and the objections thereto. The court may not pass upon a plan piecemeal, nor has it the authority in advance of the certification of a plan by the commission to bind all interested parties by finally adjudicating controversies between some of the interested parties which

may be presented when the plan is before the court for approval or disapproval.

The reorganization proceedings may be dismissed, in which case the title to the estate reverts to the debtor with the rights of all parties unimpaired except as they may have been changed by the judgment of the court upon such matters as the court is expressly authorized by the statute to adjudicate during the pendency of the proceeding.

However, there has been a long hearing before the master in accordance with the directions of the order of reference, and the objections to the report of the master have been heard by the court. It is proper that the court should give its conclusions upon the controversies stated in the order of reference and the master's report. Those findings are necessarily interlocutory in their character. They are in no way binding upon the commission in framing a plan to be certified to the court. They are not binding upon any of the parties at the hearing on the plan. They cannot affect the rights of any of the parties if this proceeding is dismissed and creditors are obliged to seek redress in other forums. The most that can be said for them is that this preliminary and tentative ruling may furnish a basis for discussion at the hearing on the plan and may tend to expedite the court proceedings.

If decisions on the matters in controversy are necessary to a ruling on the fairness of the plan when it is before the court, final ruling will be made at that time in connection with the order concerning the plan. It is possible that a plan may be presented as to the fairness of which some or all of the matters covered by the master's report may not be relevant.

With the foregoing limitations as to their effect, the court states its findings as follows:

The main controversies here grow out of conflicting constructions placed upon certain provisions of the general and first and refunding mortgages relating to the lien of the mortgages upon after acquired equipment.

When the general mortgage was executed, January 1, 1898, the lines of railway then in operation consisted

of 3500 miles. When the petition for reorganization was filed June 7, 1933, the mileage had increased to more than 8000 miles. It is clear from the language of the mortgage that the parties to it contemplated new branches, extensions and the addition of leased lines, and that is what actually occurred. The lines of the railway company then and since have been operated as a single system of railway lines, and in practice at least the equipment later acquired was put to indiscriminate use on all parts of the system lines.

The mortgages in question, so far as they deal with after acquired equipment, are not drafted with that degree of certainty and precision which one would expect to find in documents of that character. The intention of the parties is not embodied in any clear-cut, definite provision; but must be ascertained by patching together and interpreting several sections, each of which makes some reference to equipment acquired after the execution of the mortgages. The security holders under the mortgages contend for an interpretation which makes a large part of the after acquired equipment subject to the liens of their mortgages. Interests junior to the mortgages contend for an interpretation which limits materially the rights of the mortgages in after acquired equipment.

The problem presented to the court is to determine the intention of the parties by analyzing all of the mortgage and lease provisions that may be relevant, in the light of the purpose of the parties and the means adopted to accomplish such purpose.

The order of reference excludes consideration with respect to liens upon or property interest in specific units of equipment, or with respect to what specific units of equipments fall within the category of "disputed equipment". In view of the pending reorganization proceedings, and subject to the limitations placed upon the findings herein, a determination of the rights of the parties herein may be stated in terms of the value of such rights.

General Gold Bond Mortgage:

The introductory paragraph to the several granting clauses conveys to the trustee in trust the railways "now owned or leased", together with "other property now held * * * or hereafter acquired * * *, and being a part of or appurtenant to or provided for use upon any such railway."

This is followed by two granting clauses which describe the main lines and branches of said railway.

Granting clause THIRD consists of three parts: (1) lands such as road beds, station grounds and yards, "now held * * * or hereafter acquired * * *, and appertaining to or provided for use in connection with" said railway; (2) buildings and structures, such as bridges, depots, warehouses, engine-houses, shops and other structures, and tracks, "now held * * * or hereafter acquired * * *, and appertaining to any of said railways"; and (3) personal estate, such as tools, machinery, supplies, locomotives, cars and other rolling stock, and equipment, "now held * * * or hereafter acquired * * *, and appertaining to or provided for use upon" said railway.

Article Six, section 2, provides:

> "While in possession of the mortgaged premises the Railway Company shall * * * have full power, in its discretion, from time to time, to dispose, free from the lien of this indenture, of any portion of the * * * rolling stock, or equipment embraced within this indenture, which may have become unfit for such use, replacing same by, or substituting for the same, new * * * rolling stock, or equipment, which shall become subject to the first lien of this indenture."

Obviously, equipment later acquired and used for the purpose stated in Article Six, section 2, would be equipment "hereafter acquired * * * and appertaining to or provided for use upon" said railway, as set forth in Granting Clause THIRD.

The indenture, dated January 1, 1898, was to continue in effect until January 1, 1988, or for a period of 90 years.

The equipment in existence when the indenture took effect would become unfit for use or obsolete long before the maturity date. There is no doubt the parties understood when the indenture was executed that such equipment and rolling stock would have to be replaced several times within a period of 90 years if the railway were to continue as a going concern.

To dispose of something is to divest oneself of possession. This may be done by sale, gift or destruction of the article if no longer useful. In the case of railway equipment, the usual method is to dismantle the equipment and sell or reuse the salvage. The discretion lodged in the railway company by the provision quoted was the authority to determine from time to time when any equipment had become unfit for use.

The paragraph quoted above did two things: (1) It empowered the railway company to sell or dismantle any rolling stock or equipment that no longer was fit for service, free from the lien of the indenture, and (2) it placed upon the railway company the duty to acquire other rolling stock or equipment to take its place, which then became subject to the first lien of the indenture. By so doing it was intended that the mortgage security with respect to rolling stock and equipment should remain unimpaired throughout the term of the indenture. Rolling stock and equipment, so acquired by the railway company to replace original equipment or to replace rolling stock or equipment which itself had been acquired for replacement purposes, would come within the mortgage description (Granting Clause Third) of rolling stock or equipment "hereafter acquired * * *; and appertaining to or provided for use upon" said railway.

Assuming that the railway company discharges its duty to maintain unimpaired the mortgage security with respect to rolling stock and equipment by replacing each unit no longer fit for service, and that it acquires with its own funds or by other means independently of the mortgage additional rolling stock or equipment which may be used upon the railway subject to the mortgage, is such addi-

tional equipment subject to the mortgage lien? This will depend upon the intention of the parties as expressed by the language used by them in the indenture.

Granting Clause THIRD, as noted above, conveys to the mortgage trustee all locomotives, cars and other rolling stock and equipment "now held * * * or hereafter acquired * * *, and appertaining to or provided for use upon" said railway. On its face, this language, if not qualified by other language in the indenture, would seem to be broad enough to include additional rolling stock or equipment of the kind defined in the preceding paragraph. But, at the end of Granting Clause FOURTH, a proviso will be noted that may materially qualify or circumscribe the broader language in Granting Clause THIRD. Before discussing this proviso, that part of Granting Clause FOURTH that precedes the proviso may be noted, and the rule remembered that the essential function of a proviso is to limit or qualify something previously expressed. Granting Clause FOURTH relates to "all other property" or property not subject to the mortgage lien, which the mortgagor may, if it should so elect, convey to the mortgage trustee "as and for additional security". Thus it is recognized and conceded that the mortgagor may acquire and hold other property not conveyed to the mortgage trustee by the granting clauses of the indenture. The nature of such other property, that later may be acquired by the mortgagor, is described in the proviso at the end of Granting Clause FOURTH. The proviso reads:

> "And *Provided*, further, that nothing in this indenture contained shall be construed to limit the right or power of the Railway Company, hereby expressly reserved, to own and hold, or in any manner, except by the use of bonds secured by this indenture, to construct or to acquire, by purchase or by lease, other lines of railway, branches or extensions, *or* equipment or interest therein, *or* new terminals, and to hold and to dispose of, any line or property so acquired, and to retain the proceeds thereof free from the lien of this indenture."

It may be noted here that the words "or property so acquired" obviously apply to and include "equipment", appearing in a preceding line of the proviso. And it may be noted that equipment later acquired by the use of bonds secured by the mortgage is to be subject to the mortgage lien.

It is said that the words "or equipment or interest therein", although the proviso itself discloses no qualification, must be held to relate only to equipment that does not appertain to or is not provided for use upon the railway lines subject to the mortgage; that the words should be qualified by implication so that they will refer only to equipment acquired by the railway company as a part of or for use upon "other lines of railway, branches or extensions" not subject to the mortgage. Under said proviso the railway company is permitted with its own means to acquire other lines of railway, and to hold such lines of railway free from the lien of the indenture. A line of railway without equipment could not be held to be a complete railway; it would be so many acres of land, and so many tons of steel rail. With equipment with which to operate, it would be a completed unit as a railway. Therefore, the words "other lines of railway" would appear to be sufficient in themselves to include equipment, and to negative the assertion that the words "or equipment or interest therein" as used in the proviso must be limited in their meaning to equipment acquired as a part of such other line or lines of railway. Further, if the parties considered it necessary to make specific mention of equipment in connection with purchase of "other lines of railway", it is reasonable to believe that the conjunctive and not disjunctive would have been used. They would have said "other lines of railway *and* equipment". The words are "other lines of railway * * * or equipment". The use of the word "or" in the proviso would mean that the railway company might purchase on its own credit another line of railway together with the equipment thereon, or that it might purchase the equipment without purchasing the right of way. If it purchased only the equipment, then

such equipment would appear to be within the proviso and excluded from the mortgage lien. If equipment purchased from another line of railway without purchase of the right of way would not be subject to the mortgage lien, then equipment purchased elsewhere with free money should not be held to be subject to the lien.

The proviso specifically mentions "or new terminals" as property which the railway company may acquire with its own funds free from the mortgage lien. If the meaning of the proviso, which has been advanced, is to be applied to the case of new terminals, then only "new terminals" on other lines of railway acquired with free money could be constructed free from the mortgage lien. But if the "other line of railway" may be acquired with free money without becoming subject to the mortgage lien, why include in the proviso "new terminals" on such other line? It would seem that such new terminals would be free from the mortgage lien for the same reasons that the new line itself would be free from the lien. It is necessary to look elsewhere for the place to apply the words "or new terminals", and apparently such other place would be the lines of railway that are subject to the indenture.

It is noted that the proviso in all of its parts employs the conjunction "or" and not "and". The word "and" means joining together. The word "or", when attached to an object, implies an object the acceptance of which excludes all other objects. Thus it would appear that under the proviso the railway company is permitted with its own funds to acquire other lines of railway free from the mortgage lien, or that under the proviso the railway company is permitted to acquire with its own funds branches or extensions free from the mortgage lien, or that under the proviso the railway company is permitted with its own funds to acquire equipment or interest therein free from the lien of the mortgage, or that under the proviso the railway company is permitted to acquire with its own funds new terminals free from the lien of the mortgage. Nowhere in the proviso is there any restriction

on or qualification of the permissive right to do any one of the enumerated acts independently of the others.

The railway company is required by the indenture to acquire with its own funds new equipment to replace equipment no longer fit for use. It is stated that the equipment in existence at the date of the indenture, and which became subject to the mortgage lien, constituted 18,831 units. During 90 years most of this equipment would have to be replaced several times. It is likely that under its covenant to replace, the railway company would be obliged to acquire with its own funds 50,000 units. These replacement units would constitute equipment "hereafter acquired * * * and provided for use upon" said railway under Granting Clause THIRD, and as such they would become subject to the lien of the mortgage. Equipment acquired by the railway with its own funds in addition to equipment acquired for replacement should be held to be free from the mortgage lien by virtue of the right reserved to the railway company under the proviso in Granting Clause FOURTH.

Attention is called to Article Two, section 2, of the indenture, which obligates the railway company, when required by the mortgage trustee, to convey to the trustee all real and personal estate acquired by the railway company as appertaining to, or for the use of, the railway subject to the mortgage. Section 2 then provides:

> "But nothing in this indenture expressed or implied is intended or shall be construed, to limit the right or power of the Railway Company, hereby expressly reserved, in any manner, except by the use of bonds secured by this indenture, to construct, or to acquire, and to own and hold, other lines of railway, or branches or extensions, or interest therein, or other property, free from the lien hereof."

The words "other property" mean property that is not subject to the mortgage. If, under the proviso of Granting Clause FOURTH, equipment purchased by the railway company with its own funds in addition to that which

is necessary for replacements is free from the lien of the mortgage, the mortgage trustee is not empowered to demand a conveyance of any such equipment.

If the parties intended that only after-acquired equipment, obtained by the railway company on its own credit for use upon lines of railway not subject to the mortgage, should be excluded from the mortgage lien, there was no reason why that intention could not have been stated in clear and unmistakable terms. The intention should not be left to be determined by conjecture or inference if two provisions or clauses, not harmonious on their face, can be reconciled by allocating to each a separate field of operation that will not be in conflict with the other. That result follows by a determination that the after-acquired property clauses apply to equipment later acquired to replace equipment no longer fit for service, and equipment acquired by the use of general mortgage bonds; and that equipment later acquired by the railway company on its own credit, without further qualification, is not subject to the mortgage lien.

The General Gold Bond Mortgage is entitled to credit against the "disputed equipment" for (1) so much of said equipment as was necessary on June 7, 1933, to replace any of the original equipment; (2) so much of said equipment as was necessary on that date to replace equipment acquired by the use of general mortgage bonds; (3) so much of said equipment as was necessary on that date to replace original equipment that was subject to a subordinate lien under the indenture, but which later became subject to a first lien under the indenture when a prior lien was discharged; and (4) such part as of June 7, 1933, of the equity of the railway company under then existing equipment trusts as might have been necessary on that date to satisfy clause (1), clause (2) and clause (3) in this paragraph.

First and Refunding Mortgage:

This indenture is dated April 1, 1904. Granting Clause FIRST describes (1) the lines of railway then owned

and leasehold interests then held by the railway company, subject to certain existing mortgages therein described; (2) certain rolling stock and equipment consisting of 5,823 units upon which the mortgage is a first lien; and (3) defined classes of appurtenances of the railways previously described, such as telegraph lines, rights of way, depot grounds, switches, bridges, rails, terminal properties, warehouses, engine-houses, water tanks, machine shops, engines, cars and other rolling stock and equipment "appurtenant to any of said lines of railway and branches above described". It is stated that at the date of this mortgage the railway company was in possession of 39,500 units of equipment. Granting Clause SECOND of the indenture places under the mortgage lien "any and all * * * rolling stock and other equipment * * * which, from time to time, in the manner hereinafter provided, shall be purchased, acquired or constructed by the use of any of the bonds secured by this indenture except bonds issued or to be issued under the provisions of sections 2 and 3, or either of them, of Article ONE of this indenture."

Article FOUR, section 8, of the indenture provides that all locomotives, tenders, cars and other equipment upon which the indenture "shall be or become" a first lien shall be marked to distinguish such equipment from other equipment; that the railway company will maintain "such" equipment in good order and condition, reasonable wear and tear excepted; that whenever "such" equipment shall be worn out or destroyed the railway company will cause the same to be replaced by other equipment of at least equal value upon which the indenture shall be a first lien. Article NINE, section 1, contains a further provision which appears to be patterned after Article SIX, section 2, of the General Gold Bond Mortgage. The provision reads:

> "The Railway Company from time to time, while in possession of any of the property subject to this indenture, also shall have full power in its discretion to dispose of any portion of the machinery, equipment and implements, at any time subject to the lien hereof, which may have become unfit for such use, replac-

ing the same by new machinery, equipment or implements, of equal value, which shall become subject to this indenture. In no event shall any purchaser or purchasers of any property sold or disposed of under any provision of this article be required to see to the application of the purchase money."

The indenture imposed a duty on the railway company to replace from time to time the 5,823 units of equipment specified in Granting Clause First, VII, upon which the indenture was a first lien. Also, it imposed a duty on the railway company to replace equipment upon which the lien of the indenture was subordinate to any prior mortgage, such duty beginning as of the date when any such prior mortgage was paid off or otherwise discharged. Granting Clause First, VIII, applied to all equipment appurtenant to the lines of railway subject to the mortgage lien. Thus the indenture became a second lien upon that part of the equipment that was subject to then existing prior liens. Upon removal of any such prior lien the indenture became a first lien on such equipment. And for the reason that equipment acquired by the railway company by the use of mortgage bonds became subject to the indenture as a first lien thereon, if issued under sections 4, 5 and 6 of Article One, a duty was imposed to replace such equipment when no longer fit for service.

Other equipment acquired by the railway company not required for replacement purposes may be designated, for convenience, additional equipment. Does the indenture subject such additional equipment to the mortgage lien?

It is claimed that Granting Clause First, VIII, subjects such additional equipment, later acquired, to the mortgage lien. The grant of the railway property itself is found in Granting Clause First. This clause is separated into three general divisions: *First*, the fixed property comprising railway lines; *Second*, rolling stock specifically enumerated; and *Third*, appurtenances. The third division mentioned is

Granting Clause First, VIII, and bears the heading "Appurtenances". Under that heading what are deemed to be appurtenances are named or defined. The list is too long to be repeated here, but it includes such property as telegraph wires, roadbeds, turnouts, rails, terminals, warehouses, engine houses, shops, tools, furniture, *engines and cars*, tolls, earnings, and estate, right, title, interest, property, possession, claim and demand of the railway company in and to the mortgaged lines. Being included as appurtenances, the terms "estate, title or interest of the Railway Company in and to the mortgaged lines" appear to be used in the sense of legal rights or demands affecting the property conveyed to the mortgage trustee as distinguished from the physical property itself. Then follows the language in dispute, which is added at the end of the paragraph defining "Appurtenances". It reads:

> "* * * with the appurtenances * * * appertaining or hereafter to appertain thereto * * *"

Appertaining to what? The natural construction would be that the word "thereto" necessarily refers to the property described in the preceding part of the paragraph, as set forth above. Under this construction the "appurtenances * * * appertaining or *hereafter* to appertain thereto" would be appurtenances of or to the items of property named or defined in said Granting Clause First, VIII, including appurtenances "hereafter to appertain" to "engines, tenders, cars and other rolling stock." They would not include the engines or cars themselves, later acquired. At any rate, it may not be said that the words "appurtenances * * * appertaining or hereafter to appertain thereto" are so definite and direct in their application as to exclude the meaning that the appurtenances referred to are those connected with the objects described in Granting Clause First, VIII, such as engines, cars and other rolling stock.

Granting Clause Second of the indenture pledges "any and all lines of railway, extensions and branches * * *,

and any and all terminal properties, shops, machinery, tools * * *, rolling stock and other equipment * * *, which from time to time * * * shall be purchased, acquired or constructed by the use of any bonds secured by this indenture except bonds issued under the provisions of sections 2 and 3, or either of them, of ARTICLE ONE". Any of the aforesaid properties acquired by the use of bonds issued under the provisions of sections 4, 5 and 6, or any of them, of Article ONE would be subject to the mortgage lien, but not so if acquired by the use of bonds issued under sections 2 or 3. If the parties intended that the *additional* equipment as defined above was to become subject to the lien of the mortgage, why did they exclude from Granting Clause SECOND "rolling stock and other equipment" acquired by bonds issued under the provisions of sections 2 and 3 of Article ONE? The inference here would be that rolling stock and equipment acquired by the use of bonds issued under sections 2 and 3 would be free from the mortgage lien. It may be urged that equipment, referred to in Granting Clause SECOND, acquired by the use of bonds issued under sections 2 and 3, was to be equipment acquired for use upon new lines or extensions acquired by the railway company on its own credit. But Granting Clause SECOND contains no such restriction as to where equipment acquired by the use of bonds is to be used. On its face the language seems clear enough. It must mean that equipment acquired by the use of bonds issued under sections 2 and 3 is to be free from the mortgage lien whether acquired for use on new lines or extensions or on the lines of railway granted to the mortgage trustee, and that if acquired by the use of bonds issued under sections 4, 5 or 6 it is subject to the mortgage whether acquired for use on new lines or extensions or on the lines of railway granted to the mortgage trustee by Granting Clause FIRST of the indenture.

Granting Clause THIRD conveys to the mortgage trustee any and all additions and betterments "now or hereafter acquired" in connection with any of the lines of railway subject to the mortgage, and "any and all prop-

erty, real or personal, of every kind and description" acquired for use upon such lines of railway. It is claimed that "all property, real or personal," acquired for such use should be construed to include the *additional* equipment. If that is proper, then it would follow that *additional* equipment acquired for such use by the issuance of bonds under sections 2 and 3 of Article One of the indenture would be subject to the mortgage lien. But Granting Clause Second provides that rolling stock and other equipment acquired by the use of bonds issued under sections 2 and 3 shall be free from the lien of the mortgage. This seeming conflict would be resolved if the words "all property, real or personal" were to be applied, so far as equipment is concerned, to equipment acquired for replacement purposes and equipment acquired by the issuance of bonds under sections 4, 5 and 6, or either of them, of Article One. If there be uncertainty in this respect, it may perhaps be avoided by what has been called "the free property clause" immediately following Granting Clause Third of the indenture.

The so-called free property clause provides:

> "But nothing expressed or implied in this indenture is intended, or shall be construed, (a) to limit the right or power of the Railway Company, hereby expressly reserved, by the use of its credit, or by the use of bonds issued or to be issued under the provisions of Sections 2 and 3, or either of them, of Article One of this indenture, or in any manner other than by the use of bonds issued or to be issued under the provisions of Sections 4, 5 and 6, or any of them of Article One of this indenture, or their proceeds, to construct or acquire lines of railway, branches or extensions, or interests therein, or other property, free from the lien hereof; or (b) to subject to the lien of this indenture any hereafter acquired property of the Railway Company * * * other than as *expressly* granted in the Granting Clause of this indenture, which shall be purchased, constructed or acquired in any manner other than by the use of bonds issued or to be issued under the provisions of Sections 4, 5 and 6, or

any of them, of Article ONE, of this indenture, or their proceeds."

Thus the railway company is permitted to acquire, by use of its own credit, or by use of bonds issued or to be issued under sections 2 and 3 of Article ONE, "lines of railway, branches or extensions, or interests therein, *or other property*," free from the mortgage lien. It is asserted that the words "property, real or personal", in Granting Clause THIRD should be construed to include after-acquired equipment. If that meaning be accepted, then no reason is shown why the word "property" in the free property clause should not be construed to include after-acquired equipment. The free property clause provides three modes of acquisition:

(1) acquisition by use of railway company credit,

(2) acquisition by use of bonds issued under sections 2 and 3 of Article ONE, and

(3) acquisition in any other manner than by use of bonds issued under sections 4, 5 and 6 of Article ONE.

These three modes of acquisition are coordinate and of equal force, from which it must follow that "lines of railway, branches or extensions, or interests therein, *or other property*," will be free from the mortgage lien if acquired in any one of these modes. To be specific, equipment acquired by the railway company on its own credit would be free from the mortgage lien to the same extent as equipment acquired by the use of bonds issued under sections 2 and 3 of Article ONE. Such exclusion from the mortgage lien would exist in both cases, or it would not exist in either case. That it exists in the case of equipment acquired by the use of bonds issued under sections 2 and 3 of Article ONE may not be questioned. For the same reason the exemption must be held to exist in the case of equipment acquired by the railway company on its own credit. It is reasonable to believe that the free property clause

was intended by the parties to complement the scope of Granting Clause SECOND so as to include *all* after-acquired lines of railway, extensions and branches or other property, a part of which was to be subject to the mortgage lien if acquired by use of bonds issued under the mortgage except bonds issued under sections 2 and 3 of Article ONE, and the other part not subject to the mortgage lien if acquired in any other manner. There is no reason to suppose that the parties intended that the words "or other property" appearing in the so-called free property clause should have any different meaning than the description of the property listed in Granting Clause SECOND; and that description specifically names "rolling stock and other equipment".

But the suggestion is made that the words "or other property" in the free property clause, if those words include equipment, should be construed to include only that equipment, acquired by the railway company with free money, that is purchased for use on other lines of railway, branches or extensions that have been acquired with free money, and are not, therefore, subject to the mortgage lien. No such limitation or restriction is to be found in the free property clause. The suggestion mentioned has been advanced to support the claim that equipment acquired with free money, for use on railway lines subject to the mortgage, is subject to the mortgage lien; in other words, that such equipment constitutes after-acquired property which the mortgage has subjected to the mortgage lien.

The free property clause provides that nothing therein shall be construed to subject to the lien of the indenture "any hereafter acquired property of the Railway Company, * * * other than as *expressly* granted in the granting clause of this indenture, which shall be purchased, constructed, or acquired in any manner other than by use of bonds issued or to be issued under the provisions of Sections 4, 5 and 6, or any of them, of ARTICLE ONE of this indenture". Can it be said that after-acquired rolling stock and equipment is *expressly* granted in any of the

granting clauses of the indenture? The only description of after-acquired rolling stock and equipment to be found in the indenture, other than that applied to engines and cars acquired by the use of bonds issued under the indenture, is concentrated in the word "appurtenances" at the end of Granting Clause FIRST, VIII, and the words "property, real or personal," appearing in Granting Clause THIRD. The words "expressly granted" can mean only that the objects granted are directly and distinctly named or described—where identification of the objects is not dependent upon implication or inference. The word "appurtenances", or the words "property, real or personal", are far more comprehensive. The word "appurtenances" or the words "property, real or personal" may be applied to a variety of objects or things. To designate *expressly* any such appurtenance or item of property would require that the appurtenance or item be named. It is not apparent how after-acquired engines or cars can be said to be *expressly* granted by the use of the single word "appurtenances" appearing in the last clause of Granting Clause FIRST, VIII, which pledges "appurtenances . * * * appertaining or hereafter to appertain thereto", or by the use of the words "property, real or personal" appearing in Granting Clause THIRD.

There is no doubt that the parties intended to allow the Railway Company to obtain some equipment on its own credit free from the mortgage lien. The question here is *what* equipment? It is clear that later-acquired equipment for replacement purposes, and equipment so acquired by the use of mortgage bonds, was to become subject to the mortgage lien. It is not clear that equipment acquired by the railway company on its own credit, in excess of the equipment just defined, even if used on the lines subject to the mortgage, was to be subject to the lien. That conclusion has no firmer basis to support it than inferences to be drawn from general terms or expressions in the mortgage. If the parties had so intended, there were numerous specific words and sentences that could have been used

clearly to express such intention. Without clear expression of such intention it is not proper to supply it by judicial determination where the language in dispute can be otherwise applied.

All pertinent provisions of the mortgage should be reconciled and given effect. To repeat what is said herein when discussing the general gold bond mortgage, "the intention should not be left to be determined by conjecture or inference if two provisions or clauses, not harmonious on their face, can be reconciled by allocating to each a separate field of operation that will not be in conflict with the other". Equipment later acquired for replacement purposes, and equipment so acquired by the use of bonds issued under sections 4, 5 and 6 of Article One, was so-called after-acquired equipment the furnishing of which would satisfy the mortgage requirements relating to after-acquired equipment. The so-called free property clause comes into play and is given full meaning and effect according to its terms with respect to additional equipment to that just defined which the railway company elects to acquire by the use of its own credit, or by money that otherwise could be paid to its stockholders.

The First and Refunding Mortgage is entitled to credit against the "disputed equipment" (1) for so much of said equipment as was necessary on June 7, 1933, to replace any of the original equipment that was subject to a first lien under the indenture; (2) so much of said equipment as was necessary on that date to replace original equipment that was subject to a second or subordinate lien under the indenture, but which later became subject to a first lien under the indenture when a prior lien was discharged; (3) so much of said equipment as was necessary on that date to replace any equipment that was acquired by the use of first and refunding bonds issued under sections 4, 5 and 6, Article One, of the indenture; and (4) so much of the equity of the railway company as of June 7, 1933, in the then existing equipment trusts as might have been necessary on that date to satisfy clauses (1), (2) and (3) of this paragraph.

Leases:

Five leases are mentioned in the order referring the petition to a special master. The first lease, dated March 24, 1904, for a term of 999 years, is from Choctaw, Oklahoma and Gulf Railroad Company to the railway company. This lease is referred to as the Choctaw Lease. The other four leases are dated January 31, 1906, December 1, 1911, November 1, 1913, and February 1, 1914. They are mentioned in this proceeding as the R. I. A. L., The Rock Island and Dardanelle, Short Line, and Rock Island, Stuttgart and Southern leases. The provisions in each lease that are pertinent to the issue under the petition are identical. Therefore, it is sufficient to examine the Choctaw lease and determine the rights of the parties on the issue raised by the petition with respect to equipment affected by that lease.

Under the lease the lessor let, leased and demised, together with railway tracks, terminals, property and appurtenances therein described, all rolling stock and equipment of every description, including locomotives, cars and vehicles of every kind then owned or possessed, or which thereafter, during the term of the lease, might be acquired by the lessor, subject to certain mortgages and equipment trusts described in the lease.

Section Fifth of the lease provides:

> "The lessee will, during the term of this lease, keep and maintain the demised lines of railway of the lessor in good and proper condition for the passage thereover of both freight and passenger traffic, and shall and will keep and maintain in good repair, working order and condition the tracks, depots, terminal facilities and other demised property, using suitable materials for *renewal* of the same as *renewals* shall from time to time become necessary."

This provision governed the duty of the lessee during the continuance of the lease. It does not say that at all times the number of units of equipment in existence at the beginning of the lease must be maintained by replacement

if the volume of traffic should recede. The lessee would perform its duty by renewal of worn out or obsolete equipment only as such renewal might be necessary from time to time to care for the volume of traffic available, or, to use the language at the end of the provision quoted, "as renewal shall from time to time become necessary".

Section SEVENTH of the lease provides:

> "The lessee shall and will, at determination of this lease, re-deliver and surrender up to the lessor the demised premises and property in good order and condition, ordinary wear and tear excepted, with such additions, alterations and improvements as shall have been made thereto, subject, however, to any then existing encumbrances created by the lessor or by the lessee upon the demised premises or any part thereof, or upon the lessee's interest therein, and upon payment by the lessor to the lessee of the then value, over and above any and all such encumbrances, of all such additions, alterations and improvements, including equipment."

If the volume of traffic at the determination of the lease required a lesser number of units of equipment than the number taken over by the lessee when the lease was made, it would seem that the lessee, upon such determination, would perform its duty if it surrendered a sufficient number of units, in addition to all original units remaining, adequately to care for the volume of traffic at that time available. But on the other hand, if the volume of traffic at the determination of the lease required the same or greater number of units than the number taken over by the lessee when the lease was made, the lessee, upon such determination, would be required to surrender the same number of units as the number taken over when the lease was made, plus any excess number of units supplied by the lessee required for the larger volume of traffic, for which the lessor would be required to pay to the lessee the value of such excess number of units. The volume of traffic on June 7, 1933, was not less than the volume of traffic when the lease was made. It is not shown that the lessor has paid to the

lessee the value of any units of equipment furnished by the lessee in excess of the number of units taken over when the lease was made.

Attention is directed to the language of section SEVENTH which provides that surrender of the demised premises and property, with additions and improvements, shall be subject to encumbrances or liens created by the lessee upon the demised property or any part thereof, *or upon the lessee's interest therein,* upon payment by the lessor to the lessee of the then value, over and above any such encumbrances, of additions and betterments, including equipment. Loosely construed, this might imply that the lessee, during the term of the lease, could create liens upon the lessor's estate as it existed when the lease was made, and that the lessor would be bound thereby after termination of the lease. It is not to be supposed that the parties intended that the lessee might create a lien on the leased property beyond the lessee's interest therein, which would be the right to possess and use the property while the lease remained in effect. A rational construction of this paragraph would be that liens could be created by the lessee on additions and betterments added to the demised property and premises, and that upon surrender of such additions and betterments they would belong to the lessor, upon proper payment therefor, subject to the lien or liens so created. Examples of this would be an equipment trust created by the lessee to obtain equipment as additions or betterments on the lines of the lessor, or purchase money mortgages for land to be added to the demised premises.

The Choctaw lease granted to the lessee only the right to possess and use the Choctaw property. This right could be and was pledged under the first and refunding mortgage. But the pledge could not be more extensive than the right itself. The right to possess and use might expire at any time in case of default by the lessee, and in that event the right to use would cease to exist; and with the expiration of the right to use, the lien thereon would cease.

The lessor is entitled to credit against the "disputed equipment" (1) for so much of said equipment as was necessary on June 7, 1933, to replace any of the original equipment that was leased to the railway company; (2) so much of said equipment as was necessary on said date to replace equipment, if any, that was acquired subsequently to the date of the lease by the use of mortgage bonds of the lessor; and (3) so much of the equity of the railway company as of June 7, 1933, in then existing equipment trusts as might have been necessary on that date to satisfy clauses 1 and 2 of this paragraph.

Distribution of Credits:

The parties herein who may possess prior rights with respect to "disputed equipment" of the railway company are the trustee of the general gold bond mortgage, the trustee of the first and refunding mortgage, and the several lessors of lines of railway leased to the railway company.

For convenience, these terms may be used:

1. Original Equipment, meaning equipment in existence when mortgage or lease was made, and which at that time became subject thereto.

2. Original Cost, meaning cost at time of acquisition or construction.

3. Bond Equipment, meaning equipment acquired through the use of mortgage bonds.

4. Allocated Equipment, meaning equipment assigned to a mortgage to preserve the mortgage security, or to keep intact the equipment possession of which was transferred to the railway company under a lease.

5. Equity, meaning equity of the railway company as of June 7, 1933, in then existing equipment trusts.

The following determinations should be made from the records of the railway company:

(1) Original cost of "disputed equipment", less depreciation to June 7, 1933.

(2) General Gold Bond Mortgage: Original cost of original equipment, less depreciation to January 1, 1898, plus original cost of original equipment, if any, on which the mortgage was a subordinate lien which later became a first lien by reason of retirement of any prior mortgage lien thereon, less depreciation to the date when the mortgage became a first lien, plus original cost of bond equipment. Deduct from this, original cost of original equipment, less depreciation to June 7, 1933, plus original cost of bond equipment, less depreciation to June 7, 1933, plus original cost of allocated equipment, less depreciation to June 7, 1933, all of which equipment was still in service on June 7, 1933. Credit mortgage with the remainder and charge remainder against original cost of "disputed equipment", less depreciation to June 7, 1933.

(3) First and Refunding Gold Bond Mortgage: Original cost of original equipment upon which the mortgage was a first lien, less depreciation to April 1, 1904, plus original cost of original equipment, if any, on which the mortgage was a second lien which later became a first lien by reason of retirement of any prior mortgage lien thereon, less depreciation to the date when the mortgage became a first lien, plus original cost of bond equipment. Deduct from this, original cost of original equipment upon which the mortgage was a first lien, less depreciation to June 7, 1933, plus original cost of original equipment on which that mortgage was a second lien which later became a first lien by reason of retirement of any prior mortgage lien thereon, less depreciation from the date when the mortgage became a first lien to June 7, 1933, plus original cost of bond equipment, less depreciation to June 7, 1933, plus original cost of allocated equipment, less depreciation to June 7, 1933, all of which equipment was still in service

on June 7, 1933. Credit mortgage with the remainder and charge remainder against original cost of "disputed equipment", less depreciation to June 7, 1933.

(4) Original cost of original equipment under each lease, less depreciation to date of lease, plus original cost of equipment later acquired by the use of bonds issued under any mortgage of the lessor. Deduct from this, the original cost of original equipment, less depreciation to June 7, 1933, plus original cost of allocated equipment, less depreciation to June 7, 1933, plus original cost of lessor's bond equipment, less depreciation to June 7, 1933, all of which equipment was still in service on June 7, 1933. Credit lessor with remainder and charge remainder against original cost of "disputed equipment", less depreciation to June 7, 1933.

After these charges are made, any balance remaining of the original cost of "disputed equipment", less depreciation to June 7, 1933, plus the equity in equipment trusts, should be credited to claims of general creditors.

If the aggregate of these charges should exceed the original cost of the "disputed equipment", less depreciation to June 7, 1933, the excess should be charged against the equity in equipment trusts. In this event any balance of such equity should be credited to claims of general creditors.

If the aggregate of these charges should exceed the original cost of the "disputed equipment", less depreciation to June 7, 1933, plus the equity in equipment trusts, the respective charges should be proportionately reduced, in the ratio that each such charge bears to the total of such charges, to a combined amount equal to the original cost of the "disputed equipment", less depreciation to June 7, 1933, plus the equity in equipment trusts.

October 31, 1939.

SUPREME COURT OF THE UNITED STATES.

Nos. 7, 8, 20, 33 and 61.—October Term, 1942.

Frederick H. Ecker, John W. Stedman and Reeve Schley, constituting Institutional Bondholders Committee, Petitioners,
7 *vs.*
Western Pacific Railroad Corporation, A. C. James Co., The Railroad Credit Corporation, et al.

Crocker First National Bank of San Francisco and Samuel Armstrong, As Trustees Under the Western Pacific Railroad Company First Mortgage, dated June 26, 1916, Petitioners,
8 *vs.*
Western Pacific Railroad Corporation, The Western Pacific Railroad Company, Irving Trust Company, etc., et al.

The Western Pacific Railroad Company, Petitioner,
20 *vs.*
Frederick H. Ecker, et al.

Reconstruction Finance Corporation, Petitioner,
33 *vs.*
Western Pacific Railroad Corporation, A. C. James Co., et al.

Irving Trust Company, as Substituted Trustee Under the General and Refunding Mortgage of Western Pacific Railroad Company, Petitioner,
61 *vs.*
Crocker First National Bank of San Francisco, et al., etc.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 15, 1943.]

Mr. Justice Reed delivered the opinion of the Court.

Petitioners seek review of a decree of the Circuit Court of Appeals in the reorganization of The Western Pacific Railroad Company under Section 77 of the Bankruptcy Act. That decree reversed the order of the District Court which had approved the plan for reorganization certified to it by the Interstate Commerce Commission.[1]

The petitions for certiorari ask adjudication of questions which are important in the field of railroad reorganization. They involve the respective function of Commission and court, the method of

[1] Sec. 77, Bankruptcy Act, Reorganization of Railroads, 47 Stat. 1474, as amended, 11 U. S. C. § 205; In re Western Pac. R. Co., 124 F. 2d 136; In re Western Pac. R. Co., 34 F. Supp. 493; Western Pacific Railroad Company Reorganization, 230 I. C. C. 61; 233 I. C. C. 409; 236 I. C. C. 1.

valuation of railroad property by the Commission, the legality of the exclusion of stockholders and certain creditors from participation in the estate, a more favorable participation of a Reconstruction Finance Corporation claim because of new money furnished for the plan, allocation of securities among claimants, priorities of liens created by different mortgages and subsidiary issues. Heretofore this Court has not passed upon them. For their determination we granted certiorari. 316 U. S. 654.

The debtor railroad company filed its petition in the District Court for the Northern District of California on August 2, 1935, alleging its inability to pay and discharge its indebtedness as it matured and praying for reorganization under Section 77. The petition was approved as properly filed, trustees were appointed, their appointment ratified, 207 I. C. C. 793, and the appropriate steps taken to bring the plan of reorganization before the Commission for consideration. Public hearings were held by the Commission at which other plans for reorganization were filed, one by a group of bondholders known as the Institutional Bondholders Committee and one by the A. C. James Company, a secured creditor of the debtor which also was financially interested in the treatment accorded the preferred and common stock of the debtor. After full consideration of the problems of the debtor's reorganization and after the development of a plan deemed in accordance with Section 77, the Commission certified its plan to the District Court on September 28, 1939.

The Commission's conclusions and orders were reached upon exceptions to the report of its Bureau of Finance. Its plan was the outgrowth of a study of the financial condition and economic situation of the debtor, viewed in the setting of the public interest in a national transportation system. The competing claims of the various classes of creditors and stockholders were appraised in the light of the requirements of the Act that they be accorded fair and equitable treatment. There is little if any dispute concerning the primary facts from which factual or legal inferences are to be drawn.

The debtor is a California corporation with its principal operating office in San Francisco. It carries on an interstate railroad business between the States of California, Nevada and Utah.[2] For

[2] The summary of the debtor's property prepared by the Interstate Commerce Commission as of October 10, 1938, 230 I. C. C. 62, follows:

"*Location and general description of the property.*—The debtor owns or operates a total of 1,207.51 miles of standard-gage steam railroad. The main

an understanding of this opinion the obligations of the debtor as of January 1, 1939, the date proposed for the beginning of the operation of the plan, may be stated as follows:

Claim or Interest	*Principal of claim or interest*	*Accrued interest at contract rate to effective date of plan*	*Total claim including interest at contract rate to effective date of plan*
Trustees' Certificates (held by Reconstruction Finance Corporation)	$10,000,000.00	$.....	$10,000,000.00
Equipment obligations	2,750,050.00	94,202.00	2,844,252.00
First Mortgage 5% Bonds	49,290,100.00	13,143,776.66	62,433,876.66
Reconstruction Finance Corporation Collateral Notes (secured by $10,750,000 General and Refunding Mortgage bonds and other collateral*)	2,963,000.00	899,869.98	3,862,869.98
The Railroad Credit Corporation Collateral Notes (secured by $4,000,000 General and Refunding Mortgage bonds and other collateral*)	2,445,609.88	145,314.23	2,590,924.11
A. C. James Co. Collateral Notes (secured by $4,249,500 General and Refunding Mortgage bonds)	4,999,800.00	1,249,950.00	6,249,750.00
Total secured debt	$72,448,559.88	$15,533,112.87	$87,981,672.75
Unsecured Claims	5,818,791.00		
Preferred Stock	28,300,000.00		
Common Stock	47,500,000.00		
	$154,067,350.88		

*The "other collateral" does not belong to the debtor and is unaffected by the plan. See p. 38, *infra*.

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lines extend eastward 924.17 miles from Oakland, Calif., to Salt Lake City, Utah, and northward 111.81 miles from Keddie to Bieber, Calif., with operating rights over the Great Northern Railway, 46.38 miles, from Bieber to Hambone, Calif. The debtor also operates 4.2 miles of ferry service from Oakland to San Francisco, and 185.3 miles of second main track, of which 182.91 miles between Weso and Alazon, Nev., are owned by the Southern Pacific. This territory is known as the 'paired-track district,' since the two lines are used as a double-track railroad by both companies. Various branch lines springing from the Oakland-Salt Lake City line are as follows:

	Miles
Niles Junction to San Jose, Calif.	23.07
Calpine Junction to Calpine, Calif.	12.62
Hawley to Loyalton, Calif.	12.79
Reno Junction, Calif., to Reno, Nev.	33.11
Burmester to Warner, Utah	15.52
Miscellaneous	21.79
Total	118.90

Payment of this indebtedness was secured by liens, collateral or priority, as follows:

The trustees' certificates of $10,000,000 are secured by a lien on the entire estate and priority over all claims beyond reorganization expenses.

The equipment obligations of $2,750,050 are secured by rolling stock; acquired free of the liens of mortgages, through direct liens or trust arrangements. No one disputes the sound character of any of these securities. They are given priority over the fixed obligations of the reorganized company.

Subject to the trustees' certificates and equipment obligations, the first mortgage 5% bonds of $62,433,876.66, face and interest to the effective date of the plan, are secured by prior liens on all valuable property of the debtor, except (1) money, accounts, operating balances and cash items and (2) certain assets, referred to in the next paragraph, upon which the general and refunding bonds have a first lien, deemed by the Commission to be of value sufficient to support $732,010 of new income mortgage bonds and new preferred stock of $1,147,955 par. The total face and assumed value of the securities authorized by the plan, as evidence of the entire value of the system, is $84,000,000 plus. See page 23 *infra.* This paragraph reflects our conclusions as to priorities of the liens of the respective mortgages later discussed. See *Priorities of Conflicting Liens*, page 28 *infra.*

The later general and refunding mortgage bonds, $18,999,500 in face amount, are secured by a first lien on properties determined

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"*Owned or controlled and jointly affiliated railroad companies.*—The debtor owns all the outstanding capital stock of the Sacramento Northern Railway, an electrically operated standard gage freight and passenger railroad, consisting of 276.2 miles of road serving and connecting San Francisco and Oakland with various Sacramento Valley cities, principally Pittsburg, Vacaville, Sacramento, Woodland, Marysville, Colusa, and Oroville, all in California.

"By ownership of more than 99 percent of the outstanding capital stock, the debtor controls the Tidewater Southern Railway, which operates a standard gage steam freight line 61.38 miles in length, connecting Stockton with Manteca, Escalon, Modesto, and Turlock in the San Joaquin Valley of California.

"The debtor owns all the outstanding capital stock of the Deep Creek Railroad Company, which owns and operates a standard gage steam railroad extending from Wendover to Gold Hill, Nev., a distance of 44.6 miles. In addition it owns 50 percent of the capital stock of the Salt Lake City Union Depot & Railroad Company; 33 1/3 percent of the capital stock of the Central California Traction Company, operating an electrically operated freight railroad extending from Stockton to Sacramento, Calif., with a road mileage of 53.78 miles; and 50 percent of the capital stock of the Alameda Belt Line, operating 15.86 miles of terminal switching line in the city of Alameda on San Francisco Bay.

"None of the above subsidiary or affiliated companies has filed a petition under section 77 of the Bankruptcy Act, as amended."

by the Commission to be of a value and earning power sufficient to support issues of new income bonds and participating preferred stock of $732,010 and $1,147,955, respectively. See 233 I. C. C. 414, *et seq.* They are further secured, subject to the prior rights and other exceptions of the obligations listed in the preceding paragraphs, by a lien on all valuable property of the debtor. All of this series which were issued are pledged to secure the collateral notes in the amounts indicated in the preceding table.

By reason of an arrangement with the Reconstruction Finance Corporation, detailed later in the section of this opinion headed *Allocation of Securities*, B, page 25, *infra*, the distribution of securities to creditors did not reflect absolutely their priority position. The collateral notes owned by the R. F. C. were treated in the distribution of securities on the same basis as were the claims of old First bondholders. The result is summarized by the table on page 8 and footnotes 5 and 6.

By stipulation of the parties, the record shows that the value of the property of the debtor and its subsidiaries, "as found by the Interstate Commerce Commission under Section 19(a) of the Interstate Commerce Act, with additions and betterments, new lines and extensions, subsequent to date of valuation, plus non-operating properties," was $150,907,623.49 as of December 31, 1938. It is further stipulated that there is no deferred maintenance in the debtor's properties. "Its facilities and equipment are sufficient to handle expeditiously and efficiently all traffic reasonably to be anticipated in the immediate future." The value of the debtor's system, with equipment depreciated, was $144,978,559 as of December 31, 1938.

There is agreement as to the amount of system earnings available for interest for 1922 to 1939, inclusive. The amounts follow:[3]

Adjusted Consolidated Earnings Available For Interest

1922 —	$2,404,890	1928 —	$4,376,972	1934 —	$1,396,353
1923 —	3,412,234	1929 —	3,718,436	1935 —	1,377,026
1924 —	3,241,823	1930 —	2,381,529	1936 —	1,901,423
1925 —	4,557,798	1931 —	220,494 (deficit)	1937 —	1,077,407
1926 —	4,868,890	1932 —	283,912	1938 —	225,431
1927 —	3,470,861	1933 —	474,365	1939 —	1,519,916

It is to be borne in mind that while these figures represent net income of the system, as shown by its combined income account,

[3] These figures represent reported consolidated earnings "adjusted to take into account (a) rehabilitation expenditures in the years 1927-1931 and 1934-1938, (b) amortization of discount on First Mortgage Bonds of the Debtor in the years 1922-1938, and (c) deductions and credits in the years 1931-1934 made by the Commission to accord with its Accounting Rules and Regulations, . . ."

adjusted as indicated, factors other than the net income result were placed before and weighed by the Commission and the District Court. Of course the fluctuating operating revenues for the periods from freight, passenger, mail, express, victualing and miscellaneous were considered, as well as the corresponding labor, power, tax, rental and miscellaneous expenses. Operating ratio percentages for the various years are available in the evidence.

The stipulated operating revenues of the debtor's system for the years 1922-1938 and the first nine months of 1939 are as follows:

1922 —	$12,736,564	1928 —	$19,421,851	1934	— $13,779,238
1923 —	14,414,812	1929 —	20,096,557	1935	— 14,407,458
1924 —	14,669,313	1930 —	18,819,062	1936	— 16,547,344
1925 —	15,898,548	1931 —	14,852,938	1937	— 17,918,485
1926 —	17,951,468	1932 —	12,251,071	1938	— 16,057,451
1927 —	18,306,675	1933 —	12,202,489	1939 (1st 9 mths.)	— 12,836,985

Furthermore, the record shows the favorable effect upon the system's gross operating revenue of the extension of its lines into Northern California. This new construction, known as the Northern California Extension, was put into operation in 1932 and contributed the following gross revenues from freight originating, terminating and passing over the extension:

1932.....	$1,098,016	1936	$3,151,734
1933.....	1,491,466	1937	3,425,601
1934.....	2,119,427	1938	3,093,674
1935.....	2,289,858	1939 (first 9 months)	2,463,489

The extension is a link in a Pacific coast route created by this northerly extension and a corresponding southerly extension by the Great Northern Railroad Company which join at Bieber, California. The extension cost over ten million dollars and was built with the expectation, since realized, of materially increasing the value of the debtor's property as an operating road. The Commission gave consideration to this factor in estimating the probabilities of future income.

Prospects for maintaining and increasing the debtor's traffic and so its net for interest and dividends are influenced by the fact that it depends to a considerable extent upon traffic arrangements with other lines. The debtor's main line from Oakland, California, to Salt Lake City is an important section of a through route from the Pacific coast to the Midwest. In conjunction with the Denver & Rio Grande Western and the Missouri Pacific Railroad Company it offers fast through schedules. The Denver & Rio Grande Western completed, in 1934, the Dotsero Cut Off. This Cut Off and the

Moffatt Tunnel, a nearby improvement of the Denver and Salt Lake, used together materially shorten the railroad distance between Pacific coast and Midwest points and open to passenger traffic a scenic route of great beauty. The hearings on reorganization make these facts as to the likelihood of increased traffic available to the Commission and court.

These basic factors of physical condition, traffic, gross and net income et cetera were before the Commission and the courts. From them there was to be projected an estimate as to the future from which was to be drawn a present valuation of the property and its ability to carry by its earnings a certain volume in dollars of securities. There are no assets of significant worth which are not in active use as producers of income. Relying largely upon past earnings, the Commission found "that the fixed interest charges of the reorganized company should not initially and substantially exceed $500,000, if the reorganized company is to maintain its property properly and secure necessary new capital in the future." It further determined that the plan should provide a capital fund for future routine additions and betterments. This was estimated to require $500,000 annually.[4] Carrying charges of $94,202 on existing equipment trusts were to be assumed by the reorganized corporation. A new $10,000,000 first mortgage 4% bond issue was allotted $400,000 annually. These fixed charges aggregate $994,202. In addition to the fixed charges, the Commission determined the system reasonably could carry another $1,000,000 of contingent charges. Thus the over-all charge for annual fixed and contingent interest, capital and sinking funds was limited to approximately $2,000,000 per annum. Income mortgage 4½% bonds were authorized in the amount of $21,219,075. Their annual interest comes to $954,858 and their one-half per cent sinking fund calls for $106,095.

In view of the foregoing limitation, capitalization of the reorganized company was fixed at $2,750,050 of undisturbed equipment obligations, $10,000,000 of first mortgage 4% bonds, $21,219,075 of income mortgage 4½% bonds, $31,850,297 of 5% preferred stock, and 319,441 shares of common stock without par

[4] 230 I. C. C. 91: "Annual payments into the fund should be $500,000 or such lesser sum as may be required, together with unappropriated accumulations in the fund as of the close of the calendar year prior to that for which the payment is to be computed, less charges for additions and betterments during the latter year, to bring the total in the fund to $1,000,000."

value.[5] These issues of preferred and common were based upon possible earnings in addition to the $2,000,000 plus. These securities were allotted by the Commission upon consideration of "the relative priority, value, and equity of the various claims and the value of the new securities available in exchange therefor," as follows:[6]

	New First Mortgage 4% Bonds Series A	*New Income Mortgage 4½% Bonds Series A*	*New 5% preferred Stock Series A ($100 Par)*	*New Common Stock (No Par)*
First Mortgage 5% Bonds ($62,433,876.66)		$19,716,040	$29,574,060	230,593 shs.
RFC (In exchange for Trustees' Certificates of $10,000,000 and Collateral Notes of $3,862,869.98)	$10,000,000	1,185,200	1,777,800	15,788 shs.
RCC Collateral Notes ($2,590,924.11)		154,111	241,681	35,425 shs.
ACJ Collateral Notes ($6,249,750)		163,724	256,756	37,635 shs.
Totals	$10,000,000	$21,219,075	$31,850,297	319,441 shs.

[5] 233 I. C. C. 409, 413; 236 I. C. C. 1, 4. This is summarized by a petitioner as follows:

Title of Issue	*Presently to be issued*	*Annual Charges*
Undisturbed existing equipment obligations	$2,750,050	$94,202
First Mortgage 4% Bonds, Series A, due January 1, 1974	10,000,000	400,000
Total annual fixed charges		$494,202
Mandatory Capital Fund		500,000
Income Mortgage 4½% Bonds, Series A, due January 1, 2014. Interest cumulative to 13½%, otherwise noncumulative. Convertible at the option of the holder into new Common Stock at the price of $50 per share	21,219,075	954,858
Total funded debt	$ 33,969,125	
Total annual charges (fixed and contingent) and Capital Fund		$1,949,060
Income Mortgage Sinking Fund (½%)		106,095
Participating 5% Preferred Stock ($100 par value)	31,850,297	1,592,515
Total securities with par value	$65,819,422	
Total annual charges, Capital Fund, and Preferred dividend requirements		$3,647,670
Common Stock (without par value)	319,441 shs.	

[6] The applicable portion of the finding is as follows:

"(1) First-mortgage bondholders, $19,716,040 of income-mortgage bonds, $29,574,060 of preferred stock, and 230,593 shares of common stock, the common stock to be taken at the price of $57 a share; (2) Finance Corporation, $1,185,200 of income-mortgage bonds, $1,777,800 of preferred stock, and 15,788 shares of common stock, the common stock to be taken at a price of

The Commission found, correlative to and as a basis for its allocation of securities, that "the equity of the existing stock has no value, and hence holders of such stock are not entitled to participate in the plan. Further, considering that the reorganized company's income available for interest and dividends must total $4,318,035,[*] plus any undistributed profits tax that will be payable, before dividends of $3 per share may be paid on the new common stock, it is clear that even though all the securities remaining available for distribution after satisfying the claims of the first-mortgage bondholders are allotted to the other secured creditors, such securities will be inadequate in value to satisfy their claims. For this reason, and for the reasons stated with respect to the finding that the equity of the existing stock has no value, we find that the claims of the unsecured creditors, of the Western Pacific Railroad Corporation, and of the Western Realty Company, have no value, and hence no securities or cash should be distributed under the plan in respect to those claims." 230 I. C. C. 101.

The plan and a transcript of the proceedings before the Commission were duly certified to the District Court. *Re Western Pac. R. Co.*, 34 F. Supp. 493, 495. The plan in complete form and a detailed discussion of the history, property and business prospects of the debtor appears in the various reports of the Commission and the opinion below. See note 1 *supra*. The District Court heard the protests against the action of the Commission and the additional evidence offered, and found that the plan conformed in all respects to the requirements of Section 77.[7] All objections to the plan were therefore overruled and the court di-

$57 a share; (3) Credit Corporation, $154,111 of income-mortgage bonds, $241,681 of preferred stock, and 35,425 shares of common stock, the common stock to be taken at a price of $62 a share; and (4) James Company, $163,724 of income-mortgage bonds, $256,756 of preferred stock, and 37,635 shares of common stock, being the amount of common stock which bears to the amount of common stock allotted to the claim of the Credit Corporation the same proportion that the principal amount of general and refunding bonds of the debtor held by the James Company as collateral for its claim bears to the principal amount of such bonds held by the Credit Corporation for its claim." The result of the distribution per dollar of indebtedness is set out in the Commission's reports. 230 I. C. C. 101 and 233 I. C. C. 417 and 451.

[*] This amount now is somewhat larger on account of increased face of securities. 233 I. C. C. at 412.

[7] For the purposes of this controversy, the apposite requirements of Section 77, 11 U. S. C. § 205, may be excerpted as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions

rected that a copy of the order and opinion be transmitted to the Commission for use in submitting the plan for action to the first mortgage bondholders, the R. F. C., the A. C. James Co. and the Railroad Credit Corporation; the only creditors found to be entitled to vote on the adoption of the plan.

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modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character, or otherwise; (3) may include, for the purpose of preserving such interests of creditors and stockholders as are not otherwise provided for, provisions for the issuance to any such creditor or stockholder of options or warrants to receive, or to subscribe for, securities of the reorganized company in such amounts and upon such terms and conditions as may be set forth in the plan; (4) shall provide for fixed charges (including fixed interest on funded debt, interest on unfunded debt, amortization of discount on funded debt, and rent for leased railroads) in such an amount that, after due consideration of the probable prospective earnings of the property in light of its earnings experience and all other relevant facts, there shall be adequate coverage of such fixed charges by the probable earnings available for the payment thereof; (5) shall provide adequate means for the execution of the plan, ...

. . . . . .

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, . . . After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (c) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

" . . . No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court. . . .

"(e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; . . .

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further

On appeal to the Circuit Court of Appeals, Judicial Code § 128, 43 Stat. 936, this order was reversed. The court rested upon the necessity of specific valuation of the entire property, of the respective portions of it covered by the First Mortgage and the Refunding Mortgage, of each of the claims and of the new securities allocated to the creditors. Such action was deemed essential to enable the District Court to exercise its independent judgment upon matters of valuation and allocation. The failure to make

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action, in which event he shall transmit to the Commission a copy of any evidence received. . . . . If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirement of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, ... *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. . . .

. . . . . .

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

"(f) . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention, and the judge may require the trustee or trustees appointed hereunder, the debtor, any mortgagee, the trustee of any obligation of the debtor, and all other proper and necessary parties, to make any such transfer or conveyance, and may require the debtor to join in any such transfer or conveyance made by the trustee or trustees. . . ."

such separate valuations was held to require the setting aside of the District Court's approval of the plan. See note 26, *infra*.

Function of the Court. The conclusion of the Court of Appeals as to the necessity for a detailed valuation springs from its interpretation of the statute as to the function of the District Court in reorganizations. That court had said in its opinion:

"It cannot be gainsaid that the Commission knows all about the Debtor, its property, its history, financial and otherwise, its traffic and revenue, and its financial structure. No official body in the country is better qualified, by reason of experience, ability and specialized knowledge than is the Commission to find the ultimate facts as to the Debtor in relation to any of the matters mentioned." *In re Western Pac. R. Co.*, 34 F. Supp. 493, 501.

Commenting upon this, the Court of Appeals said:

"The statement indicates a possible misconception. . . .

"In determining whether a plan of reorganization satisfies the requirements of subsection e, the court is not concluded by any determination made by the Commission, but may, and must, exercise its own independent judgment; and this is true whether such determination relates to value or to some other subject. Initially, however, the duty of determining the value of any property for any purpose under § 77 rests on the Commission, not on the court." *In re Western Pac. R. Co.*, 124 F. 2d 136, 140.

Petitioners in Nos. 7, 8 and 33 seek review of this last ruling. Their petitions for certiorari query whether Section 77 does not vest

"in the Commission exclusive jurisdiction (subject only to review for arbitrary exercise) to determine whether a railroad reorganization plan is 'compatible with the public interest', including jurisdiction to determine total capitalization, the classification thereof, and the financial details of each class of proposed capitalization?"

This summary sufficiently identifies the issue without the necessity of elaborating differentiations in the petitioners' present views or of determining the degree of difference between the views of the district and appellate courts as to the function of the court under § 77.

The opinion shows the attitude of the District Court, 34 F. Supp. 493, 503, 504: "The capitalization permitted by these earnings is a mere matter of computation, which will demonstrate that the Commission did not act arbitrarily in limiting capitalization nor the respective classes thereof. . . ."

"The determination of the amount and character of the capitalization (a legislative function affecting the public interest) is

exclusively within the province of the Commission. The only qualification, if any, is that the court shall independently determine whether, in the exercise of its jurisdiction, the Commission has acted fairly, within the bounds of the Constitution, and not arbitrarily." Upon the other findings of the Commission, the District Court exercised an independent judgment based upon the record and the findings of the Commission together with additional evidence produced before the court by the parties. 34 F. Supp. 493, 505.

These reorganizations require something more than contests between adversary interests to produce plans which are fair and in the public interest. When the public interest, as distinguished from private, bulks large in the problem, the solution is largely a function of the legislative and administrative agencies of government with their facilities and experience in investigating all aspects of the problem and appraising the general interest.[8] Congress outlined the course reorganization is the follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, Section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission, subject to a degree of participation by the court.

It is clear from the discussions and the statute itself that there was recognition by everyone of the advantages of utilizing the facilities of the Commission for investigation into the many sided problems of transportation service, finance and public interest involved in even minor railroad reorganizations and utilizing the Commission's experience in these fields for the appraisals of values and the development of a plan of reorganization, fair to the public creditors and stockholders.[9] The resulting legislation was an attempted balance between the power of the Commission and that of the court.

As to the court's place in reorganization, the present statute does not vary greatly from the first legislative effort, enacted

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[8] Cf. Hearings on H. R. 7432, House Committee on Interstate & Foreign Commerce, 72d Cong., 2d Sess. (1933), pp. 11-12; Cushman, The Independent Regulatory Commissions (1941) 45-58.

[9] The need for railroad rehabilitation legislation under the bankruptcy clause of the Constitution was generally recognized. President's Message, January 11, 1933, 76 Cong. Rec. 1615; 46th Annual Report of the I. C. C., Dec. 1, 1932, p. 15; for a statement that the President-elect favored the legislation, see 76 Cong. Rec. 2917.

March 3, 1933, to reorganize railroads unable to meet their obligations.[10] The amendments of 1935 were primarily designed to cure defects disclosed by practical experience.[11] Both acts are bottomed upon the theory of debtor rehabilitation by adjustment of creditors' claims. Such treatment was essential for embarrassed railroads, as ordinary bankruptcy liquidation or judicial sales were impossible because of the size of their indebtedness and the paucity of buyers. The acts were a part of the relief granted financially involved corporations, public and private, in the depression years of the early thirties.[12] Since railroads could not take advantage of the Bankruptcy Act, § 4, 11 U. S. C. § 22, their financial adjustments for years had been carried out in equity receiverships under judicial control. These were cumbersome, costly and privately managed with inadequate consideration for the public interest in a soundly financed transportation system. *Chicago, Milwaukee & St. Paul Investigation*, 131 I. C. C. 615, 671; *United States* v. *Chicago, etc. R. Co.*, 282 U. S. 311, 331 dissent.

The first bill was introduced in the House January 21, 1933, as H. R. 14359.[13] It was drafted so as to place "the entire plan of reorganization under the jurisdiction, supervision and control" of the Commission. After Commission approval, which followed stockholder and creditor approval, it was to transmit the "approved plan, its findings and the record to the court. The court's review must be based upon the record made before the Commission."[14] This substitution of the Commission for an equity receivership under court direction was criticized and amendments suggested to "eliminate all confusion in regard to the functions to be exercised by the commission and by the court. . . . and [to] remove the most fundamental objections to the bill in its present form."[15] Notwithstanding the criticism the bill passed the House with the power lodged in the Commission, as originally

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[10] The section was extensively revised in 1935. Compare 47 Stat. 1474 with 49 Stat. 911.

[11] H. Rep. No. 1288, 74th Cong., 1st Sess., p. 1; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 1.

[12] For the twelve months ending Sept. 30, 1932, operating revenues of Class I railroads were $3,321,052,031, a decline of $915,535,318 below those of the calendar year 1931 and about equal to those of the year 1915. 46th Annual Report of the Interstate Commerce Commission, Dec. 1, 1932, p. 6. Cf. 48 Stat. 912, 798.

[13] 76 Cong. Rec. 2905.

[14] H. Rep. No. 1897, 72d Cong., 2d Sess., pp. 6-7. Subsections (d) & (g), H. R. 14359, 76 Cong. Rec. 2905, 2906.

[15] Solicitor General's Memorandum, 76 Cong. Rec. 2771, 2773.

proposed. When the House bill for the relief of debtors.[16] was reported by the Senate Committee, the railroad section was omitted. By a motion from the floor it was reinstated but in a changed form. The Senate adopted changes designed to give more power to the court. 76 Cong. Rec. 4907, 5104-34. Hearings before the court were provided. The judge, it was added, was to be "satisfied that (1) the approved plan complies with the provisions of subsection (b) of this section, is equitable and does not discriminate unfairly in favor of any class of creditors or stockholders."[17] These amendments giving concurrent powers to the court were adopted by the Senate and accepted by the House and the bill became the Act of March 3, 1933, 47 Stat. 1474.

Following the recommendation of the President in his message of June 7, 1935, the Congress adopted amendments to the 1933 act which were in line with the suggestions of the Federal Coordinator of Transportation and the Commission.[18] While the most important amendment was to furnish means to avoid the obstruction of dissatisfied classes of creditors or stockholders by making a fair and equitable plan effective over dissenters, the requirement of coordinated action by Commission and court was retained.

The Senate Report, No. 1336, 74th Cong., 1st Sess., concluded:

"The amendments to section 77 leave unimpaired the power and the duty of the commission and the courts to deal with the most important feature of all reorganization plans, that of the control of the reorganized company; and similarly the commission and courts will continue to have the power and authority of making that thorough investigation which is necessary to assure sound and reliable control for bankrupt companies when they emerge from the courts, in place of the type of control under which some railroads have been wrecked."

Under the present statute the District Court has definite responsibility in reorganization. Subsection (e). After the certification from the Commission is filed, a hearing is authorized at which all interested parties may appear. Additional evidence of opponents and proponents of the plan may be received upon "detailed and specific objections in writing to the plan and their claims for

[16] The bill dealt with the subject matter of what are now Chapters 8-11 of the Bankruptcy Act.

[17] Subsection (g), 47 Stat. 1479. The provisions of subsection (b) were then substantially like they are now.

[18] 79 Cong. Rec. 8851. H. Rep. No. 1283, 74th Cong., 1st Sess., p. 1; compare draft of Coordinator's proposals, Report of the Federal Coordinator of Transportation (1935), H. Doc. No. 89, 74th Cong., 1st Sess., p. 229.

equitable treatment". The judge shall then "approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders;" and if satisfied as to fees, costs and allowances. If the plan is disapproved, the proceedings may be dismissed or referred back to the Commission for further consideration. On approval by the judge the plan is returned to the Commission for submission to stockholders and creditors for their approval. Submission to classes of stockholders or creditors may be omitted on a finding by the Commission, affirmed by the judge, of a lack of value in the equity of the stockholders or the claims of the creditors. On certification of the results of the submission the judge shall confirm the plan finally, if satisfied the requisite approval has been obtained or is excused for reasons stated in subsection (e). The judge is not empowered to approve or confirm any plan until it has first been approved by the Commission and certified to the court. Subsection (d).

The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan."

The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation[19] and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial reexamination was not considered desirable.[20] None of

[19] Report of the Federal Coordinator, *supra*, n. 18, pp. 100-103; H. Rep. No. 1283, 74th Cong., 1st Sess., p. 3; S. Rep. No. 1336, 74th Cong., 1st Sess., p. 3; Hearings on H. R. 6249, House Committee on the Judiciary, 74th Cong., 1st Sess., Ser. 3, April 15-25, 1935, pp. 26-31.

[20] Cf. Hearings on H. R. 6249, *supra* n. 19, pp. 249-50, 291-92, 317.

the findings required of the judge under subsection (e) relate specifically to valuation. Congress apparently intended to leave the determination of valuation "of any property for any purpose under this section" to the Commission.[21] The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards. This latter point is discussed under the heading of ***Method of Valuation*** in this opinion, p. 20 *infra*, where this plan is reviewed and upheld in this respect.

Another restriction on court action is that the determination as to whether the plan is "compatible with the public interest" rests, as valuation does, with the Commission. Subsection (d). Without attempting to forecast the limits of the phrase as used in the setting of this statute, it is sufficient in this case to determine, as we do, that it includes the amount and character of the capitilization of the reorganized corporation. Cf. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. Leaving the problems of public interest to the Commission was not a departure from precedent. The phrase had been employed long before in the grant of authority to supervise the issue of securities. Section 20a, Interstate Commerce Act.[22]

The problems of capitalization are of public interest. The corporate form is universally used for the business of railroading. Railroad securities are widely distributed in investment portfolios

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[21] The bill as recommended by the Federal Coordinator of Transportation, H. Doc. 89, *supra*, n. 18, p. 238, and in a different form as considered by the Committee on the Judiciary of the House, Hearings on H. R. 6249, *supra*, n. 19, p. 8, did not contain the quoted sentence. During the hearings, the Chairman sought advice as to whether it would be legally valid to make the valuation of the Commission final in practice. This was not denied although doubt was expressed whether the Commission's finding could preclude a certain limited amount of judicial review. See Hearings on H. R. 6249, *supra* n. 20. After this discussion, the bill which was to pass the House was introduced on June 20, 1935, 79 Cong. Rec. 9814. It contained the quoted sentence, above referred to, in the form as it now appears in subsection (e).

[22] "The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose." 49 U. S. C. § 20a(2).

and among individual savers. The reasonable earning power of securities, the terms and conditions of the respective issues and the soundness of the aggregate capitalization affects the public interest immediately and directly. Capitalization is an essential factor bearing on an efficient transportation system for shipper, investor and consumer. The development of the capitalization of the reorganized company which is entrusted solely to the Commission under the requirement that the plan be compatible with the public interest is that relating to the total amount of issuable securities and the quality of the securities to be issued. So long as legal standards are followed, the judgment of the Commission on such capitalization is final.

Thus limited the district court acts concerning the plans only upon the issues specifically delegated by subsection (e). As to these, its powers are negative. It may veto the plan in its entirety but may improve it only by suggestion. It becomes a necessary and important factor in railroad reorganization. These reorganizations may be attained only through properly coordinated action between the Commission and the court.[23] In this case we are of the view that the District Court performed its required functions in accordance with the requirements of the statute. See page 12, *supra*.

Amount and Character of Capitalization. While the public interest phase of capitalization is not to be independently passed upon by the court, the court does have statutory authority to review for obedience to legal standards.[24] Petitioners in seeking certiorari and now on the merits concede that the exclusive power in the Commission to pass upon the amount and character of capitalization is subject to review for "arbitrary exercise." The respondent A. C. James Company makes the point that the restriction of the amount of capitalization to an aggregate limited by the reasonable probability of a fair return deprives those creditors and stockholders who are barred as holding claims without value, of their property interest in the debtor without due process and contrary to the mandate of Section 77. The Commission thought that the public interest required a capital structure

[23] Cf. Palmer v. Massachusetts, 308 U. S. 79, 87; Warren v. Palmer, 310 U. S. 132, 138; United States v. Morgan, 307 U. S. 183, 191; Report of President's Committee to Submit Recommendations upon the General Transportation Situation, Dec. 23, 1938, p. 25.

[24] See Opp Cotton Mills v. Administrator, 312 U. S. 126, 144.

which would give the reorganized company "a reasonable opportunity to function efficiently and continuously" and that "proposed charges, whether fixed or contingent, shall be within its probable earning power." 230 I. C. C. at 87.

Assuming at this point that the Commission's valuation is sound and reached by allowable methods, a matter discussed later in this opinion at page 20, we hold that the elimination of the claims of stockholders and creditors which are valueless from participation in the reorganization is in accordance with valid provisions of section 77(e).[25] Actual bankruptcy means a loss to some investors. Subsection (e) recognizes this inevitable result and provides a method for their elimination from the reorganization proceedings. After all of the reasonable value had been exhausted by senior securities, warrants might have been authorized for otherwise unsatisfied claims. Such warrants would represent merely the possibility of recoupment, just as the equity of redemption in judicial sales. But there is no constitutional or statutory requirement that such immediately valueless paper should be issued. A mere possibility that traffic might be found to the limit of the physical capacity of the system is not the kind of earning power which justifies the issue of securities based upon such a possibility. Whatever may be the limits of the power of the Commission to find claims worthless, the present plan may not be successfully attacked on the ground that Congress is powerless to authorize in bankruptcy the elimination of claims without value. *In re 620 Church St. Corp.*, 299 U. S. 24.

Nor do we find violation of legal standards in the requirement by the Commission for a capital fund or the issue of stock to former holders of interest bearing securities. The Commission is charged with the development of a plan which must balance and choose between public and private interests. The evidence before the Commission gave grounds for the finding of a normal requirement of an annual $500,000 fund for improvements. It is reasonable to agree with the Commission that a substantial share of the securities should be fixed stock investments rather than that the entire aggregate amount, justified by estimates of probable earnings, should be in interest bearing loans, which ultimately must be redeemed. Stock which has no retirement provisions is the backbone of a corporate structure.

[25] Such a result was within the contemplation of the Congressional committee. Hearings on H. R. 6249, *supra*, n. 19, pp. 26, 80, 107, 118, 227, 255, 278.

Method of Valuation. While by the terms of the statute the valuation of the property is left to the Commission, without participation by the court, this valuation must be made in accordance with the direction of the statute and as to that valuation is subject to judicial review. This review is limited in character by the direction of subsection (e) that valuation shall be determined by the Commission. The District Court may review to determine whether the Commission has followed the statutory mandates of subsection (e). Subsection (e) requires valuations by the Commission to be "determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts." Thus, while judicial review does not involve an independent examination into valuation, it does require that the court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's finding of value, that the statutory requirements have been followed.

An example of this type of review occurs in this record. The Irving Trust Company as Refunding Mortgage Trustee in Nos. 7 and 8 and the A. C. James Company object to the finding of the Commission that the bonds, $270,000, and stock, $360,834. par value, of the Central California Traction Company and $465,300, par value, of the capital stock of the Alameda Belt Line, pledged only under the Refunding Mortgage, had no material value. 233 I. C. C. 414-416. These securities were owned solely by the debtor but in the case of the first company represented a one-third interest in the Traction Company and in the case of the second a one-half interest in the Belt Line. Competing transcontinental railroads owned the other interests. The respective ownerships were acquired to put the debtor in a position to obtain its fair share of the business from and to these feeder lines. The facts before the Commission showed that over the preceding decade, the debtor had contributed annually substantial sums to meet the deficits of each of the companies. It was shown in the District Court that each of the companies were useful auxiliaries to the business of the debtor. However, valuation is essentially a problem for the Com-

mission. There is material evidence to support its conclusion of lack of value and its conclusion has been accepted by the District Court. This is sufficient.

In the preceding section of this opinion, we discussed the validity of the provision of subsection (e) which permits the elimination from the reorganization of claimants without equity in the debtor's properties. This provision needs also to be considered from the standpoint of statutory review of the Commission's action. As to both stockholders and creditors the section requires that a plan which allows nothing to their claims need not be submitted to them, if the worthlessness of their claims is found by the Commission, "and the judge shall have affirmed the finding." As to certain creditors and all stockholders in this case, both events took place. The specificity of the direction for reexamination of the Commission's action points to a wider scope of review than an inquiry as to whether statutory standards for valuation have been followed. It is obvious that the valuation of the whole of a debtor's property, in a simple case without conflicting or divisional liens, will mark, by a mere mathematical computation as to priorities, the claimants who must be found to be without equity in whole or in part. But we think the requirement of affirmation of the exclusion of claimants does not require an independent appraisal of the valuation which ordained their elimination. The court properly affirms the Commission, when it finds no legal objection to the Commission's use of its own valuation to determine whether particular claimants are entitled to participate in the reorganization. For example, there may arise controversies over the priority or the validity of claims. A Commission finding involving such problems would require an independent examination and an affirmation by the court.

The Circuit Court of Appeals found error in the Commission's failure to make definite valuations. It was of the view that it was necessary to determine the values of the respective claims in order to have a basis for the distribution of new assets.[26] This position respondents defend, at least to the point of saying that claims may not be foreclosed or new securities allocated without

[26] In re Western Pac. R. Co., 124 F. 2d 136, 139: "To determine this question, it was necessary to determine, as of the effective date of the plan, the value of (1) each of the claims of Reconstruction Finance Corporation, (2) the claim of Railroad Credit Corporation, (3) the claim of A. C. James Company, (4) the claims of the holders of first mortgage bonds now outstanding, (5) the $10,000,000 of new first mortgage bonds, (6) the $21,219,075

a determination of the value of the property and the assets subject to secured claims, as well as earning power. The Commission considered the debtor's investment in its property, 230 I. C. C. 61, 65, its value for rate making purposes, *id.*, 76, and the record of its earnings, *id.*, 73 *et seq.*, together with its volume of traffic and other pertinent data. It concluded that these factors would justify fixed and contingent charges of no more than two million dollars annually. In addition the Commission's plan provided for five per cent preferred stock and common stock in such amounts that it would require aggregate available annual earnings of a little more than four and a half million dollars to permit payment of a three per cent dividend. Without appraising the effect of income taxation on the remainder of earnings available

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of income bonds, (7) the 318,502.97 shares of new preferred stock and (8) the 319,441 shares of new common stock which the plan provides shall be distributed to said claimants.

"To determine the value of the above-mentioned claims, it was necessary to determine the value of (1) the debtor's entire property, (2) the property subject to the first mortgage now outstanding, (3) the $18,999,500 of refunding bonds pledged to secure the claims of A. C. James Company, Railroad Credit Corporation and Reconstruction Finance Corporation and (4) the other collateral pledged to secure each of said claims. To determine the value of the refunding bonds, it was necessary to determine the value of (1) the property subject to the refunding mortgage only and (2) the property subject both to the refunding mortgage and to the first mortgage now outstanding. This, of course, necessitated a determination as to which of the debtor's property is, and which is not, subject to each mortgage. Consolidated Rock Products Co. v. Du Bois, *supra*.

"To determine the value of the new first mortgage bonds, income bonds, new preferred stock and new common stock mentioned above, it was necessary to determine the value of (1) the debtor's entire property, (2) the property which would be subject to the new first mortgage and (3) the property which would be subject to the income mortgage.

"Subsection e of § 77 provides: 'If it shall be necessary to determine the value of any property for any purpose under this section, the [Interstate Commerce] Commission shall determine such value and certify the same to the court in its report on the plan.' In this case, as has been seen, it was necessary to determine the value of (1) the debtor's entire property, (2) each of the claims of Reconstruction Finance Corporation, (3) the claim of Railroad Credit Corporation, (4) the claim of A. C. James Company, (5) the claims of the holders of first mortgage bonds now outstanding, (6) the $10,000,000 of new first mortgage bonds, (7) the $21,219,075 of income bonds, (8) the 318,502.97 shares of new preferred stock, (9) the 319,441 shares of new common stock, (10) the property subject to the first mortgage now outstanding, (11) the $18,999,500 of refunding bonds pledged to secure the claims of Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, (12) the other collateral pledged to secure each of said claims, (13) the property subject to the refunding mortgage only, (14) the property subject both to the refunding mortgage and to the first mortgage now outstanding, (15) the property which would be subject to the new first mortgage and (16) the property which would be subject to the income mortgage. It thus became the duty of the Commission to determine these values and certify them to the court. That duty was not performed."

and partly used for interest, it is significant that only three years in the period from 1922 to 1940 showed earnings available for interest of over four million. See page 5 *supra*. With this data, the Commission determined the new capital structure. See page 8, *supra*. Taking the lowest value for the no par suggested by the Commission, $57 per share, note 6 *supra*, there is a total value of securities of eighty-four million dollars plus. The Commission was thus of the view that the value of the property for purposes of reorganization was around this figure.

The Commission was familiar with railroad securities. Control over their issue by interstate carriers has been for many years in the Commission. Sec. 20(a), Interstate Commerce Act. The standards for issuance under section 20(a) include "compatible with the public interest." Cf. *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The provisions of this section 20(a) were carried into and made a part of the reorganization section by subsections (c)(3) and (f). To create securities with voting power, in addition to those authorized might well divorce control from real ownership. Sound railroad reorganization involves more than the partitioning of assets among creditors with valuable claims and the distribution to creditors and stockholders without equity of so-called securities representing chances for then unforeseeable profits. The interest of the public in an adequate transportation service must receive consideration. *New England Divisions Case*, 261 U. S. 184, 189. Important property rights must be balanced against the need of sound financing. Consequently, the Commission limited the fixed and contingent charges involving the debt which must ultimately be paid, to two million annually, with stock representing the possibility of additional earnings. See note 5 *supra*, 230 I. C. C. 61, 92.

It is said that *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, forbids the substitution of an approved capital structure for determinations of value. In that case there was no finding of the values of the property involved and this Court said: "Absent the requisite valuation data, the court was in no position to exercise the 'informed, independent judgment' (*National Surety Co.* v. *Coriell*, 289 U. S. 426, 436) which appraisal of the fairness of a plan of reorganization entails," page 520. The district court, it being a section 77B reorganization, was required to make the requisite valuations. The requirements for valuation are the same in a section 77B proceeding as in a railroad reorganization. There is nothing, however, in the *Du Bois* case to

indicate that dollar valuations of the property or claims are essential for recapitalization or the distributions of securities in reorganizations. The defect in *Du Bois* was not the failure to find dollar values but the failure to find the worth of the security behind independent mortgages on distinct properties and of assets subject to the claims of particular groups of creditors. Such findings were required in that case because the court was dealing with a parent and two subsidiaries with inter-company accounts. Each subsidiary entity had its own creditors. The system was a unified operation and we held the claims against the subsidiaries had priority over stockholders equity in the parent, p. 523. Without a separate valuation of assets, it was impossible to tell what assets of the parent were left to form the basis for the securities distributed to the parent's stockholders. In *Du Bois*, as here, the manner of reaching that valuation, so long as it complies with the statutory standards, is not important. There are subsidiaries here but there are no claimants of the subsidiaries looking to the parent. The aggregate of the authorized securities in the present case is to be equitably distributed among claimants against a single corporation. Findings were made as to the property covered by the different mortgages of the debtor and securities allocated on the basis of that finding. 230 I. C. C. 61, 98, 99, 100, 101; 233 I. C. C. 409, 414. Under such circumstances the lack of a valuation in dollars is immaterial. The important element is the allocation of the securities so as to preserve to creditors the advantages of their respective priorities. That is to say, senior claims first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything. Consequently, we are of the opinion that the determination by the Commission of the aggregate amount of securities which may be issued against the system is in substance a finding of total value for reorganization purposes. In view of the factors of value considered and the opportunity given all parties before the Commission and the court to present all desired evidence, the Commission's determination stands upon a firm basis. There is no more important element in the valuation of commercial properties than earnings.[27] No offer was made to produce figures upon reproduction cost. It was not incumbent upon the Commission to do so. The Commission's conclusions impress us as in accord with the statutory requirements.

[27] Cf. Consolidated Rock Co. *v.* Du Bois, 312 U. S. 510, 525.

Allocation of Securities. There are two issues collateral to the Commission's valuation. One relates to adverse claims of prior liens between the holders of bonds secured on the one hand by the General and Refunding Mortgage and on the other by the First Mortgage. See p. 28, *infra*. The other is as to the correctness of the allocation of securities among the creditors. This latter issue is, of course, affected by the former. In considering allocation, we shall assume at this point what we later find, that the Commission's determination as to priorities is correct.

A. The allocation of securities is shown above at page 8. The table sets out that the holders of the Trustees' Certificates and the 5% First Mortgages, although they are senior creditors, receive large quantities of preferred and common stock, as well as new income bonds. These stocks are securities of lower dignity than the income bonds. Some of these bonds on the other hand go to creditors secured by the refunding bonds. This is because the refunding bonds have a first lien on some assets. 233 I. C. C. 414. But at any rate, under the absolute priority rule of the *Boyd* case,[28] the stratification of securities issued to creditors need not follow invariably the relative priority of the claimants.[29] Apropos of a somewhat similar situation, we said in *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. at p. 530:

"If the creditors are adequately compensated for the loss of their prior claims, it is not material out of what assets they are paid. So long as they receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis, the requirements of 'fair and equitable' are satisfied."

B. A point is made as to the treatment of the Reconstruction Finance Corporation's claims in the distribution of securities. It is to be noted, page 3 *supra*, that R. F. C. has two kinds of claims; one for $10,000,000 upon Trustees' Certificates for money advanced to the debtor while in reorganization, the other for $2,963,000 Collateral Notes, secured by refunding mortgage bonds. The Railroad Credit Corporation and the A. C. James Company are holders of similar collateral notes. The amount of bonds, as compared with the face principal of the indebtedness, varies. The R. F. C. has the most valuable collateral per dollar of in-

[28] Northern Pacific Ry. *v.* Boyd, 228 U. S. 482.

[29] Group of Institutional Investors *v.* C. M., St. P. & P. R. R. Co., Nos. 11-19, 32, 1942 Term, decided this day, slip opinion, pp. 27-29.

debtedness. To retire the Trustees' Certificates and to raise necessary new money for the reorganization, the Commission deemed it essential to sell $10,000,000 of new first mortgage, 4% bonds of 1974. To assure this, the Commission provided:

"That the [R. F. C.] purchase the bonds at par and accrued interest and that, in consideration of such purchase and the value of the collateral securing its claim, the Finance Corporation receive, for the secured notes of the debtor held by it, treatment equal to that accorded holders of the debtor's existing first-mortgage bonds."

Respondents' objections to this ruling are that the Commission acted without a finding of the value of the new bonds or their marketability at par, that the advancement of the R. F. C. secured claim to priority over the like claims of other holders violates absolute priority and that there is no finding of reasonable equivalence between the preference and the value of R. F. C.'s taking the bonds. It is further urged that securities distributed to the R. F. C. to refinance the Trustees Certificates "should be in recognition of the priority inherent in that transaction" and not in connection with the loan of R. F. C. to the debtor, which was made prior to reorganization proceedings.

It is admitted that the $10,000,000 Trustees Certificates or such of them as are presently held by the R. F. C. are worth par. No finding was made by the Commission of the value of the new Firsts. Evidence before the court showed them of a value between 80 and 90 and of poor marketability on account of the system's interest record. The court made no finding as to either.

If the R. F. C. were treated on its notes, on the basis of the proportion of bonds held as collateral, precisely as the other noteholders, it would receive $414,175 of income mortgage bonds and $649,516 of new preferred stock, in addition to its proportion of common stock. 233 I. C. C. 409, 416. This proportion of common stock would allot a much greater aggregate of common stock to the R. F. C. than it obtained by the adjustment. By reason of accepting the less valuable new Firsts in lieu of cash for its $10,000,000 Trustees' Certificates, it will receive for the principal of its claims $1,185,200 of new income bonds and $1,777,800 of new preferred stock. The R. F. C. received its unpaid interest in no par common stock at $57 per share. This is the same allocation given claimants who hold the old Firsts. 233 I. C. C. 409, 452. The other note holders received a large proportion of the principal of their claims in no par common stock at $62 per share.

It is difficult to appraise in dollars, as of the date of the Commission approval, the advantage secured for the plan by the arrangement with R. F. C.. It is equally difficult to appraise similarly as of that date the value of the Trustees' Certificates relinquished by the R. F. C. over the value of the new Firsts or to determine how much of additional worth the R. F. C. obtained. The argument that the Commission does not have statutory authority to pay a creditor, even R. F. C., a government banking corporation, for furnishing new money has little weight. Nor do we see any reason why all claims of R. F. C. may not be considered by the Commission as a single claim. *Consolidated Rock Co.* v. *Du Bois*, 312 U. S. 510, 529. There is nothing to lead us to a conclusion that the Commission gave any advantage to R. F. C. for which full consideration was not given. New money, the Commission said, "is absolutely necessary to effect a reorganization." 233 I. C. C. 409, 414. We have no reason to think the Commission allowed more compensation for this new money to R. F. C. than it would have been compelled to allow in some way, by interest or additional collateral or otherwise to another supplier. We conclude there was nothing in the discretionary action of the Commission to justify its invalidation.

C. We have held hereinbefore that valuation might be made by a method based primarily upon earnings and that so long as creditors receive "full compensatory treatment" their priorities may be represented by securities of different ranks. The Commission has made allocations of securities to the various creditors according to its judgment of the worth of their creditor position or priority in relation to the total worth of the property. It has found specifically that certain claims, under its valuations, have no value. We have pointed out the evidence before the Commission on the question of value. We cannot see that putting definitive dollar values on the whole and on parts of this property would aid the Commission in its work of valuation or the courts in their limited review of the Commission's action.

By its order of June 21, 1939, section P, 233 I. C. C. 441, 451, confirmed September 19, 1939, 236 I. C. C. 1, the Commission authorized the issue of around eighty-four million dollars of securities against the system property. This treats the equipment trusts and the securities with a face value as worth par and the no par common stock at $57 per share for all recognized creditors except the Railroad Credit Corporation and the A. C. James

Company. For distribution to these latter two creditors, the common was valued at $62.

The Commission had before it the data pertaining to past traffic, receipts, earnings and operating ratios, the system's physical condition and prospects for business. This gave an adequate basis for an intelligent estimate of future income likely to be available to meet annual charges before dividends and those dividends themselves.

From this information, a conclusion was reached as to the debts which could be paid in the order of their full or absolute priority. *Case v. Los Angeles Lumber Co.*, 308 U. S. 106, 117. The secured claim of A. C. James Company could not be satisfied in full even with the more liberal valuation of the common stock. Claims of lesser dignity were eliminated. Those entitled to priority over the mortgages, that is, current liabilities, trustees obligations and reorganization expenses, were to be satisfied by cash or assumed by the reorganized company as a charge on its assets superior to the new securities. 233 I. C. C. 409, 452; 230 I. C. C. 61, 100, 101, 102. This left as creditors only the holders of the old 5% Firsts, with an underlying mortgage on the greater part of the property, the R. F. C., the Railroad Credit Corporation and the A. C. James Company, the latter three with refunding mortgage bonds as collateral. We have already explained the arrangement whereby R. F. C. acquired the status of a first mortgage bondholder. Here it is sufficient to say that as determined by the Commission the Refundings had a lien superior to the Firsts on some assets, (233 I. C. C. 414) and the First superiority over the Refunding on the major portion. 230 I. C. C. 61, 97. See *infra*, *Priorities of Conflicting Liens*. With the foregoing facts and primary findings before it, the Commission drew the final conclusion as to allocation of securities as set out on page 8 *supra*. This allocation was based upon "the relative priority, value and equity of the various claims." Cf. 233 I. C. C. 414, 416, 417, 451 P. The distribution and report seems in accord with the requirements and standards of subsections (b), (d) and (e)(1), note 7 *supra*.

Priorities of Conflicting Liens. No. 61 is a petition by the Irving Trust Company, trustee of the General and Refunding Mortgage, which raises questions of the priority between the Refunding Mortgage and the First Mortgage as a lien on three classes of property. These are the debtor's equity in certain rolling stock and equipment acquired under equipment trusts

and a lease, the debtor's interest in the Northern California Extension and the debtor's title to certain "non-carrier" property. The Commission's plan is predicated on the priority of the First Mortgage as a lien on these properties and the Commission accordingly undertook tentatively to determine the legal questions involved. The Commission held that the First Mortgage, senior to the Refunding Mortgage, should be considered to be a first lien on these three classes of property. Petitioner, the Irving Trust Company, as substituted trustee under the Refunding Mortgage, made appropriate objections but the ruling of the Commission was adopted by the District Court. In reversing on appeal, the Circuit Court of Appeal did not pass on the question though the issue was presented. The point is made here by a party prevailing below, the petitioner Irving Trust Company on behalf of holders of refunding mortgage bonds. As the matter is fully presented by the petition for certiorari and its decision is essential to a complete review of the District Court we have concluded to consider the question. Section 240(a) Judicial Code, 28 U. S. C. § 347. *United States* v. *Bankers Trust Co.*, 294 U. S. 240, 294, 295. Such action is in the interest of expedition. *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 685. Cf. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567; *Cole* v. *Ralph*, 252 U. S. 286, 290.

The issues are those of construction of the terms of the First Mortgage. In the case of the first two classes of property, which were acquired after 1916, the year of the mortgage, the question is whether such property is covered by the after acquired property clauses of that indenture and in the case of the third class, the "non-carrier" real property, the question is the application of the granting clauses to property not intimately connected with the operation of the road at the time of the 1916 reorganization of the debtor. None of the parties relies, at least as to personalty, on the controlling nature of rules of law of a particular jurisdiction. The Commission treated the question as one of the interpretation of the language of the mortgage and we shall do likewise.

A. As to the first class of property, it is the contention of the trustee of the Refunding Mortgage that the debtor's equity in the rolling stock subject to the three equipment trusts and the lease is not subject to the lien of the First Mortgage and that it is subject to the lien of the Refunding Mortgage. Since nothing turns on the difference between the equipment trusts and the

lease, they will not further be distinguished. This equity is stipulated to have been worth over $6,000,000 on December 31, 1935, the nearest date available to August 21, 1935, the date of the filing of the petition. Since the obligations secured by all the refunding mortgage bonds outstanding amount to eleven millions it is apparent that determination of this question in favor of the refunding mortgage bondholders would go far towards assuring them equality of treatment with first mortgage bondholders.

The equipment trusts, the usual method of financing the acquisition of rolling stock, were created in 1923, 1924, 1929 and 1931. All are dated between the execution of the First Mortgage and the Refunding Mortgage. Under all, as is usual, the trustee retained title to the equipment, the debtor's equity in the property increasing as it satisfied the serially maturing obligations. The obligations of two of the trusts have become fully satisfied since the institution of this proceeding.

The first of the granting clauses of the First Mortgage conveys presently owned railroad lines, equipment and other property formerly the property of the debtor's predecessor and specifically enumerating, under the subheading "equipment", several varieties of cars and "other rolling stock." Granting clause third, entitled "after-acquired property," covers

"Any and all property and facilities of any and every kind and description, including . . . equipment . . . and any and all right, title and interest in any of such properties or facilities which may from time to time hereafter be acquired or constructed by or belong to" the debtor, if such property falls into any one of four categories:

(1) Property acquired "by the use of First Mortgage Bonds or proceeds thereof or cash deposited" under the first mortgage "or on account of the purchase, acquisition or construction thereof or work thereon" such bonds or sums are paid out; or

(2) Property constituting "an integral part or parts of lines of railroad, extensions, branches, or other property subject to the lien" of the first mortgage; or

(3) Property "used or acquired for use in or for the maintenance or operation of or appertaining to" any of the property subject to the lien of the first mortgage; or

(4) Property consisting of securities of or other interest in the property of the Salt Lake City Union Depot & Railroad Company or Standard Realty and Development Company, or any subsidiary as defined.

The fifth granting clause covers a great variety of properties and facilities used in the operation of a railroad, including tracks,

bridges, tunnels, telegraph and telephone lines, floating equipment and specifically several kinds of cars "and other rolling stock and equipment" and "all other property of every description and all rights and interests in or with respect to the use of property;

"provided that the foregoing or any thereof, whether now owned by the Company or at any time hereafter acquired by it . . . . shall be appurtenant to or used or held for use as, or as a part or as parts of, or to facilitate or safeguard the maintenance or operation of, any lines of railroad, extensions, branches . . . or other properties now or at any time hereafter subject to the lien of this indenture. . . ."[30]

Following the habendum clause is a proviso, hereafter referred to by its two opening words, reading:

"Subject, However, as to all equipment now owned to the equipment trust or conditional sale agreements secured thereon, and as to equipment hereafter acquired, to the equipment trust or conditional sale agreements to which the same shall be subject as permitted hereby, . . ."

It is stipulated that all the equipment subject to the equipment trusts in question was acquired for use and was used on all of the debtor's lines, including those specifically described in the granting clauses. This would seem to make clear that the debtor's equity in equipment trust rolling stock is covered by the lien of the First Mortgage. Subdivision (3) of the third, after acquired property clause, as well as the fifth granting clause, apply.

The refunding mortgage trustee relies, however, on a clause found between the sixth granting clause and the habendum, hereafter referred to as the reservation clause, and reading:[31]

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[30] This clause also grants "any and all replacements, renewals, improvements and betterments of and additions to" any of the lines or property subject to the lien of the mortgage. In view of the holding as to effect of those clauses quoted in the text it will be unnecessary to consider the contention of the trustee of the First Mortgage that this clause, as supplemented by certain covenants, independently subjects the debtor's equity in equipment trust rolling stock to the lien of the mortgage.

There are six granting clauses. The second covers all lines, lands, structures and equipment and other property, interests or rights, legal or equitable, then owned by the Company, and not set forth particularly. The fourth provides for the grant of additional security, and the sixth covers legal and equitable rights, claims and demands, and rents and income in the property subject to the lien of the indenture.

[31] The portion of this clause preceding that quoted in the text provides:

"But nothing express or implied in this indenture shall be construed to limit the right or power of the Company or any successor or purchasing corporation, which right and power is hereby expressly reserved, by the use of its credit or free funds or by the use of First Mortgage Bonds delivered to

"and the Company may, unless First Mortgage Bonds shall have been authenticated and delivered or their proceeds or other cash deposited hereunder paid out against the same, purchase and acquire equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust, or purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture."

It is argued that this reservation permits the acquisition of rolling stock entirely free from the lien of the First Mortgage, unless acquired, as was not the case here, by the use of proceeds of the first mortgage bonds.[32]

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the Company or any successor or purchasing corporation as in this indenture provided to reimburse the Company or any such successor or purchasing corporation for expenditures theretofore actually made out of its free funds, to construct or acquire free from the lien hereof lines of railroad, extensions or branches or interests therein, equipment, stocks, bonds or other securities or other property, rights, franchises, immunities or privileges provided the same shall not be lines of railroad, extensions, or branches or interests therein, equipment, stocks, bonds or other securities, or other property, rights, franchises, immunities or privileges (a) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; or (b) consisting of, or if securities representing, property or facilities constituting an integral part or parts of lines of railroad, extensions, branches or other property subject to the lien of this indenture or some other integral portion whereof is or integral portions whereof are subject to the lien hereof or represented by securities subject to the lien hereof; or (c) consisting of or, if securities, representing property or facilities used or acquired for use in or for the maintenance or operation of or appertaining to any of the lines of railroad, extensions, branches or other property subject, or represented by securities subject, to the lien of this indenture; or (d) consisting of shares of stock in or other securities of said The Salt Lake City Union Depot and Railroad Company or said Standard Realty and Development Company or any subsidiary company or of any right, title or interest which the Company or any successor or purchasing corporation may acquire in or to any of the property of either of the companies above named or in or to any line of railroad or other property of any corporation which shall then be or immediately prior thereto shall have been a subsidiary company as the term subsidiary company is defined in Section 2 of Article Second hereof;"

[32] The trustee finds further support for this argument in a comparison of the four limitations on the acquisition of property from free funds found in the opening portion of the reservation clause, quoted in the preceding footnote, with the latter portion of the clause, quoted in the text. The opening portion contains four limitations, of which only two are relevant to this argument. The first of these four limitations is that the property may not be acquired by the use of first mortgage bonds or their proceeds and the third relates to property acquired for use in the operation of the road which is subject to the mortgage. It is only this first limitation which is repeated in the latter portion of the reservation clause. It is argued that the omission to repeat the limitation as to property acquired for use in the operation of the road shows an intention that such a limitation should not apply in that latter portion. From this it is said to follow that property acquired for use in the operation of the road but not bought with first mortgage moneys is not subject to the mort-

We do not so view the reservation. It rather performs the function of authorizing the acquisition of equipment by equipment trust or other method and only to that extent displacing the lien of the First Mortgage arising from the after acquired property clauses. The granting clauses show a purpose to subject to the First Mortgage all the property and equipment used in connection with the road. There is repeated general mention of the grant of rolling stock, of legal and equitable interests. The third and fifth granting clauses fully cover this after acquired equity in rolling stock purchased through equipment trusts and the "Subject, however" clause clearly contemplates that the First Mortgage shall be a lien on equipment second only to equipment trust agreements. That clause provides for the subordination of the First Mortgage to equipment trust agreements to which after-acquired equipment shall be subject "as permitted hereby." These last words, a reference to the reservation clause, confirm our view that the function of the reservation clause is merely to permit the purchase of equipment by that method and not to authorize the completely untrammeled acquisition of such equipment.

It is urged that the words "free from the lien hereof" in the reservation clause must be given their literal significance. The

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gage, i. e., that the words "the Company may . . . purchase . . . equipment, free from the lien hereof, by lease, conditional sale agreement or under any form of equipment trust" should be read literally without regard to the purpose of the clause taken together with the remainder of the mortgage. Thus all but the conclusion of this argument is merely a variation of the argument discussed and rejected in the text, that the words "free from the lien hereof" are to be taken literally and that the purpose of the latter portion of the reservation clause was to accomplish the result contended for by the refunding mortgage Trustee.

If it be said that the words "free from the lien hereof" in the opening portion of the reservation clause have a different meaning from that which we give those same words in the latter portion of the clause the answer must be that in view of the different functions of the two portions of the reservation clause, the difference is required. The opening portion is entirely consistent with granting clause third and the remainder of the reservation clause.

The four limitations in the opening portion of the reservation clause substantially correspond to the four categories of after acquired property which are subject to the mortgage under granting clause third. By the third granting clause, after acquired property in these four categories is subject to the mortgage. By the opening portion of the reservation clause, property not in these categories may be purchased with free funds and will be free from the mortgage. This is so because the categories, as defined in both places, do not comprehend property unconnected with the road of the debtor. Thus the purchase with free funds of a foreign railroad or of domestic real estate unconnected with the road would be permissible under the opening portion of the reservation clause, would not have been covered by the third or fifth granting clauses and might conceivably be the subject of a supplemental indenture under granting clause sixth. See p. 30, *supra*.

argument must fail aside from the difficulties inherent in a suggestion that these words shall be lifted from context and forcibly applied without reference to an intention fairly to be drawn from three specific clauses of the mortgage and reinforced by the entire scheme of the document. The reservation clause provides that the company may acquire equipment "free from the lien hereof" if the method be by lease, conditional sale or equipment trust but may "purchase such equipment and issue obligations therefor secured by mortgage or pledge of such equipment superior to the lien of this indenture." Why the difference? Equipment acquired for cash would unquestionably become subject to the First Mortgage. Equipment acquired under a purchase money chattel mortgage would under this clause be subject to the mortgage. The First Mortgage would merely be junior to the chattel mortgage. Yet equipment acquired under an equipment trust agreement is said to be entirely free of the mortgage. The inconsistency[33] of such a result suggests that the phrases "free from the lien hereof" and "superior to the lien of this indenture" are in a sense correlative and were merely suited to the different title situations in the two methods of financing.

B. The Northern California Extension is a 112 mile branch of the debtor's main line and runs from Keddie, California, to the Great Northern Railroad at Bieber, California. It has been profitable since its construction in 1932 and the Commission expects that its traffic will increase. As has been stated the question as to the extension is whether it is covered by the after acquired property clauses of the First Mortgage. Slightly less than one-half the cost of the extension, or about $5,000,000, was financed by the sale of first mortgage bonds; another $5,000,000 was realized from the sale of unsecured debentures to the A. C. James Co., later replaced by collateral notes secured by refunding mortgage bonds, and the remainder, approximately $500,000, was borrowed from the R. F. C. on the security of refunding mortgage bonds.[34]

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[33] No reason suggests itself as to why equipment acquired for cash should have been intended to be covered by the First Mortgage and equipment acquired by the equipment trust method not be subject to the mortgage after the equipment trust obligation is completely satisfied. Yet this is a consequence of the argument pressed upon us.

[34] Construction of the extension was begun in August, 1930, and by the end of December a substantial amount of the work had been completed. Connection with the Great Northern was made on November 10, 1931, and freight service was then inaugurated under the jurisdiction of the construction department. On June 1, 1932, the line was placed in full operation. The cost of construction to May 31, 1932, was $10,183,641.90 and additional sums were

In view of this the refunding mortgage trustee contends that the First Mortgage should as a matter of equity be held a lien on the extension only to the extent of first mortgage moneys used or that it be held a first lien on a portion of the mileage equal to the proportion that first mortgage moneys bore to the total cost, or on an undivided interest in the extension in the same proportion. But here again the terms of the First Mortgage preclude such a contention. The third granting clause covers "any and all property . . . including . . . extensions . . . if

(a) acquired or constructed by the use of First Mortgage Bonds or proceeds thereof or cash deposited hereunder (except bonds delivered or cash paid out under any of the provisions of this indenture in reimbursement of previous expenditures certified as hereinafter provided) or on account of the purchase, acquisition or construction thereof or work thereon First Mortgage Bonds shall hereafter be authenticated and delivered or the proceeds of First Mortgage Bonds or other cash deposited hereunder shall hereafter be paid out under any of the provisions of this indenture; . . ."

The reservation clause supplements this by its provision that the right to acquire property free of the lien shall not extend to "lines of railroad, extensions or branches . . . (a) on account of the purchase, acquisition or construction whereof or work whereon First Mortgage Bonds shall be authenticated and delivered or their proceeds or other cash deposited hereunder shall be paid out as herein provided; . . ." See n. 31, *supra*.

The substantial nature of the financing of the extension by the sale of first mortgage bonds is a matter of record and we hold that the quoted portion of the third granting clause and especially the clause beginning "or on account of the purchase, acquisition or construction thereof or work thereon" bring this extension within the coverage of the First Mortgage. In opposition to this conclusion it is said that it would permit the First Mortgage to

later expended. It was financed as follows: First mortgage bonds in the amount of $5,000,000 were sold at 97½ between February 11, 1931, and January 29, 1932, producing $4,875,000. Between February 27, 1931, and May 31, 1932, $5,000,000 of debentures, issued under an indenture dated July 1, 1930, were sold for cash at par to A. C. James Co. These debentures were retired in March and May, 1932, through the issue of notes to the A. C. James Co. for $4,999,800 ($200 being paid in cash) secured by a pledge of $6,249,500 face amount of refunding mortgage bonds. The Refunding Mortgage was executed and delivered February 29, 1932, as of January 1 of that year. The remainder of the total cost of construction was financed by loans of $559,408 procured from the R. F. C. in March, June and August, 1932. These were parts of larger loans and were secured by refunding mortgage bonds.

become a lien on the extension if only one penny of first mortgage money had been used. That is of course not our case. Here we have a considered plan for financing an extension which contemplated that 50% of the necessary moneys be procured through the sale of first mortgage bonds. The terms of the after acquired property clause disclose an intention that where at least such part of the funds used for the construction of such an extension are first mortgage funds that the entire extension should be subjected to the lien of the mortgage. The refunding mortgage trustee contends that it is inequitable to give the first mortgage bondholders a lien to the extent of all first mortgage bonds outstanding when in fact those bondholders contributed only $5,000,000 to the cost of construction and the refunding mortgage bondholders contributed the remainder. The asserted inequity disappears on a reference to the record where it plainly appears that the parties concerned had no understanding that the lien situation would be different from what we have held it to be.[35]

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[35] The primary parties conecrned were The Western Pacific Railroad Corporation, purchaser of the $5,00.,,00 of first mortgage bonds in question and the A. C. James Co., purchaser of a like amount of debentures. The A. C. James Co. in 1929 offered to finance the cost of the extension in return for a first lien thereon. It was then believed that the cost of the extension would be approximately $5,000,000. When it developed that it would greatly exceed that amount, the A. C. James Co. withdrew this offer and substituted another offer to advance 50% of the moneys needed, the advances not to exceed $5,000,000. No mention was made in this second offer of a first lien or, indeed, of any lien and the indenture under which the debentures were issued was equally silent. The parties were fully aware that the remaining 50% of the cost would be paid by the sale of first mortgage bonds or other funds. The second offer, in the form of a commitment to bid at public sale, was accepted by the debtor.

The specifications referred to in the notice calling for bids on the debentures contain the following:

> "The main line of railroad of the Company extends from San Francisco, California, to Salt Lake City, Utah, with branches, and aggregates 1050.5 miles more or less of first track. Upon the completion of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed.
>
> "The First Mortgage of this Company dated June 26, 1916, securing this Company's First Mortgage Bonds, whereunder not more than $50,000,000. thereof may be outstanding at any one time, is a first lien on said main line of railroad."

The bid of the A. C. James Co. stated that it was made in accordance with the specifications, which had been examined by the bidder.

The specifications in connection with the offers of the $5,000,000 of first mortgage bonds contain similar statements:

> "Said First Mortgage constitutes a first lien on the main line of railroad of the Company extending from San Francisco, California, to Salt Lake City, Utah, and branches, aggregating 1050.5 miles, more or less, of first track, the Company's terminal and other railroad properties in the cities

C. Lastly, the refunding mortgage trustee makes a limited claim against certain "non-carrier" realty which is alleged to be completely free of the lien of the First Mortgage. The refunding mortgage trustee believes that this property should be given consideration as unmortgaged property in the allocation of securities to the refunding mortgage creditors.

The greater part of this property, which was not used for railway purposes, was acquired from the debtor's predecessor, the Western Pacific Railway Company, pursuant to its reorganization in 1916 and the question is whether this property is within the terms of the First Mortgage.[36] We answer this question affirmatively. Despite the fact that it is or was not used for transportation purposes, the mortgage nevertheless covers it by the conveyance of:

"First.—All and singular the following described lines of railroad, terminals, lands, equipment, shares of stock and other real and personal property and interests and rights in property owned by the Company or to which it may be entitled, formerly the property of or belonging to Western Pacific Railway Company, a corporation of the State of California, or its receivers: . . ."

. . . . . .

"III. All terminals and all lands and interests in lands, easements therein and improvements thereon, including, among other things, yards, station and depot grounds, sheds, station houses,

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of San Francisco, Oakland and elsewhere, and certain of its rolling stock and equipment. Upon the completion of the construction and/or acquisition of the Company's 'Northern California Extension' its main line of railroad will aggregate 1198.5 miles, more or less. A map of the Company's railroad system is hereto annexed.'

The bids of The Western Pacific Railroad Corporation contain a reference to the specifications similar to that in the bid of the A. C. James Co.

Mr. A. C. James was during this time the president and a director of the A. C. James Co., a director of the Western Pacific Railroad Corporation and a director of the debtor.

It is not suggested that the understanding of the Reconstruction Finance Corporation as to the lien of the refunding mortgage bonds pledged with it to secure the loans made to complete payment for the extension was different. See Western Pac. R. Co. Reconstruction Loan, 180 I. C. C. 645, 646, 648-9, an exhibit herein.

[36] A portion of this "non-carrier" property was acquired after 1916, some of it by the use of first mortgage moneys and some of it in substitution for property released from the lien of the First Mortgage. The refunding mortgage trustee makes no claim to the property acquired by the use of first mortgage moneys. Another small portion of the property was acquired after 1916 but without the use of first mortgage moneys, for use as future industrial sites and for gravel pit purposes. The claim to this last property is not specified in the briefs of the refunding mortgage trustee and it seems to be of such negligible value as would not warrant a reallocation of securities if it were to be held that this property is not subject to the first mortgage lien.

freight houses, warehouses, elevators, stock-yards, car-houses, engine houses, oil tanks, water tanks, water supply, shops, hotels, boarding houses, hospitals, docks, wharves, piers, slips, telephone and telegraph lines and other structures and erections and the appurtenances of all and every of the foregoing, whether or not for use in connection with said or any lines of railroad."

The last subdivision of the first granting clause, which follows six subdivisions specifically describing certain properties, conveys:

"other property.

VII.—All and singular the property, interests and rights, (except cash, accounts and bills receivable, traffic and other operating balances and other cash items) not comprised in the descriptions contained in the foregoing subdivisions of this clause First of these granting clauses, which belong to the Company or to which it may be entitled in any manner and which heretofore were owned by Western Pacific Railway Company or to which said company was or its receivers were entitled."

Reinforcing these provisions is the second granting clause:

"Second.—All other lines of railroad, extensions, branches, terminals, lands, structures, equipment, shares of stock, bonds, notes and other securities, claims, franchises, privileges and immunities and other property and estates, interests and rights (whether legal or equitable) now owned by or belonging to the Company, notwithstanding the same or any thereof may not be particularly set forth in these granting clauses."

In these clauses it is repeatedly specified that all property, railroad or otherwise, formerly owned by the debtor's predecessor and to which the debtor succeeded, is to be subject to the First Mortgage.

We therefore affirm the District Court's conclusion adopting the Commission's tentative determinations as to the priority of the First Mortgage.

Accommodation Collateral. The debtor, The Western Pacific Railroad Company, objects to the provision of subdivision R of the Commission's final order, approved by the District Court, directing that

"All collateral pledged by the debtor as security for notes to the Reconstruction Finance Corporation, the Railroad Credit Corporation, and the A. C. James Company shall be reduced to possession by the respective pledgees thereof, and shall be by them surrendered to the reorganized company and canceled. . . ." 233 I. C. C. 453; 34 F. Supp. 493, 505.

This order arises from the following circumstances. As is shown on page 3, *infra*, the Reconstruction Finance Corporation, the Railroad Credit Corporation and A. C. James Company have notes of the debtor secured by pledges by the debtor of various amounts of the debtor's General and Refunding Bonds and other collateral.[37]

To assist the debtor in obtaining the Reconstruction Finance Corporation and Railroad Credit Corporation loans, the A. C. James Company furnished to the debtor a block of refunding bonds, previously issued to A. C. James Company by the debtor and Western Pacific Corporation furnished to the debtor other collateral described in the Commission finding. These securities were a part of those then pledged by the debtor to secure the notes held by Railroad Credit Corporation and Reconstruction Finance Corporation, which knew the source of the collateral at the time.

The debtor's objection to the Commission's order is stated by it as follows:

"In substance, the Commission provided that the collateral owned and pledged by the Debtor should be surrendered to the reorganized Company but that the accommodation collateral borrowed from others and pledged by the Debtor should be confiscated; or, to state the proposal somewhat differently, the accommodation collateral is to be resorted to first instead of last as is required by the most elemental principles of equity and by the authorities cited below."

We think, however, that the objection is not sound and that the Commission's order is correct. These are our reasons. The refunding bonds pledged by the debtor to secure the A. C. James

[37] The claims and security therefor were found by the Commission to be, as of June 30, 1938, as follows: "class 3 items consisted of $4,999,800, face amount, of notes to the A. C. James Company, on which accrued and unpaid interest amounted to $1,124,955, and which are secured by $4,249,700, principal amount, of the debtor's general and refunding bonds, and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 4 items consisted of $2,963,000, face amount, of notes to the Reconstruction Finance Corporation, on which accrued and unpaid interest amounted to $649,181, the notes being secured by $10,750,000, principal amount, of the debtor's general and refunding bonds, and voting-trust certificates for half of the voting stock of the Denver & Rio Grande Western Railroad Company, and a second lien upon $2,000,000, principal amount, of the same issue of bonds held by the Railroad Credit Corporation; class 5 items consisted of $2,445,610, face amount, of notes to the Railroad Credit Corporation, on which accrued and unpaid interest amounted to $135,296, which notes are secured by $4,000,000, principal amount, of the debtor's general and refunding bonds, and a second lien upon the security held by the Reconstruction Finance Corporation, an assignment of certain advances by the Western Pacific Railroad Corporation, and an assignment of the distributive share of the debtor under the marshaling and distributing plan, 1931;" 230 I. C. C. 77.

Company note and left in that position throughout were pledged directly by the debtor and are not accommodation collateral in any sense. Nor do we need give consideration to the accommodation collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation notes other than the refunding bonds. In the earlier order approving the plan, the Commission provided that the rights of the Reconstruction Finance Corporation and Railroad Credit Corporation "in collateral pledged with them by parties other than the debtor" should not be disturbed or altered. 230 I. C. C. 102; subdivision O of the order of October 10, 1938, *id.* 114. On consideration of the petitions for modification of this order, the Commission refused to direct that this collateral be "surrendered to the pledgors thereof." 233 I. C. C. 431, 432. In its order, however, promulgating the present plan there is no clause comparable to subdivision O of the previous order preserving the rights of Reconstruction Finance Corporation and Railroad Credit Corporation in the collateral pledged with them by "parties other than the debtor." The sole provision in the final order as to the collateral behind the Reconstruction Finance Corporation and Railroad Credit Corporation is that found in subdivision R and quoted at the opening of this section of this opinion, directing the collateral pledged by the debtor with Reconstruction Finance Corporation, Railroad Credit Corporation and A. C. James Company, be reduced to possession, surrendered to the reorganized company and canceled. This was entirely proper. None of the collateral, other than the refunding bonds, was a claim against the debtor. A. C. James Company and the Western Pacific Corporation perhaps had unsecured claims against the debtor for their securities and other collateral which the debtor had borrowed but these were held worthless as claims against the debtor. 233 I. C. C. 452. This collateral, other than the refunding bonds, was therefore left with the pledgees with its position unaffected by any direct action of the Commission.

The "collateral pledged by the debtor" referred to in the excerpt from subdivision R of the Commission's final order, 233 I. C. C. 453, quoted above, can be only the general and refunding bonds of the debtor, including those previously furnished by A. C. James Company. The words used in subdivision R to describe them are the same used by the Commission in distinguishing the refunding bonds from the remainder of the accommodation col-

lateral. 233 I. C. C. 431, 432. Of course the collateral loaned to the debtor which was not an obligation of the debtor could not be ordered by the plan to be canceled. It remained with the pledgees. This "collateral pledged by the debtor" was properly to be reduced to possession by the pledgees, surrendered and cancelled. For these bonds, furnished by A. C. James Company, held as collateral with other bonds of the debtor, the Reconstruction Finance Corporation and Railroad Credit Corporation received their allotment of new securities, 230 I. C. C. 101, as modified by the Reconstruction Finance Corporation arrangement, described in this opinion at page 25. See 233 I. C. C. 414, 452. The A. C. James Company unsecured claim against the debtor for the loan of the bonds is valueless, 233 I. C. C. 452, and the plan does not deal with any possible claim of accommodation pledgors against pledgees of bonds which were not the property of the debtor.

Change of Conditions. The plan now under consideration was certified to the court on September 28, 1939. To provide for a $3 dividend on the no par stock, the plan calls for future earnings available for betterments, interest, sinking fund and dividends of over $4,500,000. The table on page 5 shows how difficult it had been for the system to earn that amount. Anticipated earnings was the principal factor governing the valuation of the property and the dollar volume of new securities, and past earnings was an important factor in estimating future earnings. A higher estimate of future earnings available for dividends might have created an equity for unsecured creditors or even stockholders. Furthermore, respondents urge that the "earning power" of the property referred to in subsection (e) means not only realized earnings but the system's ability, utilizing its present facilities to the full, to earn increased returns. This we deem of little weight against the history of past operations. Respondents ask us to take into consideration the changed conditions since the Commission acted. There are a few years of actual experience subsequent to the certification. By stipulation of the parties reports of operating results, combined, have been filed for our consideration for the period beginning December 1938 down to and including July 1942. Since we have agreement among the parties as to the earnings available for interest, as adjusted, through 1939, see page 5 *supra*, we need refer only to subsequent periods. These reports show the following sums available for interest, 1940—

$2,513,090; 1941—$4,548,128; 1942 (7 months) $4,830,986,* less relatively minor deductions which have not been consistently treated in the reports. This last group of figures is utilized by us as a rough extension of the table of earnings on page 5. They are useful to show the striking increases over the old averages but have not been adjusted to conform mathematically with the table of earlier years.

In the interest of advancing the solution of as many problems in reorganization as possible we have deliberated upon the effect to be given these unexpectedly large earnings. There are factors in these increased incomes which obviously affect their weight as evidence of continued capacity to produce earnings available for dividends. The effect of taxation is not wholly answered by deductions of tax estimates on the basis of present rates. The reduction by the plan of outstanding interest bearing securities makes income taxes more likely to affect net earnings. Increased wages and costs must be reckoned with and increased maintenance may reasonably be expected from increased use. Already serious proposals for decrease of tariffs have been advanced. Order of the Interstate Commerce Commission in *Ex parte No. 148*, January 4, 1943.

Respondents, of course, admit that the needs of war have increased traffic. Transcontinental transportation has at the moment displaced a large proportion of that from coast to coast, via the Panama Canal. Buses and trucks have yielded much of their gains in volume to railroads. But respondents point to the Northern California Extension and the Dotsero Cutoff as permanent feeders to the debtor's growing business. They see a post-war reconstruction and rehabilitation period which promises a continuance of heavy railway use into the indefinite future. This, say respondents, is to be appraised in the light of the necessity for a national transportation system adequate for the productive capacity of the war facilities, when they are turned to peaceful pursuits.

The Commission, at the time of its certification to the court, September 28, 1939, acted as the results of increased business were just emerging into increased profits.[38] In objections to the

*We have been furnished statements of operating results of the debtor through November, 1942, which show for that part of the year income available for fixed charges of $10,309,517.18.

[38] Cf. Florida East Coast Ry. Co. Reorganization, Supplemental Report, August 10, 1942, 252 I. C. C. 731, 733:

"In the report of April 6, 1942, division 4 recognized the fact that 1941

Commission plan filed in the court on December 8, 1939, it was suggested that "any estimate of railroad earnings made prior to the development of war conditions must be revised." The court after considering all of the objections offered, but without specifically discussing the changed conditions, approved the plan on August 15, 1940. 34 F. Supp. 493, 504. The Commission's forecast was made with knowledge and not in disregard of past fluctuations of income, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan.

Effective Date of Plan. January 1, 1939, was chosen as the effective date of the plan. The debtor objects to this on the ground that subsection (1) fixes the date of filing the petition as the date for the plan.[39] The practical result of the debtor's argument is to make the interest rate of the new securities applicable from August 2, 1935, instead of from January 1, 1939. As the new securities bear lower interest rates than the contract securities, a savings to the estate would accrue.[40] But we are of the opinion that the provisions of subsection (b) are sufficiently broad to empower the Commission to select the date for the institution of the reorganization. Cf. *Group of Industrial Investors* v. *C. M. St. P.*

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earnings were influenced by the extraordinary conditions existing as the result of the war and, in the report, stated fully all considerations leading to its conclusions as to justifiable amounts of capitalization and of new general-mortgage bonds. Under present conditions, the fact that the year 1942 gives promise of producing even larger earnings than 1941 affords too uncertain and precarious a basis to justify the increases sought."

Cf., also, In re Alabama, Tennessee and Northern R. Corporation, 47 F. Supp. 694, 708; Akron, Canton & Youngstown Ry. Co. v. Hagenbuch, 128 F. 2d 932, 939; Guaranty Trust Co. v. The Minneapolis & St. Louis R. R. (D. C. Minn.), September 10, 1942; Order No. 968, — F. Supp. —, memorandum, page 13263.

[39] Section 77(1)

"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

[40] No contention is made that fully secured claims do not bear contract interest to the date of reorganization, whenever it may be. Ticonic Bank v. Sprague, 303 U. S. 406.

& P. R. R. Co., Nos. 11-19, 32, 1942 Term, decided this day, slip opinion p. 14.

Costs. The Institutional Bondholders Committee in No. 7 and the Trustees of the First Mortgage in No. 8 call our attention to the provision in the decree in the Circuit Court of Appeals for costs against appellees there and suggest that costs should be assessed directly against the estate of the debtor in proceedings under section 77. Our reversal of the decree leaves the appellees below free of this provision of the decree and requires us to assess costs on the review. We see also no reason why costs should not be assessed against the losing parties on this review of the action of the District Court and it will be so ordered. This assessment is without prejudice to a motion for allowance for disbursements by respondents in accordance with subsection (c)(12).[41]

Other minor objections to the plan as approved by the District Court are advanced but we do not consider them as of sufficient weight to require comment.

From the foregoing it follows that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

It is so ordered.

Mr. Justice FRANKFURTER agrees with this opinion barring only the views expressed regarding the respective functions of the Interstate Commerce Commission and the District judge, under Section 77 of the Bankruptcy Act.

Mr. Justice JACKSON and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

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[41] Cf. Reconstruction Finance Corporation v. Bankers Trust Co., Nos. 387 and 388, October Term 1942, decided February 8, 1943.

SUPREME COURT OF THE UNITED STATES.

Nos. 7, 8, 20, 33 and 61.—October Term, 1942.

Frederick H. Ecker, John W. Stedman, and Reeve Schley, constituting Institutional Bondholders Committee, Petitioners,
vs.
Western Pacific Railroad Corporation, A. C. James Co., The Railroad Credit Corporation, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 15, 1943.]

Mr. Justice Roberts.

I am in agreement with much that is said in the opinion, but I desire separately to state my views as to the respective roles assigned to the Interstate Commerce Commission and to the District Court in the reorganization process.

Section 77 was adopted in the exercise of the power conferred by the Constitution upon Congress to establish uniform laws on the subject of bankruptcies throughout the United States. The proceeding is, from its initiation, one in bankruptcy. The legislation constitutes the Interstate Commerce Commission an arm of the court and clothes the Commission with certain functions as such. No question is made as to the authority of Congress thus to divide responsibilities between the court and the Commission in the formulation of a plan of reorganization. Section 77 is the guide to decision concerning the respective duties of the court and the Commission. The statutory provisions quoted in Note 7 of the majority opinion seem to me clearly to define the boundaries of the powers conferred.

Certain requisites and certain permissible features of the plan, for the formulation of which the Commission has sole responsibility, are prescribed or permitted. Within very broad limits the Commission is given discretion in the application of these in formulating a plan. [Subsection (b).] When the plan is certified to the judge his function is, as the court holds, merely to see that the limits set in subsection (b) are not transgressed; that the Com-

mission has observed the standards and limits thereby set. See Subsection (e) which directs that the judge shall approve the plan if satisfied that it complies with the provisions of subsection (b).

Other functions are reposed solely in the Commission. It is to determine whether the plan "will be compatible with the public interest". [Subsection (d).] I need not discuss the purport of this direction, which obviously relates, in the main, to the proposed corporate and capital structure of the reorganized company. That structure must be such that the rehabilitated enterprise may have a reasonable prospect of satisfactory public service. The statute will be searched in vain for any mandate to the court to review or overturn the Commission's judgment in this respect; and I agree that the District Court properly held that the protection of the public interest was so far committed to the Commission that, except for the most egregious disregard of relevant considerations, the judge should hold himself bound by the Commission's appraisal of the demands of that interest.

Another vital step in formulating any plan is committed to the judgment of the Commission. This is valuation of property. Subsection (e) states that, if it shall be necessary to determine the value of any property for any purpose under the Act, the Commission shall determine such value and certify the same to the court in its report. It seems clear, as the opinion states, that the court cannot reject the plan for any mere asserted error in valuation. Its power is limited to an examination of the question whether the Commission acted wholly without evidence, arbitrarily, or in disregard of recognized criteria.[1]

In equity reorganizations prior to the passage of § 77 the phrase "fair and equitable" had come to have a recognized content. It meant that, in allotting interests in the reorganized company, the priorities existing between lienors and stockholders of the debtor must be substantially preserved. No reorganization could be fair and equitable if, in the new capital structure, junior interests were allowed to participate at the expense of those who had had a senior position in the old.[2]

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[1] I believe this is so as to the valuation of all the assets and as to valuations of property subject to liens or available for the claims of classes of creditors or stockholders. See Subsection (e) par. 2.

[2] Northern Pacific Ry. Co. *v.* Boyd, 228 U. S. 482; Case *v.* Los Angeles Lumber Co., 308 U. S. 106; Consolidated Rock Products Co. *v.* Du Bois, 312 U. S. 510.

Section 77 sought to preserve and enforce this rule of law. By subsection (d) the Commission is charged with seeing that a proposed plan meets the requirements of subsection (e) and, by subsection (e) it is provided that, on certification of a plan to the court, all parties may file detailed and specific objections to the plan and their claims for equitable treatment. The judge is to hold a hearing on such objections "and such claims for equitable treatment". Thus the statute provides for the framing in court of sharp and specific issues directed to the plan's compliance with the rule governing allocation, and this fact is emphasized by the leave granted the parties to produce in court additional evidence. After the direction that the judge shall approve the plan "if satisfied" it complies with subsection (b), (which involves only a determination, as above indicated, whether the Commission, in setting up the plan, has respected the limits set by Congress in subsection (b)), subsection (e) goes on to deal with the judge's action on the objections of the parties and their claims for equitable treatment. It provides that he must be satisfied that the plan "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

I read this language as placing upon the court a duty quite distinct from any imposed upon it in connection with the general features of the plan or in connection with any findings of the Commission with respect to the value of property. The statute contemplates that the judge shall not only examine the findings of the Commission with respect to the fair equivalent of what is granted to mortgagees or stockholders compared to the interest in the old company that they are to surrender, and the Commission's reasons for its action, but also hear evidence by which he may be more fully informed as to the equity and fairness, as those terms have specific legal connotation, of rights accorded under the plan in relation to those theretofore enjoyed. In my view, Congress intended that the judge should satisfy himself, as in the old equity proceedings he was bound to do, that the relation between the various classes of investors is substantially maintained in the reorganization.

In order to discharge this judicial duty the court obviously may have to pass upon questions of law. In the present case, a deci-

sion as to the priority and extent of the respective mortgage liens is a legal prerequisite to an adjudication of the issue whether different classes of mortgage bondholders received fair and equitable treatment in the apportionment of new securities. I agree with the conclusions of the court on the question of law thus presented. It happens that the parties in interest do not challenge the fairness of the allocation as between them, if the Commission was right in its tentative conclusion concerning the coverage of the first mortgage and that of the general and refunding mortgage. In this case, then, the function of the court was fully performed once it had decided that question of law. In other cases, where the issue of fairness and equity depends upon the facts disclosed, I think it is the duty of the court to go farther and examine the plan sufficiently to satisfy itself that the rule of absolute priority announced in the *Boyd* case and in the *Los Angeles* and *Rock Products* cases has not been violated. In performing this duty the court should accord great weight to the Commission's action. It should require the objector to show that the Commission has failed to respect the doctrine. But it should not accord finality to the Commission's action if there be any evidence to support it. I believe the court is charged by subsection (e) with the duty of determining that, in the allocation of securities in the reorganized company, the Commission has a substantial foundation in the facts for the allocation of securities required by the plan it approves.

I concur in the judgment of the court.

Mr. Justice FRANKFURTER joins in this opinion.